No. _____

In The
Supreme Court of the United States

JAMES A. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in reviewing a *Brady* ruling, the Fifth Circuit erred in applying the highly deferential "clear error" standard of review instead of *de novo*, thereby exacerbating confusion, widening a Circuit split, and conflicting with this Court's approach.

2. Whether the Fifth Circuit recast and misapplied this Court's definition of materiality in *Kyles* by (i) failing to account for the cumulative impact of multiple failures to produce exculpatory evidence or (ii) postulating a theory of nonmateriality that required abandonment of the government's entire theory of the case.

3. Whether the suppressed exculpatory evidence was material as matter of law under *Brady* and *Kyles* because prosecutors (i) impaired the adversary process by providing incomplete and misleading summaries, causing the defense to assume that the concealed exculpatory evidence did not exist or (ii) capitalized on their concealment by repeatedly eliciting evidence and making representations to the jury that the suppressed evidence explicitly contradicted.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are contained in the caption of the case.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 650 F.3d 581 (5th Cir. 2011) ("*Brown III*"), App.1a-27a. The memorandum order of the district court (App.28a-94a) is unreported.

Prior opinions of the United States Court of Appeals for the Fifth Circuit are reported at 571 F.3d 492 (5th Cir. 2009) ("*Brown II*"), App.95a-108a, and 459 F.3d 509 (5th Cir. 2006) ("*Brown I*"). App.113a-172a.

BASIS FOR JURISDICTION IN THIS COURT

Petitioner, a former Merrill Lynch executive, seeks reversal of the denial of his motion for new trial premised on *Brady* violations. Brown was convicted of perjury and obstruction of justice for his testimony before the Enron grand jury about a transaction between Merrill and Enron in late 1999. 18 U.S.C. §§ 1503 and 1623.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix (App.175a-177a) reproduces the text of the Fifth Amendment and 18 U.S.C. §§ 1503 and 1623.

STATEMENT OF THE CASE

Petitioner James Brown's convictions arise out of the government's failed "honest services" prosecution of several Merrill Lynch and Enron employees. The charges concerned alleged criminal conduct in the 1999 "Enron barge transaction" and the grand jury investigation in the wake of Enron's collapse. Brown's convictions for perjury and obstruction are the sole remaining charges in this litigation. Brown testified before the grand jury about his "personal understanding" of the barge transaction, stating his belief that the parties reached only a lawful "best-efforts" agreement to remarket the barges, and not an illegal buy-back guarantee.

For years, Brown specifically requested raw notes, FBI 302s, and testimony of all participants in the transaction, especially Merrill in-house counsel, Katherine Zrike, and former Enron Treasurer, Jeff McMahon. Zrike and McMahon were among the numerous unindicted coconspirators whom prosecutors regularly threatened to indict, thereby rendering them and other crucial witnesses unavailable to the defense. Meanwhile, prosecutors steadfastly denied

that they possessed *any Brady* evidence and claimed that their production of nineteen pages of court-ordered "summaries" exceeded their constitutional obligation. Beginning in late 2007, years after the trial, new prosecutors disclosed thousands of pages of actual notes, 302s, and testimony. The disclosures included direct, declarative statements by Zrike and McMahon that explicitly contradicted the government's central theory of the case, its hearsay evidence, and its jury arguments.

Remarkably, the prosecutors' production of additional evidence in March 2010 revealed that in 2004 the original prosecutors had *yellow-highlighted* selected exculpatory statements in the evidence they submitted for the district judge's pretrial *in camera* review. Despite highlighting the statements as *Brady* and *Giglio* evidence, prosecutors nevertheless withheld this favorable information from Brown, providing instead admittedly "meager" "summaries," which the Fifth Circuit later recognized as incomplete and misleading. To this day, prosecutors deny that their massive, belated productions included any *Brady* evidence that should have been given to Brown pretrial.

The Fifth Circuit reviewed the district court's *Brady* ruling only for "clear error," concluding that evidence was exculpatory and "plainly suppressed," but "not material." Ignoring the issue of the government's *yellow-highlighting*, the Fifth Circuit misstated the substantive *Brady* standard for materiality, corrupted the review process established in *Kyles*, and ignored the fact that the prosecutors repeatedly

elicited hearsay evidence and forcefully argued facts that were directly contradicted by the first-hand suppressed evidence. This Court must grant a writ of certiorari to resolve a circuit split regarding the proper standard of review, clarify the correct process under *Brady* and *Kyles*, and prevent prosecutors from impairing the adversary process by crafting misleading and incomplete summaries or by capitalizing on their concealment of exculpatory evidence.

A. The Underlying Transaction

1. In late 1999, Enron solicited Merrill to invest $7 million cash to purchase a minority interest in a company that would own several electrical power stations located on floating barges moored off the Nigerian coast.

2. It was a rushed, year-end deal that, ironically, Petitioner Brown opposed from the outset. Tr. 1036-37.

3. Merrill in-house counsel, Katherine Zrike, shepherded the transaction through Merrill's multi-level vetting process, and Brown's superiors approved it in discussions without Brown despite his prior objections. Tr. 4065-4113, 4115-23, 4128-30.

B. Relevant Proceedings in the District Court

1. Brown and several codefendants were indicted, tried for six weeks, and convicted of conspiracy and honest-services wire fraud. Brown alone was convicted of perjury and obstruction of justice.

2. Brown repeatedly requested *Brady* material, informing the court that no potential witness would speak with any defendant because of the government's tactics. App.203a-206a.

3. The government consistently denied that it possessed any *Brady* material, asserting that it had exceeded its obligations under *Brady*. App.207a-211a.

C. Brown's 2004 Trial

1. According to the government, Enron's unlawful "guarantee" or "promise" to buy back the barges rendered Merrill's $7 million equity investment a loan; Enron's accounting of the transaction as a sale was therefore a "sham." App.191a-197a.

2. Brown and his Merrill codefendants steadfastly maintained that Merrill received and accepted only a lawful representation that Enron would use its "best efforts" to remarket the barges to a third party within six months. Tr. 1500-08, 1695-96, 3239-40, 5701-3, 6485. "Best efforts" is a term of art describing a lawful level of commitment that is less than a guarantee. Tr. 1650-53, 4520.

3. Brown testified voluntarily before the grand jury. He was asked about his "understanding" of the transaction, "accurate or not." App.109a-112a, 178a-181a. Brown testified regarding his "personal understanding" that Enron had not made an unlawful "promise" or "guarantee," but instead had committed to use its "best efforts" to remarket the barges to a

third party. App.181a. That testimony was the sole basis for Brown's perjury and obstruction convictions.

