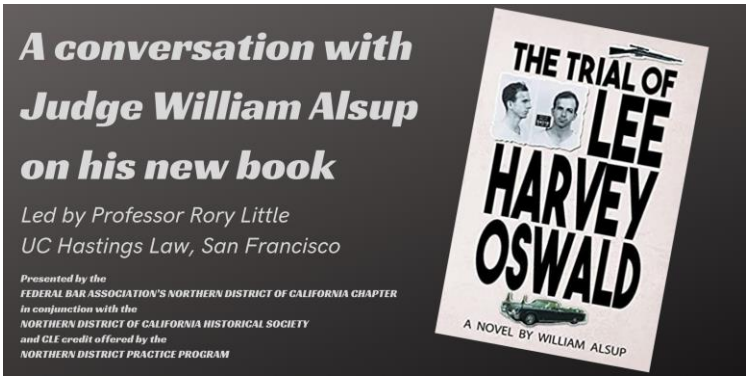

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ABSTRACT

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BRADY CASES

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FEDERAL RULES OF EVIDENCE
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No. 490
U.S.

Brady v. Maryland

373 U.S. 83 (1963) · 83 S. Ct. 1194
Decided May 13, 1963

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 490.

Argued March 18-19, 1963. Decided May 13, 1963.

In separate trials in a Maryland Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence, petitioner and a companion were convicted of first-degree murder and sentenced to death. At his trial, petitioner admitted participating in the crime but claimed that his companion did the actual killing. In his summation to the jury, petitioner's counsel conceded that petitioner was guilty of murder in the first degree and asked only that the jury return that verdict "without capital punishment." Prior to the trial, petitioner's counsel had requested the prosecution to allow him to examine the companion's extrajudicial statements. Several of these were shown to him; but one in which the companion admitted the actual killing was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted and sentenced and after his conviction had been affirmed by the Maryland Court of Appeals. In a post-conviction proceeding, the Maryland Court of Appeals held that suppression of the evidence by the prosecutor denied petitioner due process of law, and it remanded the case for a new trial of the question of punishment, but not the question of guilt, since it was of the opinion that nothing in the suppressed confession "could have reduced [petitioner's] offense below murder in the first degree." *Held:* Petitioner was not denied a federal constitutional right when his new trial was restricted to the question of punishment; and the judgment is affirmed. Pp. 84-91.

(a) Suppression by the prosecution of evidence favorable to an accused who has requested it 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. Pp. 86-88.

(b) When the Court of Appeals restricted petitioner's new trial to the question of punishment, it did not deny him due process or equal protection of the laws under the Fourteenth Amendment, since the suppressed evidence was admissible only on the issue of punishment. Pp. 88-91.

84 226 Md. 422, 174 A.2d 167, affirmed. *84

E. Clinton Bamberger, Jr. argued the cause for petitioner. With him on the brief was *John Martin Jones, Jr.*

Thomas W. Jamison III, Special Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief were *Thomas B. Finan*, Attorney General, and *Robert C. Murphy*, Deputy Attorney General.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 154 A.2d 434. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief
85 under the Maryland *85 Post Conviction Procedure Act. 222 Md. 442, 160 A.2d 912. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A.2d 167. The case is here on certiorari, 371 U.S. 812.[1]

[1] Neither party suggests that the decision below is not a "final judgment" within the meaning of 28 U.S.C. § 1257 (3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that "Final judgment in a criminal case means sentence. The sentence is the judgment" (*Berman* v. *United States*, 302 U.S. 211, 212) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt "that presents a serious and unsettled question" (*Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 547) that "is fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.*, 323 U.S. 373, 377). This question is "independent of, and unaffected by" (*Radio Station WOW* v. *Johnson*, 326 U.S. 120, 126) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See *Largent* v. *Texas*, 318 U.S. 418, 421-422. Cf. *Local No. 438* v. *Curry*, 371 U.S. 542, 549.

The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words "without capital punishment." 3 Md. Ann. Code, 1957, Art. 27, § 413. In Maryland, by reason of the state constitution, the jury in a criminal case are "the Judges of Law, as well as of fact." Art. XV, § 5. The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the
86 question of punishment. *86

We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals — *United States ex rel. Almeida* v. *Baldi*, 195 F.2d 815, and *United States ex rel. Thompson* v. *Dye*, 221 F.2d 763 — which, we agree, state the correct constitutional rule.

This ruling is an extension of *Mooney* v. *Holohan*, 294 U.S. 103, 112, where the Court ruled on what nondisclosure by a prosecutor violates due process:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

In *Pyle* v. *Kansas*, 317 U.S. 213, 215-216, we phrased the rule in broader terms:

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney* v. *Holohan*, 294 U.S. 103."

87 *87

The Third Circuit in the *Baldi* case construed that statement in *Pyle* v. *Kansas* to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. In *Napue* v. *Illinois*, 360 U.S. 264, 269, we extended the test formulated in *Mooney* v. *Holohan* when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." And see *Alcorta* v. *Texas*, 355 U.S. 28; *Wilde* v. *Wyoming*, 362 U.S. 607. Cf. *Durley* v. *Mayo*, 351 U.S. 277, 285 (dissenting opinion).

We now hold that 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.

The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts."[2] A prosecution that withholds evidence on demand of an accused which, if made available,

88 *88 would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169.

[2] Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954: "The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my

> illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts."

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

> "There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. . . . [I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady*.
>
> "Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. . . .
>
> "The appellant's sole claim of prejudice goes to the punishment imposed. *If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree*. We, therefore, see no occasion to retry that issue." 226 Md., at 429-430, 174 A.2d, at 171. (Italics added.)

89 *89

If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner's offense "below murder in the first degree"? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

But Maryland's constitutional provision making the jury in criminal cases "the Judges of Law" does not mean precisely what it seems to say.[3] The present status of that provision was reviewed recently in *Giles* v. *State*, 229 Md. 370, 183 A.2d 359, appeal dismissed, 372 U.S. 767, where the several exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that "Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused." 229 Md., at 383, 183 A.2d, at 365. The cases cited make up a long line going back nearly a century. *Wheeler* v. *State*, 42 Md. 563, 570, stated that instructions to the jury were advisory only, "except in regard to questions as to what shall be considered as evidence." And the court "having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction." *Bell* v. *State*, 57 Md. 108, 120. And see *Beard* v. *State*, 71 Md. 275, 280, 17 A. 1044, 1045; *Dick* v. *State*, 107 Md. 11, 21, 68 A. 286, 290. Cf. *Vogel* v. *State*, 163 Md. 267, 162 A. 705.

90 *90

> 3 See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39, 43; Prescott, Juries as Judges of the Law: Should the Practice be Continued, 60 Md. St. Bar Assn. Rept. 246, 253-254.

We usually walk on treacherous ground when we explore state law,[4] for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the "admissibility of evidence" pertinent to "the issue of the innocence or guilt of the accused."

Giles v. *State, supra*. In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession "could have reduced the appellant Brady's offense below murder in the first degree." We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record.[5] But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that
91 sporting chance through the use of a *91 bifurcated trial (cf. *Williams* v. *New York*, 337 U.S. 241) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

4 For one unhappy incident of recent vintage see *Oklahoma Packing Co.* v. *Oklahoma Gas Electric Co.*, 309 U.S. 4, that replaced an earlier opinion in the same case, 309 U.S. 703.

5 "In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?" Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39. See also *Bell* v. *State, supra*, at 120; *Vogel* v. *State*, 163 Md., at 272, 162 A., at 706-707.

Affirmed.

Separate opinion of MR. JUSTICE WHITE.

1. The Maryland Court of Appeals declared, "The suppression or withholding by the State of material evidence exculpatory to an accused is a violation of due process" without citing the United States Constitution or the Maryland Constitution which also has a due process clause.– We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See *New York City* v. *Central Savings Bank*, 306 U.S. 661; *Minnesota* v. *National Tea Co.*, 309 U.S. 551. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. *Bell* v.
92 *Hood*, 327 U.S. 678, *92 wholly aside from the due process question involving the suppression of evidence. The majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, "The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment." After discussing at some length and disposing of the suppression matter in federal constitutional terms it says the question

still to be decided is the same as it was before: "The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment."

– Md. Const., Art. 23; *Home Utilities Co., Inc.*, v. *Revere Copper Brass, Inc.*, 209 Md. 610, 122 A.2d 109; *Raymond* v. *State*, 192 Md. 602, 65 A.2d 285; *County Comm'rs of Anne Arundel County* v. *English*, 182 Md. 514, 35 A.2d 135; *Oursler* v. *Tawes*, 178 Md. 471, 13 A.2d 763.

The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rulemaking or legislative process after full consideration by legislators, bench, and bar.

3. I concur in the Court's disposition of petitioner's equal protection argument.

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK joins, dissenting.

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's Fourteenth Amendment right to equal protection?[1] In my
93 opinion an affirmative answer would *93 be required *if* the Boblit statement would have been admissible on the issue of guilt at petitioner's original trial. This indeed seems to be the clear implication of this Court's opinion.

[1] I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 86-88 of its opinion.

The Court, however, holds that the Fourteenth Amendment was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal cases "the Judges of Law, as well as of fact," as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under § 645G of the Maryland Post Conviction Procedure Act, Md. Code, Art. 27 (1960 Cum. Supp.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case,[2] rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. 226 Md., at 430, 174 A.2d, at 171. This interpretation is indeed fortified by the Court of Appeals' earlier general discussion as to the admissibility of third-party confessions, which falls short of saying anything that is
94 dispositive *94 of the crucial issue here. 226 Md., at 427-429, 174 A.2d, at 170.[3]

[2] Section 645G provides in part: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper." Rule 870 provides that the Court of Appeals "will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended."

[3] It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of *Day* v. *State*, 196 Md.

384, 76 A.2d 729. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.

Nor do I find anything in any of the other Maryland cases cited by the Court (*ante*, p. 89) which bears on the admissibility *vel non* of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not "overrule" the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that "in the final analysis the jury are the judges of both the *law* and the facts, and the verdict in this case is *entirely* the jury's responsibility." (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement *would* have been admissible at the trial on the issue of guilt.[4]

[4] In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been admissible for all purposes, counsel for the State, after some colloquy, stated: "It would have been, yes."

In this state of uncertainty as to the proper answer to the critical underlying issue of state law, and in view of the fact that the Court of Appeals did not
95 in terms *95 address itself to the equal protection question, I do not see how we can properly resolve this case at this juncture. I think the appropriate course is to vacate the judgment of the State Court of Appeals and remand the case to that court for further consideration in light of the governing constitutional principle stated at the outset of this opinion. Cf. *Minnesota* v. *National Tea Co.*, 309 U.S. 551.

96 *96

No. 13-9003
United States Court of Appeals, Third Circuit.

Dennis v. Sec'y, Pa. Dep't of Corr.

834 F.3d 263 (3d Cir. 2016)
Decided Aug 23, 2016

No. 13-9003

08-23-2016

James A. Dennis v. Secretary, Pennsylvania Department of Corrections ; Superintendent, State Correctional Institution at Greene ; Superintendent, State Correctional Institution at Rockview; District Attorney of Philadelphia County, Appellants.

Ronald Eisenberg, Esquire (Argued), Susan E. Affronti, Esquire, Ryan Dunlavey, Esquire, Philadelphia County Office of District Attorney, 3 South Penn Square, Philadelphia, PA 19107, Counsel for Appellants. Amy L. Rohe, Esquire (Argued), Reisman Karron Greene, 1700 K. Street, N.W., Suite 200, Washington, DC 20006, Stuart B. Lev, Esquire, Federal Community Defender Office for the District of Pennsylvania, Trial Unit, 601 Walnut Street, The Curtis Center, Suite 540 West, Philadelphia, PA 19106, Melanie Gavisk, Federal Public Defender, 411 E Bonneville Ave Suite 250, Las Vegas, NV, 89101, Counsel for Appellee. Catherine M. A. Carroll, Esquire, WilmerHale, 1875 Pennsylvania Avenue, N.W., Washington, DC 20006, Counsel for Amicus Appellees.

RENDELL, Circuit Judge.

Ronald Eisenberg, Esquire (Argued), Susan E. Affronti, Esquire, Ryan Dunlavey, Esquire, Philadelphia County Office of District Attorney, 3 South Penn Square, Philadelphia, PA 19107,
269 Counsel for Appellants.*269 Amy L. Rohe, Esquire (Argued), Reisman Karron Greene, 1700 K. Street, N.W., Suite 200, Washington, DC 20006, Stuart B. Lev, Esquire, Federal Community Defender Office for the District of Pennsylvania, Trial Unit, 601 Walnut Street, The Curtis Center, Suite 540 West, Philadelphia, PA 19106, Melanie Gavisk, Federal Public Defender, 411 E Bonneville Ave Suite 250, Las Vegas, NV, 89101, Counsel for Appellee.

Catherine M. A. Carroll, Esquire, WilmerHale, 1875 Pennsylvania Avenue, N.W., Washington, DC 20006, Counsel for Amicus Appellees.

Before: McKEE Chief Judge, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE and RENDELL[*] Circuit Judges

[*] Honorable Marjorie O. Rendell assumed Senior Status on July 1, 2015.

OPINION

RENDELL, Circuit Judge.

James Dennis has spent almost twenty-four years unsuccessfully challenging his conviction for the murder of Chedell Williams. The Pennsylvania Supreme Court repeatedly affirmed Dennis's first-degree murder conviction and sentence and denied his applications for post-conviction relief. Thereafter, Dennis filed an application under 28 U.S.C. § 2254, and the United States District Court for the Eastern District of Pennsylvania granted Dennis habeas corpus relief, concluding that the Pennsylvania Supreme Court had

unreasonably applied *Brady v. Maryland* , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), with respect to three pieces of evidence suppressed by the Commonwealth. The suppressed *Brady* material—a receipt corroborating Dennis's alibi, an inconsistent statement by the Commonwealth's key eyewitness, and documents indicating that another individual committed the murder—effectively gutted the Commonwealth's case against Dennis. The withholding of these pieces of evidence denied Dennis a fair trial in state court. We will therefore affirm the District Court's grant of habeas relief based on his *Brady* claims.

I. Background

A. Factual Background

On October 22, 1991, Chedell Williams and Zahra Howard, students at Olney High School, climbed the steps of the Fern Rock SEPTA station, located in North Philadelphia. Two men approached the girls and demanded "give me your fucking earrings." App. 465. The girls fled down the steps; Howard ran to a nearby fruit vendor's stand and Williams ran into the intersection at Tenth and Nedro Streets. The men followed Williams. The perpetrators tore Williams's gold earrings from her earlobes. One of the men grabbed her, held a silver handgun to her neck, and shot her. The men then ran up the street to a waiting getaway car and fled the scene. The precise time of injury was 1:54 p.m. Emergency personnel responded within minutes, but Williams was pronounced dead at the hospital less than an hour later.

B. Police Investigation and the Trial

The police undertook an investigation into the Williams murder, primarily aimed at determining the identity of the shooter. Frank Jastrzembski led a team of detectives who pursued the investigation based on rumors that "Jimmy" Dennis from the Abbottsford Homes projects in East Falls[1] committed the crime, despite being unable to identify the source of the rumors. Resting on tips 270 by neighbors from *270 the projects, police proceeded with Dennis as the primary, if not the sole, suspect.[2]

[1] The Fern Rock SEPTA station is located in North Philadelphia. The Abbottsford projects are located in Northwest Philadelphia.

[2] Detective Jastrzembski testified at trial that neither the alleged second individual nor the person in the car were ever arrested, although the case was ongoing.

Detectives obtained eyewitness reports and identifications, very few of which aligned with Dennis's appearance. Nearly all of the eyewitnesses who gave height estimates of the shooter described him as between 5'9? and 5'10?. He was described as having a dark complexion and weighing about 170 to 180 pounds. The victim, Williams, had a similar build as the shooter; she was 5'10? and weighed 150 pounds. Dennis, on the other hand, is 5'5? tall and weighed between 125 and 132 pounds at the time of trial.

Prior to trial, three eyewitnesses identified Dennis in a photo array, at an in-person lineup, and at a preliminary hearing: Williams's friend, Zahra Howard; a man working on a garage near the intersection, Thomas Bertha; and a SEPTA employee who was standing in front of the station at the time of the murder, James Cameron.[3]

[3] Chief Judge McKee's masterful concurrence summarizes with great detail the photo array, line up, and the bystanders' identifications. As Chief Judge McKee notes, a majority of the nine eyewitnesses who viewed the photo array were unable to identify Dennis. Anthony Overstreet was installing stone facing on a nearby garage with Bertha at the time of the incident. Overstreet told police that he recognized the shooter from around Broad and Olney Streets in North Philadelphia. Although

Overstreet stated that Dennis looked like the shooter when he reviewed the photo array, he identified a different individual as the shooter during a later in-person lineup —not Dennis. George Ritchie, who was across the street from Bertha and Overstreet, was unable to identify anyone as the shooter among photos provided by the police, despite initially asserting that he would be able to identify the perpetrators again. The two fruit vendors Howard ran toward, David Leroy, a hot dog vendor near the station, and Clarence Verdell, a bystander on the SEPTA steps, did not identify Dennis from the photo array. None of these bystanders were called to testify at trial.

Zahra Howard

• *Photo Array* : Howard identified Dennis, saying "this one looks like the guy, but I can't be sure ... He looks a little like the guy that shot Chedell." App. 1537. When asked if she could be sure, she replied "No." *Id.*

• *Lineup* : Howard indicated that she "thought" Dennis was the shooter. App. 586.[4]

[4] The District Court reasoned that the eyewitnesses' memory may have been supplanted by photos from the array: "That some (but notably not all) of the witnesses went on to identify Mr. Dennis in a life [sic] lineup two months after providing only tentative photo array identification indicates that their memories of the photo array may have 'replaced' their memories of the actual event. Or, more simply, that Mr. Dennis was familiar to them because they had seen his photo previously, and had no prior exposure to the other members of the lineup." *Dennis v. Wetzel* , 966 F.Supp.2d 489, 492 n.4 (E.D. Pa. 2013) (internal quotation marks and citation omitted), *vacated and remanded sub nom. Dennis v. Sec'y, Pa. Dep't of Corr.* , 777 F.3d 642 (3d Cir. 2015), *reh'g en banc granted, opinion vacated* (May 6, 2015) ("*Dennis V* ").

Chief Judge McKee's concurrence expands on this concern. He observes that "[a]llowing a witness to view a suspect more than once during an investigation can have a powerful corrupting effect on that witness' memory." J. McKee Concurring Op. at 328. Research shows "that while fifteen percent of witnesses who mistakenly identify an innocent person during the first viewing of a lineup, that percentage jumps to thirtyseven percent if the witness previously viewed that innocent person's mug shot." Id. Here, "[t]he witnesses who identified Dennis at trial were given not two, but three, opportunities to view Dennis. These multiple views could help explain why initially tentative guesses became certain identifications by the time the witnesses took the stand." Id. at 329

271 *271

• *Preliminary Hearing and Trial* : Howard testified at trial that she had identified Dennis as the shooter at a preliminary hearing. App. 474-75. She also made an in-court identification during trial. *Id.*

Thomas Bertha

• *Photo Array* : Bertha initially said that the first photo, which was a photo of Dennis, looked like the man running with the gun and later confirmed his identification.

• *Lineup* : When asked to identify the shooter, Bertha simply stated "three," which was Dennis. App. 586.

• *Trial:* Bertha identified Dennis as the shooter at trial.

James Cameron

• *Photo Array* : Cameron said that Dennis looked like the shooter, but wavered "I can't be sure." App. 1548.

• *Lineup* : Cameron identified Dennis, who was in the third position in the lineup, by simply stating "number three" without reservation. App. 689.

• *Preliminary Hearing and Trial* : At trial, Cameron identified Dennis as the shooter and confirmed that he had identified Dennis at the preliminary hearing.

At trial, the prosecutor introduced testimony from detectives who verified that Howard, Bertha, and Cameron each identified Dennis in the photo array and lineup. No other eyewitness identifications were referenced.

Dennis was arrested on November 22, 1991. His signed statement indicated that he stayed at his father's house until about 1:30 p.m. on the day in question, when his father drove him to the bus stop and watched him get on the "K" bus toward Abbottsford Homes to attend singing practice that evening. Dennis rode the K bus for approximately thirty minutes to the intersection of Henry and Midvale Avenues. During the trip, Dennis saw Latanya Cason, a woman he knew from Abbottsford Homes. In his statement to police, which was read into the record at trial, Dennis asserted that when he and Cason disembarked the bus "[he] waved to her." App. 710. After getting off the bus, Dennis walked to Abbottsford Homes, where he spent the rest of the day with his friends. Dennis's father, James Murray, corroborated Dennis's story. He stated that they spent the morning together, and that he drove Dennis to the bus stop shortly before 2:00 p.m. to catch the K bus to Abbottsford Homes.

The Commonwealth's case rested primarily on eyewitness testimony, which Assistant District Attorney Roger King emphasized in his opening statement to the jury. Though ADA King acknowledged that the Commonwealth had no physical evidence—the silver handgun and the earrings were never recovered—he contended that the eyewitness identifications were sufficient for a conviction. Three eyewitnesses were called to testify at trial: Zahra Howard, Thomas Bertha, and James Cameron.

Zahra Howard, who was present with the victim at the time of the murder, led the Commonwealth's case. She recounted what had occurred, noting that the shooter was "right in front of" her and Williams, about one or two feet away, and that she looked the shooter in the face. App. 467–68. About ten seconds passed between the first time she saw the men until she turned around and ran away from the scene; she also saw the shooter for about five to ten seconds while he was grabbing Williams in the street. Howard identified Dennis in a photo array, at an in-person lineup, and at a preliminary hearing. Defense counsel focused his cross-examination on her hesitation in prior identifications. Howard described the shooter as wearing a black hooded sweatshirt and a red sweat
272 suit. In *272 her statement, Howard said that the shooter was about same height as Detective Danks, who was 5'9? or 5'10?, or taller. Howard testified at trial that she had never seen the shooter or his accomplice before in her life.

Thomas Bertha and his partner, Anthony Overstreet, were installing stones on a garage near Tenth and Nedro Streets on the day in question. After hearing the gunshot, they came down from their ladders and looked down the street from the sidewalk. The two perpetrators ran past them. The shooter passed between three to eight feet in front of Bertha, and Bertha ran after him. Bertha made visual contact with the shooter, who was running toward him, for about three to four seconds. Defense counsel impeached Bertha by recalling that, at the preliminary hearing, Bertha testified that he could not have seen the shooter for longer than about a second. Bertha viewed the photo array and attended the lineup, identifying Dennis at both. He described the shooter as wearing red sweat pants, a red hooded sweatshirt, a black cap, and a leather jacket. Bertha testified at trial that he remembered telling the police that the shooter was 5'9? and 180 pounds.

James Cameron was working as a SEPTA cashier on the day of the murder. He was about eight to ten feet from Williams when she was shot and saw the shooter for a few seconds. Cameron saw the shooter's face several times but acknowledged that he "didn't really pay attention." App. 664. He testified at trial that he saw the shooter for about thirty to forty seconds collectively. This estimate contradicted Cameron's prior testimony at the preliminary hearing where he claimed that about twenty seconds passed between when he first saw the shooter and when the shooter ran away. Cameron viewed the array, attended the lineup, and testified at the preliminary hearing, identifying Dennis at each instance, as well as at trial. Cameron stated that Dennis looked like the shooter, "especially from the side." App. 676. He described the shooter as wearing a red sweat suit and a dark jacket, carrying a small silver revolver. He did not remember giving detectives a specific height and weight description, but remembered telling them that the shooter was "stocky."[5] App. 664.

5 Detectives Manuel Santiago and William Wynn testified at trial about the eyewitnesses' prior identifications. Detective Santiago supervised the activities at the crime scene on the day of the murder and compiled a photo array to show to Howard, Bertha, and Cameron, which included eight photographs with Dennis's photo in the first position. Dennis looked different in the photograph than at the time of arrest. Santiago did not ask Howard why she could not be sure that it was the shooter. Detective Wynn, the lineup supervisor for the Philadelphia Police, conducted the in-person lineups for Howard, Bertha, and Cameron. Defense counsel placed Dennis as number three in the lineup. All participants dressed similarly and carried large numbers for identification.

Aside from eyewitness testimony, the Commonwealth presented testimony from Charles "Pop" Thompson and Latanya Cason, who spoke about their interactions with Dennis on October 22, 1991, the day of the murder. Thompson was in Dennis's singing group, which held rehearsal at Abbottsford Homes that day. Thompson did not remember what Dennis was wearing, but told detectives that he saw Dennis with a gun that night. He also identified an illustrative .32 chrome revolver, which had been admitted as a Commonwealth exhibit, as being similar to the one he saw in Dennis's possession. Thompson had an open drug possession charge at the time of trial, but testified that he was not expecting any help from the Commonwealth with the drug charge in exchange for his testimony. Three years after trial, Thompson attested in a statement that he had never 273 *273 seen Dennis with a gun and that his testimony at trial was false.

Latanya Cason, who knew Dennis "by living up [her] way" at Abbottsford Homes, testified that she saw him between 4:00 and 4:30 p.m. at Henry and Midvale Avenues on October 22, 1991. App.

731. Cason's estimate that she saw Dennis between 4:00 and 4:30 p.m. was "strictly a guess" on her part—she did not know exactly what time she saw Dennis—but there was no question she saw him that day. App. 745. Prior to seeing Dennis, Cason took public transportation to the 3-2 center where she picked up her public assistance check, signing a document to confirm pick up. She then filled her daughter's prescription, got some fish, ran a few additional errands, and went home via the K bus. Cason testified at trial that she did not see Dennis at 2:00 p.m. that day because she was just leaving work at 2:00 p.m. Although the Commonwealth introduced a schedule of payment and food stamps at trial, which stated that Cason was slated to pick up her public assistance check and food stamps on October 22, 1991, nothing was introduced at trial indicating the precise time of day she retrieved her benefits.

Detective Jastrzembski executed a search warrant of Dennis's father's home and seized two black jackets, a pair of red pants, and a pair of white sneakers. The police lost the items prior to trial. Detectives and two experts testified at trial about physical aspects of the crime, but the Commonwealth did not introduce any physical evidence at trial.[6]

[6] The Commonwealth's other witnesses did not testify as to Dennis's connection to the murder. Rather, they spoke to the emergency response to the crime (Fireman Oakes), the scene of the crime (Sergeant Fetscher), Williams's body chart (Detective Brown), and the projectile removed from her body (Detective Reinhold). Williams's ex-boyfriend recounted a prior incident where Williams had been robbed at gunpoint for the same earrings she wore on the day of the murder. Officer Jachimowicz, a firearms expert, testified as to the type of gun that was likely used in the murder, and although he acknowledged that there were thousands of models of .32 caliber handguns, he asserted with certainty that the nickel finish Harrington Richardson 733 was probably used in the murder. Detective Dominic Mangoni transported Howard and Bertha to the lineup. Detective Thomas Perks participated in Dennis's arrest. Williams's mother and father, Barbara and Barry, identified their daughter and testified to her future. Dr. Sekula-Perlman, a medical examiner, ruled Williams's death a homicide by a shot at close range. Sergeant Fetscher took information from witnesses at the scene, including Howard, Bertha, and Cameron. None of these witnesses testified substantively as to Dennis's alleged involvement in the murder.

Dennis's defense strategy centered on his alibi, good character, and mistaken identity.[7] His defense comprised of testimony by his father, James Murray, Dennis himself, a few members of his singing group, and character witnesses. Dennis did not have evidence to support an "other suspect" defense.

[7] Defense counsel sought to discredit eyewitness testimony put forth by the Commonwealth, primarily that of Zahra Howard. However, counsel's cross-examination was confined to highlighting Howard's prior hesitation in identifying Dennis. Similarly, defense counsel's cross-examination of Cason focused on shakiness in her recollection; counsel had nothing to indicate that her timeline was incorrect, or that she was mistaken or testifying falsely.

Dennis's father testified that the two of them were together from the evening of October 21, 1991, until about 1:50 p.m. on October 22, 1991. Murray lives about fifteen to eighteen blocks from the Fern Rock Station, roughly a five-minute drive with traffic. Murray testified that "[he] kn[ew] for a fact that [Dennis] was on [the K bus]" at the
274 time of Williams's murder *274 because he drove Dennis to the stop and watched from his car as

Dennis boarded the bus. App. 804. The Commonwealth pointed out that Murray had visited Dennis forty times since his arrest.

Willis Meredith, James Smith, and Marc Nelson, members of Dennis's singing group who had known Dennis for ten years or more, testified on Dennis's behalf about rehearsal on the day of the murder. Meredith saw Dennis for about twenty minutes around 2:15 or 2:30 p.m., which aligned with Dennis's account. Smith testified that Dennis was dressed in dark sweats and a dark hooded shirt at rehearsal that night—he was not wearing any red. Meredith, Smith, and Nelson each testified that Thompson and Dennis frequently got into arguments. Each testified that they had not seen a handgun in Dennis's possession.[8] Other defense witnesses, including Dennis's brothers, friends, and church leaders, testified to Dennis's reputation for being honest, truthful, peaceful, and law-abiding.[9]

[8] Lawrence Merriweather also testified to seeing Dennis on the day in question. Merriweather testified that he saw Dennis between 3:00 and 3:30 p.m.

[9] The Commonwealth responded with character witnesses that disputed the testimony of Dennis's character witnesses.

Finally, Dennis took the stand. He testified that he had nothing to do with Williams's shooting and was not in the area at the time of her murder.[10] In line with his father's testimony, Dennis said he spent the previous night at his father's house and left at 1:30 or 1:45 p.m. to take the bus to Abbottsford Homes for singing practice. When Dennis left his father's house, he was wearing a dark blue jeans set; he changed into black sweats at Merriweather's house before rehearsal. Dennis testified that he took the K bus, where he "thought" he saw Tammy Cason, to Henry and Midvale Avenues in East Falls, arriving around 2:30 p.m.[11] App. 1028. Dennis then went to Willis Meredith's house for twenty to thirty minutes. Dennis acknowledged getting into frequent arguments with Thompson about Thompson's desire to be the leader of the singing group.

[10] Dennis testified that Helen Everett, his girlfriend, told him about the rumor that he, Derrick, and Rodney, committed the murder. He testified that Derrick and Rodney spoke with the police about the murder. Neither testified at trial.

[11] Anthony Sheridan, a SEPTA employee called by the Commonwealth, testified that there was a K bus that left the stop near Dennis's father's house at approximately 1:56 p.m. and that it would take approximately half an hour to arrive at Henry and Midvale.

Counsels' closings reiterated the trial's themes—eyewitness identifications and Dennis's alibi. Defense counsel pointed to eyewitness identifications as the key question in the Commonwealth's case, but he had no means of impeaching Howard, the eyewitness with the closest view of the shooter. Defense counsel highlighted Thompson's motive to lie, but Thompson's testimony did not directly link Dennis to Williams's murder. Finally, defense counsel had to backtrack from using Cason to bolster Dennis's timeline due to the timing discrepancy between her version—that they saw one another between 4:00 and 4:30—and Dennis's account that he saw Cason at 2:30. In his closing statement to the jury, counsel urged that Dennis had not, in fact, seen Cason on the bus to detract from the inconsistency.

ADA King similarly saw Howard as the key witness at trial and instructed the jury that "if you believe Zahra Howard, that's enough to convict James Dennis." App. 1207. King attacked Dennis's testimony that he saw Tammy Cason on

the K bus as incredible, and undercut Dennis's father's testimony by urging that "blood is thicker
275 *275 than water," leaving no disinterested witnesses to support Dennis's account. App. 1208-09.

The jury found Dennis guilty of first-degree murder, robbery, carrying a firearm without a license, criminal conspiracy, and possession of an instrument of a crime. It found Dennis's lack of significant criminal history a mitigating factor during the penalty phase, but it also found that the killing was committed in the course of a felony, amounting to an aggravating circumstance. The jury sentenced Dennis to death.

C. Undisclosed Evidence

The prosecution failed to disclose to Dennis's counsel three pieces of exculpatory and impeachment evidence: (1) a receipt revealing the time that Cason had picked up her welfare benefits, several hours before the time she had testified to at trial, thus corroborating Dennis's alibi (the "Cason receipt"); (2) a police activity sheet memorializing that Howard had given a previous statement inconsistent with her testimony at trial, which provided both invaluable material to discredit the Commonwealth's key eyewitness and evidence that someone else committed the murder (the "Howard police activity sheet"); and (3) documents regarding a tip from an inmate detailing his conversation with a man other than Dennis who identified himself as the victim's killer (the "Frazier documents").

1. Cason receipt

Detectives interviewed Latanya Cason, the woman identified in Dennis's initial statement, at Abbottsford Homes a few months after Dennis's arrest. Cason told detectives that she thought she remembered seeing Dennis the day of the murder, but her timeline contradicted the one Dennis outlined. She said that she worked until 2:00 p.m., went to the 3-2 center to pick up her public assistance check, picked up a prescription and some fish, boarded the K bus, and got off near Abbottsford Homes. According to Cason, she saw Dennis when she got off the K bus between 4:00 and 4:30 p.m., not between 2:00 and 2:30 p.m. as Dennis indicated. The only discrepancy between Dennis's testimony and Cason's was the time of their interaction. Police records indicate that Cason gave detectives a Department of Public Welfare ("DPW") card marked "Schedule of check payment" at the time of her interview, which was introduced at trial. However, the Commonwealth possessed another DPW document not disclosed at trial—a receipt bearing the time Cason picked up her check. Cason testified at trial as a witness for the prosecution and her testimony aligned with her initial statement to detectives.

On appeal, Dennis's new appellate counsel obtained Cason's time-stamped receipt from the DPW.[12] Cason stated in an affidavit that police had a copy of the time-stamped receipt when they interviewed her and that she gave police her only copy of the receipt. The receipt indicated that Cason picked up her welfare check at 13:03, or 1:03 p.m. In complete contradiction to her trial testimony, then, Cason could not have been working until 2:00 p.m. that day. Cason attributed her prior incorrect testimony to misunderstanding military time, so that she "may have thought that the 13:03, which is on the receipt, was 3:03 p.m."
276 App. 1736. Based *276 on the discrete time indicated on the receipt, Cason's affidavit stated she would have seen Dennis "between 2:00 and 2:30 p.m. at the Abbottsford Homes, and not 4:00 to 4:30 that is in my statement." *Id.*

12 It is not clear how counsel would have been able to obtain Cason's receipt on appeal because DPW regulations placed strict limitations on the type of information it would disclose and to whom. *See* 55 Pa. Code § 105.4(a)(1). Presumably, counsel would have sought permission from Cason, or assistance from Cason herself, in obtaining the receipt.

2. Howard police activity sheet

Two days after the murder, detectives interviewed Diane and Mannasett Pugh, Williams's aunt and uncle. Diane Pugh told detectives that, the night after the murder, Zahra Howard told them that she recognized the assailants from Olney High School, where she and Williams were students. Dennis did not attend Olney High School. Howard's assertion that she recognized the assailants from school contradicted her prior statements to police that she had never seen the men before and did not recognize them from school. Police recorded in their "THINGS TO DO" list that they planned to interview Howard about her inconsistent statements.

Howard further told the Pughs that two people named "Kim" and "Quinton" had also been present at the murder. The following day, another of Williams's aunts, Elaine Parker, told police that Howard mentioned Kim and Quinton were at the scene. The Commonwealth disclosed Parker's statement prior to trial. However, the prosecution did not disclose information about Howard's inconsistent statement to the Pughs. Mere hours after meeting with Parker and receiving additional information that Howard had omitted or misstated facts in her initial statement to police, two detectives met with Howard, ostensibly to follow up on their "things to do." Ignoring their recorded intentions, however, the detectives only questioned Howard about a photo array and did not inquire about the inconsistent statements.

3. Frazier documents

Prior to Dennis's arrest, Philadelphia detectives received a call from Montgomery County police relaying a tip from an inmate at the Montgomery County Correctional Facility, William Frazier. Frazier told Montgomery County detectives that he spoke with the man who may have murdered Williams during a three-way call with Frazier's friend, Tony Brown, facilitated by Frazier's aunt. During the call, Brown told Frazier and Frazier's aunt that he "fucked up" and murdered Williams when the gun went off accidentally during a botched robbery of her earrings. App. 1692. He also said that two other men, Ricky Walker and "Skeet," aided in committing the crime. Frazier told detectives that Brown had a brown car, that he "like[d] to wear sweat suits," and that the men knew the victim as "Kev['s] ... girl."[13] App. 1694–95.

13 Williams, the victim, previously dated a man named Kevin Williams.

Frazier told police that Brown and the others had hid in Frazier's empty apartment for two days following the murder. Frazier provided addresses for the men, including their parents' and girlfriends' addresses, an address and phone number for his aunt, and an address for the pawn shop Brown frequented. Frazier volunteered to take detectives on a "ride along" to point out the houses and pawn shop.

Following the tip, Detectives Santiago and Jastrzembski interviewed Walker, who admitted to knowing Williams from Olney High School, but denied knowing Brown or Skeet. Walker denied any involvement in the murder, and claimed that his mother could verify that he was sleeping when Williams was murdered. Walker admitted to hanging out around Broad and Olney, the exact area where Overstreet said he had seen the perpetrator before. Detectives never verified
277 Walker's alibi nor *277 showed his photo to any of the eyewitnesses. Detectives never located Brown or Skeet.

Detectives, including Jastrzembski, spoke with Frazier's landlord, who had no knowledge of anyone entering Frazier's apartment. Detectives did not interview Frazier's aunt to obtain her account of the call with Brown.

The Commonwealth suppressed at least six documents relating to the Frazier tip from Dennis's trial counsel: (1) Frazier's initial statement to the Montgomery County police (Oct 31, 1991); (2)

Frazier's statement to the Philadelphia police (Nov. 1, 1991); (3) Police Activity Sheet regarding Frazier's landlord (Nov. 1, 1991); (4) Police Activity Sheet regarding Ricky Walker (Nov. 2, 1991); (5) Frazier's signed search consent; and (6) Ricky Walker's statement (Nov. 2, 1991). The Commonwealth concedes that these documents were not disclosed to Dennis until a decade after trial.

D. Review of State Court Conviction

Like many habeas cases, this case has a lengthy procedural history. Only those decisions and arguments relevant to the instant appeal are summarized below.

On July 22, 1998, the Pennsylvania Supreme Court affirmed Dennis's conviction and death sentence on direct appeal by a vote of four to three. *Commonwealth v. Dennis* , 552 Pa. 331, 715 A.2d 404 (1998) ("*Dennis I* "). Dennis argued on direct appeal that the Commonwealth violated his due process rights by failing to disclose Cason's time-stamped receipt prior to trial, in opposition to *Brady v. Maryland* , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).[14]

14 The Pennsylvania Supreme Court's 2004 decision, *Commonwealth v. Dennis* , 580 Pa. 95, 859 A.2d 1270 (2004) ("*Dennis II* "), is not relevant to this appeal. On December 12, 2000, Dennis filed a motion for discovery, seeking the prosecutor's jury selection notes, and the PCRA court granted Dennis's motion. After granting the Commonwealth's request for reconsideration of the order, the PCRA court reinstated the discovery order on July 10, 2001. In *Dennis II* , the Pennsylvania Supreme Court reversed the order granting discovery of the prosecutor's jury selection notes and remanded the case for completion of PCRA review.

On September 15, 1998, Dennis filed a timely *pro se* petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), received new counsel, and also received discovery. In December 1999, PCRA counsel was appointed and filed an amended petition, and, subsequently, a supplemental amended petition and a second supplemental petition on December 1, 2000, and July 10, 2002, respectively. Two pieces of evidence at issue in this appeal were disclosed during PCRA discovery. First, Dennis received the police activity sheet memorializing Howard's statements to Diane Pugh the night after the murder, which indicated that she recognized the shooter from Olney High School. Second, Dennis received the six documents relating to the Frazier lead that police had abandoned. The PCRA court denied Dennis's claims that the prosecution violated *Brady* by failing to disclose the Howard statement and the Frazier documents. Dennis again appealed to the Pennsylvania Supreme Court.

The Pennsylvania Supreme Court affirmed the PCRA court in part and vacated in part, and remanded two claims. *Commonwealth v. Dennis* , 597 Pa. 159, 950 A.2d 945 (2008) ("*Dennis III* "). The court found that the Commonwealth's failure to disclose the Frazier documents did not violate *Brady* because the prosecution was not required to disclose "every fruitless lead" and that "inadmissible evidence cannot be the basis for a *Brady* violation." *Id.* at 968 (internal quotation
278 marks omitted) *278 (quoting *Commonwealth v. Lambert* , 584 Pa. 461, 884 A.2d 848, 857 (2005)).

The Pennsylvania Supreme Court remanded to the PCRA court Dennis's claim that the Commonwealth violated *Brady* by suppressing the contents of the police activity sheet memorializing Zahra Howard's inconsistent statement. After evidentiary hearings on remand, the PCRA court again dismissed Dennis's petition. *Commonwealth v. Dennis* , Case No. 92-01-0484, slip op. (Pa. Ct. Com. Pl. Mar. 17, 2010). The Pennsylvania

Supreme Court concluded that it was not relevant that Howard denied her prior inconsistent statement at the evidentiary hearing before the PCRA court. *See, e.g.* , *Commonwealth v. Dennis* , 609 Pa. 442, 17 A.3d 297, 309 (2011) ("*Dennis IV* ").

The Pennsylvania Supreme Court affirmed the PCRA denial on appeal. *Id.* It concluded that the police activity sheet was not material under *Brady* because "Howard was extensively cross-examined" and because "there were two eyewitnesses other than Howard who observed the shooting at close range ... [and] positively identified [Dennis] as the shooter in a photo array, in a line up, and at trial." *Id.*

Following the Pennsylvania Supreme Court ruling, Dennis filed a habeas corpus petition under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Pennsylvania for review of his conviction and death sentence. The District Court granted Dennis habeas relief based on Dennis's *Brady* claims as to the Commonwealth's failure to disclose the Cason receipt, the Frazier documents, and the police activity sheet containing Howard's inconsistent statement. *Dennis V* , 966 F.Supp.2d at 518.

The District Court concluded that the state court's ruling regarding the Cason receipt involved an unreasonable determination of the facts. The Pennsylvania Supreme Court had concluded that the receipt was not exculpatory because (1) "[Cason's] testimony would not support Appellant's alibi"; (2) it would have been cumulative of testimony by another witness; and (3) there was no evidence that the Commonwealth withheld the receipt from the defense. *Dennis I* , 715 A.2d at 408. The District Court determined that the receipt corroborated Dennis's alibi, provided direct evidence that Cason's testimony was false, and would have been strong impeachment evidence. Therefore, the state court's determination that the receipt was not "exculpatory" was an unreasonable determination of the facts. *Dennis V,* 966 F.Supp.2d at 508.

The District Court also concluded the Pennsylvania Supreme Court had engaged in a similarly unreasonable determination of facts regarding whether the receipt was actually suppressed by the police. In its opinion, the Pennsylvania Supreme Court stated that the police came into possession of the receipt when interviewing Cason, and that the Commonwealth never claimed to have disclosed the receipt to defense counsel. The District Court relied on *Kyles v. Whitley* , 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), for the proposition that favorable evidence in the police's possession is imputed to the prosecution. *Dennis V,* 966 F.Supp.2d at 509–10. It also interpreted the three-factor balancing test in *United States v. Pelullo* , 399 F.3d 197 (3d Cir. 2005), to come out in favor of required disclosure by the Commonwealth. Further, the state court's conclusion that the receipt was not material was an unreasonable application of clearly established federal law because the "receipt and Cason's accompanying corrected testimony would have provided independent, disinterested corroboration of Dennis'[s] explanation for where he was at the time of Williams'[s] murder," would have transformed Cason from a government witness into a defense witness who supported Dennis's *279 alibi, and would have provided impeachment evidence to challenge Cason's testimony that she had worked until 2:00 p.m. that day, which otherwise could not have been challenged. *Dennis V* , 966 F.Supp.2d at 511.

The District Court also granted habeas relief on the basis of Dennis's *Brady* claim regarding the Frazier documents, concluding that the state court had adopted an unreasonably narrow reading of *Brady* . The Pennsylvania Supreme Court had held that the prosecution did not violate *Brady* by failing to disclose the Frazier documents because Dennis did not show that the documents were

admissible and material. The District Court rejected the assertion that inadmissible evidence cannot be the basis of a *Brady* claim, reasoning that the United States Supreme Court has never stated such a rule and that most circuit courts, including the Third Circuit, have held to the contrary. *Id.* at 503. Additionally, that the United States Supreme Court proceeded with the *Brady* analysis after acknowledging that the polygraph results at issue in *Wood v. Bartholomew* , 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995), were not admissible indicated to the District Court that there is no admissibility requirement for *Brady* evidence. *Dennis V* , 966 F.Supp.2d at 503.

The Pennsylvania Supreme Court had also held that the prosecution need not disclose every "fruitless lead" in order to comply with *Brady* . The District Court determined that this conclusion was unreasonable under *Kyles* . The Frazier documents contained "internal markers of credibility," such as a description of the victim as "Kev['s] ... girl," which was accurate, an admission to shooting the victim in the correct location on her body, and a description of the alleged perpetrators that matched other descriptions of the shooter more closely than Dennis did. *Id.* at 504. The District Court reasoned that the Frazier documents would have led to further investigation that could have proved vital to the defense and could have been used to impeach the police investigation or provide a defense that another person committed the murder. *Id.* at 505.

Lastly, the District Court granted habeas relief on the basis of Dennis's claim that the Commonwealth violated *Brady* when it withheld the police activity sheet containing Howard's inconsistent statements. The District Court concluded that the Pennsylvania Supreme Court had unreasonably applied *Brady* and its progeny in rejecting the Howard *Brady* claim. First, the Pennsylvania Supreme Court had unreasonably dismissed the impeachment value of the evidence and incorrectly concluded that cross-examination of Howard rendered new impeachment evidence immaterial. The District Court noted that the United States Supreme Court has directly rejected the notion that there can be no *Brady* claim relating to impeachment evidence where a witness was already impeached with other information. *See Banks v. Dretke,* 540 U.S. 668, 702, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (rejecting the state's argument that no *Brady* violation occurred because the witness was "heavily impeached at trial," where the withheld evidence was the only impeachment evidence that the witness was a paid informant).[15] The District Court emphasized that, although Howard was cross-examined at trial, she was not impeached. *Dennis V* , 966 F.Supp.2d at 514–15. Second, the District Court concluded that the Pennsylvania Supreme Court had incorrectly applied a sufficiency of the evidence test in direct contravention of *Kyles* 's directive that *Brady* material be viewed in light of all of the *280 evidence. Rather, the state court should have focused on whether the defendant received a fair trial in the absence of the disclosed evidence. *Id.* at 516. Finally, the District Court found it unreasonable that the state court had failed to consider the effect of the evidence on trial counsel's investigation, pretrial preparation, decision to interview or call certain witnesses, or the effect of cross-examining detectives on their investigation into Howard. Given that the police themselves thought it was important to follow up with Howard about her possible statements to Pugh, the District Court concluded it was clear that the lead was material from an investigatory point of view. *Id.*

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15 The parenthetical language here is a direct quote from the parenthetical used by the District Court in its description of *Banks* . *See Dennis V* , 966 F.Supp.2d at 514–15.

The District Court also concluded that the Pennsylvania Supreme Court had failed to undertake a cumulative materiality analysis as required by *Kyles* . *Id.* at 517–18. It did not rule on

Dennis's remaining claims. *Id.* at 491, 501 n.19 & 510 n.27. The Commonwealth filed a timely notice of appeal.

A panel of this Court issued an opinion on February 9, 2015. *Dennis v. Sec'y, Pa. Dep't of Corr.* , 777 F.3d 642 (3d Cir. 2015). This opinion was vacated and rehearing *en banc* was granted on May 6, 2015.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. §§ 2241 and 2254 over Dennis's habeas corpus petition. This Court has appellate jurisdiction under 28 U.S.C §§ 1291 and 2253. The District Court based its decision on a review of the state court record and did not conduct an evidentiary hearing, so our review of its order is plenary and we apply the same standard the District Court applied. *Branch v. Sweeney* , 758 F.3d 226, 232 (3d Cir. 2014) ; *Brown v. Wenerowicz* , 663 F.3d 619, 627 (3d Cir. 2011).

The Antiterrorism and Effective Death Penalty Act (AEDPA) dictates the manner in which we conduct our review. Federal habeas courts cannot grant relief "with respect to any claim that was adjudicated on the merits in State court" unless the adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under § 2254(d)(1), "clearly established federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade* , 538 U.S. 63, 71–72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). It "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor* , 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). AEDPA allows federal courts to grant habeas relief only if the state court decision is contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

A state court decision is "contrary to" clearly established federal law if the state court (1) "applies a rule that contradicts the governing law" set forth in Supreme Court precedent or (2) "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different" from that reached by the Supreme Court. *Williams* , 529 U.S. at 405–06, 120 S.Ct. 1495. Interpreting Supreme Court precedent in a manner that adds an additional element to the legal standard for proving a constitutional violation is
281 "contrary to" clearly established federal *281 law. *Id.* at 393–94, 397, 120 S.Ct. 1495 (reasoning that the Virginia Supreme Court's interpretation of *Strickland v. Washington* , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which increased the burden on petitioners, was "contrary to" Supreme Court precedent).

A state court decision is an "unreasonable application of federal law" if the state court "identifies the correct governing legal principle," but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413, 120 S.Ct. 1495. A strong case for habeas relief "does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter* , 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). Habeas relief may not be granted on the basis that the state court applied clearly established law incorrectly; rather, the inquiry is "whether the state court's application of clearly established federal law was *objectively* unreasonable." *Williams* , 529 U.S. at 409, 120 S.Ct. 1495 (emphasis added). A rule's unreasonable application corresponds to the specificity of the rule itself: "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-

by-case determinations." *Richter* , 562 U.S. at 101, 131 S.Ct. 770 (internal quotation marks and citation omitted). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* (internal quotation marks omitted).

Finally, under 28 U.S.C. § 2254(d)(2), a state court decision is based on an "unreasonable determination of the facts" if the state court's factual findings are "objectively unreasonable in light of the evidence presented in the state-court proceeding," which requires review of whether there was sufficient evidence to support the state court's factual findings. *See Miller – El v. Cockrell* , 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Determinations of factual issues made by state courts are presumed to be correct. 28 U.S.C. § 2254(e)(1) ; *Miller – El* , 537 U.S. at 340, 123 S.Ct. 1029. However, "[d]eference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller – El* , 537 U.S. at 340, 123 S.Ct. 1029.

Judges Fisher and Hardiman advance an interpretation of *Richter* that far exceeds its reach. Further, their approach would have the federal habeas courts "rewrite" state court opinions, as Judge Jordan's thorough concurrence observes. We recognize that the AEDPA standard is "difficult to meet ... because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Richter* , 562 U.S. at 102, 131 S.Ct. 770. The highly deferential standard "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 102–03, 131 S.Ct. 770 (internal quotation marks omitted). This level of deference stems from deep-rooted concerns about federalism. *Williams* , 529 U.S. at 406, 120 S.Ct. 1495 (noting that Congress intended to "further the principles of comity, finality, and federalism" in passing AEDPA). That said, *Richter* and its progeny do not support unchecked speculation by federal habeas courts in furtherance of AEDPA's goals. While we must give state court decisions "the benefit of the doubt," as Judge Fisher recognizes, federal habeas review does not entail speculating as to what other theories could have supported the state court ruling when reasoning has been provided, 282 *282 or buttressing a state court's scant analysis with arguments not fairly presented to it. Make no mistake about it, the Dissents justify the state court ruling based on an argument never presented to it. No case decided by our court or the United States Supreme Court permits this approach. We now write to clarify how we interpret the Supreme Court's jurisprudence as to when and how federal courts ought to "fill the gaps" in state court opinions on federal habeas review subject to AEDPA.

The United States Supreme Court has clearly laid out the analytical path for federal habeas courts confronted with a state court opinion devoid of reasoning—i.e., a bare ruling. When a state court decision lacks reasoning, the Supreme Court instructed habeas courts to "determine what arguments or theories supported or, *as here, could have supported* , the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter* , 562 U.S. at 102, 131 S.Ct. 770 (emphasis added). *Richter* is that case. This is not.

In *Richter* , the Court faced the question of whether AEDPA deference "applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." *Id.* at 98, 131 S.Ct. 770. The United States Supreme Court admonished the Ninth Circuit's *de novo* review of the California Supreme Court's one-

sentence summary denial of petitioner's claim under *Strickland* , and held that state court decisions that are devoid of reasoning, i.e., a bare ruling, constitute adjudications on the merits that trigger AEDPA deference. *Richter* , 562 U.S. at 98, 131 S.Ct. 770 ("[T]he habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient...."). In other words, state courts need not articulate a statement of reasons to invoke AEDPA deference by federal habeas courts. *Id.* ("[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning."). The California Supreme Court had provided no reasoning; accordingly, in order to determine whether the state court had made a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or an unreasonable determination of fact, the federal habeas court was required to theorize based on what was presented to the state court.

We suggest that the concept of "gap filling" is fairly limited. It should be reserved for those cases in which the federal court cannot be sure of the precise basis for the state court's ruling. It permits a federal court to defer while still exploring the possible reasons. It does not permit a federal habeas court, when faced with a reasoned determination of the state court, to fill a non-existent "gap" by coming up with its own theory or argument, let alone one, as here, never raised to the state court. In *Premo v. Moore* , 562 U.S. 115, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011), decided on the same day as *Richter* , the state court had concluded that the petitioner had not received ineffective assistance of counsel under *Strickland* , but did not specify on which *Strickland* prong—performance or prejudice—petitioner failed to meet his burden. As in *Richter* , the Supreme Court instructed the Ninth Circuit to assume "that both findings would have involved an unreasonable application of clearly established federal law." 562 U.S. at 123, 131 S.Ct. 733. Unsure as to which *283 prong formed the basis for the state court's ruling, the federal court could fill the gap by exploring the two prongs of *Strickland* .

In contrast, when the state court pens a clear, reasoned opinion, federal habeas courts may not speculate as to theories that "could have supported" the state court's decision. The Supreme Court established this limitation on *Richter* "gap filling" in *Wetzel v. Lambert* , —— U.S. ——, 132 S.Ct. 1195, 182 L.Ed.2d 35 (2012), where it described the proper analytical path for state court decisions accompanied by reasoning:

> Under § 2254(d), a habeas court must determine *what arguments or theories supported* ... the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Id. at 1198 (quoting *Richter* , 562 U.S. at 102, 131 S.Ct. 770 ; alterations in original; emphasis added). This is fairly straightforward. As explained above, the Court in *Richter* included the language "or, as here, could have supported" when it initially instructed courts on gap filling. Courts were tasked with considering what theories "could have supported" the state court decision in cases akin to those "as here," or, summary denials. Removing the clause "or, as here, could have supported" from the instruction when the state court provides a fully-reasoned decision removed the task of speculative gap-filling from the habeas court's analysis. Instead, federal habeas courts reviewing reasoned state court opinions are limited to "those arguments or theories" that actually supported, as opposed to "could have supported," the state court's decision. The

Supreme Court's intent to limit deference to the state court to those reasons that it articulated in its opinion is further supported by the Supreme Court's instruction that the court on remand consider whether "*each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA." *Id.* at 1199.

When a state court ruling is based on a reasoned, but erroneous, analysis, federal habeas courts are empowered to engage in an alternate ground analysis—relying on any ground properly presented—but, in such a case, the federal court owes no deference to the state court. In *Lafler v. Cooper* , ——U.S. ——, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), the state court had "simply found that respondent's rejection of the plea was knowing and voluntary" in rejecting defendant's ineffective counsel claim and "failed to apply *Strickland* ," despite referencing the performance and prejudice prongs of *Strickland* in its opinion. *Id.* at 1390. "By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law" and the Supreme Court analyzed the *Strickland* claim *de novo* . *Id.* at 1390. The Court was not filling a gap in *Lafler* . Instead, it was employing different analysis that was very much a part of the case, and supplied an alternate ground for concluding, on *de novo* review, that there was no ineffectiveness of counsel.

Justices of the Supreme Court have indicated in a concurrence from the denial of a petition for certiorari that federal courts are bound to the text of state court opinions. Justice Ginsburg, joined by Justice Kagan, observed

> *Richter* 's hypothetical inquiry was necessary, however, because *no* state court opinion explained the reasons relief had been denied. In that circumstance, a federal habeas court can assess whether the state court's decision *involved* an unreasonable application of clearly established

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> Federal law only by hypothesizing reasons that might have supported it. But *Richter* makes clear that where the state court's real reasons can be ascertained, the § 2254(d) analysis can and should be based on the actual arguments or theories that supported the state court's decision.

Hittson v. Chatman , —— U.S. ——, 135 S.Ct. 2126, 2127–28, 192 L.Ed.2d 887, *reh'g denied* , —— U.S. ——, 136 S.Ct. 15, 192 L.Ed.2d 984 (2015) (mem.) (internal quotation marks, alterations, and citations omitted). Other courts of appeals have similarly limited *Richter* 's gap-filling instruction to the bare ruling situation. *See Johnson v. Sec'y, DOC* , 643 F.3d 907, 910 (11th Cir. 2011) ("When faced with an ineffective assistance of counsel claim that was denied on the merits by the state courts, a federal habeas court 'must determine what arguments or theories supported or, [if none were stated], could have supported, the state court's decision[.]" (alterations in original) (quoting *Richter* , 562 U.S. at 102, 131 S.Ct. 770)); *see also Grueninger v. Dir., Va. Dep't of Corr.* , 813 F.3d 517, 525–26 (4th Cir. 2016) ("looking through" a state court summary refusal to hear an appeal to the prior reasoned decision and observing that "where there is no indication of the state court's reasoning, a federal habeas petitioner must show that there was 'no reasonable basis for the state court to deny relief,' and a federal habeas court must defer under AEDPA to any reasonable 'arguments or theories ... [that] *could* have supported[ ] the state court's decision' " (quoting *Richter* , 562 U.S. at 98, 102, 131 S.Ct.

770) (internal citations omitted; alterations in original)); *Montgomery v. Bobby* , 654 F.3d 668, 700 (6th Cir. 2011) (Clay, J., dissenting) ("If the state court articulated its reasons, the habeas court must identify and evaluate those reasons under § 2254(d) ; only if the state court did not articulate its reasons must the habeas court hypothesize as to the state court's reasoning, and evaluate those hypothetical reasons."). Federal courts should only gap-fill when presented with a bare ruling or when it is unsure as to the basis of the state court ruling on the issue presented. *See Premo* , 562 U.S. at 123, 131 S.Ct. 733 (concluding that when the state court neglected to articulate which prong of *Strickland* was deficient, the federal habeas court ought to evaluate both prongs of *Strickland*). We will not gap-fill when the state court has articulated its own clear reasoning. Instead, we will evaluate the state court's analysis and review *de novo* any properly presented alternative ground(s) supporting its judgment.