4. Prosecutors acknowledged that a "best-efforts" agreement would have been lawful. App.191a-192a. Accordingly, government witnesses testified, and prosecutors argued, that (i) there was no "best-efforts" agreement, *id*.; *id*. at 197a-198a; Tr. 1506-8, 1650-53, 1695-96, 3520-22, 3618, and (ii) Brown lied when he testified regarding his understanding that it was a "best-efforts" representation and not "a promise." Tr. 6154, 6199, 6274-76, 6497, 6510-11, 6540.

5. Ben Glisan and Michael Kopper, Enron executives and subordinates of Enron CFO Andrew Fastow, served as the government's star witnesses. They stole millions of dollars from Enron and were highly motivated to cooperate with the government. Tr. 1311-30, 1497-1504, 3563-69. Glisan and Kopper testified that former Enron Treasurer, Jeff McMahon, "promised" or provided Merrill an illegal guarantee that Enron would buy back Merrill's interest in the barges at a guaranteed price and rate of return. Tr. 1340, 3601-03.

6. Glisan and Kopper testified that Fastow ratified McMahon's "guarantee" in a brief phone call on December 23, 1999 with several Merrill employees (but not Brown). Tr. 1339-40, 1559, 3608. The government did not call a single witness who participated in the call or heard what Fastow or McMahon actually said. Instead, it used only the double-hearsay testimony

of Glisan, Kopper, and others. Tr. 1480-81. *See* Dkt.1168, p. 22 n.30.

7. McMahon also participated in the December 23, 1999 phone call, but did not testify, largely because the prosecutors repeatedly threatened to indict him. The government stipulated that McMahon was "not available." Tr. 5260-61.

8. As to Brown specifically, only government witness Tina Trinkle testified that she believed Brown participated in an earlier internal Merrill telephone call (the "Trinkle call"), during which "somebody," "he," gave his "verbal assurances" that "sound[ed] like a guaranty." Tr. 1036-47, 1072-73. The government repeatedly argued that this imputed knowledge of the "McMahon guarantee" to Brown, App.198a-200a, although another person on the call (perhaps Brown himself) rejected a guarantee as improper. Tr. 1045-46.

D. The First Appeal and Proceedings in the District Court on Remand for a New Trial

The Fifth Circuit reversed the conspiracy and wire fraud convictions of all Merrill defendants, *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007) ("*Brown I*"), App.113a;[1] acquitted Brown's subordinate, Bill Fuhs,

[1] The Merrill defendants' alleged conduct was "not a federal crime under the honest services theory of fraud." *Id*. at 114a, 136a-138a (reversing 12 of 14 convictions).

id. at 138a-143a; and, affirmed Brown's convictions for perjury and obstruction on a split vote. *Id*. at 144a-158a. Judge DeMoss would have acquitted Brown on those counts. *Id*. at 167a-172a (DeMoss, J., concurring in part and dissenting in part).

1. From late 2007 until March 2010, pending retrial, new prosecutors disclosed 6,300 pages of notes, 302s, and grand jury testimony that the original prosecutors had concealed. The March 2010 production of 1,500 pages revealed that the original prosecutors had *highlighted in yellow* selected exculpatory statements of McMahon and Zrike as *Brady* and *Giglio* evidence for the trial court to review *in camera* before the 2004 trial, but nevertheless withheld that information from Brown. As new prosecutors made piecemeal productions, Brown filed new trial motions and repeatedly requested an evidentiary hearing. Dkts.1004, 1020, 1030, 1160, 1168, 1201, 1217, 1227.

2. The district court denied Brown's requests for a hearing and his motions, thereby leaving the perjury and obstruction convictions standing. App.28a.[2]

[2] The repercussions of the government's tactics still loom large. It increased the stakes for Brown even as this Petition was being finalized. Brown was denied bail pending appeal and served a year in prison beginning in August 2005. Upon reversal of all conspiracy and wire fraud counts, Brown moved for immediate release, on the ground that he had already served the maximum sentence under the Guidelines applicable to perjury and obstruction. The government agreed to Brown's release *instanter* and the Fifth Circuit promptly so ordered. Since the

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The government dismissed the conspiracy and wire fraud charges against Brown three days before his scheduled retrial in September 2010. Dkt.1263. Brown appealed the denial of his motion for a new trial.

E. Applying a Clear Error Standard of Review, the Fifth Circuit Found that Exculpatory Evidence Was Suppressed But Not Material

1. The Fifth Circuit held that the first two prongs of a *Brady* violation were met regarding the statements of McMahon and Zrike. App.22a. "The McMahon notes contain numerous passages that unequivocally state that . . . there was only a 'best efforts' agreement and no 'promise,'" and they were "plainly suppressed." App.22a-23a. The court also noted that those statements could have been used to impeach Glisan and Kopper. App.23a. Addressing

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first anniversary of Brown's release, however, the government has repeatedly threatened to reincarcerate Brown and predicated any alternative resolution on abandonment of his *Brady* claims.

With full knowledge that Brown was finalizing this Petition within days, the government filed a motion on December 12, 2011, asking the Fifth Circuit to "recall and reform" its original 2005 mandate. The government asserted that Brown should be resentenced now under a higher Guidelines range. The government took this extraordinary action despite having declined the district court's invitation four years ago to seek mandamus on the resentencing issue, Dkt.1027, at p. 10 n.1, and having since acknowledged that it had waived the issue, Dkt.1152, at pp.11-12.

the government's four-line misleading summary and comparing it to McMahon's definitive denials of any guarantee, the court observed: "'No' is not the same thing as 'I do not recall.'"

2. The court assumed *arguendo* that Zrike's evidence was favorable and suppressed because it "could have helped Brown by giving the defense an argument to counter the prosecution's position that the absence of a written 'best efforts' agreement was evidence that there was no 'best efforts' agreement at all." App.25a. Nonetheless, applying a clear error standard of review, the court held the "plainly suppressed" exculpatory evidence "not material" to Brown's defense. App.1a, 16a-17a, 23a, 26a.