Dennis's claims at issue on appeal stem from the Commonwealth's violations of *Brady v. Maryland* , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Prosecutors have an affirmative duty "to disclose [*Brady*] evidence ... even though there has been no request [for the evidence] by the accused," which may include evidence known only to police. *Strickler v. Greene* , 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) ; *Kyles* , 514 U.S. at 438, 115 S.Ct. 1555. To comply with *Brady* , prosecutors must "learn of any favorable evidence known to the others acting on the government's behalf ..., including the police." *Strickler* , 527 U.S. at 281, 119 S.Ct. 1936 (internal quotation marks omitted) (quoting *Kyles* , 514 U.S. at 437, 115 S.Ct. 1555).

To prove a *Brady* violation, a defendant must show the evidence at issue meets three critical elements. First, the evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching." *Id.* at 281–82, 119 S.Ct. 1936 ; *see also United States v. Bagley* , 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) ("Impeachment evidence ..., as well as exculpatory evidence, falls within the *Brady* rule."). Second, it
285 *285 "must have been suppressed by the State, either willfully or inadvertently." *Strickler* , 527 U.S. at 282, 119 S.Ct. 1936. Third, the evidence must have been material such that prejudice resulted from its suppression. *Id.* ; *see also Banks* , 540 U.S. at 691, 124 S.Ct. 1256. The "touchstone of materiality is a 'reasonable probability' of a different result." *Kyles* , 514 U.S. at 434, 115 S.Ct. 1555. Materiality "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal ... [Rather], [a] 'reasonable probability' of a different result is ... shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* (internal quotation marks omitted).

III. Discussion

The District Court held that the Pennsylvania Supreme Court had unreasonably applied *Brady* and its progeny in rejecting Dennis's claims that the prosecution was required under *Brady* to disclose the Cason receipt, the Frazier documents, and the police activity sheet containing Howard's inconsistent statements. The Pennsylvania Supreme Court issued a thorough decision on each claim. We conclude, like the District Court, that the Pennsylvania Supreme Court's decisions regarding Dennis's *Brady* claims rested on unreasonable conclusions of fact and unreasonable applications of clearly established law, or were contrary to United States Supreme Court precedent. We will affirm the District Court and grant habeas relief on Dennis's *Brady* claims based on the Cason receipt, the Howard police activity sheet, the Frazier documents, and their cumulative prejudice.

A. Cason Receipt

1. Facts

The Commonwealth did not disclose the DPW receipt that was in the police's possession, provided objective impeachment evidence of a key Commonwealth witness, and bolstered Dennis's alibi. Cason signed the DPW receipt when she picked up her check on October 22, 1991, the day of Williams's murder. The receipt's time stamp shows Cason picked up a $94.00 payment for "public assistance" at "13:03," or 1:03 p.m. During Dennis's direct appeal, Cason signed an affidavit detailing her recollection of the interview she had with police prior to Dennis's trial. According to Cason, detectives brought a copy of the time-stamped receipt to the interview, and she "located and gave the detective [her] pink copy of the same receipt. The detective kept [her] copy of the receipt." App. 1735.

The Commonwealth called Cason to testify at Dennis's trial. She testified that she left work around 2:00 p.m., picked up her welfare check, ran errands, and saw Dennis when she got off the K bus "between 4:00 and 4:30." App. 733. The receipt serves two functions: (1) it negates her testimony that she worked until 2:00 p.m. on October 22; and (2) it demonstrates that, contrary to Cason's testimony at trial that she retrieved her receipt after 3:00 p.m., Cason actually picked up her check at 1:03 p.m. Cason admits in her affidavit that she "may have thought that the 13:03, which was on the receipt, was 3:03 p.m." App. 1736. In light of the time-stamped receipt, Cason explained in her affidavit, she "would have seen [James] Dennis between 2:00 and 2:30 p.m. at the Abbottsford Homes, and not 4:00 to 4:30 that is in my statement." *Id.*

2. State Court Decision

The Pennsylvania Supreme Court rejected Dennis's *Brady* claim stemming from the Cason receipt. The Court found, consistent with Cason's affidavit, that the "police came into possession of
286 a Department *286 of Public Welfare (DPW) receipt showing that Cason cashed her check at 1:03 p.m." *Dennis I* , 715 A.2d at 408. In denying Dennis's ineffective assistance of counsel claim, the Court held that Cason's new version of events "would not support [Dennis's] alibi [ ] because the murder occurred at 1:50 p.m., forty minutes earlier than Cason's earliest estimate" of when she saw Dennis. *Id.* The Court further held that the corrected testimony "would have been cumulative of testimony of witness Willis Meredith, who testified that he saw [Dennis] at the Abbottsford Homes at approximately 2:15 to 2:30 p.m." *Id.* The Court dismissed the *Brady* claim because the receipt was "not exculpatory, because it had no bearing on [Dennis's] alibi, and there [was] no evidence that the Commonwealth withheld the receipt from the defense." *Id.*

3. AEDPA Review

The state court ruling was a reasoned ruling that the District Court could understand; no gaps needed to be filled. Dennis was entitled to habeas relief based on the Cason *Brady* claim only if he could demonstrate that the decision was an unreasonable application of, or contrary to, clearly established law, or an unreasonable determination of the facts. 28 U.S.C. § 2254(d). Addressing the reasoned view of the Pennsylvania Supreme Court, we conclude that it unreasonably applied *Brady* and its progeny in evaluating the Cason receipt and made unreasonable determinations of fact. The receipt would have served as independent documentary corroboration of a key witness for Dennis's alibi defense, and suppression by the Commonwealth violated *Brady* .

a) Favorability

The Cason receipt provided exculpatory and impeachment evidence that would have bolstered Dennis's alibi defense at trial, so it easily meets *Brady* 's first prong. *Banks* , 540 U.S. at 691, 124 S.Ct. 1256 (stating that both impeachment and exculpatory evidence satisfy the first *Brady* prong).

The Pennsylvania Supreme Court erred by failing to recognize the impeachment value of the Cason receipt, which would have provided documentary evidence that Cason testified falsely at trial. The

United States Supreme Court has made plain that impeachment evidence may be considered favorable under *Brady* even if the jury might not afford it significant weight. *See Kyles* , 514 U.S. at 450–51, 115 S.Ct. 1555 (rejecting 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 [an] argument ... confuses the weight of the evidence with its favorable tendency").[16]

16 This framing of *Kyles* was taken from *Lambert v. Beard* , 537 Fed.Appx. 78, 86 (3d Cir. 2013).

Dennis's defense strategy pitted his credibility, and that of his witnesses, against eyewitness credibility, Cason's testimony, and the testimony of the other prosecution witnesses. No physical evidence was admitted at trial. Evidence that challenged Dennis's credibility, or that of other defense witnesses like his father, was therefore particularly crucial to the outcome of the trial. As the District Court aptly noted:

> Armed with the receipt, Dennis's counsel —at the very least—would have been able to show that Cason was mistaken about the timing of the afternoon, by pointing out that she could not possibly

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> have worked until 2 p.m. since she was at the DPW center at 1:03 p.m. ... The time stamped receipt would have directly contradicted [Cason's testimony that she didn't get off work until 2:00 p.m.].

Dennis V , 966 F.Supp.2d at 508. Without evidence to challenge the veracity of Cason's testimony, Dennis's assertion that he saw Cason as he got off the K bus lost significant credibility, as did his father's corroboration of Dennis's version of his timeline.

Further, the Pennsylvania Supreme Court erroneously concluded that the receipt was not exculpatory because it did not affect Dennis's alibi. *Dennis I* , 715 A.2d at 408. It held that Cason's revised recollection of the day "would not support [Dennis's] alibi [ ] because the murder occurred at 1:50 p.m., forty minutes earlier than Cason's earliest estimate." *Id.* This conclusion fails to recognize how Cason's corrected testimony corroborates testimony provided by Dennis and other witnesses, namely, his father.

The Commonwealth argues that the Pennsylvania Supreme Court reasonably concluded that the receipt did not require disclosure pursuant to *Brady* because Cason's corrected testimony would not have made it impossible for Dennis to have been at Fern Rock station when Williams was murdered. Cason's affidavit stated that she saw Dennis at 2:30 p.m. at Abbottsford Homes. The Commonwealth contends that Dennis could have committed the murder at Fern Rock at 1:50 p.m. and returned to Abbottsford Homes by 2:30 p.m. because the shooter entered a waiting getaway car after the murder and it was a thirteen minute drive between the two. This view unreasonably discounts the buttressing effect Cason's corrected testimony would have on Dennis's alibi theory. Although Cason's corrected testimony, assuming it would mirror precisely what she said in her affidavit, would not definitively place Dennis in a location where it was impossible for him to commit the murder, Cason's testimony would have strengthened Dennis's and his father's testimony that Dennis had been with his father that afternoon and was on the bus at the time of the murder.

Validating Dennis's and his father's testimony about his alibi on the day in question is sufficient to demonstrate favorability under *Brady* . Exculpatory evidence need not show defendant's innocence conclusively. Under *Brady* , "[e]xculpatory evidence includes material that goes to the heart of the defendant's guilt or innocence as well as that which may well alter the jury's judgment of the credibility of a crucial

prosecution witness." *United States v. Starusko* , 729 F.2d 256, 260 (3d Cir. 1984) (citing *Giglio v. United States* , 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)). That Cason's corrected testimony does not wholly undermine the prosecution's theory of guilt does not sap its exculpatory value. The Commonwealth had an obligation to disclose the receipt under *Brady* because it would have altered the jury's judgment about Cason's credibility. Cason's evidence is not favorable simply because of where Cason said she saw Dennis as corrected in her affidavit—at Abbottsford Homes. Rather, as Dennis argues, the exculpatory value lies in corroborating testimony of witnesses at trial who otherwise received little objective reinforcement, and whose credibility, as a result of Cason's mistaken testimony in the absence of the receipt, was seriously undermined.

The only discrepancy between Cason's testimony and the alibi established by Dennis and his father was the precise time Cason and Dennis saw one another—Cason claimed to have seen Dennis around 4:00 or 4:30 p.m., while Dennis said it was
288 around 2:30 p.m. As both parties note, the *288 other witnesses that testified on behalf of Dennis were friends and family, who were vulnerable to arguments of bias. To the contrary, Cason offered disinterested testimony that corroborated the government's theory. Although the Commonwealth indicates that Cason could have been discredited in a similar manner as Dennis's other witnesses, nothing in the record indicates that Cason shared the type of close relationship with Dennis as other witnesses who testified on his behalf.

The receipt contradicted Cason's testimony at trial. Her corrected recollection, coupled with a specific documentary basis, would have provided disinterested corroboration of Dennis's and his father's testimony. The Pennsylvania Supreme Court made an unreasonable determination of the facts and an unreasonable application of federal law in refusing to acknowledge the receipt's exculpatory and impeachment value.

b) Suppression of the receipt

The Pennsylvania Supreme Court stated that "the police came into possession of [the] receipt" when interviewing Cason. *Dennis I* , 715 A.2d at 408. Later, in a section analyzing materiality, it concluded there was "no evidence that the Commonwealth withheld the receipt from the defense." *Id.* The Pennsylvania Supreme Court provided no explanation for its latter statement, and we cannot be sure whether the court was assessing the facts or interpreting the law. If it was construing fact, it was clearly unreasonable because the police had the receipt and therefore so did the prosecution.[17] *See Kyles* , 514 U.S. at 437–38, 115 S.Ct. 1555. If it was making a conclusion of law as to the duty to disclose, the conclusion is similarly problematic because the court ignored *Kyles* . As Judge Jordan observes in his concurrence, "[i]f one follows the instruction of *Kyles* , those two statements are impossible to harmonize." J. Jordan Concurring Op. at 352.

17 The Commonwealth argues on appeal that the Pennsylvania Supreme Court did not make a factual finding and that the statement that the police had the receipt was merely framing for the later substantive discussion. In *Bobby v. Bies* , 556 U.S. 825, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009), cited in support by the Commonwealth, the Supreme Court held that a state court's alleged factual finding could not support issue preclusion because there was no evidence that the alleged state court finding was supported by the record at trial or on appeal and further was not necessary to the judgments made by the state court. *Bies* bears no relation to our case where there is ample evidence in the record that the police took possession of the receipt, as attested by Cason herself.

Once the Pennsylvania Supreme Court determined that the police detectives had obtained the receipt from Cason, the Commonwealth had constructive

possession and was required to disclose the receipt to Dennis prior to trial. In 1995, three years prior to the Pennsylvania Supreme Court's decision, the United States Supreme Court explained this duty:

> [T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all [favorable] evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Kyles , 514 U.S. at 437–38, 115 S.Ct. 1555 289 (internal quotation marks and citation *289 omitted). In ignoring *Kyles* 's instruction that prosecutors must disclose evidence obtained by the police, the Pennsylvania Supreme Court unreasonably applied clearly established federal law. The Commonwealth's argument that the receipt did not appear in the prosecution file does nothing to undercut its duty to disclose under *Kyles* and, as the District Court correctly notes, borders on bad faith. It explained:

> The Commonwealth admits that the entire homicide file—where one may expect a document recovered by the police to exist—went missing in March 1997, before the Commonwealth had submitted its direct appeal briefing. The Commonwealth may not point to a missing file and declare it the petitioner's burden to prove that the receipt was, at one point, contained inside.

Dennis V , 966 F.Supp.2d at 509 (citation omitted). The Commonwealth has never asserted that it disclosed the receipt to Dennis. We refuse to allow it to evade its duty under *Brady* based on failure to adequately search or maintain its own files.

The Commonwealth argues that because Dennis's appellate counsel was able to obtain the receipt from the DPW nearly five years post-trial, the prosecution had no responsibility under *Brady* to turn it over to defense counsel when the receipt came into its possession. Judge Fisher adopts this approach and excuses the Commonwealth from its *Brady* responsibility by injecting an argument that was not even mentioned by the Pennsylvania Supreme Court, much less fairly presented before it.

The Commonwealth did not raise a "due diligence" argument, as such, before the state court. Rather, in its Response to Defendant's Reply Brief, the Commonwealth argued for the first time that there was no *Brady* violation because the receipt was publicly available. The entirety of the alleged due diligence argument is below.

> [A]lthough defendant does not explain how he obtained a copy of [the Cason receipt], he presumably did so from the Department of Public Welfare, thus establishing its public availability. *Brady* does not require the Commonwealth to produce evidence that was not in its sole possession, but was available, as this document apparently was.

App. 2026. As Judge Jordan observes, Pennsylvania law generally regards arguments raised for the first time in reply briefs as waived. J. Jordan Concurring Op. at 353 n.9.

Further, our review on habeas is limited to the record as presented to the state court. *See Cullen v. Pinholster* , 563 U.S. 170, 181–82, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). There was no

evidence regarding the availability of the receipt. In fact, the Commonwealth's assertion that the receipt was publicly available was incorrect, as it runs counter to specific Pennsylvania regulations in effect at the time. As they existed during Dennis's appeal, the DPW's privacy regulations protected the vast majority of private information; the only exception was that the Commonwealth may disclose "the address and amount of assistance a person is currently receiving" following a direct request about a specific person. 55 Pa. Code § 105.4(a)(1). Even if the DPW receives a subpoena requesting information about a recipient, it must challenge that demand and "plead, in support of its request to withhold information, that under the Public Welfare Code (62 P.S. §§ 101 –1503), the rules of the Department prohibit the disclosure of information in records and files, including the names of clients, except as provided in subsection (a)." *Id.* § 105.4(b)(3). To the extent that information was publicly available regarding Cason's public assistance payments, it was limited to Cason's
290 address and her amount *290 of assistance, which is irrelevant to her interaction with Dennis on the day of Williams's murder. Only the Commonwealth held information that would support Dennis's alibi—the time-stamped receipt Cason provided to the police.

Even if we were to imagine that a diligence argument was presented and considered by the state court, the United States Supreme Court has never recognized an affirmative due diligence duty of defense counsel as part of *Brady* , let alone an exception to the mandate of *Brady* as this would clearly be. The Supreme Court has noted that its precedent "lend[s] no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks* , 540 U.S. at 695, 124 S.Ct. 1256. To the contrary, defense counsel is entitled to presume that prosecutors have "discharged their official duties." *Id.* at 696, 124 S.Ct. 1256 (quoting *Bracy v. Gramley* , 520 U.S. 899, 909, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997)). Further, the duty to disclose under *Brady* is absolute—it does not depend on defense counsel's actions. *United States v. Agurs* , 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) ("[I]f the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made."). *Brady* 's mandate and its progeny are entirely focused on prosecutorial disclosure, not defense counsel's diligence.

The emphasis in the United States Supreme Court's *Brady* jurisprudence on fairness in criminal trials reflects *Brady* 's concern with the government's unquestionable advantage in criminal proceedings, which the Court has explicitly recognized. *See, e.g.* , *Strickler* , 527 U.S. at 281, 119 S.Ct. 1936 (reasoning that the "special status" of the prosecutor in the American legal system, whose interest "in a criminal prosecution is not that [he] shall win a case, but that justice shall be done ... explains ... the basis for the prosecution's broad duty of disclosure" (quoting *Berger v. United States* , 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935))). Construing *Brady* in a manner that encourages disclosure reflects the Court's concern with prosecutorial advantage and prevents shifting the burden onto defense counsel to defend his actions. Requiring an undefined quantum of diligence on the part of defense counsel, however, would enable precisely that result—it would dilute *Brady* 's equalizing impact on prosecutorial advantage by shifting the burden to satisfy the claim onto defense counsel.

The focus on disclosure by the prosecutor, not diligence by defense, is reiterated in the Supreme Court's approval of the shift in the traditional adversarial system *Brady* imposes. In *United States v. Bagley* , the Court explained that "[b]y requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model" because the prosecutor is not tasked simply with

winning a case, but ensuring justice. 473 U.S. 667, 675 n.6, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Further, the Court placed the burden of obtaining favorable evidence squarely on the prosecutor's shoulders. *See Kyles* , 514 U.S. at 437, 115 S.Ct. 1555 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case."). That the government may be burdened by the *Brady* rule does not undercut its need to comply with it. The imposition of an affirmative due diligence requirement on defense counsel would erode the prosecutor's obligation under, and the basis for, *Brady* itself.

Indeed, the United States Supreme Court has
291 cautioned against such a rule. It *291 has rejected the notion that defense counsel's diligence is relevant in assessing "cause" for the failure to raise a *Brady* suppression issue in state court proceedings. In *Strickler* , it reasoned that because counsel was entitled to rely on the prosecutor fulfilling its *Brady* obligation, and had no reason for believing it had failed to comply, the failure to raise the issue earlier in habeas proceedings was justified. *See Strickler* , 527 U.S. at 286–89, 119 S.Ct. 1936. Similarly here, the prosecutor's duty is clear. Dennis's counsel was entitled to rely on the prosecutor's duty to turn over exculpatory evidence.[18] Assessing whether he could or should have discovered the receipt is beside the point.[19]

18 Dennis's trial counsel asserted in an affidavit he "did not specifically request a copy of the welfare check receipt from the Commonwealth, because [he] did not know of its existence," but he had "[b]y formal motion ... request[ed] all exculpatory evidence be produced." App. 1725.

19 The Tenth Circuit and the D.C. Circuit agree that defense counsel's knowledge is not at issue in *Brady* . *Banks v. Reynolds* , 54 F.3d 1508, 1517 (10th Cir. 1995) ("[T]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge.... The only relevant inquiry is whether the information was exculpatory." (internal quotation marks omitted)); *accord In re Sealed Case* , 185 F.3d 887, 896–97 (D.C. Cir. 1999).

In *Banks* , the Supreme Court explicitly rejected the notion that "the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence, so long as the potential existence of a prosecutorial misconduct claim might have been detected." 540 U.S. at 696, 124 S.Ct. 1256 (internal quotation marks and citations omitted). *Banks* concluded that "[a] rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* ; *see also United States v. Tavera* , 719 F.3d 705, 712 (6th Cir. 2013) (recognizing that "the clear holding in *Banks* " does away with any belief that *Brady* imposes a due diligence requirement on defense counsel); *Bell v. Bell* , 512 F.3d 223, 242 (6th Cir. 2008) (Clay, J., dissenting) ("The rule emerging from *Strickler* and *Banks* is clear: Where the prosecution makes an affirmative representation that no *Brady* material exists, but in fact has *Brady* material in its possession, the petitioner will not be penalized for failing to discover that material.").

While we think that the United States Supreme Court has made it clear that *Brady* requires the prosecution to turn over all material favorable evidence in its possession, we acknowledge that it is not totally frivolous under our Third Circuit jurisprudence for the Commonwealth to have argued, as it did here, that because defense counsel could or should have discovered the Cason receipt with due diligence, the prosecution was not required to disclose it.[20] That is because our case law, as we discuss below, is inconsistent and could easily confuse. Thus, we need to clarify our position: the concept of "due diligence" plays no role in the *Brady* analysis.[21] To the contrary, the
292 focus of the *292 Supreme Court has been, and it

must always be, on whether the government has unfairly "suppressed" the evidence in question in derogation of its duty of disclosure. *See Gov't of the V.I. v. Mills* , 821 F.3d 448, 460 n.10 (3d Cir. 2016) ("The critical question in assessing constitutional error is to what extent a defendant's rights were violated, not the culpability of the prosecutor." (quoting *Marshall v. Hendricks* , 307 F.3d 36, 68 (3d Cir. 2002))).

[20] Surprisingly, several courts of appeals have endorsed some form of a due diligence requirement. For a comprehensive overview of common features of the diligence rule and where it emerged, see Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule* , 60 UCLA L. Rev. 138, 141, 147–56 (2012). Common features include that the evidence was equally available to the prosecution and the defense, that the evidence was known by the defendant, and that the relevant facts were accessible by the defendant. *Id.* at 153–56.

[21] The Second Circuit also recently recognized in a habeas case that "[t]he [United States] Supreme Court has never required a defendant to exercise due diligence to obtain Brady material." *See Lewis v. Conn. Comm'r of Corr.* , 790 F.3d 109, 121 (2d Cir. 2015). It retained its test for when evidence is not "suppressed" for *Brady* purposes, however. *Id.*

In *Brady* , the United States Supreme Court held "that 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, 83 S.Ct. 1194 (emphasis added). Suppression is "[t]he prosecution's withholding from the defense of evidence that is favorable to the defendant." *Suppression of Evidence* , Black's Law Dictionary (10th ed. 2014). Inquiries into prosecutorial suppression are, by nature, retrospective as to the actions of the prosecutor—they do not place affirmative duties on defense counsel pre-trial. *Agurs* , 427 U.S. at 108, 96 S.Ct. 2392 ("[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.").

The government must disclose all favorable evidence. Only when the government is aware that the defense counsel already has the material in its possession should it be held to not have "suppressed" it in not turning it over to the defense. Any other rule presents too slippery a slope. In *United States v. Perdomo* , 929 F.2d 967, 973 (3d Cir. 1991), and *United States v. Starusko* , 729 F.2d 256, 262 (3d Cir. 1984), we opened the door to a due diligence exception to *Brady* . *Starusko* , 729 F.2d at 262 (" '[T]he government is not obliged under Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.' " (quoting *United States v. Campagnuolo* , 592 F.2d 852, 861 (5th Cir.1979))). In *Grant v. Lockett* , 709 F.3d 224, 230–31 (3d Cir. 2013), we may have widened that opening when we combined our conclusion that defense counsel was constitutionally ineffective in violation of the defendant's rights with a finding that there was no *Brady* violation because counsel clearly should have discovered the prosecutor's key witness's criminal record and been aware that he was on parole when the shooting occurred and when he testified at trial. We did note in *Grant* that Grant himself had obtained the witness's criminal records while in custody, but we did not rest our ruling on that fact.

In *Wilson v. Beard* , 589 F.3d 651, 663–64 (3d Cir. 2009), we got it right. There we concluded that "[i]f the prosecution has the obligation, pursuant to *Perdomo* , to notify defense counsel that a

government witness has a criminal record even when that witness was represented by someone in defense counsel's office, *the fact that a criminal record is a public document cannot absolve the prosecutor of her responsibility to provide that record to defense counsel* ." *Id.* (emphasis added) (internal quotation marks and citations omitted). Thus, we held that a criminal record, which arguably could have been discovered by defense counsel, is suppressed if not disclosed. Defense counsel in *Wilson* certainly had the ability to obtain the alleged *Brady* material—a criminal record—by virtue of his legal training. Yet we required disclosure pursuant to *Brady* . We also got it right in *Pelullo* when we rejected
293 defendant's argument *293 that certain documents were *Brady* material and somehow "suppressed" when the government had made the materials available for inspection and they were defendant's own documents. *Pelullo* , 399 F.3d at 212 ("[T]he government repeatedly made the warehouse documents available to [the defendant] and his attorneys for inspection and copying.").

To the extent that we have considered defense counsel's purported obligation to exercise due diligence to excuse the government's non-disclosure of material exculpatory evidence, we reject that concept as an unwarranted dilution of *Brady* 's clear mandate. Subjective speculation as to defense counsel's knowledge or access may be inaccurate, and it breathes uncertainty into an area that should be certain and sure. *See* Weisburd, *supra* , at 164 ("[P]rosecutors ... cannot accurately speculate about what a defendant or defense lawyer could discover through due diligence. Prosecutors are not privy to the investigation plan or the investigative resources of any given defendant or defense lawyer."). The United States Supreme Court agrees. It has recognized that ample disclosure is "as it should be" because it "tend[s] to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.... The prudence of the careful prosecutor should not therefore be discouraged." *Kyles* , 514 U.S. at 439–40, 115 S.Ct. 1555 (internal citations omitted).

All favorable material ought to be disclosed by the prosecution. To hold otherwise would, in essence, add a fourth prong to the inquiry, contrary to the Supreme Court's directive that we are not to do so. In *Williams v. Taylor* , the Virginia Supreme Court had interpreted the Supreme Court's decision in *Lockhart v. Fretwell* , 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) "to require a separate inquiry into fundamental fairness even when [petitioner] [was] able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding." 529 U.S. 362, 393, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Court held that the Virginia Supreme Court's imposition of this additional test was an unreasonable application of, and contrary to, *Strickland v. Washington* , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Williams* , 529 U.S. at 393–94, 120 S.Ct. 1495. Adding due diligence, whether framed as an affirmative requirement of defense counsel or as an exception from the prosecutor's duty, to the well-established three-pronged *Brady* inquiry would similarly be an unreasonable application of, and contrary to, *Brady* and its progeny.

The Pennsylvania Supreme Court's conclusion that the prosecution did not withhold the Cason receipt was an unreasonable application of law and fact. The receipt was in its possession pursuant to *Kyles* and, under United States Supreme Court precedent, it is clear that there is no additional prong to *Brady* and no "hide and seek" exception depending on defense counsel's knowledge or diligence. *See Banks* , 540 U.S. at 696, 124 S.Ct. 1256.

c) Materiality

Without a doubt, Dennis suffered prejudice due to the Commonwealth's failure to disclose the receipt. The defense strategy was rooted in Dennis's alibi that he was getting on the K bus at

the time of the murder. The Commonwealth's withholding of the receipt transformed a witness who would otherwise have been an alibi witness for Dennis into a witness for the prosecution or, at least, left Dennis powerless to impeach Cason's false testimony if offered by the prosecution. The
294 state court's conclusion that Dennis suffered *294 no prejudice is an unreasonable determination of fact and law.

Failure to disclose the Cason receipt made testimony by a key government witness, who provided the sole testimony contradicting Dennis's alibi, unassailable. The Commonwealth highlighted how weighty Cason's testimony was at trial. In his opening, referring to Cason as simply a "lady from the neighborhood," ADA King emphasized the discrepancy between Cason's and Dennis's testimony: "[Cason] had something very interesting to say. Yeah, I saw him when I was on the bus, but it wasn't 2:00, it was 4:00." App. 404. At closing, King reiterated the inconsistencies between Cason's and Dennis's testimony, and added that "[the Commonwealth] called her, not the defense. She came in and said, I was at work at 2:00. I saw him somewhere between 4:00 and 4:30. Try again, Jimmy. That one didn't work." App. 1209. Disclosure of the receipt would have given defense counsel evidence to demonstrate that Cason falsely testified when she asserted that she worked until 2:00 p.m. on October 22. Disclosure would have allowed defense counsel to undermine Cason's credibility or would have caused her to correct her testimony—as she did later in an affidavit—so as to support Dennis's version of events. Impeachment using the receipt may have caused Cason to explain to the jury that her prior testimony rested on a misunderstanding of military time and allowed Cason to correct her timeline during trial. More likely, the prosecution would not have called Cason at all, and Dennis would have called Cason to corroborate his testimony.[22] Finally, ADA King would not have, at closing, been able to point out the inconsistencies between Dennis's and Cason's testimonies.

22 The Commonwealth concedes that if it had the receipt, Cason would have provided little value to the prosecution and they would not have called her. Indeed, Dennis probably would have.