3. The following facts supplement the Fifth Circuit's recitation and provide the requisite context for evaluating the legal issues of the standard of review, the materiality of the evidence, the *Kyles*' protocol, and the ways in which the government exploited its suppression of favorable evidence.

a. *Jeffrey McMahon*, the original purported "guarantor," also participated in the December 23 phone call in which Fastow supposedly ratified McMahon's guarantee. Despite the fact that McMahon was never indicted, prosecutors told the jury that McMahon was "the key." They argued at least sixteen times that McMahon provided the initial unlawful buyback

guarantee.[3] Simultaneously, and until March 2010, prosecutors concealed McMahon's exculpatory statements that explicitly refuted their contentions. McMahon's repeated declarations to government agents that neither he nor Fastow ever made any guarantee but only agreed to use best efforts were crucial to Brown's case.[4]

b. *Katherine Zrike*, Merrill in-house counsel, shepherded the transaction through Merrill's extensive vetting process, going two managerial levels above Brown where his superiors approved the transaction over his objections. Under threat of indictment herself, Zrike would not speak with Brown before

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[3] "You know that Enron, through its treasurer [McMahon] and chief financial officer [Fastow], made an oral guarantee to these Merrill Lynch defendants, that they would be taken out of the barge deal by June 30th, 2000, at a guaranteed rate of return." App.196a. *See also* App.193a-194a, 199a-202a.

[4] Before the 2004 trial, Task Force Prosecutors *yellow-highlighted* (as shown in *italics* below) or highlighted around the following statements, acknowledging them to the district court as *Brady* or *Giglio* evidence, but nevertheless failing to turn them over to the defense:

> "Never made rep[resentation] to ML [Merrill Lynch] that E[nron] would buy them out at price or @ set rate of return." App.214.
>
> "Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. *Agreed E[nron] would use best efforts to help them sell assets*." App.213a.
>
> "No – never guaranteed." "*Agreed E[nron] would use best efforts to help them sell assets*." "*Use best efforts to try to resell*." App.218a. *See also* App.215a-217a, 219a-227a.

trial. The government's court-ordered pretrial "summary" was a mere one-and-one-fourth pages, despite Zrike's hundreds of pages of sworn testimony and 302s. The summary did not mention Brown or "best efforts," although her suppressed evidence was replete with exculpatory references to both. Although Zrike was called as a defense witness by a codefendant, Brown had no knowledge of the details or force of Zrike's prior sworn testimony, which showed that she was central to the negotiation and documentation of the transaction before and long after the December 23 phone call. *Compare* App.185a-186a, *with* 228a-236a, *and* App.187a-190a.

Pointing to Zrike, the government repeatedly emphasized to the jury that no best-efforts remarketing agreement could have existed because none was ever memorialized in writing. "The written agreement between Enron and Merrill Lynch had no remarketing or best efforts provision. . . . You can spend as many hours as you would like. You will nowhere in those documents ever find a reference to a remarketing agreement or a best-efforts provision. It's not in there." App.197a-198a. The prosecutor repeatedly called upon the defense to explain: "But ask yourselves this simple question: If it's a re-marketing agreement, if that's all it is, why was it not put in writing?" App.191a-192a. *See also* App.192a.

At the same time, however, the government suppressed the exculpatory answer to that very question. It concealed Zrike's favorable evidence explaining her knowledge of the oral agreement. Prosecutors

yellow-highlighted Zrike's grand jury testimony for the district court but concealed from the defense her statement: "*The fact that they would not put in writing an obligation to buy it back, to indemnify us, all those things were consistent with the business deal and were not things that I felt were nefarious [or] problematic*." App.233a-234a (*yellow-highlighted* material in *italics*).

The prosecutors also concealed Zrike's prior testimony explaining her knowledge of the negotiations and her efforts to document the best-efforts agreement:

> The other thing that we marked up and we wanted to add was a best efforts clause, . . . that they would use their best efforts to find a [third-party] purchaser. . . . [T]he response from the Enron legal team was that – both of those provisions would be a problem. . . . [t]hey kept coming back to the fact that it really had to be a true passage of risk. . . . [W]e were not successful in negotiating that with [Enron's counsel]. App.230a-231a.

REASONS FOR GRANTING THE WRIT

Petitioner requests this Court's intervention to establish three clear rules to enforce the crucial constitutional protections established in *Brady v. Maryland*. First, consistent with the majority of Circuits, this Court should establish that *Brady* decisions must be reviewed *de novo*. Second, this Court should reject

the Fifth Circuit's novel and dangerous approach to determining materiality, and thereby refine and reinforce the *Kyles* test.[5] Third, this Court should adopt and mandate the majority rule that exculpatory evidence is material *per se* if the government corrupts the adversary process by providing deficient summaries or affirmatively capitalizing on its suppression at trial.

Recurring and widespread *Brady* violations, and the government's repeated refusal to confess error, establish the need for this Court to clarify prosecutors' constitutional duty, protect the *Brady-Kyles* rule and process, and enforce defendants' rights when the government seeks to benefit from its own misconduct.

I. THE FIFTH CIRCUIT'S "CLEAR ERROR" STANDARD OF REVIEW FOR *BRADY* INTENSIFIES THE CONFUSION AND WIDENS THE SPLIT AMONG THE CIRCUITS, MOST OF WHICH CONDUCT *DE NOVO* REVIEW

Even employing the overly deferential "clear error" standard, the Fifth Circuit reversed the district court in part, finding the evidence of Zrike and McMahon favorable, and suppressed, thus satisfying

[5] The Fifth Circuit is out of step with the majority of the Circuits and with this Court's precedents. This Court has granted *certiorari* three times to reverse the Fifth Circuit in Enron prosecutions. *See Skilling v. United States*, 130 S. Ct. 2896 (2010); *Yeager v. United States*, 557 U.S. 110 (2009); *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005).

the first two prongs of *Brady*. App.22a-23a. As for materiality, the third prong of *Brady*, the Fifth Circuit's application of the "clear error" standard led it to conclude that the suppressed evidence was "not material" to Brown's defense. App.1a, 16a-17a, 23a, 26a. Its application of this most deferential standard of review to the crucial materiality prong of *Brady* creates a dangerous precedent, promotes inconsistent results, confuses the procedures surrounding *Brady*, and eviscerates the *Kyles* protocol.