Cason's uncorrected testimony left the jury with conflicting stories as to Dennis and Cason's interactions on the day of the murder. Following Cason's testimony that she could not have seen Dennis between 2:00 and 2:30 p.m., Dennis qualified his trial testimony and said that he only "thought" he saw Cason. App. 1030. During closing, Dennis's counsel told the jury, "Remember what [Dennis] told you when he got up there? It's wrong. He didn't see [Cason] on the bus. He thought he saw her on the bus, but he didn't." App. 1179–80. The District Court thoughtfully explained how Dennis's uncorrected testimony damaged defense counsel's strategy:

> This scrambled explanation left the jury with two options, equally unhelpful to Dennis: believe that Cason and Dennis had seen each other on the bus, as both testified, but that it happened later than Dennis said—and therefore find no alibi for the time of the crime; or believe counsel's new story that Dennis was on the earlier bus, and thus could not have committed the crime, but never saw Cason at all. Cason's corrected testimony would have transformed Cason from a damaging Commonwealth witness to a uniquely powerful, disinterested defense witness who would provide document-supported corroboration for Dennis'[s] alibi....

Dennis V , 966 F.Supp.2d at 512. The impeachment value the receipt provided would have eliminated the conflicting stories for the jury and, given the weight of Cason's testimony alleged by the prosecution at trial, could have raised significant doubt about Dennis's guilt. The state court's determination that Dennis did not suffer

prejudice as a result of Cason's unchallenged
295 testimony was unreasonable. *295 In concluding that the Commonwealth had evidence that its witness's testimony was false, we need not reach whether the prosecutors here intentionally presented false evidence because the inquiry is solely the impact that the absence of evidence had on the trial. *See Brady* , 373 U.S. at 87, 83 S.Ct. 1194 ; *Mills* , 821 F.3d at 460 n.10.

In *Banks* , the United States Supreme Court admonished prosecutors for letting statements by an informant, which they believed to be false, stand uncorrected throughout the proceedings. The Court concluded that "prosecutors represented at trial and in state postconviction proceedings that the State had held nothing back ... It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutor's submissions as truthful." 540 U.S. at 698, 124 S.Ct. 1256. Earlier *Brady* cases indicate similar concern for allowing false testimony. *See, e.g.* , *Agurs* , 427 U.S. at 103, 96 S.Ct. 2392 ("[C]onviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.") (footnotes omitted). Letting Cason's testimony stand when the Commonwealth had evidence it was false unquestionably violated *Brady* and entitles Dennis to a new trial.

The state court took an unreasonably narrow view of *Brady* materiality by focusing on the fact that Cason would only have been able to say that she saw him around 2:30 p.m. Cason's testimony need not fully corroborate Dennis's alibi in order to show materiality under *Brady* . *Kyles* explained that *Brady* materiality does not turn on a determination of the sufficiency of the evidence, but instead requires the court to consider the constitutional error in light of all the evidence to determine whether it "put[s] the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at 435, 115 S.Ct. 1555. Transforming Cason, a disinterested individual with documentary support, into a defense witness meets the requirements of *Brady* materiality because it would have necessarily bolstered Dennis's alibi defense narrative and "put the whole case in ... a different light." *Id.*

Dennis testified that his father drove him to the bus stop around 1:50 p.m., where he boarded the K bus. Dennis asserted in his statement to police, which was read into the record at trial, that he waved at Cason when "*we* got off" the K bus at Abbottsford Homes, a trip that generally took about thirty minutes. App. 710 (emphasis added). Dennis's statement implies that they rode the K bus together and, setting aside the difference in timelines, Cason's testimony aligns with his account since Cason also took the K bus to Abbottsford Homes and saw Dennis there after she disembarked. Regardless of whether the receipt would have refreshed Cason's memory enough to cause her to testify that she and Dennis were on the 1:56 p.m. K bus together, it certainly would have empowered defense counsel to elicit testimony from Cason that the location in which she saw Dennis was consistent with her exiting the bus at the same time he did and to acknowledge that even if she did not notice him on the bus, she had no reason to disbelieve that he was there.

Cason, unlike the other witnesses Dennis called, did not know him well. Cason testified that she knew Dennis, but when ADA King asked her how long she had known him, Cason replied, "I don't really, you know, know him, I know him by living up my way" at Abbottsford Homes. App. 731. Because Cason simply knew Dennis from the neighborhood, she served as a significantly less interested witness compared to Dennis's other testifying witnesses, who were all close friends,
296 family, *296 and church leaders. As a result, she was less vulnerable to accusations of bias, and her testimony in support would have carried more weight with the jury. This is particularly important given the nature of her testimony compared to Dennis's other witnesses. Unlike Dennis's other

witnesses, Cason's testimony would have been supported by documentary proof of her timeline, the time-stamped receipt, to provide independent credibility to her testimony. In light of the receipt, Cason's testimony on Dennis's behalf would have been doubly strong—she was disinterested, and the receipt provided documentary corroboration for her version of the events.[23]

[23] The Commonwealth argues that Cason's testimony would be duplicative of Willis Meredith's non-alibi testimony. Willis Meredith, a friend of Dennis's, testified that he saw Dennis at Abbottsford Homes around 2:30 p.m. Cason's testimony is not cumulative for two reasons: (1) Willis, like Dennis's other witnesses, was a friend and open to accusations of bias from the prosecution; and (2) Cason's testimony was corroborated by independent documentary evidence. So, even if her testimony simply placed Dennis at Abbottsford Homes around 2:30, it did so with more evidentiary weight than Meredith's.

The Commonwealth criticizes the District Court's analysis of the Cason receipt *Brady* claim as a misinterpretation of the record. Primarily, this critique rests on the District Court's conclusion that the Pennsylvania Supreme Court "overlook[ed] the fact that both Cason and Dennis testified that they saw each other *on the bus* ." *Dennis V* , 966 F.Supp.2d at 511. While it is true that Cason did not testify at trial that she saw Dennis on the K bus, nor did she deny it, and the Commonwealth's failure to turn over the receipt deprived defense counsel of the opportunity to refresh Cason's memory with the receipt or at least elicit that she saw Dennis immediately upon exiting the bus, thereby corroborating that they exited at the same location. Given that her unrefreshed testimony put the encounter after 4:00 p.m., defense counsel had no reason to elicit such testimony. But whether Cason testified that she saw Dennis on the bus or disembarking the bus, such testimony would have reinforced Dennis's own testimony that he was on the bus and placed him in a location that would have made it practically impossible for him to murder Williams. *Brady* , therefore, required that the Commonwealth disclose the receipt.

At minimum, Cason's time-stamped receipt would have empowered defense counsel to effectively impeach one of the Commonwealth's strongest witnesses and mitigated the devastating effect of her testimony on Dennis's credibility and his father's. At most, the Commonwealth's case would have been short one witness, and Dennis's alibi defense strategy would have been doubly strong due to (1) Cason's status as a disinterested defense witness with the documentary corroboration and (2) the resulting increase in Dennis's and his father's credibility. The Pennsylvania Supreme Court was therefore unreasonable in concluding that the receipt was not favorable to Dennis when it would have bolstered his alibi. It was unreasonable in concluding that there was "no evidence" that the Commonwealth had suppressed the receipt when the state court found that detectives had the receipt in their possession. And finally, it was unreasonable in concluding that the receipt was not material. Had the Commonwealth disclosed the receipt, the jury may well have credited Dennis's alibi defense.

B. Howard Police Activity Sheet

1. Facts

A suppressed police activity sheet reveals that two days after Williams's murder, Zahra Howard, an eyewitness and key witness for the Commonwealth at trial, made a statement to
297 Williams's aunt and *297 uncle, Dianne and Mannasett Pugh, that was inconsistent with an earlier statement she had made to police. Shortly after the murder, Howard told police that she did not recognize the shooter from school. The Pughs told police, however, that Howard told them the day after the murder that she knew the perpetrators from Olney High School, and that "Kim" and "Quinton" were at the scene when the shooting

occurred. App. 1506. Quinton was Dianne Pugh's nephew. The police indicated in their "THINGS TO DO" list that they intended to speak with the Pughs again and "[i]nterview Zahra Howard again" in light of her inconsistent statement to the Pughs. App. 1507. When police met with Howard the following day, however, they did not ask Howard about her conversation with the Pughs.

2. State court decision

The Pennsylvania Supreme Court initially characterized Dennis's *Brady* claim regarding Howard's inconsistent statement as one "with at least arguable merit." *Dennis III* , 950 A.2d at 969. But the court was not prepared to rule on the record before it, and it remanded the Howard *Brady* claim to the PCRA court to address that claim in the first instance. *Id.*

The PCRA court rejected the *Brady* claim following an evidentiary hearing. The District Court aptly summarized the PCRA hearing and decision by the Pennsylvania Supreme Court:

Dennis sought to argue the merits of the *Brady* claim on the papers; he objected to the introduction of evidence from Howard and Diane Pugh because, he argued, their recollections now, a decade after the trial, about who the shooter was or what they told the police had no relevance on the question of whether the Commonwealth had violated *Brady* by failing to disclose the activity sheet. As Dennis's PCRA counsel told the court:

The testimony has to be evaluated in its trial context. And all we can do at this point is put on paper for the court what we expect the impeachment to have been, assuming, for example, Zahra Howard denies having made the statement. We have to demonstrate on paper how she could have been impeached, and how that evidence relates to other evidence in the case.... Her testimony today about what she remembers from 16 years ago we can cross-examine, but it doesn't illuminate the question of materiality in the context of the trial.

NT 12/22/08 at 15. The court allowed the testimony over Dennis's objections. As expected, both Howard and Pugh denied that Howard had ever suggested that she recognized the assailants. Pugh's testimony should not carry much weight, however, given that she declared before she was even sworn in, "I don't remember nothing, nothing at all. It's been 15, 16 years so I don't remember. They just subpoenaed me and I'm here." *Id.* at 56.

The PCRA court ultimately rejected the *Brady* claim. It noted that, during the hearing, Howard "testified credibly that she did not know the appellant from Olney High School, nor had she seen him prior to the murder." *Commonwealth v. Dennis,*

Case No. 92–01–0484, slip op. (Pa.Ct.Com.Pl. Mar. 17, 2010), at 13. Although the question whether Howard recognized *James Dennis* ("the appellant") or had seen him before the murder is entirely irrelevant to whether she told Diane Pugh that she had seen the *shooter* before the murder, this is, in fact, the entirety of the testimony that the Commonwealth elicited from Howard at the PCRA hearing:

Q: And in that conversation [with Diane Pugh] did you ever say anything about recognizing the defendant before?

298 *298

A: No.

Q: Did you ever see the defendant at Olney High School?

A: No.

Q: Did you ever see him around Olney High School?

A: No.

NT 12/22/08 at 18. On cross, when Dennis's lawyer asked her about whether she said she had ever seen *the shooter* before, or whether she had ever told anyone she recognized *the shooter* from Olney High School, Howard denied recognizing the shooter or having ever said she did. *Id.* at 25–27.

Given both trial and PCRA counsel's thorough cross-examination of Howard, the PCRA court determined that it was "unlikely that any additional impeachment evidence contained in the police activity sheet ... would have created a reasonable probability that the result of the proceeding would have been different had it been disclosed." *Dennis,* slip op. at 14. The court further noted that the government's case at trial "did not rest solely on" Howard's testimony. *Id.* Finally, the contents of the activity sheet amounted to inadmissible hearsay, which "cannot be the basis for a *Brady* violation." *Id.* at 15.

The Pennsylvania Supreme Court largely accepted the PCRA court's determinations, despite its seeming recognition, in *Dennis III,* of the investigatory value the activity sheet would have had and its earlier dismissal of the admissibility issue. It agreed that Dennis had failed to prove a reasonable probability of a different result

had the activity sheet been disclosed. *Commonwealth v. Dennis,* 609 Pa. 442, 17 A.3d 297, 309 (2011) ("*Dennis IV* "). It echoed the PCRA court in noting that "Howard was extensively cross-examined by defense counsel in an attempt to impeach her testimony during trial," and that "there were two eyewitnesses other than Howard" who identified Dennis; "[t]he disclosure of the activity sheet would have had no impact upon these eyewitnesses' testimony."*Id.* It did not specifically address the question of admissibility.

Dennis V , 966 F.Supp.2d at 513–14.

3. AEDPA Review

There is no question that Howard's inconsistent statement would have been helpful to the defense but was not revealed to defense counsel until PCRA discovery, ten years after trial. The Pennsylvania Supreme Court denied Dennis's *Brady* claim regarding the Howard statement on materiality grounds. Although the court articulated the proper standard for materiality, whether a "reasonable probability" of a different outcome has been established, it applied *Kyles* in a manner inconsistent with Supreme Court precedent.

First and foremost, defense counsel could have used Howard's inconsistent statement as an effective means of impeachment during trial. As noted above, impeachment evidence unquestionably falls under *Brady* 's purview and cannot be suppressed by the prosecution. The Commonwealth notes that evidence is not necessarily material under *Brady* simply because it may open up avenues for impeachment—the focus of the inquiry is on the "reasonable probability of a different result" under *Kyles* . Such a probability exists here. The type of impeachment evidence provided by the activity sheet would have undercut the credibility of a key prosecution witness in a manner not duplicated by other challenges the defense was able to level at trial. Consequently, the impeachment material provided by the suppressed activity sheet is material under *Brady* , and it was unreasonable for the Pennsylvania Supreme Court to hold otherwise.

299 *299 Howard was the Commonwealth's key eyewitness against Dennis and the Commonwealth accordingly highlighted her testimony. ADA King emphasized the importance of Howard's testimony in his closing argument: "[I]f you believe Zahra Howard, that's enough to convict James Dennis." App. 1207. As Williams's friend and the person with the closest view of the shooter, Howard's testimony carried significant emotional and practical weight with the jury.[24]

[24] Howard's testimony undoubtedly bore more emotional weight with the jury than the other eyewitness testimony presented at trial due to Howard's close friendship with the victim. Because of Howard's personal connection with, and physical proximity to, Williams at the time of her murder, stress may have played a particularly damaging role in the strength of her identification. Chief Judge McKee explains in his concurrence that that stress may impair a witness's identifications. J. McKee Concurring Op. at 329–30. Here, the identification that the Commonwealth so confidently framed as sufficient to support Dennis's conviction may have suffered the greatest from the effect of stress.

Unlike other testifying eyewitnesses, Howard had views of the perpetrator at numerous stages during the incident. At trial, Howard testified that she saw the shooter for approximately twenty seconds total. This comported with her testimony at the preliminary hearing. The two other testifying eyewitnesses' views were much briefer. Bertha testified at the preliminary hearing that he saw the assailant for about a second. At trial, he expanded the amount of time he said he saw the shooter to three or four seconds. Cameron initially testified at the preliminary hearing that he saw the assailant for twenty seconds but upped the amount of time

to thirty to forty seconds at trial. Notably, Cameron qualified his testimony by admitting that he "didn't really pay attention."[25] App. 664. In contrast to Bertha and Cameron's, Howard's testimony was consistent, lengthy, and involved numerous views of the assailant—on the subway stairs, during the face-to-face encounter and finally, when Williams was shot. Because of the consistency and emotional weight of Howard's testimony, defense counsel's strategy was heavily reliant on impeaching Howard by any means—counsel attempted to "discredit her any ... way [he] could." App. 1326.

[25] Judge Fisher concedes that Bertha and Cameron may not have been paying attention during the incident, but urges that "the gunshot focused their view and spurred them into action." J. Fisher Dissent Op. at 366. As Chief Judge McKee's concurrence highlights, however, the presence of a weapon at a crime scene "has a consistently negative impact on both feature recall accuracy and identification accuracy." J. McKee Concurring Op. at 331. Here, the gunshot may have startled Bertha and Cameron to attention, but research demonstrates that the accuracy of their recollection of the perpetrators would have been reduced, not amplified, by the presence of the silver handgun.

Counsel's ability to discredit Howard was limited, however. Without evidence that would directly contradict Howard's testimony at trial, defense counsel sought to discredit Howard by pointing out her initial hesitation in identifying Dennis as the perpetrator during the photo array. Counsel could not challenge Howard's trial testimony on other grounds. But prosecutors held contradictory statements by Howard about whether she recognized the perpetrators. Howard had initially told police, and later testified at trial, that she had never seen the perpetrators before and had not recognized them from school. According to the Pughs, however, Howard had said she recognized the shooter from Olney High School. The Pughs (along with Parker) also stated that Howard had also identified two other individuals, Kim and Quinton, as being present at the scene.

As noted by the District Court, cross-examination
300 does not equate to actual *300 impeachment. Defense counsel cross-examined Howard, but he could only engage in limited questioning focused on challenging her hesitation identifications of Dennis as the shooter. This is decidedly different from the actual impeachment enabled by the activity sheet. In *Banks* , a witness was heavily impeached at trial, but the prosecution suppressed evidence that the witness served as a paid informant. 540 U.S. at 702, 124 S.Ct. 1256. Accordingly, none of the impeachment conducted at trial covered his status as an informant; the jury weighed his credibility without knowing this. *Id.* at 702–03, 124 S.Ct. 1256. The Supreme Court rejected the state's argument that because the witness was heavily impeached, further impeachment evidence was immaterial. *Id.* at 702, 124 S.Ct. 1256. We have similarly indicated that additional impeachment evidence helps to substantiate *Brady* claims in a way that might make them material. In *Lambert v. Beard* , we stated that "it is patently unreasonable to presume —without explanation—that whenever a witness is impeached in one manner, any other impeachment becomes immaterial." 633 F.3d 126, 134 (3d Cir. 2011), *judgment vacated on other grounds sub nom. Wetzel v. Lambert* , —— U.S. ——, 132 S.Ct. 1195, 182 L.Ed.2d 35 (2012). The mere fact that a witness has been heavily cross-examined or impeached at trial does not preclude a determination that additional impeachment evidence is material under *Brady* .

Indeed, we have granted habeas relief on the basis of a "significant difference" between the suppressed impeachment and other types of impeachment evidence used at trial. *Slutzker v. Johnson* , 393 F.3d 373, 387 (3d Cir. 2004). In *Slutzker* , we held that a police report memorializing a witness's inconsistent statement

was significantly different from the reports used to impeach the witness at trial. In the reports used at trial, the witness failed to identify the defendant, but in the suppressed report, she definitively stated that the man she saw was not the defendant. We concluded that "[t]he latter is much more convincing impeachment evidence, and the failure to disclose it leaves us in doubt that the trial verdict was worthy of confidence." *Id.* The police activity sheet memorializing Howard's statement similarly provides distinct and persuasive impeachment material that discredits Howard's testimony more thoroughly than the identification challenges defense counsel levelled at trial.

The Commonwealth relies on *United States v. Walker* , 657 F.3d 160 (3d Cir. 2011), and *United States v. Perez* , 280 F.3d 318 (3d Cir. 2002), in arguing that the activity sheet does not add anything significant to the record and is consequently immaterial, even if the evidence is unique. However, the activity sheet adds to the record in a distinct and significant way, so *Walker* and *Perez* do not compel us to find it immaterial. In *Walker* , defendants sought a new trial based on the state's suppression of information, unrelated to the trial itself, about an informant witness. The informant, who testified at defendant's trial, was found with cocaine and marijuana in his pocket on the day of a controlled buy operation in an unrelated case. We held that suppression of that information did not rise to the level of a *Brady* violation. 657 F.3d at 188 (noting that another witness for the prosecution provided direct support). Unlike our case, where Howard's statement to the Pughs directly undercut the credibility of her eyewitness testimony in Dennis's case, the alleged *Brady* evidence in *Walker* was wholly unrelated to defendant's case. Further, we reiterated the principle in *Walker* that "there are some instances where specific impeachment evidence is so important (for issues *such as the identity of the culprit*) that it is material for *Brady* purposes even when a witness has already been effectively impeached on other issues." *Id.* 301 (emphasis *301 added). Thus, *Walker* supports the view that withholding impeachment material that is germane to a critical aspect of the case—as here, the identity of the perpetrator—violates *Brady* .

Similarly, *Perez* does not support the Commonwealth's contention. The alleged *Brady* material in *Perez* was a witness's later statement inculpating another defendant and exculpating Perez. The initial statement, unlike Howard's initial statement in this case, was corroborated by documentary evidence and co-defendant testimony at trial. Here, Howard's eyewitness testimony played a pivotal emotional and practical role that could not be replaced by other evidence. There are material differences in impeachment value as well. In *Perez* , we concluded that cross-examination on the basis of the later statement would not have induced the co-defendant to admit to committing the crime. *Perez* , 280 F.3d at 350–51. Here, the type of statement at issue is different—Howard would have been confronted with an inconsistent statement, but not one that would have implicated her in the crime.

Armed with the activity sheet, defense counsel could have impeached Howard in a manner that very well may have led her to admit she recognized the perpetrators from her high school. Regardless of whether she actually recognized the shooter, Howard's credibility would have been placed counter to that of the victim's aunt and uncle, the Pughs, who would have undoubtedly been called at trial. Consequently, Howard's impeachment could have changed the jury's perception of her credibility.

There are significant, material differences between the type of cross-examination defense counsel engaged in and what he could have done had he known of the police activity sheet. As the District Court noted, "the activity sheet would have shown that [Howard] either lied to Williams'[s] close relatives—only days after the murder and in a manner that implicated Diane Pugh's own nephew

—or she was lying at trial." *Dennis V* , 966 F.Supp.2d at 515. Thus, the government's suppression necessarily undermines confidence in the outcome of Dennis's trial. Discrediting the prosecution's central witness, and the eyewitness with the most significant exposure to the shooter, would have had devastating effects on the prosecution's case at trial. The remaining two eyewitnesses were located farther away from the incident, had only brief glimpses of the perpetrators, or were admittedly paying little attention. Challenging Howard's identification of the shooter did little to undermine her credibility as a witness; but armed with the inconsistent statement, defense counsel could have undercut Howard's testimony sufficiently that a jury may not have convicted Dennis. There is a reasonable probability that had the activity sheet been disclosed, the result of the proceeding would have been different.

The Commonwealth argues that Howard did not make the statements attributed to her in the activity sheet. In support of this assertion, the Commonwealth looks to Howard's and the Pugh's testimony during PCRA review—over sixteen years after Dennis's trial. Her statements during PCRA review carry little weight in how we consider a jury's credibility determination at trial. In *Kyles* , the Supreme Court explicitly rejected the contention that post-conviction credibility determinations could replicate the jury's credibility determinations at trial. *Kyles* , 514 U.S. at 449 n.19, 115 S.Ct. 1555 ("[N]either observation [during post-conviction proceedings] could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials."). The court oriented its analysis around how the jury would have weighed the information, not the credibility of the post-conviction testimony itself.
302 Thus, the *302 proper inquiry remains whether use of the activity sheet by defense counsel at trial would have resulted in a different outcome at trial. The jury makes the credibility determination, not the Court sixteen years post-trial.

Although the Supreme Court instructed habeas courts in *Wood* not to ignore testimony at evidentiary hearings that would undermine the potential usefulness of alleged *Brady* material, the admissions during a post-conviction hearing in *Wood* differed significantly from those provided by Howard during PCRA review. In *Wood* , counsel specifically admitted that "disclosure [of the polygraph results] would not have affected the scope of his cross-examination," and consequently, he did not bother to obtain admissions during post-conviction review. *Wood* , 516 U.S. at 7–8, 116 S.Ct. 7. The post-conviction testimony at issue here is markedly different. Dennis's trial counsel testified that discrediting Howard through inconsistent statements was an integral part of the trial strategy. Interpreting Howard's statements during PCRA hearings as indicating that she did not, in fact, make the statements to the Pughs contained in the activity sheet would allow the Commonwealth to cure its suppression of material evidence through delay. This we will not do.

The Commonwealth's argument that the information contained in the activity sheet was double hearsay, so not admissible for impeachment purposes, fairs no better. The Pennsylvania Supreme Court did not rest its decision on an admissibility determination. Rather, it rooted its analysis in a misapplication of the *Kyles* materiality standard: that "any additional impeachment based on the activity sheet would have created a reasonable probability that the result of the proceeding would have been different." *Dennis IV* , 17 A.3d at 309.

Counsel could also have used the information to challenge the adequacy of the police investigation. Defense counsel could have questioned Detectives Jastrzembski and Santiago as to why they did not ask Howard questions about her inconsistent statement when they saw her again only a few hours after indicating that confronting her was part of their "things to do." Their subsequent meeting with Howard centered on reviewing a photo array.

The detectives never asked Howard about admitting to the Pughs that she recognized the assailants from Olney High School. They never asked Howard about Kim and Quinton, despite having recently left a discussion with Parker, who stated that Howard mentioned Kim and Quinton to her as well. There is also no indication that they conducted any further investigation into the Pughs and whether they misheard all of these details or had reason to fabricate Howard's inconsistent statement. Armed with the statement, defense counsel could have highlighted the investigatory failures for the jury, which could have supported Dennis's acquittal.

Further, defense counsel could have used the Howard inconsistent statement to mount an "other suspect" defense at trial. According to the Pughs, Howard stated that she recognized the shooter from Olney High School where she and Williams were enrolled. Dennis attended Roxborough High School for his entire high school career. The simple conflict between where Dennis attended school and where Howard stated the assailants went to school would have removed Dennis as a suspect and empowered defense counsel to put forth an "other suspect" defense at trial, which he was otherwise unable to do. Together with the failure to follow up on the statements to the Pughs, defense counsel could have urged that Dennis's was a case where police arbitrarily put blinders on as to the possibility that someone else committed the crime and pursued the easy lead.

303 *303 Although the Pennsylvania Supreme Court acknowledged that "the omission is to be evaluated in the context of the entire record," *Dennis IV* , 17 A.3d at 309, it ultimately applied the *Brady* materiality standard unreasonably by using sufficiency of the evidence as a touchstone. As pointed out by the District Court, the Supreme Court instructed in *Kyles* that "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." 514 U.S. at 434–35, 115 S.Ct. 1555. Rather, "the *Kyles* Court rebuked the dissent for assuming that Kyles must lose on his *Brady* claim because there would still have been enough to convict, even if the favorable evidence had been disclosed. 'The rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of the evidence (or insufficiency) is the touchstone.' " *Dennis V* , 966 F.Supp.2d at 516 (quoting *Kyles* , 514 U.S. at 435 n.8, 115 S.Ct. 1555). State courts may not "emphasize[ ] reasons a juror might disregard new evidence while ignoring reasons she might not." *Wearry v. Cain* , —— U.S. ——, 136 S.Ct. 1002, 1007, 194 L.Ed.2d 78 (2016).

The Pennsylvania Supreme Court concluded that "[t]he disclosure of the activity sheet would have had no impact upon [two additional] eyewitnesses' testimony" and consequently, the activity sheet was not material under *Brady* . *Dennis IV* , 17 A.3d at 309. In making its conclusion as to the materiality of the activity sheet, the Pennsylvania Supreme Court tied the materiality of the activity sheet to a requirement that Dennis show that Cameron's and Bertha's eyewitness testimony would not be sufficient to support the jury's finding. This analysis is entirely inconsistent with the Court's instructions on materiality. The Commonwealth argues, and the Dissent appears to accept, that by citing *Commonwealth v. Weiss* , 604 Pa. 573, 986 A.2d 808 (2009) —which reiterated the Supreme Court's admonition of the sufficiency of the evidence test—the Pennsylvania Supreme Court applied the proper standard. However, unreasonable application of federal law under AEDPA occurs when the state court identifies the proper principle, but "unreasonably applies that principle to the facts of the prisoner's case." *Williams* , 529 U.S. at 413, 120 S.Ct. 1495. Indeed, in *Lafler* , the state court had identified the two *Strickland* prongs—prejudice and performance—yet the United States Supreme Court concluded that the state court had unreasonably used the "knowing and voluntary" standard and disregarded *Strickland* . 132 S.Ct. at 1390.

Here, the Commonwealth's argument that the Pennsylvania Supreme Court knew the proper standard for materiality does little to demonstrate that it actually applied it reasonably. Instead of engaging in a holistic materiality inquiry per *Kyles* , the Pennsylvania Supreme Court proceeded down an analytical path that hinged the activity sheet's *Brady* materiality on the sufficiency of the evidence, namely, the strength of Bertha and Cameron's eyewitness testimony, in direct contravention of how the Supreme Court has defined materiality.

Judge Fisher's Dissent relies on the Supreme Court's decision in *Strickler* to support the Pennsylvania Supreme Court's approach to materiality in *Dennis IV* . Like the activity sheet, the exculpatory materials at issue in *Strickler* would have cast doubt on the testimony of a key prosecution, Anne Stoltzfus. In *Strickler* , the Court of Appeals for the Fourth Circuit below had identified the *Kyles* standard for materiality and had concluded that "without considering Stoltzfus' testimony, the record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and
304 future dangerousness that warranted *304 the imposition of the death penalty." *Strickler* , 527 U.S. at 290, 119 S.Ct. 1936. The United States Supreme Court soundly rejected the Fourth Circuit's approach upon review in *Strickler* . It instructed that "[t]he standard used by [the Fourth Circuit] was incorrect" and reiterated that "the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions." *Id.* ("[T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " (quoting *Kyles* , 514 U.S. at 435, 115 S.Ct. 1555)). The Pennsylvania Supreme Court did precisely what the *Strickler* Court rejected—it evaluated whether, after considering Howard's testimony, the remaining eyewitness testimony was sufficient for Dennis's conviction. *Dennis IV* , 17 A.3d at 309 ("[T]here were two eyewitnesses other than Howard who observed the shooting at close range. ... The disclosure of the activity sheet would have had no impact upon these eyewitnesses' testimony.").

Further, the materiality of the impeachment evidence in *Strickler* is distinguishable from the police activity sheet at issue here because the evidence against petitioner in *Strickler* was far more extensive and varied than the Commonwealth's case against Dennis. As Judge Fisher recognizes, there was "considerable forensic and other physical evidence" linking the petitioner to the crime in *Strickler* . 527 U.S. at 293, 119 S.Ct. 1936. The Supreme Court ultimately concluded that "[t]he record provide[d] strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached." *Id.* at 294, 119 S.Ct. 1936. Thus, the *Strickler* Court held that petitioner had not shown materiality under *Brady* .