A. The Fifth Circuit Split from the Majority of Circuits, which Review *Brady* Determinations *De Novo*

This Court has never explicitly articulated the standard of review that courts must apply to the *Brady* inquiry, and Brown's case provides an excellent vehicle to settle the issue. The Fifth Circuit's use of the clear error standard of review widens an existing split and conflicts with the majority of Circuits.[6] The

[6] The Fifth Circuit resurrected a disturbing line of cases that conflated the standards of review for *Jencks* and *Brady* determinations. It first (correctly) applied a clear error standard in *United States v. Mora*, 994 F.2d 1129 (5th Cir.), *cert. denied*, 510 U.S. 958 (1993), in reviewing a district court's *in camera* determination of whether certain materials constituted a "statement" for purposes of the *Jencks* Act. *Id*. at 1138-39. *Mora* then incorrectly extrapolated the clear error standard to the defendant's *Brady* claim. *Id.* at 1139. Other cases then picked up the clear error standard. *See United States v. Williams*, 998 F.2d 258, 268-69 (5th Cir. 1993) (citing *Mora*), *cert. denied*, 510 U.S. 1099 (1994); *United States v. Holley*, 23 F.3d 902, 913-14 (5th

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Courts of Appeals for the First, Second, Third, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits consistently review *Brady* determinations, including the materiality prong of *Brady,* using the *de novo* standard.[7]

Cir.) (citing *Mora* and *Williams* for "clearly erroneous" standard for pure *Brady* issue), *cert. denied*, 513 U.S. 1043 (1994). The Fifth Circuit revived its clear error standard of review of *Brady* issues in *United States v. Skilling*, 554 F.3d 529, 578-79 & n.74 (2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2010) (relying on the earlier Fifth Circuit cases). It then followed *Skilling* in *Brown*, but extended the clear error standard even further, to *Brady*'s materiality prong. App. 1a.

[7] *Conley v. United States*, 415 F.3d 183, 188-90, 194 (1st Cir. 2005) (applying *de novo* review to *Brady* determination); *United States v. Madori*, 419 F.3d 159, 169 (2d Cir. 2005) ("[W]e examine the record *de novo* to determine whether the evidence in question is material as a matter of law."), *cert. denied*, 546 U.S. 1115 (2006); *United States v. Risha*, 445 F.3d 298, 303 (3d Cir. 2006) ("*Brady* claims present mixed questions of law and fact. This Court conducts a *de novo* review of the District Court's conclusions of law, and a clearly erroneous review of findings of fact."); *United States v. Tarwater*, 308 F.3d 494, 515 (6th Cir. 2002) (*de novo* review applied to all prongs of *Brady*); *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991) (de novo review of materiality as mixed question of fact and law), *cert. denied*, 504 U.S. 930 (1992); *United States v. Cooper*, 654 F.3d 1104, 1119 (10th Cir. 2011) ("This court reviews *de novo* claims that the prosecution violated *Brady* by failing to disclose material exculpatory evidence, 'including the determination of whether suppressed evidence was material.' ") (citing *United States v. Hughes*, 33 F.3d 1248, 1251 (10th Cir. 1994)); *United States v. Jones*, 601 F.3d 1247, 1266 (11th Cir. 2010) ("We review *de novo* alleged *Brady* violations."); *United States v. Pettiford*, 627 F.3d 1223, 1227-28 (D.C. Cir. 2010) ("The assessment of the

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The Seventh Circuit applies a more deferential standard of review where (i) materials were reviewed by the district court *in camera* before trial, and (ii) the sought-after materials constituted "confidential files." *United States v. Phillips*, 854 F.2d 273, 276-78 (7th Cir. 1988) ("When a criminal defendant seeks access to confidential [FBI] informant files, we rely particularly heavily on the sound discretion of the trial judge."). Outside those special circumstances, however, the Seventh Circuit conducts *de novo* review. *See Goudy v. Basinger*, 604 F.3d 394, 398-99 (7th Cir. 2010) (applying *de novo* standard to materiality); *United States v. Bhutani*, 175 F.3d 572, 576 (7th Cir. 1999) (reviewing *Brady* materiality question *de novo*), *cert. denied*, 528 U.S. 1161 (2000).

The Fourth Circuit picked up the Fifth's "clear error" thread in *United States v. Trevino*, 89 F.3d 187, 189-90 (4th Cir. 1996), adopting the clear error standard for the entirety of a *Brady* claim involving a confidential document. Confusingly, the Fourth Circuit has also applied *de novo* review. *See United States v. King*, 628 F.3d 693, 701-02 (4th Cir. 2011) (holding that, notwithstanding district court's *in camera* review, "we review [the court's] legal conclusions *de novo* and its factual findings for clear error"); *Walker v. Kelly*, 589 F.3d 127, 140 (4th Cir. 2009) (same).

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materiality of evidence under *Brady* is a question of law reviewed *de novo*.") (citation omitted).

The Eighth Circuit generally "review[s] *de novo* allegations of *Brady* violations," *Mandacina v. United States*, 328 F.3d 995, 1001 (8th Cir.) (reviewing *de novo*, even after two reviews by district court), *cert. denied*, 540 U.S. 1018 (2003), but, even more perplexingly, has reviewed some cases for abuse of discretion.[8]

The Ninth Circuit has sometimes applied the more deferential standards of the Fourth, Fifth, Seventh, and Eighth Circuits.[9] More recently, however, in *United States v. Kohring*, 637 F.3d 895, 901 (9th Cir. 2011), on facts remarkably similar to Brown's, the Ninth Circuit reviewed "*de novo* a district court's *Brady*/*Giglio* determinations and all other questions of law"[10] and awarded the defendant a new trial.

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[8] *See United States v. Willis*, 89 F.3d 1371, 1381 n.6 (8th Cir.) (citing to Seventh Circuit "exception"; abuse of discretion standard employed where *in camera* review was of juvenile's sealed statement), *cert. denied*, 519 U.S. 909 (1996).

[9] *See United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (applying clear error standard where *in camera* review conducted of probation file), *cert. denied*, 489 U.S. 1032 (1989); *United States v. Monroe*, 943 F.2d 1007, 1012 (9th Cir. 1991) (citing back to *Strifler* and other "privileged" materials cases as authority for using clear error standard), *cert. denied*, 503 U.S. 971 (1992).

[10] *See also United States v. Price*, 566 F.3d 900, 907 & n.6 (9th Cir. 2009) (holding that "denial of a new trial motion based on alleged *Brady* violations is reviewed *de novo*"); *United States v. Jernigan*, 492 F.3d 1050, 1053-54 (9th Cir. 2007) (*en banc*) (materiality is always reviewed *de novo*).