The record laid by the Commonwealth in Dennis's case pales in comparison to the one mounted by the government in *Strickler* . For instance, the police in *Strickler* recovered hairs from clothing found with the victim that were microscopically akin to petitioner's, and petitioner's fingerprints were found on the inside and outside of the victim's car. 527 U.S. at 293 n.41, 119 S.Ct. 1936. No similar physical evidence exists on the record in Dennis's case. The Supreme Court recognized the importance of Stoltzfus's testimony, as it was the only disinterested narrative account provided at trial, but ultimately concluded in its holistic materiality inquiry that petitioner failed to show that there was "a reasonable probability that his conviction or sentence would have been different had these materials been disclosed." *Id.* at 296, 119 S.Ct. 1936. The conclusion that petitioner failed to show materiality against the variety and extensiveness of the evidence against petitioner in

Strickler differs from the Pennsylvania Supreme Court indication that two other eyewitness accounts were sufficient for a jury to convict Dennis.

In sum, the Pennsylvania Supreme Court unreasonably applied *Brady* and its progeny in denying Dennis's *Brady* claim based on the Howard inconsistent statement. It unreasonably disregarded the impeachment value of the evidence in discrediting the Commonwealth's key eyewitness and the adequacy of the investigation. It unreasonably applied a sufficiency of the evidence test by tying the materiality of the activity sheet to the sufficiency of the remaining inculpatory eyewitness testimony. And finally, the Pennsylvania Supreme Court failed to consider that the activity sheet would have enabled defense counsel to raise a defense he was otherwise unable
305 to present—that a student at *305 Olney High School committed the murder. There is a reasonable probability that, had the activity sheet been disclosed, the jury would have had a reasonable doubt as to Dennis's guilt.

C. Frazier Documents

1. Facts

Prior to Dennis' arrest, Philadelphia police received a lead from Montgomery County Detectives that someone other than Dennis may have murdered Williams. William Frazier, an inmate at the Montgomery County Correctional Facility called police and told them that Tony Brown "shot ... [a] female in the middle of the street near the Fern Rock station" after the girl resisted his efforts to take her earrings, which Brown sold at a pawn shop for $400. App. 1689–90.

Frazier heard Brown's confession during a three way call facilitated by his aunt, Angela Frazier. Frazier recounted the conversation in a signed statement given to Philadelphia Police less than two weeks after Williams's murder. Brown admitted that he—along with Frazier's cousin, Ricky Walker, and a man called "Skeet"—had "fucked up" and killed Chedell Williams. App 1692. Frazier told police that Brown knew Williams, and identified her as "Kev with the blue pathfinder ... his girl." App. 1694.

During the call, Brown asked Frazier if he heard about "the incident on the news about the girl that [was] killed over a pair of earrings," and Brown confessed "that was us." App. 1692. Frazier reported "[Tony] said that he and Ricky got out of the car and Skeet was driving. They approached the girl, Tony pulled his gun out and told her to give up the earrings ... she refused. So he put the gun to her neck ... [and] it accidentally went off." *Id.* Walker briefly joined the call and reported that they were scared, and that they left Frazier's apartment, where they sought cover after the murder, in the middle of the night so that no one would see them. Frazier reported that Brown and Walker sounded "extremely nervous and upset." App. 1694. Frazier described Tony as 5'>7?, two inches taller than Dennis, with light brown skin. Like the assailant, Tony "like[d] to wear sweat suits;" he had also committed robberies in the past and owned "a collection of guns." App. 1693–95.

Frazier gave detectives addresses for Brown and Walker, the address where Skeet used to live. Frazier also gave police Angela Frazier's address and phone number, Brown's mother's address, and an address of the pawn shop, along with a description of the proprietor. Frazier agreed to go on a ride along to show detectives the addresses he reported. The Philadelphia police, including Jastrzembski, spoke with Frazier's landlord, who confirmed that Frazier rented the apartment located at the address he provided. Although the landlord reported that nobody had been in the apartment since Frazier's arrest, the men used unconventional means to enter Frazier's apartment the night of the murder—they climbed through Frazier's right window.[26]

26 While this matter was pending before the panel, the government located Frazier in federal prison and interviewed him. During this interview, Frazier admitted the story he

> told police in 1991 was, in his words, "bullshit," that the "three-way" phone call with his aunt and "Tony Brown" "never happened," and that he did not know anyone named "Tony Brown" or "Skeet." Response to Pet. Rh'g at 17 n.13. Ultimately, Frazier's admission many years post-trial does not change our analysis of whether, given the information the Commonwealth had at the time of the tip, they were required to disclose the lead documents pursuant to *Brady* .

Detectives interviewed Walker, who told them that he "c[ouldn't] stand" his cousin, *306 Frazier. App. 1703. Walker denied knowing Tony Brown and Skeet and denied any involvement with, or knowledge about, Williams's murder. He told detectives that he was at his house with his mother on the day of the murder. Police did not conduct an investigation into Walker's alibi or alert defense counsel to any of the information on Frazier's tip.

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2. State court decision

The Pennsylvania Supreme Court affirmed the PCRA court's denial of Dennis's *Brady* claim as to the Frazier documents on the grounds that Dennis failed to demonstrate that the documents were material and admissible. The Pennsylvania Supreme Court relied on its decision in *Commonwealth v. Lambert* , 584 Pa. 461, 884 A.2d 848 (2005), in which it emphasized that the prosecution need not "disclose to the defense every fruitless lead followed by investigators of a crime" and asserted that "inadmissible evidence cannot be the basis for a *Brady* violation." *Lambert* , 884 A.2d at 857 (citation omitted). The court concluded: "In the absence of any argument regarding the gravamen of *Lambert* ... [Dennis] has failed to establish a basis for relief" regarding the Frazier documents. *Dennis III* , 950 A.2d at 968. However, as Dennis points out, the Pennsylvania Supreme Court retreated from its decision in *Lambert* in a later opinion so as to comport with Supreme Court precedent regarding the need for admissibility. *Commonwealth v. Willis* , 616 Pa. 48, 46 A.3d 648, 670 (2012) ("[W]e hold that admissibility at trial is not a prerequisite to a determination of materiality under *Brady* .... Therefore, nondisclosed favorable evidence which is not admissible at trial may nonetheless be considered material for *Brady* purposes[.]").

3. AEDPA Review

The state court addressed the merits of the Frazier claim and, as a result, Dennis may obtain habeas relief only if he can demonstrate that the decision was an unreasonable application of, or contrary to, clearly established law, or an unreasonable determination of the facts. 28 U.S.C. § 2254(d). It is undisputed that the first two elements of *Brady* are met. The Frazier documents indicated that someone other than Dennis committed the crime, and were thus exculpatory, and there is no question that the state did not disclose the documents until PCRA discovery. However, the Pennsylvania Supreme Court unreasonably applied *Brady* and its progeny in concluding that the Frazier documents were immaterial. Also, in appending an admissibility requirement onto *Brady* , the Pennsylvania Supreme Court acted contrary to clearly established law, as defined by the United States Supreme Court.

The Pennsylvania Supreme Court's justification that the Frazier documents were a "fruitless lead" was unreasonable. There is no requirement that leads be fruitful to trigger disclosure under *Brady* , and it cannot be that if the Commonwealth fails to pursue a lead, or deems it fruitless, that it is absolved of its responsibility to turn over to defense counsel *Brady* material. The rationale behind *Brady* itself rests on the principle that prosecutors bear an obligation to structure a fair trial for defendants:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. ... A prosecution that withholds evidence ... which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice,

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> even [if] ... his action is not the result of guile[.]

Brady , 373 U.S. at 87–88, 83 S.Ct. 1194 (internal quotation marks and footnote omitted). Structuring a fair trial for defendants demands that prosecutors freely disclose material that is helpful to the defense. Consequently, making *Brady* disclosure depend on a prosecutor's own assessment of evidentiary value, as opposed to the benefit to defense counsel, is anathema to the goals of fairness and justice motivating *Brady* .

The lead was not fruitless, it was simply not rigorously pursued. Detectives did not interview Angela Frazier, who facilitated the three-way call and was on the phone when Brown confessed to the murder. Detectives did not question Walker again—who admitted to having a bias against Frazier—after he stated that he did not know any Brown or Skeet, nor did they attempt to verify Walker's alibi on the day of the murder. Detectives did not investigate the owner of the pawn shop where Brown purportedly sold Williams's earrings. Detectives did not obtain the photos of Brown, Skeet, and Walker that were in Frazier's apartment. Detectives went to an incorrect address seeking information about Skeet and spoke with a woman named Janice Edelen, who said she did not know any man called Skeet. Finally, detectives did not visit the addresses Frazier provided until ten years after the murder. Armed with the Frazier documents, Dennis's counsel would have been prepared to pursue the lead himself or at least informed the jury of the police's misguided focus on Dennis and failure to pursue the lead.

The Pennsylvania Supreme Court grafted an admissibility requirement onto the traditional three-prong *Brady* inquiry when it rejected Dennis's *Brady* claim as to the Frazier documents on the ground that he failed to affirmatively show that the documents were admissible. The Pennsylvania Supreme Court's characterization of admissibility as dispositive under *Brady* was an unreasonable application of, and contrary to, clearly established law as defined by the United States Supreme Court.

The Commonwealth articulates the Pennsylvania Supreme Court's decision somewhat differently. It argues that our role on habeas review is determining "whether, under Supreme Court precedent, it was objectively unreasonable for the Pennsylvania Supreme Court to reject Dennis's claim that he only had to argue or allege that disclosure 'might' have affected his investigation or preparation for trial." Appellants Br. 74. This framing incorrectly states what the Pennsylvania Supreme Court did in *Dennis III* . It did not simply discount Dennis's argument that defense counsel could have prepared differently had the documents been disclosed—it appended an admissibility requirement to *Brady* in contravention of clearly established law.

The Pennsylvania Supreme Court cited *Wood v. Bartholomew* , 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995), as attaching an admissibility requirement to *Brady* . The United States Supreme Court's holding in *Wood* compels the opposite conclusion, however. The Supreme Court held in *Wood* that there was no *Brady* violation when the prosecution did not disclose the results of two polygraph examinations that were inadmissible at trial. *Wood* , 516 U.S. at 6, 116 S.Ct. 7. The *Wood* Court noted that *Brady* governs "evidence," and that the polygraph results, since they were

inadmissible under state law, were "not 'evidence' at all." *Id.* at 5–6, 116 S.Ct. 7. However, under Washington law, polygraphic examinations cannot be admissible for any purpose at trial, even for impeachment purposes. *Id.* at 5, 116 S.Ct. 7. At most, the Court's holding in *Wood* could *308 support the proposition that evidence that cannot be used in any manner at trial under state law may be immaterial under *Brady* . The holding does not reach so far as to allow state courts to attach a general admissibility requirement onto the *Brady* inquiry as the Pennsylvania Supreme Court did in *Dennis III* .

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Further, the *Wood* Court analyzed the *effect* of suppressing the polygraph results, despite their uncontroverted inadmissibility. After acknowledging their inadmissibility, the *Wood* Court proceeded to examine whether, if disclosed, the results would have led to the discovery of evidence that would have influenced the course of trial, including pre-trial preparations. *See Wood* , 516 U.S. at 7, 116 S.Ct. 7 (considering whether trial counsel would have prepared differently given the results, though ultimately concluding that disclosure would not have resulted in a different outcome). The Supreme Court's decision to continue its inquiry in light of wholly inadmissible alleged *Brady* material is telling. As the District Court aptly observed, "[i]f inadmissible evidence could never form the basis of a *Brady* claim, the Court's examination of the issue would have ended when it noted that the test results were inadmissible." *Dennis V* , 966 F.Supp.2d at 503.

The Supreme Court's choice in *Wood* to consider the way in which suppression of the polygraph results affected preparation and trial aligns with the way in which materiality is discussed in *Kyles* . *Kyles* makes clear that evidence is material under *Brady* when the defense could have used it to "attack the reliability of the investigation." 514 U.S. at 446, 115 S.Ct. 1555. As noted by the District Court, in *Kyles* , defense counsel could have used the information at issue "to throw the reliability of the investigation into doubt and to sully the credibility" of the lead detective. *Id.* at 447, 115 S.Ct. 1555. The proper inquiry for the Pennsylvania Supreme Court was to consider whether disclosure of the Frazier documents would have impacted the course of trial, which includes investigative activities. Here, disclosure of the Frazier documents would have empowered defense counsel to pursue strategies and preparations he was otherwise unequipped to pursue.

Imposition of an admissibility requirement does not comport with the United States Supreme Court's longstanding recognition that impeachment evidence may be favorable and material, and if so, is unquestionably subject to *Brady* disclosure. The Court stated definitively in *Strickler* that "[o]ur cases make clear that *Brady* 's disclosure requirements extend to materials that, *whatever their other characteristics* , may be used to impeach a witness." 527 U.S. at 282 n.21, 119 S.Ct. 1936 (emphasis added). As to both the first *Brady* prong, favorability, and the third *Brady* prong, materiality, the Supreme Court has held that impeachment evidence falls under *Brady* 's purview. *Id.* at 281–82, 119 S.Ct. 1936 (the evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching."); *Kyles* , 514 U.S. at 445, 115 S.Ct. 1555 (concluding that evidence was material because "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others"). Further, nearly all of the cases decided by the United States Supreme Court since *Brady* have dealt with impeachment evidence. *See Wearry v. Cain* , ––– U.S. ––––, 136 S.Ct. 1002, 194 L.Ed.2d 78 (2016) (per curiam), *Wetzel v. Lambert* , ––– U.S. ––––, 132 S.Ct. 1195, 182 L.Ed.2d 35 (2012) ; *Smith v. Cain* , ––– U.S. ––––, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012) ; *Cone v. Bell* , 556 U.S. 449, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) ; *Banks v. Dretke* , 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) ; *Strickler v. Greene* , 527 U.S. 263, 119

S.Ct. 1936, 144 L.Ed.2d 286 (1999) ; *309 *United States v. Bagley* , 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) ; *United States v. Agurs* , 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) ; *Moore v. Illinois* , 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972) ; *Giglio v. United States* , 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) ; *Giles v. Maryland* , 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967). It would be difficult to find stronger support for the proposition that admissibility is not a requirement under *Brady* , and the Supreme Court's repeated consideration of impeachment material in *Brady* cases—without any reservation whatsoever—compels us to conclude that it is unreasonable to graft an admissibility requirement onto *Brady* 's traditional three-pronged inquiry.

Beyond the recognition that impeachment evidence is covered by *Brady* , the essence of the United States Supreme Court's *Brady* jurisprudence focuses on the benefits of disclosure to the defense, not admissibility. This is evidenced by the definition of materiality itself. *Kyles* provides that evidence is material "if there is a reasonable probability that, *had the evidence been disclosed to the defense* , the result of the proceeding would have been different." 514 U.S. at 433–34, 115 S.Ct. 1555 (1995) (quoting *Bagley* , 473 U.S. at 682, 105 S.Ct. 3375 (opinion of Blackmun, J.)) (emphasis added). Quite simply, under *Brady* , the focus of the inquiry is on whether the information had "been disclosed to the defense," not whether it was admissible at trial. *See id.* An admissibility requirement improperly shifts that focus.

The United States Supreme Court's focus on disclosure is mirrored in the way in which it has applied the "reasonable probability" standard used to assess materiality under *Brady* . When the Court has reviewed applications of the "reasonable probability" standard, it has weighed the strength of the suppressed evidence against the strength of disclosed evidence to evaluate its impact, not critiqued the character of the evidence itself. *See Strickler* , 527 U.S. at 290–94, 119 S.Ct. 1936. In *Strickler* , the Court denied a *Brady* claim on materiality grounds because "the record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if [an eyewitness] had been severely impeached." *Id.* at 294, 119 S.Ct. 1936. Thus, the focus was on disclosure, given the effect of other available material, not the character of the material itself.

The Supreme Court's later decision in *Cone v. Bell* similarly affirmed its longstanding focus on disclosure regardless of admissibility at trial. There, the Court considered impeachment evidence including police bulletins, statements contained in official reports, and FBI reports to be *Brady* material. *Cone* , 556 U.S. at 470–71, 129 S.Ct. 1769. Neither the Sixth Circuit nor the District Court below fully considered whether the suppressed documents would have persuaded the jury to impose a lesser sentence. *Id.* at 475, 129 S.Ct. 1769 ("It is possible that the suppressed evidence, viewed cumulatively, may have persuaded the jury that Cone had a far more serious drug problem than the prosecution was prepared to acknowledge, and that Cone's drug use played a mitigating, though not exculpating, role in the crimes he committed."). *Cone* held that the courts below had failed to "thoroughly review the suppressed evidence or consider what its cumulative effect on the jury would have been" regarding Cone's sentence. *Id.* at 472, 129 S.Ct. 1769. By remanding the case for full consideration of the *Brady* claim despite the fact that the suppressed evidence was not necessarily admissible, the Court indicated that the admissibility of suppressed evidence ought not to change the materiality inquiry itself, which is understood as "a reasonable probability that, had the evidence been disclosed, the result *310 of the proceeding would have been different." *Id.* at 470, 476, 129 S.Ct. 1769.

Our recent decision in *Johnson v. Folino* , 705 F.3d 117 (3d Cir. 2013) further affirms the view that inadmissible evidence is often very material:

> [I]nadmissible evidence may be material if it could have led to the discovery of admissible evidence. Furthermore ... we think that inadmissible evidence may be material if it could have been used effectively to impeach or corral witnesses during cross-examination. Thus, the admissibility of the evidence itself is not dispositive for *Brady* purposes. Rather, the inquiry is whether the undisclosed evidence is admissible itself or could have led to the discovery of admissible evidence that could have made a difference in the outcome of the trial sufficient to establish a "reasonable probability" of a different result.

Id. at 130 (citations omitted). Here, however, the Pennsylvania Supreme Court ignored how the United States Supreme Court has evaluated materiality and instead made inadmissibility a determinative factor, indeed, the determinative factor.

The Pennsylvania Supreme Court's characterization of admissibility as a separate, independent prong of *Brady* effectively added admissibility as a requirement. This runs afoul of Supreme Court precedent. The Pennsylvania Supreme Court required "evidence sought under *Brady* be material *and* admissible." *Dennis III* , 950 A.2d at 968 (emphasis added). The Supreme Court has never added a fourth "admissibility" prong to *Brady* analysis. Like the imposition of a due diligence prong, adding an admissibility prong would alter *Brady* 's traditional three-prong inquiry in a manner that the Supreme Court rejected in *Williams* . *See Williams* , 529 U.S. at 393, 120 S.Ct. 1495.

Most federal courts have concluded that suppressed evidence may be material for *Brady* purposes even where it is not admissible. *See United States v. Morales* , 746 F.3d 310, 314 (7th Cir. 2014) (listing cases). However, the Seventh and Fourth Circuits have indicated that inadmissible evidence cannot be material. *Morales* , 746 F.3d at 314 ; *see also Jardine v. Dittmann* , 658 F.3d 772, 777 (7th Cir. 2011) ("Logically, inadmissible evidence is immaterial under [the *Brady*] rule"); *Hoke v. Netherland* , 92 F.3d 1350, 1356 n.3 (4th Cir. 1996). *Jardine* and *Hoke* involved evidence that was prohibited from being used under state evidence laws and their assertions regarding an admissibility requirement were not determinative to their holdings. *Jardine* , 658 F.3d at 777 (noting that the undisclosed material was inadmissible under state law and could not be used to impeach, but concluding that no *Brady* violation occurred only after evaluating other avenues through with the material could be used); *Hoke* , 92 F.3d at 1355–56 (holding that the undisclosed information about the murder victim's sexual history would not have been material in light of overwhelming physical and other evidence and resolving the case on grounds other than admissibility). *Morales* is similarly unpersuasive, as it observed that the Courts of Appeals for the First, Second, Third, Sixth, and Eleventh Circuits have read *Brady* to include material but inadmissible evidence. 746 F.3d at 314. The *Morales* court even conceded that "[w]e find the Court's methodology in *Wood* to be more consistent with the majority view in the courts of appeals than with a rule that restricts *Brady* to formally admissible evidence." *Id.* at 315.[27] *311

The Frazier documents were material under *Brady* . Dennis's counsel could have used the information contained in the Frazier documents to challenge detectives at trial regarding their paltry investigation of the lead. As we previously noted, the lead was "fruitless" because the Commonwealth failed to take sufficient action to determine if it was fruitful—the Commonwealth essentially abandoned it. The Commonwealth does not dispute that trial counsel could have used the information in the suppressed documents to question the detectives.

27 Although the United States Supreme Court recently recognized that circuit splits may indicate a possibility of fairminded disagreement under AEDPA, it did so where the circuit split emerged out of an express reservation left by the Supreme Court on the precise question decided by the state court. In *White v. Woodall* , the Kentucky Supreme Court decided that a no-adverse inference instruction, required by the Fifth Amendment to protect a non-testifying defendant at the guilt phase, is not required at the penalty phase. —— U.S. ——, 134 S.Ct. 1697, 1701, 188 L.Ed.2d 698 (2014)*reh'g denied* , —— U.S. ——, 134 S.Ct. 2835, 189 L.Ed.2d 799 (2014). In so doing, the Kentucky Supreme Court relied on the Supreme Court's decision in *Mitchell v. United States* , 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), to support its denial. *Mitchell* included an express reservation on the question the state court decided. *See White* , 134 S.Ct. at 1703. In the wake of reservation in *Mitchell* , "[t]he Courts of Appeals ... recognized that *Mitchell* left [the sentencing question] unresolved; their diverging approaches to the question illustrate the possibility of fairminded disagreement." *White* , 134 S.Ct. at 1703 n.3. Thus, the United States Supreme Court opined that the Kentucky Supreme Court's rejection of respondent's Fifth Amendment claim was not objectively unreasonable because there was an intentional lack of guidance from the Court. The United States Supreme Court has made no such express reservations when it comes to *Brady* materiality or an admissibility requirement. Consequently, to the extent that language from our sister circuits might be read to recognize a general admissibility requirement in *Brady* , we respectfully conclude that they have erred. Discrepancies as to the interpretation of *Wood* ought not to substantiate the Pennsylvania Supreme Court's erroneous application of the *Brady* materiality standard in this case.

Further, had the Commonwealth not suppressed the Frazier documents, Dennis could have presented an "other person" defense at trial, which he was otherwise not able to do. The Frazier documents bring to light that Walker admitted to going to Olney High School—the school Williams and Howard attended—and he recognized Williams from school. Thus, the documents not only support *an* alternative shooter theory, but *the very same* alternative shooter theory that defense counsel could have been prepared to raise had the Howard activity sheet also been disclosed. Alterations in defense preparation and cross-examination at trial are precisely the types of qualities that make evidence material under *Brady* . Consequently, it was unreasonable for the Pennsylvania Supreme Court to conclude that the Frazier documents were not material. There is a reasonable probability that had the jury heard an "other person" defense, the result of the proceeding would have been different.

The Pennsylvania Supreme Court unreasonably applied federal law and applied law in a manner contrary to Supreme Court precedent. The Commonwealth's suppression of the Frazier documents violated *Brady* as they were favorable to the defense, and could have been used by defense counsel as exculpatory and impeachment evidence. Dennis is entitled to a new trial.

D. Cumulative Materiality

While the suppression of the Cason receipt, the Howard police activity sheet, and the Frazier documents support ordering a new trial, the cumulative effect of their suppression commands it. Had the *Brady* material been disclosed, there is a reasonable probability that the outcome of the
312 trial would have been different, and its *312 suppression undermines confidence in the verdict.

The District Court engaged in a cumulative materiality analysis in addition to granting each individual *Brady* claim. *Dennis V* , 966 F.Supp.2d at 517–18. This analysis was proper. When the issue ripened in *Dennis IV* and the Pennsylvania Supreme Court could have assessed the cumulative prejudice of withholding the Cason receipt, Frazier documents, and police activity sheet containing Howard's statements, it declined to do so explicitly. We are required to presume that the state court considered and rejected Dennis's cumulative materiality argument. *Johnson v. Williams* , —— U.S. ——, 133 S.Ct. 1088, 1097, 185 L.Ed.2d 105 (2013). Just as the Pennsylvania Supreme Court's rejections of Dennis's *Brady* claims constituted unreasonable application of federal law, its rejection of the cumulative materiality of the suppressed evidence, though not done explicitly, was an unreasonable application of *Brady* and its progeny.

The Supreme Court in *Kyles* instructed that the materiality of withheld evidence must be "considered collectively, not item by item." 514 U.S. at 436, 115 S.Ct. 1555. 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, 115 S.Ct. 1555 ("[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."). The Supreme Court recently reiterated that state courts are required to evaluate the materiality of suppressed evidence cumulatively. *Wearry* , 136 S.Ct. at 1007 ("[T]he state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively.")

As acknowledged by the District Court, the cumulative impeachment value of the suppressed evidence would have undermined the Commonwealth's case. The Cason receipt would have impeached the Commonwealth's primary response to Dennis's alibi by providing documentary proof that Cason testified falsely and would have transformed her into a witness for the defense. The inconsistent statement contained in the police activity sheet would have impeached Howard's credibility, undoubtedly the Commonwealth's most important eyewitness. Her impeachment by the Pugh statement would challenge her credibility, not simply the reliability of her identification during the photo array and lineup, which was what defense counsel was limited to at trial. Discrediting Cason and Howard may very well have raised sufficient doubt among the jury to acquit Dennis. Moreover, the Frazier documents could have supported the existence of another suspect who attended Howard's high school, and the significance of this becomes even more pronounced when considered with Howard's statements to the Pughs that the suspect attended her high school.

Together, the suppressed documents provided ample material to challenge the Commonwealth's investigation following the murder. As the District Court stated:

> Defense would have had a strong case to make that the Commonwealth abandoned promising leads: Police failed to meet with Frazier's aunt, to verify Walker's alibi, or to include Walker and Brown in photo arrays or line-ups; police also failed to follow up with Howard about the statement she allegedly made to the Pughs, to take a formal statement from the Pughs, or to interview Quinton. The Commonwealth allowed Cason to testify incorrectly that she worked until 2 p.m., and failed to investigate Dennis'[s] alibi given the actual timing of

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> Cason's activities. Discrediting the investigation is a crucial corollary to presenting an innocence/alibi defense: If the defense could lead the jury to believe that the Commonwealth conducted a shoddy investigation, the jury would have been more likely to listen to and believe Dennis'[s] alibi.

Dennis V , 966 F.Supp.2d at 518. The withholding of the *Brady* material would have given defense counsel unique ability to discredit the Commonwealth's primary witnesses, bolster his alibi defense using objective documentary support from a disinterested party, highlight the shoddiness of the Commonwealth's investigation, and perhaps point to another perpetrator. The cumulative effect of the suppression of these documents requires habeas relief.

IV. Conclusion

For the foregoing reasons, we will affirm the judgment of the District Court and grant Dennis a conditional writ of habeas corpus. Petitioner shall be released unless the Commonwealth commences a new trial against him within ninety days after issuance of the mandate.

McKEE, Chief Judge, concurring.

I. Introduction

More than three decades ago, Justice Brennan cautioned:

> [E]yewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'[1] [1] [1] [1]

[1] *Watkins v. Sowders* , 449 U.S. 341, 352, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting) (alterations and emphasis in original) (quoting Elizabeth Loftus, *Eyewitness Testimony* 19 (1979)).

[1] All references to the "Dissent" refer to Judge Fisher's dissenting opinion, unless the reference is explicitly made to Judge Hardiman's dissent.

[1] **First Circuit:** *United States v. Rodriguez* , 162 F.3d 135, 147 (1st Cir. 1998) ("The government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defender....").

Second Circuit: *United States v. Payne* , 63 F.3d 1200, 1208 (2d Cir. 1995) ("[E]vidence is not considered to have been suppressed within the meaning of the *Brady* doctrine if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of that evidence." (internal quotation marks and alteration omitted)).

Fourth Circuit: *United States v. Wilson* , 901 F.2d 378, 381 (4th Cir. 1990) ("[W]here the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine.").

Fifth Circuit: *United States v. Dixon* , 132 F.3d 192, 199 (5th Cir. 1997) ("*Brady* does not obligate the government to produce for a defendant evidence or information already known to him, or that he could have obtained from other sources by exercising reasonable diligence." (internal quotation marks and alteration omitted)); *United States v. Prior* , 546 F.2d 1254, 1259 (5th Cir. 1977) ("[N]umerous cases have ruled that the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.").

Sixth Circuit: *Matthews v. Ishee* , 486 F.3d 883, 891 (6th Cir. 2007) ("Where ... the factual basis for a claim is reasonably available to the petitioner or his counsel from another source, the government is under no duty to supply that information to the defense." (internal quotation marks omitted)).

Seventh Circuit: *Boss v. Pierce* , 263 F.3d 734, 740 (7th Cir. 2001) ("Evidence is suppressed for *Brady* purposes only if ... the evidence was not otherwise available to the defendant through the exercise of reasonable diligence.").

Eighth Circuit: *United States v. Zuazo* , 243 F.3d 428, 431 (8th Cir. 2001) ("The government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels.").

Ninth Circuit: *Raley v. Ylst* , 470 F.3d 792, 804 (9th Cir. 2006) ("[W]here the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a *Brady* violation by not bringing the evidence to the attention of the defense." (quoting *United States v. Brown* , 582 F.2d 197, 200 (2d Cir. 1978))).

Eleventh Circuit: *LeCroy v. Sec'y, Fla. Dep't of Corr.* , 421 F.3d 1237, 1268 (11th Cir. 2005) ("To establish that he suffered a *Brady* violation, the defendant must prove that ... the defendant did not possess the evidence and

could not have obtained it with reasonable diligence....").

[1] The inability of federal courts to follow AEDPA has reached epidemic proportions. As I pointed out in 2012, since 2000

> the Supreme Court has granted certiorari in ninety-four cases arising under AEDPA, forty-six of which involved questions of federal court deference to decisions of state courts. Thirty-four of those cases (approximately seventy-four percent) have been reversed because the court of appeals failed to afford sufficient deference to the state court. Remarkably, twenty-two of those cases—almost fifty percent—were reversed without dissent.

Garrus v. Sec'y of Pennsylvania Dep't of Corr. , 694 F.3d 394, 412–14 (3d Cir. 2012) (en banc) (Hardiman, J., dissenting) (collecting cases).

In the four short years since we decided Garrus , the errors have continued apace. By my count, of the nineteen cases arising under AEDPA in which the Supreme Court has granted certiorari, fourteen involved questions of federal court deference to statecourt decisions. Thirteen of those cases were reversed—ten without dissent . See Kernan v. Hinojosa , ––U.S. ––––, 136 S.Ct. 1603, 1606, 194 L.Ed.2d 701 (2016) (per curiam) (reversing the Ninth Circuit's treatment of a summary decision as a nonmerits adjudication and noting that "the Ninth Circuit has already held that statecourt denials of claims identical to [the petitioner's] are not contrary to clearly established federal law"); Woods v. Etherton , ––U.S. ––––, 136 S.Ct. 1149, 1153, 194 L.Ed.2d 333 (2016) (unanimously reversing the Sixth Circuit because "a fairminded jurist—applying the deference due the state court under AEDPA —could certainly conclude that the court was not objectively unreasonable in deciding that appellate counsel was not incompetent under Strickland , when she determined that trial counsel was not incompetent under Strickland "); White v. Wheeler , –– U.S. ––––, 136 S.Ct. 456, 461–62, 193 L.Ed.2d 384 (2015) (unanimously reversing the Sixth Circuit's grant of habeas relief because it "did not properly apply the deference it was required to accord the statecourt ruling"); Davis v. Ayala , –– U.S. ––––, 135 S.Ct. 2187, 2208, 192 L.Ed.2d 323 (2015) (reversing the Ninth Circuit's grant of the writ on the ground that fairminded jurists could disagree as to whether a state court's exclusion of a defendant's attorney from part of a Batson hearing was harmless error); Woods v. Donald , –– U.S. ––––, 135 S.Ct. 1372, 1377, 191 L.Ed.2d 464 (2015) (unanimously reversing the Sixth Circuit's grant of habeas relief because the state court's conclusion that the petitioner's counsel was not per se ineffective "was not contrary to any clearly established holding" of the Court); Glebe v. Frost , ––U.S. ––––, 135 S.Ct. 429, 430, 190 L.Ed.2d 317 (2014) (unanimously reversing the Ninth Circuit's conclusion that the state court "unreasonably applied clearly established federal law by failing to classify the trial court's restriction of closing argument as structural error" because no Supreme Court precedent clearly established that such mistakes rank as structural error); Lopez v. Smith , –– U.S. ––––, 135 S.Ct. 1, 5, 190 L.Ed.2d 1 (2014) (unanimously reversing the Ninth Circuit where it "had no basis to reject the state court's assessment that [the petitioner] was adequately apprised of the possibility of conviction on an aidingandabetting theory"); White v. Woodall , –– U.S. ––––, 134 S.Ct. 1697, 1702–04, 188 L.Ed.2d 698 (2014)

(reversing the Sixth Circuit's grant of habeas relief because the state court's determination that the trial court's jury instructions did not violate clearly established federal law was not "objectively unreasonable"); Burt v. Titlow , ––– U.S. ––––, 134 S.Ct. 10, 17–18, 187 L.Ed.2d 348 (2013) (reversing without dissent the Sixth Circuit's judgment that the state court's conclusion that counsel's performance was ineffective was unreasonable); Nevada v. Jackson , ––– U.S. ––––, 133 S.Ct. 1990, 1994, 186 L.Ed.2d 62 (2013) (per curiam) (unanimously reversing the Ninth Circuit's grant of habeas relief where the state court reasonably applied federal law in determining that the petitioner had not been denied the right to present a complete defense when he was not allowed to present certain extrinsic evidence); Metrish v. Lancaster , ––– U.S. ––––, 133 S.Ct. 1781, 1792, 185 L.Ed.2d 988 (2013) (unanimously reversing the Sixth Circuit's grant of the writ where Supreme Court had "never found a due process violation in circumstances remotely resembling [the petitioner's] case"); Johnson v. Williams , ––– U.S. ––––, 133 S.Ct. 1088, 1097, 185 L.Ed.2d 105 (2013) (reversing without dissent the Ninth Circuit's grant of relief based on the faulty conclusion that the state court had overlooked a meritorious Sixth Amendment claim); Ryan v. Gonzales , ––– U.S. ––––, 133 S.Ct. 696, 700, 184 L.Ed.2d 528 (2013) (killing two birds with one stone in unanimously reversing both the Sixth Circuit's and Ninth Circuit's grants of relief where the courts wrongly concluded that federal law provides a right to incompetent prisoners to suspend their federal habeas proceedings); but see Brumfield v. Cain , ––– U.S. ––––, 135 S.Ct. 2269, 2281, 192 L.Ed.2d 356 (2015) (finding the state court's determination of the facts regarding a defendant with an IQ of 75 unreasonable).

James Dennis was sentenced to death because three eyewitnesses appeared at trial and confidently pointed their fingers at him when asked if they saw Chedell Williams' killer in the courtroom. The prosecution later told the jury that if they believed these witnesses, they should convict James Dennis of first degree murder. And they did.

The Dissent would deny Dennis relief in large part because it believes that "the evidence against Dennis was strong."[2] [2] [2] [2] According to the Dissent, "it is hard to discount the identification testimony of three eyewitnesses."[3] [3] [3] [3] Yet, nearly half a century of scientific research teaches that eyewitness testimony can be one of the greatest causes of erroneous convictions. The jurors in Dennis' trial, like many juries, were never properly instructed about the dangers of eyewitness identifications. The jury charge given in this case failed to equip them with the knowledge necessary to accurately assess the reliability of the three eyewitnesses who pointed their fingers at James Dennis and said, "He's the one."

2 Dissent at 357 (Fisher, J.).

2 Although the Majority is correct that the "Supreme Court has never recognized an affirmative due diligence duty of defense counsel as part of *Brady* " (Majority Op. at 290), there is no Supreme Court opinion that forecloses the adoption of that duty. The Supreme Court has emphasized that the *Brady* rule requires disclosure of evidence that is "unknown to the defense," *United States v. Agurs* , 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the rule is rooted in "the defendant's right to a fair trial," *id* . at 108, 96 S.Ct. 2392. Based on that language, several courts of appeals have concluded that information is not unknown to the defense for *Brady* purposes if it can be obtained by the exercise of reasonable diligence, and that requiring diligence on the part of

defense counsel does not implicate the right to a fair trial. *See, e.g.* , *Lugo v. Munoz* , 682 F.2d 7, 10 (1st Cir. 1982) ("Since the information at issue here was available to the defense attorney through diligent discovery, we find that the prosecutor's omission was not of sufficient significance to result in the denial of the defendant's right to a fair trial" (internal quotation marks omitted).); *United States v. Brown* , 628 F.2d 471, 473 (5th Cir. Unit A 1980) ("Truth, justice, and the American way do not ... require the Government to discover and develop the defendant's entire defense."); *United States v. Hedgeman* , 564 F.2d 763, 769 (7th Cir. 1977) (establishing a diligence requirement and noting that "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial"). The Dissent has also collected cases to that effect. (*See* J. Fisher Dissent Op. at 362–63 n.1.) In any event, on AEDPA review it is sufficient for our purposes that there is no Supreme Court decision clearly holding that there is not a reasonable diligence requirement. *See Harrington v. Richter* , 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (noting that a state-court error on habeas review must be one that is "well understood and comprehended in existing law beyond any possibility for fairminded disagreement").

[2] The Majority asserts that the DPW receipt was not publicly available because DPW regulations prevent disclosure of information about welfare recipients. Maj. Op. 289–90. Dennis did not argue this point below or raise it on appeal, and, to the extent the DPW privacy regulations applied to the receipt, Dennis's admission that the receipt was available with minimal investigation makes the regulations irrelevant.

[2] *See* Noam Biale, *Beyond A Reasonable Disagreement: Judging Habeas Corpus* , 83 U. Cin. L. Rev. 1337, 1391 (2015) ("Since *Richter* ... the circuits have split on whether the opinion's 'could have supported' language for decisions unaccompanied by a reasoned opinion applies to decisions that *do* include a reasoned opinion.").

[3] *Id.*

[3] *See Grant v. Lockett* , 709 F.3d 224, 231 (3d Cir. 2013) ("It is therefore clear that trial counsel could have discovered [the otherwise-suppressed evidence] had he exercised reasonable diligence."); *United States v. Pelullo* , 399 F.3d 197, 213 (3d Cir. 2005) ("[T]he burden is on the defendant to exercise reasonable diligence."); *United States v. Starusko* , 729 F.2d 256, 262 (3d Cir. 1984) ("[T]he government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself" (internal quotation marks omitted).).

[3] *See Williams v. Taylor* , 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("[T]he phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' ... refers to the holdings, as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision* ." (emphasis added)).

3 The Majority and Judge Jordan conclude that the Supreme Court's decision in *Lafler v. Cooper* "implies a limit" to the reason-supplying rule announced in *Richter* . Jordan Concurrence 351. I do not read *Lafler* that way. Significantly, habeas relief in that case rested on the Supreme Court's holding that Michigan Court of Appeals' application of *Strickland* was "*contrary to* "—not an "unreasonable application of"—clearly established federal law. —— U.S. ——, 132 S.Ct. 1376, 1390, 182 L.Ed.2d 398 (2012). Specifically, rather than applying the *Strickland* ineffective-assistance-of-counsel standard, the state court applied a (completely wrong) "knowing and voluntary" plea rejection rule. *Id.* Because a decision is categorically "contrary to" clearly established federal law if the state court "applies a rule that contradicts the governing law," *Williams v. Taylor* , 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), AEDPA deference was inappropriate, so de novo review applied. *Lafler* , 132 S.Ct. at 1390. Consequently, the case was not amenable to *Richter* 's "could have supported" analysis to determine whether the state court decision was an *unreasonable application* of federal law. For these reasons, I disagree with the Majority and Judge Jordan that *Lafler* instructs federal courts to "take the state court's decision as written" and apply *Richter* only in the small subset of cases in which the state court left so-called "gaps" to be filled. Jordan Concurrence 351.

Nor do I read Wetzel v. Lambert to imply any limit on Richter . Although the opinion in that case did not include Richter 's "theories [that] ... could have supported" language in its recitation of AEDPA's general standard, see —— U.S. ——, 132 S.Ct. 1195, 1198, 182 L.Ed.2d 35 (2012), the Court did not reject that approach by implication. Rather, in Wetzel the reasons for upholding the state court's decision under AEDPA were expressed by the state court. The petitioner claimed the prosecution violated Brady by suppressing a police activity sheet consisting of a photo display marked with written notations suggesting that "someone other than or in addition to" the petitioner had committed the crime. Id. at 1196–97. We granted habeas relief, but the Supreme Court vacated and remanded, explaining that we had "overlooked the determination of the state courts that the notations were ... 'not exculpatory or impeaching' but instead 'entirely ambiguous.' " Id. at 1198. The Court criticized us for "focus[ing] solely on the [state court's] alternative ground that any impeachment value that might have been obtained from the notations would have been cumulative." Id. The problem was that "[i]f the conclusion in the state courts about the content of the document was reasonable—not necessarily correct, but reasonable—whatever those courts had to say about cumulative impeachment evidence would be beside the point." Id. Hence, by failing to recognize—as the state courts did—the " 'ambiguous' nature of the notations" and the " 'speculat[ive]' nature of [the petitioner's] reading of them," we ran afoul of AEDPA. Id. Far from implying a limitation on Richter , Wetzel merely requires federal habeas courts to review state court opinions in search of a reasonable reading that would support the decision under federal law.

I therefore write separately to underscore the problems inherent in eyewitness testimony and the inadequacies of our standard jury instructions relating to that evidence. Jury instructions must educate jurors on the relevant scientific findings regarding eyewitness reliability in order to mitigate the dangers associated with inaccurate eyewitness identifications. The standard instructions, which were used here, are not only insufficient, they are misleading. However, I join

314 the Majority's *314 thoughtful explanation of why Dennis is entitled to relief under AEDPA's stringent standard of review in its entirety.

In the last thirty years, over 2,000 studies have examined human memory and cognition and their relationship to the reliability of eyewitness identifications.[4] [4] [4] [4] This impressive body of scholarship and research has revealed that eyewitness accounts can be entirely untrustworthy. As the International Association of Chiefs of Police has concluded, "[o]f all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification."[5] [5] [5] [5]

4 *State v. Henderson* , 208 N.J. 208, 27 A.3d 872, 892 (2011), *holding modified by State v. Chen* , 208 N.J. 307, 27 A.3d 930 (2011) ; Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress* , 27 Int'l J.L. & Psychiatry 265, 265 (2004).

4 More specifically, *Richter* says: "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of th[e Supreme] Court." 562 U.S. at 102, 131 S.Ct. 770.

4 The Majority adopts the district court's conclusion that the activity sheet would have shown that Howard either lied to the Pughs or lied at trial. Maj. Op. 301. Given Howard's testimony at trial and the postconviction relief hearings, an alternative conclusion is as least as likely: in a crowded and grieving house immediately after the murder, the Pughs misunderstood or later misreported what Howard said.

4 Some courts have begun to recognize *Richter* 's true reach. *See, e.g* , *Holland v. Rivard* , 800 F.3d 224, 235 (6th Cir. 2015) (concluding that although "a state court decision unaccompanied by any explanation differs from a state court decision based on erroneous reasoning ... *Richter* suggests that this is not a meaningful distinction" and that AEDPA requires a habeas petitioner to show that there was "*no reasonable basis* for the state court to deny relief ... *whether or not* the state court reveals [its reasoning]"); *Trottie v. Stephens* , 720 F.3d 231, 240–41 (5th Cir. 2013) ("We review only the ultimate legal determination by the state court—not every link in its reasoning."); *Brady v. Pfister* , 711 F.3d 818, 827 (7th Cir. 2013) (Wood, J.) ("[I]t is clear that a bad reason does not necessarily mean that the ultimate result was an unreasonable application of established doctrine.... If a state court's rationale does not pass muster ... for Section 2254(d)(1) cases, the only consequence is that further inquiry is necessary."); *Mann v. Ryan* , 774 F.3d 1203, 1224–25 (9th Cir. 2014) (Kozinski, J., concurring and dissenting) ("I have misgivings about whether, in light of the Supreme Court's decision in *Richter* , we are still entitled to reverse a state court's reasonable decision based on what we consider to be its incorrect reasoning.... After *Richter,* it seems clear that we should assess the reasonableness of a state court's decision, not its reasoning.").

5 Int'l Ass'n of Chiefs of Police, *Training Key No. 600: Eyewitness Identification* 5 (2006), *available at* http://www.ripd.org/Documents/APPENDI

X/2/SupportingM¨aterials/IP1¨130¨IACP2¨006.pdf.

5 At the same time, the court went so far astray in applying *Brady* that its decision also "involved an unreasonable application of ... clearly established Federal law...." 28 U.S.C. § 2254(d)(1).

5 *See Weiss* , 986 A.2d at 816 (remanding to the postconviction relief court to "consider whether disclosure of the impeachment evidence to competent counsel would have made a different result reasonably probable," which "will necessarily entail a review of all the evidence presented at trial, not for its sufficiency, but for the potential negative effect disclosure of the alleged impeachment evidence would have had thereon"); *id.* at 815 ("The United States Supreme Court has made clear that *Bagley* 's materiality standard is not a sufficiency of the evidence test.").

5 Such arbitrariness is all the more perplexing in light of the fact that AEDPA "does not require citation of [Supreme Court] cases—indeed, it does not even require *awareness* of [Supreme Court] cases." *Early v. Packer* , 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002).

Yet, the law has not caught up to the science. The Innocence Project has documented that, nationwide, eyewitness misidentifications have been a factor in seventy-five percent of the wrongful convictions that were subsequently overturned by DNA evidence.[6] [6] [6] [6] One of the most powerful and prominent examples of such a wrongful conviction is the story of Ronald Cotton and Jennifer Thompson. In July 1984, a man broke into Thompson's apartment and raped her at knife point.[7] [7] [7] [7] When shown a photo array three days later, Thompson tepidly selected Cotton as her attacker.[8] [8] "I think this is the guy,"[9] [9] she said, pointing to Cotton's photo. The lead detective then asked her if she was sure, and she responded, "Positive."[10] [10] But belying her professed certainty, she then asked the detective, "Did I do OK?"[11] [11] He reassured her, "You did great."[12] [12] About a month later, Thompson viewed a live lineup, in which Cotton was the only one repeated from the prior photo array.[13] When Thompson positively identified Cotton from that lineup, she stated that she was certain he was the one who had attacked her.[14] Cotton was then arrested and charged with one count of rape. At his trial, Thompson testified that she was "absolutely sure" 315 that Cotton *315 was her rapist.[15] There was no corroboration of her identification, and she admitted that she had not been wearing her eyeglasses at the time of the attack.[16] Nonetheless, a jury convicted Cotton on the strength of Thompson's positive identification.[17] Cotton was sentenced to life in prison plus fifty-four years.[18]

6 The Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* 3 (2009), *available at* http://www.innocenceproject.org/wp-content/uploads/2016/05/eyewitness_id_report-5.pdf; *see also* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 8-9, 279 (2011) (finding same in 190 of 250 DNA exoneration cases); Brief for Am. Psychol. Ass'n as Amicus Curiae Supporting Petitioner at 14-15, *Perry v. New Hampshire* , 132 S.Ct. 716 (2012) ("[S]tudies have consistently found that the rate of inaccurate identifications is roughly 33 percent.").

6 It is important to understand the interplay between §§ 2254(a) and 2254(d). "Section 2254(a) permits a federal court to entertain only those applications alleging that a

person is in state custody 'in violation of the Constitution or laws or treaties of the United States.' " *Cullen v. Pinholster* , 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). Section 2254(d) imposes an "additional restriction" on habeas relief in cases where a claim "has been adjudicated on the merits in State court proceedings." *Id* . (internal quotation marks omitted). In those circumstances, habeas relief is barred unless the state court's decision is "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Section 2254(d) thus sets forth a necessary, but not sufficient, prerequisite to habeas relief only for those claims adjudicated on the merits in state court. If that high bar is cleared—*i.e.* , the state court's decision is so unreasonable or contrary to federal law as established by the Supreme Court—we are still restricted to granting habeas relief only if the petitioner has shown he is in custody in violation of federal law under § 2254(a). In that second analysis, we review the petitioner's claim *de novo* , without deference to the state court's legal conclusions. *Panetti* , 551 U.S. at 953, 127 S.Ct. 2842 ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires.").

6 The Majority asserts that the Frazier "lead was not fruitless, it was simply not rigorously pursued." Maj. Op. 307. The police did pursue this lead, however, going so far as to take Frazier out of his jail cell and bring him with them on his tour of Philadelphia. The Majority questions why police did not interview more of the people involved in Frazier's tale. Police can always do more investigative work, but they have limited resources. And simply put, this lead coming from a jailhouse snitch was a dead end. The police should not be faulted for deciding not to waste more time on what Frazier himself admitted was "bullshit." Response to Pet. Rh'g 17 n.13.

6 *See Hodges v. Colson* , 727 F.3d 517, 537 n.5 (6th Cir. 2013) ("[If *Richter* is limited to summary dispositions], the more information the state court provides, the less deference we grant it. This is contrary not only to the language of the statute, which speaks of 'claims' not components of claims, but also contrary to the spirit of § 2254(d), which is designed to give more deference to a state court judgment on the merits.").

7 60 Minutes, *Eyewitness: How Accurate is Visual Memory?* , CBS News, Mar. 6, 2009, http://www.cbsnews.com/news/eyewitness-how-accurate-is-visual-memory.

7 *See Premo* , 562 U.S. at 126-27, 131 S.Ct. 733 (on performance: "It is not clear how the successful exclusion of the confession would have affected counsel's strategic calculus. The prosecution had at its disposal two witnesses able to relate another confession.... Moore's counsel made a reasonable choice to opt for a quick plea bargain."); *id* . at 129, 131 S.Ct. 733 (on prejudice: "The state court here reasonably could have determined that Moore would have accepted the plea agreement even if his second confession had been ruled inadmissible. By the time the plea agreement cut short investigation of Moore's crimes, the State's case was already formidable and included two witnesses to an admissible confession.").

7 Because the Pennsylvania Supreme Court could reasonably have determined that the Cason receipt was not suppressed and reasonably determined that the Frazier documents were not subject to *Brady* , materiality was an issue with only the Pugh statement. Accordingly, there is no need to conduct a cumulative materiality analysis.

7 I disagree with Judge Jordan that my understanding of *Richter* conflicts with *Ylst v. Nunnemaker* and *Wiggins v. Smith* . Both of those cases involved the threshold question of whether the petitioners' claim had been decided *on the merits* . The *Ylst* Court was faced with an "unexplained" State supreme court order denying the petitioner's habeas petition, wherein it was unclear whether the court rested its denial on a procedural default (the basis of the lower court's holding) or on the merits of his *Miranda* claim. 501 U.S. 797, 801, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). The Supreme Court reversed the Ninth Circuit's conclusion that the decision was on the merits, explaining that, "where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Id.* at 803, 111 S.Ct. 2590. To the extent that *Ylst* requires us to "look through" unreasoned state court opinions to the last reasoned opinion, I have no quarrel with Judge Jordan that we ought to first consider whether the state court's stated explanation is reasonable before deigning to supply reasons of our own under *Richter* . As for *Wiggins* , we have explained that the reason the Court declined to apply deference with respect to the prejudice prong of the petitioner's *Strickland* claim was that the state courts had not decided the *Strickland* prejudice issue "on the merits." *Palmer v. Hendricks* , 592 F.3d 386, 400 (3d Cir. 2010) ; *see also Wiggins* , 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis."). Because AEDPA deference only extends to "any claim that was adjudicated on the merits in State court proceedings," 28 U.S.C.A. § 2254(d), the determination whether the state-court decision under federal review was made on the merits is prior to the consideration, *vel non* , of whether adequate reasons exist in support of that decision. I do nevertheless agree with Judge Jordan that *Wiggins* is in some tension with my approach because it engaged in de novo review of the second prong of *Strickland* even though the state court denied relief but addressed only the first prong. However, *Richter* —decided after *Wiggins* —speaks clearly on this point. "[A] habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.... whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Richter* , 562 U.S. at 98, 131 S.Ct. 770.

8 *Id.*

8 The Commonwealth argues that this sentence is not necessarily a factual finding to which we must defer under § 2254(e)(1), but was instead the Pennsylvania Supreme Court's recapitulation of Dennis's argument. The Majority rightly rejects that argument. (*See* Majority Op. at 288 n.17.) The plain language of *Dennis I* indicates that the statement was a finding of fact. *See Paulson v. Newton Corr. Facility, Warden* , 703 F.3d 416, 420 (8th Cir. 2013) (interpreting, in a habeas case, a state-court

opinion consistent with its "plain language"). When the Pennsylvania Supreme Court was referring to arguments from the parties, it said so: in the very next paragraph of that opinion, every sentence contains some version of the words "appellant argues." No such language appears in the disputed sentence (or its entire surrounding paragraph, for that matter). Thus, it certainly appears that the Pennsylvania Supreme Court was making a statement of historical fact when it said that "the police came into possession of" the Cason receipt. *Dennis I* , 715 A.2d at 408.

Without the deference afforded to an express factual finding, it would be an open question whether the police actually possessed the Cason receipt. When Dennis first offered Cason's affidavit alleging that the police took her receipt, he himself argued that a "remand for an evidentiary hearing" would be "necessary to establish the record" before the Brady issue could be resolved. (App. 2012; see also App. 1891, 2021.) Likewise, the Commonwealth understood Cason's affidavit to be merely a proffer of her "proposed testimony," and argued that such testimony would have lacked the support of "competent evidence." (App. 1923.) Further complicating matters, Cason's 1997 recollection of her interview with the police is in conflict with the police's contemporaneous record of that encounter in 1992 (which did not enter the court record until after Dennis I , during PCRA proceedings). Were we here on de novo review of that factual finding, we could well question whether the police did, in fact, have the Cason receipt. As it stands, the state court's factual findings are "presumed to be correct." 28 U.S.C. § 2254(e)(1).

9 Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts, Committee on Science, Technology, and Law, Committee on Law and Justice, Division of Behavioral and Social Sciences and Education, National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 10 (2014).

9 In its sur-reply brief before the state court, the Commonwealth mentioned the potential "public availability" of the receipt. (App. 2026.) Under Pennsylvania law, however, arguments raised for the first time in reply briefs are generally regarded as waived. *Commonwealth v. Potts* , 388 Pa.Super. 593, 566 A.2d 287, 296 (1989).

10 *Id.*

10 In *Ylst* , the Supreme Court held that when there is one reasoned state judgment rejecting a federal claim, any later unexplained orders upholding that judgment or rejecting the same claim will be presumed to rest upon the same ground. 501 U.S. at 803, 111 S.Ct. 2590. In emphasizing the difficulty of discerning the reasoning behind an unexplained state-court order—or one "whose text or accompanying opinion does not disclose the reason for the judgment," *id* . at 802, 111 S.Ct. 2590 —the Court said: "Indeed, sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." *Id* . at 803, 111 S.Ct. 2590. Although *Ylst* predates the passage of AEDPA, the *Richter* Court cited it favorably, 562 U.S. at 99–100, 131 S.Ct. 770, thus indicating the continued validity of its presumption.

11 *Id.*

11 That reading of *Richter* has ample support in other circuits. *See, e.g.* , *Cannedy v. Adams* , 706 F.3d 1148, 1158 (9th Cir. 2013) ("[I]t does not follow from *Richter* that, when there *is* a reasoned decision by a lower state court, a federal habeas court may no longer 'look through' a higher state court's summary denial to the reasoning of the lower state court."); *Johnson v. Secretary, DOC* , 643 F.3d 907, 930 n.9 (11th Cir. 2011) ("The Court's instruction from *Harrington* does not apply here because the Florida Supreme Court did provide an explanation of its decision...."); *Sussman v. Jenkins* , 642 F.3d 532, 534 (7th Cir. 2011) (distinguishing *Richter* because that case "addresses the situation in which a state-court decision 'is unaccompanied by an explanation,' " whereas in the instant case "the state appellate court issued an opinion").

To read Richter to apply to a state court's ultimate decisions, irrespective of stated reasoning, also requires that we assume the Richter Court intended to overrule some precedents sub silentio . In particular, Ylst established a presumption that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." 501 U.S. at 803, 111 S.Ct. 2590. Judge Hardiman endeavors to narrow the Ylst presumption to only apply when we are uncertain as to whether the state court decided a claim "on the merits." (J. Hardiman Dissent Op. at 368 n.7.) So, in his view, we look through to the last reasoned state court decision to determine whether the case was decided on the merits, and then, having answered that question, take no account of the reasoning in that state court decision. But, in applying the Ylst presumption, the Supreme Court has analyzed and discussed the expressed reasoning of lower state courts. See Johnson v. Williams , —— U.S. ——, 133 S.Ct. 1088, 1097–99, 185 L.Ed.2d 105 (2013) ; see also Hittson v. Chatman , —— U.S. ——, 135 S.Ct. 2126, 2128, 192 L.Ed.2d 887 (2015) (Ginsburg, J., concurring in the denial of certiorari) ("There is no reason not to 'look through' ... to determine the particular reasons why the state court rejected the claim on the merits."). The proper application of the Ylst presumption raises all of the same policy problems Judge Hardiman has noted —just one step lower in the state review process. If we "look through" an unreasoned state court decision, Ylst presumably requires that we then review the reasoning given in the lower state court. If not, then why bother "looking through" at all? If we truly read Richter in the way Judge Hardiman proposes—and took his reasoning to its logical conclusion —it would require that we void the Ylst presumption, because we need not "look through" unreasoned judgments when we actually review only decisions and not their reasoning. But, in the words of the Supreme Court, "a presumption which gives [unreasoned orders] no effect—which simply 'looks through' them to the last reasoned decision—most nearly reflects the role they are ordinarily intended to play." Ylst , 501 U.S. at 804, 111 S.Ct. 2590 (emphasis in original). It is hard to accept that the Richter Court intended to implicitly overrule Ylst , particularly because the Court cited Ylst favorably. See Richter , 562 U.S. at 99–100, 131 S.Ct. 770. The Court also applied the Ylst presumption just this past term, thus confirming its continued viability. See Kernan v. Hinojosa , —— U.S. ——, 136 S.Ct. 1603, 1605–06, 194 L.Ed.2d 701 (2016) (per curiam).