Kohring demonstrates how the Fifth Circuit's incorrect standard of review is outcome-determinative, and not just a minor point of procedure. As here, the government's case in *Kohring* rested primarily on two star witnesses and an FBI agent. After Kohring's conviction, the government disclosed, for the first time, "several thousand pages of documents, including 'FBI 302 reports,' [and] notes from interviews," from crucial witnesses. *Kohring*, 637 F.3d at 900. As in *Brown*, the district court denied *Kohring*'s motion for new trial without a hearing. It reasoned that while favorable, the withheld evidence did not satisfy the materiality prong of *Brady.* Reviewing *de novo*, showing the district court's materiality determination no deference, *id*. at 901-03, the Ninth Circuit held that the withheld evidence would have provided the defendant with numerous original avenues for impeachment of the prosecution's star witnesses. *Id*. at 911-12.

Such inconsistent standards and results demonstrate the current injustice, confusion among the circuits, and the pressing need for a uniform *de novo* standard of review.

B. The Fifth Circuit's Decision Cannot Be Reconciled With This Court's Precedents

This Court's precedents imply a *de novo* standard of review of *Brady* determinations. In *Ornelas v. United States*, this Court wrote that legal rules "acquire content only through application. Independent

review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." 517 U.S. 690, 697 (1996). *Accord Lilly v. Virginia*, 527 U.S. 116, 136 (1999); *see also Thompson v. Keohane*, 516 U.S. 99, 114-16 (1995) (citing the "law declaration aspect of independent review" and requiring *de novo* appellate review of "in custody" determinations). Accordingly, it held that "ultimate questions of reasonable suspicion and probable cause . . . should be reviewed *de novo*." *Ornelas*, 517 U.S. at 691. The same standard of review should apply to *Brady* determinations, which require a similarly nuanced application of relevant constitutional standards.

Brady places the duty to disclose favorable information squarely on the shoulders of the prosecution. *See*, *e.g.*, *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The prosecutor, who alone knows the theory and evidence he will use to convict and who "alone can know what is undisclosed," is therefore "assigned the consequent responsibility to gauge the likely net effect" of all favorable evidence before trial and to determine whether suppression would be prejudicial to the defense. *Kyles v. Whitley,* 514 U.S. 419, 437 (1995). As this Court has stressed, "the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome." *Id*. at 439. Rather, "a prosecutor anxious about tacking too close to the wind," *id*., should "resolve doubtful questions in

favor of disclosure."[11] *United States v. Agurs*, 427 U.S. 97, 108 (1976). *Cf*. *Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009); *Strickler v. Greene*, 527 U.S. 263, 281 (1999). "This is as it should be," *Kyles*, 514 U.S. at 439, to satisfy the prosecutor's obligation "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Just as important, "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 440.

In *United States v. Bagley*, 473 U.S. 667 (1985), this Court announced the substantive standard for assessing *Brady*'s materiality prong. Evidence favorable to the defense – whether exculpatory or for impeachment purposes, *see id*. at 676 – is deemed material, and its suppression by prosecutors demands a new trial without further showing of prejudice if a "reasonable probability" exists that "its suppression undermines confidence in the outcome of the trial." *Id*. at 678. In making this objective determination,

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[11] Apparently, the government's 2010 production of the yellow-highlighted 2002 interview notes of McMahon was accidental. The new prosecutor denied he had produced them. Transcript, June 24, 2010, Dkt.1212 at 15-16. This fact alone illuminates the need for (i) clear instructions from this Court to the government on the breadth and depth of its duty and (ii) swift and sure consequences for its failure to honor *Brady*. To this day, the government has not produced all the material Brown has specifically requested.

Bagley showed no deference to the trial court's determination.

In *Kyles,* this Court reversed the Fifth Circuit on a *Brady* issue, holding that the only way to assess whether the absence of the suppressed evidence could "undermine confidence" in the original result was to return to the moment of pretrial suppression by the prosecutors and consider the "potential impact" of the missing evidence. 514 U.S. at 434-35. *Kyles* underscored that Petitioner need not prove that the evidence presented was insufficient to convict, *id*., or that the suppressed evidence would "more likely than not" have led to a different result, *id*. at 434. Rather, an accused can prove a *Brady* violation by showing that 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 (emphasis added). Again, this Court applied that standard as a matter of law.

In *Kyles*, this Court reviewed the withheld items individually, considering for each how competent defense counsel could have used the evidence in the actual trial. Only after this careful review, which by definition would be impossible pretrial, did this Court conclude that the cumulative impact of the suppressed information could reasonably have recast

the entire case so as to "undermine confidence in the verdict."[12] *Id*. at 435, 441, 453-54.

The requirement that the court view the record as a whole implicates *de novo* review. In *Agurs*, for example, this Court stated that "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete." 427 U.S. at 108. *See Bagley*, 473 U.S. at 683 ("reviewing court should assess the possibility that such effect [of the withholding that caused defense to be misled] might have occurred in light of the totality of the circumstances. . . ."). Appellate review of an "entire record" suggests independent, plenary review.

All the Circuits have recognized in at least some cases that the question of materiality is a legal judgment. The materiality analysis must be applied to evidence that was not tested at trial, and must be judged for its "potential impact" on the jury and on competent defense counsel, who was unaware of the evidence. Because only legal judgments are at stake,

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[12] The Fifth Circuit's deference to the district court's *pretrial* review in *Brown* contravenes the policy of *Brady* and usurps the roles of both the advocate and the jury. Pretrial, the court has little information about defense strategy, and therefore no insight into how defense counsel could use the evidence. *See Agurs*, 427 U.S. at 108, 112 ("[T]here is a significant practical difference between the pretrial decision of the prosecutor [or the trial court, who is even less capable pretrial than a prosecutor] and the post-trial decision of the judge. . . . [T]he omission [for *Brady* purposes] must be evaluated in the context of the entire record.").

appellate courts operate at no disadvantage, and a trial court is in no better position to make the required assessment.[13]

A *de novo* standard of review is necessary to bring coherence and uniformity to the Circuits' procedure in *Brady* appeals and offers full fidelity to this Court's precedents. Only *de novo* review authorizes and requires the fully independent analysis of how competent defense counsel *could* have used each piece of withheld evidence – whether to impeach a government witness, buttress an alternative theory of the case, frame the opening statement, prepare for trial generally, or raise a reasonable doubt.

[13] Justice Alito said as much in his separate opinion in *Cone v. Bell*, writing, "[i]f the only purpose of remand is to require an evaluation of petitioner's *Brady* claim in light of the present record, the District Court is not in a superior position to conduct such a review. And even if such a review is conducted in the first instance by the District Court, that court's decision would be subject to *de novo* review in the Court of Appeals." 129 S. Ct. at 1792 (Alito, J., concurring in part and dissenting in part).