And, under Judge Hardiman's approach, Ylst is not the only precedent that would have to fall. Compare J. Hardiman Dissent Op. at 375 ("Where the state court denies

relief but addresses only certain prongs of a test or components of a claim, the reviewing federal court should likewise consider what reasons regarding an unaddressed prong or component could have supported the decision."), with Wiggins v. Smith , 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (reviewing a Strickland claim, and concluding that its "review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the Strickland analysis"), and Palmer v. Hendricks , 592 F.3d 386, 400 (3d Cir. 2010) (citing Wiggins for the proposition "that because the state courts did not decide the prejudice issue on the merits, AEDPA's deferential standards do not apply to our resolution of the prejudice question"). In Wiggins , the Supreme Court did not defer to the state court's order in assessing the second prong of the petitioner's Strickland claim because "neither of the state courts below reached this prong of the Strickland analysis." 539 U.S. at 534, 123 S.Ct. 2527. The Court thus acted contrary to Judge Hardiman's proposed holding here—it engaged in de novo review of the second prong even though "the state court denie[d] relief but addresse[d] only certain prongs of a test or components of a claim...." (J. Hardiman Dissent Op. at 375.) Judge Hardiman forthrightly acknowledges that his proposed holding is in tension with Wiggins , but then suggests that Richter (as the later of the two cases) undermines Wiggins . I do not believe that Richter intended that result, especially because the two cases can be reconciled.

12 *Id* .

12 Again, if we determine that a state court's reasoning is contrary to clearly established federal law, we then engage in *de novo* review of the claim in question. *See supra* note 6; *Panetti* , 551 U.S. at 948–54, 127 S.Ct. 2842. In his dissent, Judge Hardiman posits a hypothetical in which our decision to grant habeas relief could turn on the state court's method of drafting its decision. If the state court issues a summary order, we would apply *Richter* and deny habeas relief by application of AEDPA deference. If, however, it issues a reasoned decision, and that reasoning is contrary to clearly-established federal law, we would grant habeas relief—to the very same claimant—after *de novo* review of the underlying claim. My colleague thinks that outcome absurd, but, whether we like it or not, that is what the Supreme Court directs us to do. Under AEDPA, we must defer (1) to the reasoning actually elaborated in a state court decision, and (2) to any basis that can reasonably support a state court's decision, but *only* if its own reasoning cannot be fairly discerned. The latter is the import of *Richter* . If the Supreme Court wanted us to afford AEDPA deference to all state court decisions regardless of the extent of their reasoning, that would be a rule of considerable consequence for habeas petitioners. Presumably the Supreme Court would have said (or at least suggested) as much in *Richter* , *Premo* , *Lafler* , *Wetzel* , or any of the other numerous habeas appeals it has considered in recent years and that Judge Hardiman has collected in his dissent. If anything, though, the Court has said the contrary. *See Panetti* , 551 U.S. at 954, 127 S.Ct. 2842 ("§ 2254 does not preclude relief if *either* the reasoning *or* the result of the state-court decision contradicts" clearly-established Supreme Court precedent (internal quotation marks and alteration omitted, emphasis added).).

A petitioner does not get any windfall under the approach I have outlined based on Supreme Court precedent. If his claim

does not have merit, it will fail even under de novo review. Under Judge Hardiman's approach, by contrast, state prosecution teams do get a windfall. They would prevail unless every conceivable route to victory is "contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In other words, the prosecution wins even if it never argued a sensible position and the state court gave only a completely erroneous basis for its decision. I do not believe we can or should read Richter as going that far.

13 *Id.* ; 60 Minutes, *supra* .

14 National Research Council, *Identifying the Culprit* , *supra* , at 10.

15 *Id.*

16 Jules Epstein, *Eyewitnesses and Erroneous Convictions: An American Conundrum* , *in Controversies in Innocence Cases in America* 41, 43 (Sarah Lucy Cooper ed., 2014).

17 National Research Council, *Identifying the Culprit* , *supra* , at 10.

18 *Id.*

The story does not end there. In prison, Cotton learned that a fellow inmate named Bobby Poole had admitted raping Thompson to another inmate. Based on this information, Cotton managed to win a new trial.[19] At that retrial, Thompson had an opportunity to view Poole. Her reaction: "I have never seen him in my life."[20] As Thompson later recounted in an interview about the case, when she was asked to look at Poole during Cotton's second trial, she was angry: "I thought, 'how dare you. How dare you question me? How dare you try to paint me as someone who could possibly have forgotten what my rapist looked like, I mean, the one person you would never forget. How dare you.' "[21]

19 Epstein, *supra* , at 43.

20 National Research Council, *Identifying the Culprit* , *supra* , at 10.

21 60 Minutes, *supra* .

Based on Thompson's unequivocal affirmation of her identification of Cotton, he was once again convicted. He served over a decade in prison before DNA tests finally confirmed that Cotton was innocent and Poole was, in fact, the rapist.[22] As one legal commentator described this case, "[t]he fallibility of eyewitness testimony and the malleability of memory could not be clearer, as here a crime victim had seen the scientifically proven perpetrator but instead saw Cotton's face as that of her assailant."[23]

22 National Research Council, *Identifying the Culprit* , *supra* , at 10.

23 Epstein, *supra* , at 43 (citation omitted).

As I will elaborate below when I discuss the even more remarkable story of John White's erroneous conviction, Cotton's story cannot readily be dismissed as a fluke. Moreover, problems of erroneous identification remain even where more than one eyewitness identifies the same person as the perpetrator. In thirty-eight percent of misidentification cases documented by the Innocence Project, multiple eyewitnesses misidentified the same innocent person.[24] Almost

without exception, eyewitnesses who identify the wrong person express complete confidence that they chose the real perpetrators.[25]

24 The Innocence Project, *Reevaluating Lineups* , *supra* , at 3.

25 National Research Council, *Identifying the Culprit* , *supra* , at 11.

We should therefore find precious little solace in the fact that three eyewitnesses fingered James Dennis. As I will discuss, the procedures used to elicit the identifications of Dennis and the circumstances surrounding the crime raise serious questions about the accuracy of those identifications. The voluminous studies conducted on the subjects of memory and eyewitness identifications make it painfully clear that many of the identification procedures used in this case were inconsistent with the fundamental concept of
316 neutral inquiry. As a *316 result, these identifications lack many of the basic indicia of reliability. Yet, the jury that convicted Dennis was completely unaware of these problems. In addition, the jurors were never even informed that five other eyewitnesses, with similar or better opportunities to observe the shooting, either could not identify Dennis as Chedell Williams' killer or identified someone else. Accordingly, the three courtroom identifications do little to assuage my concerns about the reliability of the identification testimony that the jury considered. Rather, I cannot help but wonder if an innocent man may have spent more than two decades on death row.

It is as obvious as it is tragic that mistaken identifications have disastrous effects for the unjustly accused. That is particularly true where—as here—the death penalty is imposed. But wrongful convictions are not the only consequence of our continued failure to incorporate the teachings of scientific research into judicial proceedings. Mistaken identifications "also erode public confidence in the criminal justice system as a whole."[26] In addition, when someone is wrongfully convicted, the real perpetrator remains free to victimize again. Thus, this is an issue of far-reaching importance to the defense, prosecutors, police departments, as well as to judges: All have an interest in minimizing the possibility of erroneous identifications. The New Jersey Supreme Court accurately described the situation in its landmark decision discussing eyewitness identifications: "At stake is the very integrity of the criminal justice system and the courts' ability to conduct fair trials."[27]

26 National Research Council, *Identifying the Culprit* , *supra* , at 22 (citing Int'l Ass'n of Chiefs of Police, *National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions* (2013)).

27 *State v. Henderson* , 208 N.J. 208, 27 A.3d 872, 879 (2011), *holding modified by State v. Chen* , 208 N.J. 307, 27 A.3d 930 (2011).

Before I begin my discussion of the science as applied to this case, I want to emphasize that my point here is not to cast aspersions on the motives of the police or prosecutors involved in this investigation or to insinuate that they intentionally used suggestive procedures to convict Dennis. On the contrary, I have no reason to believe they were motivated by anything other than a sincere desire to bring the killer of Chedell Williams to justice. The science surrounding eyewitness identifications and reliability was simply not as well-understood at the time of Dennis' investigation and trial as it is today.

II. The Identifications

A. *The Crime*

As the Majority recounts and the Dissent emphasizes, the shooting at issue here occurred in broad daylight, at the intersection of Tenth Street

and Nedro Avenue, in Philadelphia. This intersection is adjacent to the Fern Rock SEPTA station, where steps lead up to a ticketing office. On October 22, 1991, Chedell Williams and her friend Zahra Howard walked up these steps so that Williams could purchase a SEPTA Transpass. As they climbed the steps on opposite sides of a railing that extended up the middle, two men approached them head on. A man with a red sweat suit—whom witnesses later uniformly described as the shooter—initially approached Howard on her side of the railing and demanded her earrings. The women fled, and Howard managed to hide behind a nearby fruit stand while the man in the red sweat suit pursued Williams into the intersection of Tenth and Nedro. Howard later stated that, up until that point, she had not seen a gun. Howard watched as the man in the red
317 struggled to take *317 Williams' earrings, pulled her close to him, and shot her in the neck with a "silver revolver."[28] Williams fell to the ground, and both men ran north on Tenth Street.

28 J.A. 1495.

Five other witnesses gave similar accounts of the shooting in police interviews conducted the day of the murder. First, James Cameron, a SEPTA cashier, stated that he was standing at Tenth Street and Nedro Avenue, chatting with another SEPTA employee, when he saw a man grab Williams in the street, pull out a "dull silver gun," and shoot her.[29]

29 J.A. 1496.

As the two perpetrators fled, they ran past Anthony Overstreet and Thomas Bertha. Overstreet and Bertha were working on a house on North Tenth Street, near the intersection where the shooting occurred. After hearing screaming followed by a gunshot, both men saw Williams fall to the ground as the two perpetrators ran directly toward them. Both Overstreet and Bertha observed the man in the red sweat suit holding a chrome-plated gun in his hand.

Overstreet's initial interview with police is particularly important because he expressed confidence that he would be able to identify the shooter if he saw him again. Overstreet was about six feet from the perpetrators as they ran past him. In his interview, he recounted that they "both looked right in my face" as they fled.[30] Moreover, Overstreet told officers that "he would definitely be able to identify them" because "he ha[d] seen the man with the red hooded jumpsuit who had the gun before."[31] Overstreet then explained that he might have known the shooter from the "area of Broad & Clearview St[reets] where he used to hang."[32] He later clarified that he thought he had seen the shooter at a house where Overstreet used to smoke cocaine, and he gave the police the address of that house.

30 J.A. 1494.

31 *Id.*

32 *Id* .

Another eyewitness who expressed confidence he could identify the shooter was George Ritchie. At the time of the shooting, Ritchie was repairing a car on Tenth Street. "He heard 2 [black men] hollering and running away from the train station and towards him in the middle of 10th St."[33] Ritchie was about twenty-five feet away from them and "saw them clearly."[34] He told police that "he did get a good look at these two [black males] and can identify them if he sees them again."[35]

33 J.A. 1493.

34 *Id.*

35 *Id* .

Another eyewitness, Clarence Verdell, had an opportunity to view the perpetrators immediately prior to the shooting and provided the police with a detailed description of the accomplice's face. Verdell saw the perpetrators as they initially chased Williams and Howard down the ticketing office steps. A moment later, Verdell heard what sounded like a firecracker. He then turned and saw Williams fall to the ground. Verdell never saw the gun and had never seen either the girls or the males before. He told his interviewer that he would be able to recognize the accomplice, but did not get a good look at the shooter.

Finally, police interviewed David LeRoy, a vendor who sold hot dogs at Tenth and Nedro. He stated that he saw the shooter pull Williams toward him and kill her. He noted that the shooter had on a red
318 hat, pulled down to his eyes.*318 Two weeks after the crime, the police interviewed a fruit vendor and his son, Joseph DiRienzo and Joseph DiRienzo, Jr. They had also been present at the murder scene and echoed the description of the crime provided by the other witnesses.

B. *The Photo Arrays*

A few days after the shooting, the police heard rumors that James Dennis might have been the shooter, and they decided to show witnesses photo arrays containing his picture. The detectives compiled three arrays of eight photographs each. Dennis' picture was placed in the first position of the first array, and police used this array to solicit an identification of the shooter (the second array was used to attempt identification of the accomplice, and the third was shown thereafter to offer the witnesses one more opportunity to identify a suspect). At trial, Detective Manuel Santiago explained how he compiled the array: he used the "most recent photo"[36] that he could find of Dennis and then "went into [police] files and obtained photos of young black males, which would not be too unlike the photo of Mr. James Dennis."[37] When Detective Santiago showed the witnesses the arrays, he instructed them: "I'm going to show you a photograph spread with eight photos. See if you recognize anyone."[38]

36 J.A. 165.

37 *Id* .

38 J.A. 161.

Only four of the nine eyewitnesses could make any identification from the arrays: Zahra Howard, Thomas Bertha, Anthony Overstreet, and James Cameron indicated that Dennis "look[ed] familiar."[39] However, none of these witnesses was initially certain about their "identifications." For example, when Detective Santiago showed Howard the arrays, she pointed to Dennis and stated, "[t]his one looks like the guy, but I can't be sure."[40] Detective Santiago next showed the same spreads to James Cameron. When asked if he recognized anyone, Cameron stated, "#1 looks familiar but I can't be sure."[41] When provided the same arrays, Bertha pointed to Dennis and stated, "[t]hat looks like the one that was running with the gun."[42] Santiago probed further: "Can you be sure that photo #1 is the male that you saw get away from the girl and run at you with the gun after the gunshot?"[43] It was then that Bertha replied, "Yes I can."[44] Detective Santiago's follow-up question and Bertha's response bear an eerie resemblance to the follow-up question asked of Jennifer Thompson ("Are you sure?") after her response ("Positive") following her initial tentative selection of Ronald Cotton from a photo array.

39 J.A. 1548.

40 J.A. 1537.

41 J.A. 1548.

42 J.A. 1555.

43 J.A. 1556.

44 *Id* .

A different detective showed Anthony Overstreet the arrays. After Overstreet had reviewed the first array, the detective asked "[i]s there anyone in these photos that you can identify?"[45] Overstreet replied: "Yes, in the first set of photos, #1 looks like the male who shot the girl."[46] The detective then asked Overstreet to repeat his identification: "The male that you identified, is he the male you saw running up the street with the gun?" "Yes he
319 is," Overstreet confirmed.[47] Thus, when *319 asked about the male that he had "*identified* ," Overstreet moved from saying that Dennis' picture "looked like" the shooter to affirming that Dennis "is" the shooter. This may, at first, appear to be a meaningless distinction that is nothing more than innocuous reply to a simple follow-up question. However, as I will discuss in greater detail below, such subtle, and seemingly innocent, probes can sow seeds that blossom into certain, albeit inaccurate, identifications.[48]

45 J.A. 1565.

46 *Id* .

47 J.A. 1566.

48 *See infra* Part III.A.4.

Significantly, none of the remaining five eyewitnesses selected Dennis from the photo arrays. When a detective showed Verdell the spreads, he stated, "The best I can say is it's either #1, #5, or #8. I concentrated more on the male that was directly behind Chedell and I believe him to be the accomplice."[49] Verdell returned to the police station a few days later to reexamine the photos. The second time around, he stated "it would be either #1 or #8 who was the [shooter]. I lean more towards #1 because of the build of the male but he definitely doesn't have that cut of hair now. I definitely do not remember him having his hair cut that way."[50] Neither David LeRoy nor either of the DiRienzos identified Dennis from the arrays.

49 J.A. 1576.

50 J.A. 1581.

Finally, the Commonwealth denies that police ever showed George Ritchie a photo array. Ritchie vigorously disputes this claim. In 2005, Ritchie testified at Dennis' Post-Conviction Relief hearing that officers showed him an array during their investigation but became frustrated when Ritchie was unable to identify the shooter from the photos. Assuming *arguendo* that the Commonwealth's claim regarding Ritchie is true, that means that the police and prosecution did not attempt to learn if Ritchie would have identified Dennis or someone else as the shooter even though Ritchie had initially expressed confidence in his ability to identify the shooter.

C. *The Lineup*

On December 19, 1991, about a month and a half after the police showed the witnesses the photo arrays, officers conducted an in-person lineup involving Dennis and five fillers. Fillers are non-suspects who are added to the line-up to provide the witnesses with choices. Although Dennis' attorney requested that all eyewitnesses be

present, *only the witnesses who had identified Dennis from the photo array* (Howard, Cameron, Bertha, and Overstreet) participated.

The police had those four witnesses view the lineup at the same time, in the same room. Accordingly, nothing prevented the witnesses from observing each other's reactions. As I elaborate below, studies consistently caution against conducting a lineup in this fashion.[51] At trial, one of the officers that helped conduct the lineup, Detective William Wynn, testified that the following instructions were given to the four witnesses:

> We're going to view a lineup of six men. They'll be numbered from one through six from your left to your right.... I want you to look at each man carefully, see if you can identify any of these men as being involved in your incident. If you can identify any of these men, just remember the number of the man that you can identify, and when we're through looking at all six men, I'll order them out of this viewing area or box, as we call it. At that time I will call you outside of the lineup room, one at a time by

320 *320

> name, and ask you as to whether or not you can make an identification. If you can, just tell me the number of the man that you can identify. If you can't, simply tell that you cannot. It's important that while you're in the lineup room, there will be no pointing, talking, shouting or displaying of emotions so as not to influence one another's decision. It will be important to you not only this evening but also at a later date.[52]

After the witnesses viewed each person in the lineup, the police called them out of the room, one by one, and asked if they could make an identification.

Cameron and Bertha identified Dennis. Howard pointed out Dennis, but was less sure, stating only "I think it was [him]."[53] Overstreet—the witness who initially expressed the most confidence in his ability to identify the shooter due to his alleged prior exposure to him—identified an entirely different person from the lineup.

D. *In-Court Identifications*

At Dennis' trial over a year later, the prosecution called only the three witnesses who had picked him from the photo arrays and lineup. When asked whether Chedell Williams' killer was in the courtroom, Bertha, Cameron, and Howard each confidently pointed to Dennis, even though all three had expressed doubt in their earlier identifications.

III. The Science of Eyewitness Identifications

As I noted at the outset, we have long known that eyewitness identifications are not always as reliable as witnesses (and jurors) may believe them to be. In 1927, long before the explosion of research in this area, Justice Felix Frankfurter wrote: "[t]he hazards of [eyewitness identification] testimony are established by a formidable number of instances in the records of English and American trials."[54] In 1932, well before the availability of DNA analysis, Yale Law professor Edwin M. Borchard documented almost seventy cases involving eyewitness errors that caused miscarriages of justice.[55] Over thirty years later, the Supreme Court acknowledged this

51 *See infra* Part III.A.4.

52 J.A. 226-27.

53 J.A. 228-29.

problem in *United States v. Wade* .[56] There, the Court famously proclaimed that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[57]

54 Felix Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen* 30 (Universal Library ed., 1962).

55 Edwin M. Borchard, *Convicting the Innocent; Sixty-Five Actual Errors of Criminal Justice* (1932).

56 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

57 *Id.* at 228, 87 S.Ct. 1926.

In the ensuing decades, the scientific community has made significant strides in understanding this phenomenon.[58] A combination of basic and applied research on human visual perception and cognition has revealed that the reliability of
321 eyewitness *321 identifications is largely contingent on the conditions under which memories are created, stored, and then later recalled. "At its core, eyewitness identification relies on brain systems for visual perception and memory: The witness perceives the face and other aspects of the perpetrator's physical appearance and bearing, stores that information in memory, and later retrieves the information for comparison with the visual percept of an individual in a lineup."[59] Research has shown that certain variables can impact the processes of these memory functions with serious implications for the reliability of the subsequent memories. These variables generally fall into two basic categories: system variables and estimator variables.

58 *See, e.g.* , Gary L. Wells, Nancy K. Steblay, & Jennifer E. Dysart, *Double-Blind Photo Lineups Using Actual Eyewitnesses: An Experimental Test of a Sequential Versus Simultaneous Lineup Procedure* , 39 L. & Hum. Behav. 1, 1 (2015); Laura Smalarz & Gary L. Wells, *Contamination of Eyewitness Self-Reports and the Mistaken-Identification Problem* , 24 Current Directions Psychol. 120, 120 (2015); Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (1995); *Eyewitness Testimony: Psychological Perspectives* (Gary L. Wells & Elizabeth A. Loftus eds., 1984).

59 National Research Council, *Identifying the Culprit* , *supra* , at 14-15.

A. *System Variables*

System variables are the procedures and practices law enforcement use to elicit eyewitness identifications.[60] Examples of system variables include the instructions law enforcement officers give to witnesses when they ask them to provide identifications, the comments of police to witnesses during the identification process, and the types of procedures (lineup, photo array, etc.) used to solicit the identification. These factors are important not only because they heavily influence the reliability of identifications, but also because they largely lie within the exclusive control of the criminal justice system. The following section explores a few critical system variables and their effects on the accuracy of eyewitness identifications.

60 *See id.* at 16, 72, 76.

1. Blinded versus Non-Blinded Procedures

One of the most important system variables that law enforcement can control is the blinding of identification procedures.[61] Blinding occurs when the officer administering an identification procedure, such as a photo array, knows who the suspect is but cannot determine when the witness is viewing the suspect's photo. "In one common 'blinded' procedure, the officer places each photo in a separate envelope or folder and then shuffles the envelopes/folders so that only the witness sees the images therein."[62] This blinding can also be doubled: for example, when an officer who neither knows the suspect's identity nor position in the photo array shows the array to an eyewitness. Such blinding is used to prevent the officer from giving the witness conscious or unconscious cues that can affect the witness' identification.[63]

61 *See State v. Henderson* , 208 N.J. 208, 27 A.3d 872, 896–97 (2011), *holding modified by State v. Chen* , 208 N.J. 307, 27 A.3d 930 (2011) ; National Research Council, *Identifying the Culprit* , *supra* , at 24-25, 26.

62 National Research Council, *Identifying the Culprit* , *supra* , at 25.

63 *Id.* at 25.

Common sense suggests that identification procedures administered without some degree of blinding are inherently untrustworthy, and research confirms this.[64] Typically, the greater the level of blinding, the more reliable the procedure. One of the foremost experts on eyewitness identifications has concluded that blind lineup administration is "the single most important characteristic that should apply to eyewitness identification."[65] Social psychologists believe this is crucial to avoiding the "expectancy effect": "the tendency for experimenters to obtain results they expect ... because they have helped to shape that

322 *322 response through their expectations."[66] In a seminal meta-analysis of 345 studies across eight broad categories of behavioral research, researchers found that "[t]he overall probability that there is no such thing as interpersonal expectancy effects is near zero."[67] "Even seemingly innocuous words and subtle cues—pauses, gestures, hesitations, or smiles—can influence a witness' behavior."[68] Moreover, the witness usually remains completely unaware of the signals she has been given or their effect on her identification.

64 *See Henderson* , 27 A.3d at 896–97 ; National Research Council, *Identifying the Culprit* , *supra* , at 24-25, 26.

65 *Henderson* , 27 A.3d at 896 (internal quotation marks omitted).

66 Robert Rosenthal & Donald B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies* , 3 Behav. & Brain Sci. 377, 377 (1978).

67 *Id.*

68 *Henderson* , 27 A.3d at 896 (citing Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy* , 89 J. Applied Psychol. 1106, 1107 (2004) and Steven E. Clark, Tanya E. Marshall, & Robert Rosenthal, *Lineup Administrator Influences on Eyewitness Identification Decisions* , 15 J. Experimental Psychol.: Applied 63, 66-73 (2009)).

Outside the realm of law enforcement, in scientific experiments for instance, it is standard practice to use blinding. The importance of blind administration is so great that a failure to

implement such a policy can affect even seemingly objective processes, such as the analysis of DNA samples. In one experiment, researchers gave seventeen experienced DNA analysts a mixed sample of DNA evidence from an actual crime scene—a gang rape committed in Georgia.[69] All seventeen analysts worked at the same accredited government laboratory in the United States.[70] Years earlier, prosecutors had relied on this evidence to convict a man named Kerry Robinson.[71] In the real investigation, two analysts from the Georgia Bureau of Investigation concluded that Robinson "could not be excluded" as a suspect based on his DNA profile relative to the crime scene sample.[72] Nevertheless, of the seventeen analysts involved in the study of this case, only one agreed that Robinson "could not be excluded."[73] Four analysts found that the evidence was inconclusive, and *the other twelve said he could be excluded* .[74] All seventeen analysts were blinded to contextual information about the case.[75] Experts speculated that a failure to blind the DNA testing in the real investigation could explain the inconsistency between the results the Georgia Bureau of Investigation and the seventeen independent analysts obtained. "The difference between you giving them the data and saying 'what do you make of it?' and the local district attorney giving them the data and saying 'We've arrested someone, is his profile in here?' is huge."[76]

69 Linda Geddes, *Fallible DNA Evidence Can Mean Prison or Freedom* , 2773 The New Scientist: Special Report 1, 5 (2010).

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.* at 6 (internal quotation marks omitted).

The Supreme Court has recognized the significance of such cues for decades. In 1967, in *United States v. Wade* , the Court ruled that a pretrial lineup is a "critical stage" of prosecution at which a defendant had a right to the presence of counsel.[77] The Court explained:

77 388 U.S. 218, 236–37, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

323 *323

> The fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief pre-occupation is with the problem of getting sufficient proof, because he has not "come clean," involves a [ ] danger that this persuasion may communicate itself even in a doubtful case to the witness in some way.[78]

78 *Id.* at 235, 87 S.Ct. 1926 (internal alterations, quotation marks, and citation omitted).

The importance of conscious and unconscious police persuasion cannot be overstated in the context of a trial because it negates the effect that strenuous cross-examination may otherwise have on the witness' confidence in her identification. "[E]ven though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability."[79]

Obviously, if an eyewitness is completely unaware that her identification has been shaped by subliminal cues communicated by investigators, it is incredibly difficult, if not impossible, to dissuade that witness of the accuracy of her identification. As was true for Jennifer Thompson in the rape case discussed earlier, vigorous cross-examination may serve only to reinforce the witness' certainty of her identification.[80] The Supreme Court recognized in *Wade* that once a pretrial identification is made, the identifying witness becomes "the sole jury."[81] Thus, "[t]he trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation."[82]

79 *Id* .

80 *See* 60 Minutes, *supra* .

81 *Wade* , 388 U.S. at 235, 87 S.Ct. 1926.

82 *Id.*

None of the identifications in Dennis' case were obtained through processes that included blinding. The officers who showed the photo arrays and conducted the lineup knew that Dennis was the suspect, and they knew his position in the arrays and in the lineup. As the above studies make clear, it is entirely possible that the officers investigating Williams' killing gave the witnesses unconscious cues about their suspicions. Dennis' jurors would have been in a far better position to assess the reliability of the three courtroom identifications had they been informed of the importance of blinding procedures and their absence here.

2. Pre-Identification Instructions

The instructions police give witnesses prior to attempting to elicit an identification constitute a second important system variable. There is broad consensus that police must instruct witnesses that the suspect *may not* be in the lineup or array and that the witness should not feel compelled to identify anyone.[83] In two meta-analyses, researchers found that providing this information to witnesses in advance significantly increased the reliability of the results in target-absent lineups.[84] In one study, the number of people that chose innocent fillers in target-absent lineups increased by forty-five percent when the lineup administrators failed to tell the subjects that they need not choose a suspect.[85] *324 One hardly needs to engage in a protracted review of the wealth of data on this point to appreciate its implications. Without such instructions, witnesses may misidentify innocent suspects merely because they assume the suspect is present and the person misidentified bears the strongest resemblance to the actual perpetrator. Research confirms this.[86] It is therefore critical that courts inform jurors of this system variable where present. Such information enables jurors to consider the impact that the absence of such instructions may have had on witness identifications.

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83 *State v. Henderson* , 208 N.J. 208, 27 A.3d 872, 897 (2011), *holding modified by State v. Chen* , 208 N.J. 307, 27 A.3d 930 (2011).

84 *See* Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification* , 29 Law & Hum. Behav. 395, 418-20 (2005); Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects* , 21 Law & Hum. Behav. 283, 285-86, 294 (1997).

85 *See* Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender* , 66 J. Applied Psychol. 482, 485 (1981).

86 *See* Clark, *Effects of Biased Lineup Instructions* , *supra* , at 421; Steblay, *Social Influence in Eyewitness Recall* , *supra* , at 284.

The record in Dennis' case shows that the investigators failed to give such instructions to the witnesses. Accordingly, there is a real risk that the witnesses identified Dennis because he most closely resembled Williams' killer. Indeed, that is a fair interpretation of this record. Upon seeing Dennis' photo, Howard did not say "that's him," or "I think this is the shooter." Instead, she tentatively told officers: "This one *looks* like the guy, but I can't be sure."[87] Like Howard, Bertha and Cameron also initially responded to these arrays in a manner that strongly suggests that they selected Dennis because his photograph bore a closer resemblance to the shooter than any of the fillers. They qualified their selection of Dennis by saying: "Number 1 *looks familiar* but I can't be sure"[88] ; and "that *looks like* the one that was running with the gun."[89] It simply cannot be assumed that either statement was the equivalent of proclaiming: "that's him," or "he's the one."