II. THE FIFTH CIRCUIT RECAST AND MISAPPLIED THE MATERIALITY TEST OF *KYLES*; ITS ULTIMATE CONCLUSION THAT THE SUPPRESSED EVIDENCE IN *BROWN* WAS "NOT MATERIAL" WAS ERRONEOUS AS A MATTER OF LAW

A. The Fifth Circuit Misstated the Materiality Test

The Fifth Circuit recast and misapplied the materiality test, further confusing *Brady*, *Kyles*, and their progeny. The Fifth Circuit recognized that prosecutors suppressed favorable testimony from Merrill counsel, Zrike, and Enron Treasurer, McMahon, that could have impeached several witnesses. Nevertheless, it summarily concluded that "the favorable evidence that Brown points to is not, even cumulatively, sufficient to give us a 'definite and firm conviction' that it *establishes a substantial probability* of a different outcome." App.26a (emphasis added).

The Fifth Circuit applied the wrong legal standard. The law has long required only a "reasonable" probability, not a "substantial" probability. Furthermore, under *Kyles*, a defendant need only show that the evidence "*could* reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at 435 (emphasis added).

This is not a small point of procedure but rather a crucial issue of due process, emphasized by this Court in discussing the "reasonable probability" standard. *See id*. at 434 ("The question is not whether the defendant would more likely than not have received a

different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."). *Accord Strickler*, 527 U.S. at 289-90 (1999). As this Court explained, "the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Agurs*, 427 U.S. at 111.

A "reasonable probability" requires less for reversal than would "more likely than not" or a preponderance standard.[14] *Washington v. Strickland*, 466 U.S. 668, 693-94 (1984).[15] This Court has consistently held that a "reasonable probability" is shown when the absence of the suppressed evidence "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678; *cf. Kyles*, 514 U.S. at 434. And, the "adjective [reasonable] is important." *Id*. The Court has never suggested that a "*substantial* probability of a different result" standard could provide a fair or acceptable substitute. Because the Fifth Circuit applied the wrong legal standard (and the wrong standard of review), its decision cannot stand.

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[14] Justice Souter urged that the term "significant possibility" is more accurate and understandable. *Strickler*, 527 U.S. at 297-301 (Souter, J., concurring in part).

[15] *Strickland*, 466 U.S. at 694, borrowed the standard from the *Brady* case of *Agurs*, 427 U.S. at 104, which then returned the standard in *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.).

B. The Fifth Circuit Ignored *Bagley-Kyles* and Adopted a Novel and Dangerous Process, Reinventing the Government's Case to Render the Favorable Suppressed Evidence "Not Material"

After acknowledging that Brown's counsel could have used McMahon's suppressed statements to impeach the testimony of two star prosecution witnesses, the Fifth Circuit disregarded this Court's precedent and found the suppressed evidence was not material.[16] Yet Glisan and Kopper, who testified for 300 pages each, were essential to the government's case.[17]

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[16] Despite the lip service offered by the Fifth Circuit, its approach is disturbingly similar to the approach this Court rejected in *Kyles*, where this Court noted:

> Although the [Court of Appeals] majority's *Brady* discussion concludes with the statement that the court was not persuaded of the reasonable probability that Kyles would have obtained a favorable verdict if the jury had been "exposed to any or all of the undisclosed materials," 5 F.3d, at 817, the opinion also contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone.

Kyles, 514 U.S. at 440. In *Brown III*, as in *Kyles*, "[t]he result reached by the Fifth Circuit [ ] is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*." *Id*. at 441.

[17] They were permitted to repeat McMahon's hearsay statements only because McMahon had been named an unindicted coconspirator on the substantive fraud counts. McMahon's hearsay favorable suppressed statements would have been admissible to impeach Glisan and Kopper's account because, as the

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Their primary function was to prove the alleged "McMahon guarantee." In closing arguments, prosecutors referred to Glisan's testimony at least fifty-two times, to Kopper's approximately twenty-seven times, and reminded the jurors about the "McMahon guarantee" sixteen times. Indeed, the "likely damage [to the government's case if this testimony were rebutted or impeached] is best understood by taking the word of the prosecutor." *Kyles*, 514 U.S. at 444. During closing arguments, the prosecutors contended that Glisan and Kopper were the government's best witnesses and McMahon was "the key." App.193a-194a, 196a, 199a-202a.

Beyond ignoring the centrality of the two key witnesses, the Fifth Circuit imagined that it was reviewing a case in which Glisan and Kopper did not testify about the supposed "McMahon guarantee" at all. Employing this novel approach, the Circuit *sua sponte* reinvented the government's case, hypothesizing: "Even if the net result of disclosing the McMahon notes to Brown would have been that the government would not have asked Glisan or Kopper to testify at all about what McMahon told them, that would have had essentially no impact on the government's case." App.24a.

In the Fifth Circuit's revised version of the trial, the suppressed McMahon evidence would not have

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Fifth Circuit acknowledged, hearsay can be impeached by other hearsay. App.24a n.22 (citing Fed. R. Evid. 806).

been material – there would have been no testimony to impeach. According to the Circuit, the government could have proceeded with a theory in which Andrew Fastow made an illicit guarantee,[18] rather than its actual, chosen theory and persistent refrain: McMahon made the guarantee, and Fastow merely ratified it in the December 23 phone call. *Id*.

It is hard to imagine exculpatory evidence more material than evidence that requires a total restructuring of the government's case. To accommodate the Fifth Circuit's considerable effort to render the suppressed exculpatory evidence nonmaterial, one would have to jettison the prosecution's jury opening, presentation of evidence by multiple witnesses, and closing arguments. That is the very definition of materiality.[19]

The case against Brown was already so weak that one circuit judge would have acquitted him and the jury separately found that Brown did not substantially interfere with the administration of justice. Tr. 6967. The Fifth Circuit's convoluted hypothetical

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[18] But, the government's Fastow summary, incomplete as it was, disclosed that Fastow did not use the word guarantee and likely, not "promise." Tr. 1611-13, 1675. Dkt.1168, Ex. I, at pp. 3-6. That is exactly why McMahon was "the key."

[19] In the Fifth Circuit's alternative universe, where no witness could testify that McMahon had made an illegal buyback guarantee (for fear of devastating cross-examination), Brown would have been entitled to an acquittal. Without McMahon's alleged guarantee, the "Trinkle call," was meaningless, Tr. 1142-43, and the government was stripped of its only means to impute "guilty knowledge" to Brown. *Cf*. App.198a-200a.

demonstrates unequivocally that the suppressed evidence "puts the whole case in [ ] a different light." *See Kyles*, 514 U.S. at 435.

1. The McMahon evidence would have altered the entire trial

Had Brown's counsel known before trial that McMahon repeatedly told the government that he had not made any guarantee, but instead that he and Fastow – the only two purported guarantors – offered to engage in only a "best-efforts" agreement to remarket the barges (exactly as Brown told the grand jury), then Brown's counsel could have prepared and conducted the entire case differently. Brown would have been empowered with the knowledge that such evidence existed – itself a dramatic revelation even six years later. Brown's counsel could have included in his opening statement that there would be evidence that neither McMahon nor Fastow made a guarantee, and he could have featured evidence from McMahon that only a "best-efforts" representation was made (evidence appearing only in the mutually-corroborating raw notes from multiple agents' interviews of McMahon and Fastow). Brown could have pointedly cross-examined Glisan and Kopper.[20]

[20] Defense counsel could have also used the statements to make an immunity request for McMahon who, despite frequent threats, was never indicted for *making* the supposed guarantee that served as the basis for Brown's perjury and obstruction convictions. Counsel could have also used it as direct evidence

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The Fifth Circuit also ignored the fact that Brown's counsel could have used the McMahon notes to impeach other government witnesses and continue to "put the whole case in [ ] a different light." *Kyles*, 514 U.S. at 435. Notably, FBI Agent Raju Bhatia was permitted (improperly) to "vouch" for the entire prosecution, while implying reliance on knowledge and evidence not available to the defendant or the jury: "Based on my investigation, my conducting interviews with numerous people, the review of all the documents, the evidence, going over all the transcripts of the people that are here in this trial that [Enron "promising" a buyback] is exactly what I believe to have happened in this case." Tr. 3289-90. Agent Bhatia testified improperly and without fear of impeachment because the government concealed the crucial, contradictory evidence that Agent Bhatia and the prosecutors knew existed. This *Brady* evidence would have enabled Brown to conduct a compelling and incisive cross-examination of a witness who, unimpeached, was devastating to the defense.[21]

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supporting Brown's belief in the truth of his grand-jury testimony and to raise a defense of government misconduct.

[21] Additionally, McMahon's statements could have impeached (1) Tina Trinkle, whose only role was to testify to an internal Merrill call in which McMahon's alleged guarantee was discussed and supposedly rendered Brown a coconspirator, *see supra* note 19, and (2) government witness Timothy Henseler, the federal agent who, unbeknownst to Brown, took notes of interviews with McMahon. Tr. 2914-48, 2989-3073.

2. The Zrike evidence would have altered the entire trial

The Fifth Circuit's analysis again contravened this Court's requirements when it acknowledged that Zrike's testimony before the Grand Jury and the SEC "could have helped Brown" by explaining the absence of a written best-efforts agreement, but then dismissed the suppressed evidence as not material. App.25a-26a. According to the Fifth Circuit, the suppressed evidence would have been only of "marginal" benefit to Brown, because Zrike testified for the defense and the prosecution successfully "neutralized" her testimony by showing that she and the other lawyers had been kept "out of the loop." *Id*. at 26a.

The Fifth Circuit's recognition that the evidence "could have helped Brown" and rebutted the government's argument is, again, the definition of materiality. The true nature of Zrike's participation in the approval and negotiation process alone could have served to rebut the government's claims. The exculpatory evidence that the government withheld demonstrated that Zrike was central to the process. She was not out of the loop; she completed it. Zrike's suppressed testimony indicated that she knew of the best-efforts agreement and tried to document it well after the government claims Merrill had received a secret illegal guarantee. Zrike further undermines the import of the "Trinkle call." Brown's defense team was entitled to have all of Zrike's testimony before trial, so that it could plan its approach to this key

witness (and to others), rather than fly blind, examining a witness who was under constant threat of indictment.[22]

Had Brown received all of Zrike's grand jury and SEC testimony before trial, he would have known that she was an unequivocal supporting witness whose favorable sworn testimony was already preserved. This would have enabled Brown to present a much stronger defense, including taking an aggressive tack in his examination of Zrike. Most likely, it would have led Brown to take the stand himself (as he had already done, voluntarily and without subpoena, three times previously).

The government's impeachment of Zrike was possible only because Brown's counsel did not have the suppressed materials to prepare for her testimony and rehabilitation. Because of the suppression, Brown was unable to ask Zrike about her knowledge of the best-efforts agreement, her attempts to document it, her role in the ongoing negotiations, or her testimony that it was Enron's counsel who rejected best-efforts language and any other provision that might be construed to retain risk to Enron in those later negotiations. Zrike's testimony would have corroborated directly Brown's statements and supported

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[22] *See Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001) ("without substantive disclosure by the prosecution, the supposed failure by the defense to petition for leave to seek out [a witness] cannot fairly be seen as a default or a neglect, or even as an election . . . to call a witness cold, [ ] would be suicidal.").

their shared, genuine belief that there was no guarantee, but instead that Enron had committed only to use its best efforts to remarket the barges. *See*, *e.g.*, Dkt.1168, Ex. Y at 88-89, 123-24, 192, 196-207.

III. *BRADY* POLICY WARRANTS A CLEAR RULE THAT EVIDENCE BE DEEMED MATERIAL WHEN THE GOVERNMENT IMPAIRS THE ADVERSARY PROCESS OR CAPITALIZES ON ITS OWN SUPPRESSION, A TEST ADOPTED BY AT LEAST SIX CIRCUITS

The prosecutors' "summaries" – fewer than two full pages summarizing hundreds of pages of statements of Zrike and McMahon – failed via significant omissions to disclose exculpatory evidence, and they were affirmatively misleading. *Cf*. App.183a-187a. Such conduct alone warrants reversal. *See United States v. Service Deli*, 151 F.3d 938, 942-44 (9th Cir. 1998) (reversing conviction when the prosecution's summary of undisclosed evidence was misleading). *See also United States v. Stevens*, No. 1:08-cr-00231-EGS (D.D.C. April 7, 2009) (government's "use of [*Brady*] summaries is an opportunity for mischief and mistake").

The prosecutors' "incomplete response" effectively and wrongfully represented to the defense "that the evidence does not exist" and caused the defense "to make pretrial and trial decisions on th[at] basis." *Bagley,* 473 U.S. at 682-83 (opinion of Blackmun, J.). "[T]he more specifically the defense requests certain

evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." *Id*.

Compounding their deception, Brown's prosecutors repeatedly elicited hearsay testimony at trial, making arguments that were squarely contradicted by the first-hand evidence they suppressed. App.187a-190a. Even if the prosecutors did not personally believe the exculpatory evidence, they had a duty to disclose it. *Kyles*, 514 U.S. at 439.

Other Circuits have found a due process violation and prosecutorial misconduct where, as in Brown's case, prosecutors' arguments have "deliberately suggested the contrary of the facts known [only] to the government." *United States v. Udechukwu*, 11 F.3d 1101, 1102, 1105-06 (1st Cir. 1993). In *Udechukwu*, the government suppressed favorable evidence that may not necessarily have been sufficient *per se* to establish materiality. However, because the government exploited that suppressed evidence and made it a central issue in the case, the court held that the prosecution's conduct at trial established materiality as a matter of law. That approach is faithful to this Court's requirement that a complete assessment of the entire trial record is required.

Prosecutorial argument that capitalizes on the defendant's ignorance may elevate the suppressed favorable evidence to the level of materiality. *Id*. at 1106. In *Brown*, as in *Udechukwu*, there was "a kind

of double-acting prosecutorial error: a failure to communicate salient information, which, under *Brady* . . . and *Giglio* . . . should be disclosed to the defense, and a deliberate insinuation that the truth is to the contrary."[23] *Id*.

Under equivalent circumstances, Brown would have received a new trial in the First, Second, Fourth, Sixth, Ninth, and Tenth Circuits, which have held that evidence is material as a matter of law when the government takes advantage of its suppression by attempting to prove what the suppressed evidence negates or undermines. For example, in *Monroe*

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[23] *See United States v. Triumph Capital Group*, 544 F.3d 149, 161-65 (2d Cir. 2008) (providing new trial for *Brady* violations where suppressed evidence, going "to the core of its[ ] case," included facts "entirely at odds with the government's theory of the case at trial"); *United States v. Gil*, 297 F.3d 93, 103-04 (2d Cir. 2002) (ordering a new trial where suppressed evidence "b[ore] importantly on the central issue at trial," and the prosecutor attacked the defendant's credibility for testifying about facts which were supported by evidence the government improperly withheld); *Tassin v. Cain*, 517 F.3d 770, 779, 781 (5th Cir. 2008) (finding "a Fourteenth Amendment violation under the clear precedent of *Giglio*, *Napue*, and *Brady*," where government repeatedly "capitalized on [ ] testimony" that was undermined or refuted by evidence it withheld); *accord Robinson v. Mills*, 592 F.3d 730, 738 (6th Cir. 2010) (holding evidence material under *Brady* because it undermined the government's star witness who alone contradicted the defendant's theory of the case); *Nuckols v. Gibson*, 233 F.3d 1261, 1266-67 (10th Cir. 2000) ("Because impeachment of the witness who held the key to successful prosecution was denied to the defense, we have no doubt Petitioner suffered prejudice as a consequence."). Even the Fifth Circuit followed this rule as recently as *LaCaze v. Warden*, 645 F.3d 728, 737-39 (5th Cir. 2011).

v. Angelone, 323 F.3d 286 (4th Cir. 2003), the court found a *Brady* violation undeniable and a new trial mandated where prosecutors "stressed" and "insisted" on facts during closing argument that were "significantly undermined" by suppressed evidence. *Id*. at 314-17 & n.61. Under such circumstances, "it is impossible to say that [defendant] received a fair trial." *Id*. at 317.

Here, the government not only suppressed favorable evidence, but also carefully crafted false and misleading summaries that led defendants to believe that no exculpatory evidence emerged from the government's investigation. Prosecutors "impair[ed] the adversary process." *Bagley*, 473 U.S. at 682 (plurality opinion). Brown had no way to learn what Zrike remembered. The government's summary did not mention Brown or the best-efforts agreement. App.185a-186a. This reasonably led Brown to believe there was no such evidence. Similarly, the prosecutors' summary of McMahon reported that "he didn't recall" making a guarantee, giving Brown no clue that in truth McMahon declared repeatedly and definitively that he "recalled": "No – never guaranteed"; and neither he nor Fastow agreed to anything more than to "use best efforts to help them sell assets." App.213a-227a.

The Court should establish a bright-line rule, which flows naturally from *Giglio v. United States*, in which this Court made clear that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary

demands of justice.'" 405 U.S. 150, 153 (1972) (citation omitted). The prosecutors' own *yellow-highlighting* in *Brown* demonstrates that they knew of exculpatory evidence squarely contradicting their position, and they suppressed it anyway. Then, at trial, the same prosecutors repeatedly and unfairly capitalized on the lack of contrary evidence that resulted from their own unconstitutional and unethical tactics. A bright-line rule, establishing that exculpatory evidence is material *per se* when the government either crafts incomplete or misleading summaries, or capitalizes on its own suppression, is necessary to deter future violations and to hold the government accountable.

CONCLUSION

As reflected in the recent oral argument before this Court in *Smith v. Cain*, No. 10-8145 (Nov. 8, 2011), our legal system is infected with recurring prosecutorial misconduct and *Brady* infractions. These constitutional infirmities have been exposed more often in high-profile litigation, and sadly, only after considerable damage has been done to the defendant.[24] In this case, the government suppressed

[24] *See*, *e.g.*, Order, *In re Special Proceedings*, No. 1:09-mc-00198-EGS (D.D.C. Nov. 21, 2011) (Summary of report of misconduct in prosecution of the late Senator Ted Stevens: federal prosecutors were engaging in "systematic concealment of exculpatory evidence" and "significant, widespread, and at times intentional misconduct").

exculpatory evidence that the prosecutors themselves had *yellow-highlighted* as *Brady* evidence, but nevertheless concealed. The prosecutors then repeatedly capitalized on their suppression at trial. Such conduct is inexplicable, inexcusable, unconstitutional, and dangerous. This Court's intervention is essential to conform the practice of prosecutors generally and foreclose replication of the Fifth Circuit's perilous approach.

This litigation provides an excellent vehicle for this Court to establish a *de novo* standard of review for *Brady* violations and mandate clear rules that compel respect for *Brady* and *Kyles.* In addition, this Court may refine expectations for the Department of Justice that will aid it in reacquiring the status it held when it heeded this Court's admonition that the government's interest in criminal matters "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Only then can the public repose confidence in the attorneys who are entrusted with the power of the sovereign and are privileged to represent the United States of America.

For these reasons, this petition for *writ of certiorari* should be granted, Brown's convictions reversed, and a new trial ordered.

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