87 J.A. 1537 (emphasis added).

88 J.A. 1548 (emphasis added).

89 J.A. 1555 (emphasis added).

3. Photo Array and Lineup Construction

Researchers have also found that the way that a photo array or live lineup is constructed can affect the reliability of the resulting identifications. A number of considerations are critical. First, not surprisingly, mistaken identifications are more likely where the suspect stands out in comparison to the fillers.[90] Using fillers that are relative look-alikes forces a witness to examine her memory, whereas placing the suspect among a group of individuals that bear little resemblance to him causes him to stand out. "[A] biased lineup may [also] inflate a witness' confidence in the identification because the selection process seemed easy."[91] As of yet, there is no clear agreement among researchers about whether fillers should more closely resemble a witness' pre-lineup description of the suspect or the actual suspect.[92] However, whether the fillers more
325 closely resemble *325 the suspect or the witness' pre-lineup description, the fillers' appearances should not make the suspect stand out.

90 *See* Roy S. Malpass, Colin G. Tredoux, & Dawn McQuiston-Surrett, *Lineup Construction and Lineup Fairness* , *in* 2 *The Handbook of Eyewitnesses Psychology* 155, 156-58 (2007).

91 *State v. Henderson* , 208 N.J. 208, 27 A.3d 872, 898 (2011), *holding modified by State v. Chen* , 208 N.J. 307, 27 A.3d 930 (2011) (citing David F. Ross et al., *When Accurate and Inaccurate Eyewitnesses Look the Same: A Limitation of the 'Pop-Out' Effect and the 10-to 12-Second Rule* , 21 Applied Cognitive Psychol. 677, 687 (2007) and Gary L. Wells & Amy L. Bradfield, *Measuring the Goodness of Lineups: Parameter Estimation, Question Effects, and Limits to the Mock Witness Paradigm* , 13 Applied Cognitive Psychol. S27, S30 (1999)).

92 *Compare* Steven E. Clark & Jennifer L. Tunnicliff, *Selecting Lineup Foils in Eyewitness Identification Experiments: Experimental Control and Real-World Simulation* , 25 L. & Hum. Behav. 199, 212 (2001), *and* Gary L. Wells, Sheila M. Rydell, & Eric P. Seelau, *The Selection of Distractors for Eyewitness Lineups* , 78 J. Applied Psychol. 835, 842 (1993), *with* Stephen Darling, Tim Valentine, & Amina Memon, *Selection of Lineup Foils in*

Operational Contexts , 22 Applied Cognitive Psychol. 159, 165-67 (2008).

Second, all lineups should include a minimum of five fillers.[93] The logic here, which appears to be a matter of general agreement, is again clear: the greater the number of choices, the less the chance of making a lucky guess, and the more the witness is forced to rely on her own memory to identify the suspect.

93 *See* Nat'l Inst. of Justice, U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* 29 (1999).

Third, for similar reasons, lineups should not feature more than one suspect. In its landmark decision on the issue of eyewitness identification, the Supreme Court of New Jersey emphasized that, "if multiple suspects are in the lineup, the reliability of a positive identification is difficult to assess, for the possibility of 'lucky' guesses is magnified."[94]

94 *Henderson* , 27 A.3d at 898 (internal quotation marks omitted).

The trial judge here noted that the composition of the lineup was somewhat suggestive because Dennis was slightly shorter than the rest of the participants, causing him to stand out. The jurors were therefore able to consider this disparity as they evaluated the reliability of the identifications. However, the court did not provide the jury with an explanation of *how* this may have affected the witnesses' identifications of Dennis in that lineup. Nor did it give the jurors information that would allow them to consider the lineup construction in context with all of the other factors that were involved in the identifications of Dennis.

4. Interactions with Witnesses: Witness Feedback

Another critical system variable is whether law enforcement provides a witness with any feedback or other information in the course of her identification. As I touched on in my discussion of blinding procedures, "[t]he nature of law enforcement interactions with the eyewitness before, during, and after the identification plays a role in the accuracy of eyewitness identifications and in the confidence expressed in the accuracy of those identifications by witnesses."[95] Elizabeth Loftus, a pioneering researcher in the field of human memory and cognition, has thoroughly documented the effects of received information on memory accuracy. In one study, she showed college students a video of a car crash on a country road.[96] Afterward, she asked them to estimate how fast the car was going. Half the students were asked how fast the car was going when it "passed the barn" along the country road; the other half were simply asked how fast the car was going "along the country road."[97] A week later, she asked the same students whether they had seen a barn in the film. Approximately seventeen percent of the students who were given the "passed the barn" cue recalled seeing the barn in the video.[98] In contrast, less than three percent of the non-barn cue group remembered a barn.[99] In reality, *there was no barn* in the video.[100] This demonstrates the very subtle—yet extremely powerful— *326 effect statements at the time of memory recall can have.

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95 National Research Council, *Identifying the Culprit* , *supra* , at 91 (citing Steven. E. Clark, Tanya E. Marshall, & Robert Rosenthal, *Lineup Administrator Influences on Eyewitness Identification Decisions* , 15 J. of Experimental Psychol.: Applied 63 (2009)).

96 *See* Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report* , 7 Cognitive Psychol. 560, 566 (1975).

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id* .

In the eyewitness identification context, such information often comes in the form of pre- or post-identification information that may reinforce an identification. For example, research confirms the intuitive proposition that when investigators give cues that suggest "you got the right guy," the witness' confidence in the identification is artificially inflated. A meta-analysis of twenty studies covering 2,400 identifications found that witnesses who received feedback "expressed significantly more retrospective confidence in their decision compared with participants who received no feedback."[101] Such feedback not only causes a witness to misjudge the reliability of her identification, it can also result in the witness embellishing the opportunity she had to observe the perpetrator and the crime. "Those who receive a simple post-identification confirmation regarding the accuracy of their identification significantly inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper memory abilities in general."[102] Furthermore, confirmational feedback need not be immediate to corrupt a witness' memory. One study showed that the effects of confirmational feedback may be the same even when it occurs two days after an identification.[103] Other research further substantiates that these effects can withstand the passage of time.[104]

101 Amy B. Douglass & Nancy M. Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect* , 20 Applied Cognitive Psychol. 859, 863 (2006).

102 *Id.* at 864-65; *see also* Gary L. Wells & Amy L. Bradfield, "*Good, You Identified the Suspect* ": *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience* , 83 J. Applied Psychol. 360 (1998).

103 *See* Gary L. Wells, Elizabeth A. Olson, & Steve D. Charman, *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay* , 9 J. Experimental Psychol.: Applied 42, 49-50 (2003).

104 *See* Jeffrey S. Neuschatz et al., *The Effects of Post-Identification Feedback and Age on Retrospective Eyewitness Memory* , 19 Applied Cognitive Psychol. 435, 449 (2005).

The particular perils of witness feedback are evident in many of the documented cases of false identifications. Here again, the story of Ronald Cotton and Jennifer Thompson is illustrative: officer feedback led Thompson to harden her false memory of Cotton as her rapist. In the process, her memory was effectively immunized from any impact cross-examination may otherwise have had on her confidence, which impeded the jury's ability to properly assess her testimony.

I realize, of course, that law enforcement officials are not completely in control of the feedback witnesses receive. Interactions among witnesses outside the confines of police proceedings, for instance, can affect the reliability of the witnesses' identifications.[105] For example, if one witness *327 talks to another, she can alter or reinforce the other's memory of the same event. "[P]ost-identification feedback does not have to be presented by the experimenter or an authoritative

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figure (e.g. police officer) in order to affect a witness' subsequent crime-related judg[ ]ments."[106] In one study, after witnesses made incorrect identifications, they were told either that their co-witness made the same or a different identification.[107] Not surprisingly, confidence rose among the witnesses that were told that their co-witness had agreed with them and fell among those told that co-witnesses had disagreed.[108]

105 *See, e.g.* , Rachel Zajac & Nicola Henderson, *Don't It Make My Brown Eyes Blue: Co-Witness Misinformation About a Target's Appearance Can Impair Target-Absent Line-up Performance* , 17 Memory 266, 275 (2009) ("[P]articipants who were [wrongly] told by the [co-witness] that the accomplice had blue eyes were significantly more likely than control participants to provide this information when asked to give a verbal description."); Lorraine Hope et al., *"With a Little Help from My Friends ...": The Role of Co-Witness Relationship in Susceptibility to Misinformation* , 127 Acta Psychologica 476, 481 (2008) (noting that all participants "were susceptible to misinformation from their co-witness and, as a consequence, produced less accurate recall accounts than participants who did not interact with another witness"); Helen M. Paterson & Richard I. Kemp, *Comparing Methods of Encountering Post-Event Information: The Power of Co-Witness Suggestion* , 20 Applied Cognitive Psychol. 1083, 1083 (2006) ("Results suggest that co-witness information had a particularly strong influence on eyewitness memory, whether encountered through co-witness discussion or indirectly through a third party."); John S. Shaw III, Sena Garven, & James M. Wood, *Co-Witness Information Can Have Immediate Effects on Eyewitness Memory Reports* , 21 Law & Hum. Behav. 503, 503, 516 (1997) ("[W]hen participants received incorrect information about a co-witness's response, they were significantly more likely to give that incorrect response than if they received no co-witness information."); C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects* , 79 J. Applied Psychol. 714, 717-18 (1994).

106 Elin M. Skagerberg, *Co-Witness Feedback in Line-ups* , 21 Applied Cognitive Psychol. 489, 494 (2007).

107 Luus & Wells, *The Malleability of Eyewitness Confidence* , *supra* , at 717-18.

108 *Id.* ; *see also* Skagerberg, *supra* , at 494-95 (showing similar results).

Though law enforcement officials may not be able to completely insulate witnesses from this system variable, police did not even attempt to guard against it here. The witnesses who identified Dennis viewed the lineup in the same room and at the same time. Detective Wynn's instruction to the witnesses not to react or show emotion during the lineup reduces the risk of feedback, but this instruction did not eliminate it. Therefore, the risk that the witnesses' reactions may have influenced the results of the lineup cannot be discounted, and the jurors should have been instructed about this possibility.

Furthermore, the record of Bertha's photo array identification establishes the existence of at least some officer-to-witness feedback. Detective Santiago asked Bertha to affirm his identification: "Can you be sure that photo #1 is the male that you saw get away from the girl and run at you with the gun after the gunshot?"[109] Only then did Bertha state he was "*sure* "[110] Dennis was the shooter as opposed to his initial statement that Dennis' photo merely "look[ed] like"[111] the shooter.

109 J.A. 1556.

110 *Id.*

111 J.A. 1555.

I am not suggesting that Detective Santiago's question ultimately negated Bertha's ability to make an in-court identification. Nor am I suggesting that Detective Santiago intentionally tried to reinforce Bertha's confidence in his identification or "prime" him for a subsequent in-court identification. I am, however, suggesting that the jury should have been informed of how Detective Santiago's response to Bertha's initial selection of Dennis' photo may have affected the reliability of Bertha's lineup identification and, as I next explain, his subsequent in-court identification as well.

5. Multiple viewings

Another crucial system variable—and one that
328 was clearly present here—is the *328 opportunity to engage in multiple viewings of a suspect. Allowing a witness to view a suspect more than once during an investigation can have a powerful corrupting effect on that witness' memory. It creates a risk that the witness will merely identify a suspect based on her past views of him rather than her memory of the relevant event. Meta-analysis has revealed that while fifteen percent of witnesses mistakenly identify an innocent person during the first viewing of a lineup, that percentage jumps to thirty-seven percent if the witness previously viewed that innocent person's mug shot.[112] This phenomenon is known as "mug shot exposure." Related studies have also shown the existence of "mug shot commitment." This refers to the fact that once witnesses positively identify an innocent person from a mug shot, "a significant number" then "reaffirm[ ] their false identification" in a later photo lineup.[113] This is true *even when* the real suspect is actually present in the lineup.[114] Nonetheless, multiple viewings seem to have no impact on the reliability of a lineup identification "when a picture of the suspect was not present in photographs examined earlier"[115] by the witness.

112 Kenneth A. Deffenbacher, Brian H. Bornstein, & Steven D. Penrod, *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference* , 30 L. & Hum. Behav. 287, 299 (2006).

113 *See* Gunter Koehnken, Roy S. Malpass, Michael, S. Wogalter, *Forensic Applications of Line-Up Research* , *in Psychological Issues in Eyewitness Identification* 205, 219 (Siegfried L. Sporer, Roy S. Malpass, Gunter Koehnken eds., 1996).

114 *Id* .

115 *Id.* at 218. However, as noted earlier, Dennis' picture was presented in photo arrays that witnesses saw prior to viewing the lineup.

The incredible story of John White that I mentioned at the outset serves as a powerful example of the impact that multiple viewings can have on witness identifications. In 1979, John White was accused of breaking into the home of a seventy-four-year-old woman and then beating and raping her.[116] After the victim picked White out of a photo array, he was placed in a live lineup.[117] White was the only person repeated in both the photo array and live lineup. The victim identified White from that live lineup.[118] DNA analysis later revealed that the victim's actual assailant was not White, but a man named James Parham. By the cruelest of ironies, Parham had actually been placed in the live lineup with White

as a filler when the victim identified White as her assailant. Despite having an opportunity to view her *real* rapist in the lineup, the victim affirmed her initial selection of White. Her erroneous identification led to a life sentence for White, who served twenty-seven years before the DNA evidence exonerated him.[119]

116 The Innocence Project, *John Jerome White*, http://www.innocenceproject.org/cases/john-jerome-white/ (last visited July 5, 2016).

117 *Id.*

118 *Id.*

119 *Id.*

A leading researcher offered the following explanation of White's case:

> The witness had already identified John White from a photographic lineup. And, John White was the only person who was in both the photographic lineup and the live lineup. Hence, what we have here, I believe, is a strong example of how a mistaken identification from one procedure (a photo lineup) is repeated in the next procedure (a live lineup) even though the real perpetrator is clearly present in the second procedure. Repeating the same mistake can occur for several reasons. One possibility is that the initial mistaken identification changed the memory of the witness; in effect John White's face "became" her memory of the attacker and the face of Parham no longer existed once she mistakenly identified John White. Another possibility is that she approached the live lineup with one goal in mind—find the man she had identified from the photos. Perhaps she never really looked at Parham because she quickly saw the man she identified from photos and did not need to look further.[120]

120 Gary Wells, *The Mistaken Identification of John Jerome White*, https://public.psych.iastate.edu/glwells/The_Misidentification_of_John_White.pdf (last visited July 6, 2016).

329 *329

The witnesses who identified Dennis at trial were given not two, but three, opportunities to view Dennis. These multiple views could help explain why initially tentative guesses became certain identifications by the time the witnesses took the stand. The possibility cannot be ignored that the witnesses here, like the victims in White and Cotton's cases, selected Dennis in the live lineup because they were looking for the man they had already identified from the photo arrays. The jurors should have been informed of the impact of multiple viewings so that they could have considered that effect in determining how much weight to afford the lineup identifications and/or the in-court identifications. Absent that information, the jurors were ill equipped to assess the possibility that Howard, Bertha, and Cameron's lineup and in-court identifications of Dennis may have been based on prior viewings of his picture rather than their memories of the crime.

These system variables on the accuracy of eyewitness identifications highlight the importance of the procedures law enforcement

officials use when soliciting identifications. As the Oregon Supreme Court has explained, "it is incumbent on courts and law enforcement personnel to treat eyewitness memory just as carefully as they would other forms of trace evidence, like DNA, bloodstains, or fingerprints, the evidentiary value of which can be impaired or destroyed by contamination. Like those forms of evidence, once contaminated, a witness' original memory is very difficult to retrieve."[121]

121 *State v. Lawson* , 352 Or. 724, 291 P.3d 673, 689 (2012).

B. *Estimator Variables*

Estimator variables are the conditions present during memory formation or storage. They can also have a substantial impact on the reliability of eyewitness identifications.[122] Crucial estimator variables include, but are not limited to, the amount of stress on the observer, the presence of weapons, and visibility conditions. Unlike system variables, estimator variables are beyond the control of the criminal justice system. Nevertheless, asking jurors to consider eyewitness identifications without properly instructing them on the impact that such estimator variables may have had erects yet another barrier to accurate evaluation of identifications.

122 *See State v. Henderson* , 208 N.J. 208, 27 A.3d 872, 895 (2011), *holding modified by State v. Chen* , 208 N.J. 307, 27 A.3d 930 (2011) ; National Research Council, *Identifying the Culprit* , *supra* , at 1, 72, 92-93.

1. Stress

First, high levels of stress at the time of memory formation can negatively impact a witness' ability to accurately identify the perpetrator.[123] Stressful conditions impair *330 a witness' ability to identify key characteristics of an individual's face.[124] A meta-analysis of the effect of high stress on eyewitness identifications found that stress hampers both eyewitness recall and identification accuracy.[125]

123 *See* Charles A. Morgan III et al., *Accuracy of Eyewitness Identification Is Significantly Associated with Performance on a Standardized Test of Face Recognition* , 30 Int'l J.L. & Psychiatry 213 (2007); Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory* , 28 L. & Hum. Behav. 687 (2004); Morgan et al., *Accuracy of Eyewitness Memory* , *supra* .

124 *See* Charles A. Morgan III et al., *Misinformation Can Influence Memory for Recently Experienced, Highly Stressful Events* , 36 Int'l J.L. & Psychiatry 11, 15 (2013).

125 Deffenbacher et al., *Effects of High Stress* , *supra* , at 699.

A recent study examining the effects of stress on identifications at a U.S. Military mock prisoner-of-war camp illustrates this phenomenon.[126] In this study, 509 active-duty military personnel, with an average of 4.2 years in the service, underwent two types of interrogations.[127] After twelve hours of confinement, participants experienced either a high-stress interrogation involving real physical confrontation followed by a low-stress interrogation without physical confrontation, or vice versa.[128] The interrogations were separated by approximately four hours, and about half the participants received the high-stress interrogation first, while the other half experienced the low-stress interrogation first.[129] Both interrogations lasted about forty minutes.[130] Twenty-four hours after the interrogations, the participants were asked to identify their interrogators from live lineups, sequential photo arrays, or simultaneous

photo arrays.[131] Across all identification procedures, subjects had far more difficulty accurately identifying their high-stress interrogators.[132] Sixty-two percent of subjects could identify their low-stress interrogators in live lineups, while only thirty percent of subjects could accurately identify their high-stress interrogators from such lineups.[133] Furthermore, fifty-six percent of subjects erroneously identified a person who was not their interrogator (false positive) during live lineups, while only thirty-eight percent of subjects did so for their low-stress interrogations.[134]

126 Morgan et al., *Accuracy of Eyewitness Memory* , *supra* , at 266.

127 *Id.* at 267-68.

128 *Id.* at 268.

129 *Id.*

130 *Id.*

131 *Id.* at 269-70.

132 *Id.* at 272.

133 *Id.*

134 *Id.*

This study is particularly stunning when one considers that the subjects all had a prolonged and unobstructed opportunity to view their interrogators, and the interrogators were all within arm's reach of their subjects. The subjects' ability to see the faces of their interrogators was therefore exponentially better than the opportunity witnesses to most violent crimes have to see perpetrators. Their views were certainly better than those of Howard, Bertha, and Cameron. As the study's authors explained,

> [c]ontrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 min[utes], ... [t]hese data provide robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error.[135]

135 *Id.* at 274.

331 *331

Notably, this study further found that memories formed during a stressful event are highly susceptible to modifications from misinformation received after the event. That has particular relevance here given the presence of the system variables described above.

Stress almost certainly affected all of the witnesses who saw Chedell Williams gunned down. The shooting undoubtedly caused Howard —the prosecution's star witness—a significant amount of stress. Not only was she herself chased, but she also watched as the perpetrator grabbed her best friend and shot her at point-blank range. It is not surprising that multiple witnesses recalled hearing Howard screaming. Stress also likely affected Bertha's ability to later make an accurate identification. He saw the shooter as the shooter rushed him, head on, pistol in hand. Jurors cannot properly assess eyewitness identification testimony where stress was present at memory formation unless this variable is explained to them.

2. Weapon Focus

The presence of weapons is a second, and related, estimator variable. The National Research Council has stated, "[r]esearch suggests that the presence of a weapon at the scene of a crime captures the visual attention of the witness and impedes the ability of the witness to attend to other important features of the visual scene, such as the face of the perpetrator.... The ensuing lack of memory of these other key features may impair recognition of a perpetrator in a subsequent lineup."[136] In 1992, an analysis of weapon focus studies concluded that the presence of a weapon significantly reduced witnesses' ability to recall their perpetrators.[137] A more recent study of the pertinent literature confirms that weapon presence has a consistently negative impact on both feature recall accuracy and identification accuracy.[138]

136 National Research Council, *Identifying the Culprit* , *supra* , at 93.

137 Nancy K. Steblay, *A Meta-analytic Review of the Weapon Focus Effect* , 16 L. & Hum. Behav. 413, 415-17 (1992).

138 Jonathan M. Fawcett et al., *Of Guns and Geese: A Meta-Analytic Review of the 'Weapon Focus' Literature* , Psychol., Crime & L. 1, 22 (2011).

Here, the jury was never informed that visibility of the perpetrator's gun may well have hampered the witnesses' ability to observe and/or form an accurate memory of the assailant's face. Howard, Bertha, and Cameron all provided clear descriptions of the gun, revealing their focus on it. But the jury was never informed of how this powerful estimator variable may have affected them.

3. Memory Decay

The period between memory formation and memory recall is known as the "retention interval" and constitutes another important estimator variable. A meta-analysis of fifty-three facial memory studies found "that memory strength will be weaker at longer retention intervals than at briefer ones."[139] Most of the studies analyzed in this meta-analysis examined retention intervals of less than one month, many of them less than one week. This meta-analysis also found agreement among experts that "the rate of memory loss for
332 *332 an event is greatest right after an event and then levels off over time."[140] Furthermore,

139 Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation* , 14 J. Experimental Psychol.: Applied 139, 142 (2008); *see also* Carol Krafka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification* , 49 J. Personality & Soc. Psychol. 58, 65 (1985) (finding a substantial increase in the misidentification rate in target-absent arrays from two to twenty-four hours after event).

140 Deffenbacher et al., *Forgetting the Once-Seen Face* , *supra* , at 143.

> [t]he effect of the retention interval also is influenced by the strength and quality of the initial memory that is encoded, which, in turn, may be influenced by other estimator variables associated with witnessing the crime (such as the degree of visual attention) and viewing factors (such as distance, lighting, and exposure duration).[141]

141 National Research Council, *Identifying the Culprit* , *supra* , at 99.

The in-court identifications of Dennis were made nearly *one year* after the crime occurred—a very significant retention interval under the relevant studies. Research is hardly necessary to appreciate the difficulty of trying to accurately recall the details of this chaotic and traumatizing event—lasting only a matter of seconds—a year later. The jurors should have been informed of that difficulty and its possible impact on the accuracy of these identifications. They were not.

4. Exposure Duration, Distance, and Lighting

As one would expect, exposure duration, distance, and lighting affect the accuracy of eyewitness identifications.[142] The charge that was given here did alert the jurors to the impact of these factors on the accuracy of an identification.[143] However, as I explain in the following section, it did not adequately convey the impact these factors can have on in-court identifications.

[142] Brian H. Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associated with Initial Memory Strength* , 18 Psychol., Crime & L. 473 (2012) (meta-analysis of the effect of exposure duration on facial identification accuracy); R.C.L. Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy* , 32 Law & Hum. Behav. 526 (2008) (study of the effect of distance on identification accuracy).

[143] Race-bias—referring to the relative races of the witness and perpetrator—is another crucial estimator variable. Although this variable does not raise concerns here because the three eyewitnesses and the perpetrator were all Black, it is nevertheless worth noting because it again shows the extent to which circumstances (other than opportunity to observe) can greatly impact the reliability of an eyewitness identification. Research has thoroughly documented a phenomenon known as "own-race bias" wherein people more accurately identify faces within their own race as compared to those of members of a different racial group. *See* National Research Council, *Identifying the Culprit* , *supra* , at 96; Roy S. Malpass & Jerome Kravitz, *Recognition for Faces of Own and Other Race* , 13 J. Personality & Soc. Psychol. 330 (1969). The Innocence Project analyzed 297 DNA exonerations and found that a cross-racial misidentification occurred in forty-two percent of the cases in which an erroneous eyewitness identification was made. Edwin Grimsley, *What Wrongful Convictions Teach Us about Racial Inequality* , The Innocence Project (Sept. 26, 2012), http://www.innocenceproject.org/Content/What_Wrongful_Convictions_Teach_Us_About_Racial_Inequality.php.

C. *The Dissent's Dismissal of Estimator Variables*

As the Majority recounts, nearly all of the eyewitnesses who mentioned the shooter's height in their initial police interviews described him as between 5'8? and 5'10?.[144] The witnesses also described the shooter as having a dark complexion and weighing about 170 to 190 pounds. James Dennis is 5'5? tall and weighed between 125 and
333 132 pounds at the time of trial.*333 The Dissent dismisses and tries to rationalize away this considerable size discrepancy. In an attempt to reinforce the reliability of the three witnesses, the Dissent relies on research that concludes eyewitnesses tend to underestimate the height and weight of taller and heavier targets and overestimate the height and weight of shorter and lighter targets.[145] The Dissent's use of that research is cruelly ironic. The finding of those studies was not that we should disregard eyewitness inaccuracy, as the Dissent's citation implies. Those researchers found just the opposite. The studies discovered that eyewitness identifications are

frequently *unreliable* .[146] As two of the researchers explained, "[t]he width and range of subjects' errors for the targets' height and weight in this study showed clearly that some subjects experience great difficulty in accurately judging another individual's physical characteristics."[147]

144 In fact, one eyewitness—Joseph DiRienzo Jr.—described the shooter's height in terms of his own height: "about my height, about 5' >9?." J.A. 1649.

145 Dissent at 358 (Fisher, J.) (citing Christian A. Meissner, Siegfried L. Sporer, & Jonathan W. Schooler, *Person Descriptions as Eyewitness Evidence* , *in* 2 *Handbook of Eyewitness Psychology* 3, 8 (Rod C.L. Lindsay et al. eds., 2007) and Rhona H. Flin & John W. Shepherd, *Tall Stories: Eyewitnesses' Ability to Estimate Height and Weight Characteristics* , 5 Hum. Learning 29, 34 (1986)).

146 Meissner, Sporer, & Schooler, *Person Descriptions as Eyewitness Evidence* , *supra* , at 8 (citing the Flin and Shepherd study); Flin & Shepherd, *Tall Stories* , *supra* , at 36.

147 Flin & Shepherd, *Tall Stories* , *supra* , at 36.

The Dissent also focuses on the strength of three estimator variables. The Dissent reminds us that "the visual conditions were excellent,"[148] the witnesses saw the shooter at "close range,"[149] and none of the identifications were cross-racial.[150] This is not only misleading, it also ignores many other system and estimator variables that were at least as important (if not more important) than the ones the Dissent focuses upon.

148 Dissent at 357 (Fisher, J.).

149 *Id.*

150 *Id.* at 358 (citing *Arizona v. Youngblood* , 488 U.S. 51, 72 n.8, 109 S.Ct. 333, 102 L.Ed.2d 281).

I agree that the lighting was good. However, the lighting here was likely no better than that in the rooms where the military personnel who failed to recognize the faces of their interrogators were questioned under stressful conditions.[151] The witnesses here were in close proximity to the shooter. However, they were not as close as Jennifer Thompson was to Ronald Cotton or John White's accuser was to him. Moreover, these witnesses only had a matter of seconds to view the perpetrators. Howard saw the shooter as he rushed towards her, Cameron in the seconds the crime occurred, and Bertha as the shooter ran past him. All of the witnesses' views occurred under highly stressful circumstances and their focus appears to have been as much on the gun in the shooter's hand as on the shooter's face. As I will explain in greater detail below, the charge that the jurors received did not focus their attention on any of those considerations.

151 Morgan et al., *Accuracy of Eyewitness Memory* , *supra* , at 268.

The lack of blinding, the presence of officer feedback, the fact that the record suggests that the witnesses thought they had to select someone from the photo arrays, the multiple viewings of Dennis, and the witnesses' viewing of the live lineup in the same room, all suggest that the identifications may have been corrupted by cues from law
334 enforcement and/or other witnesses.*334 We would be justifiably skeptical of any clinical trial where the researcher knew which sample was a placebo or who received the placebo. Yet, we do not think

twice about allowing someone to be convicted of a crime and sentenced to death on the basis of identification procedures where the investigator presenting the photo array or lineup is fully aware of who the suspect is. The witnesses who identified Dennis at trial had not one, but three opportunities to view Dennis. And none of the procedures included any level of blinding. Nothing in this record suggests that anyone other than Dennis was present in both the photo array and lineup. Yet, the jury was not made aware of the potential importance of any of these considerations. That should sound a note of caution in assessing the reliability of these identifications.

Finally, we should not ignore the fact that the majority of the witnesses that police interviewed after the crime were unable to identify Dennis as the shooter. Jurors did not know that Joseph DiRienzo, Joseph DiRienzo, Jr., Clarence Verdell, and David LeRoy all were unable to identify Dennis from the photo array. Although Anthony Overstreet did identify Dennis from this array, he did not think Dennis was the shooter once he had an opportunity to view him in the lineup. Overstreet had expressed the most confidence in his ability to positively identify the shooter during the initial police interviews.[152] When the totality of circumstances is viewed in context, the evidence of Dennis' guilt is not as uncompromising as the Dissent suggests.

[152] The fact that Overstreet and other non-identifying witnesses could theoretically have been called by defense counsel is no answer. No defense attorney in her right mind would put such witnesses on the stand, knowing that the witnesses had seen photographs of the defendant and would know the person sitting at counsel table was the person the police had arrested for the crime. A criminal justice system seeking fairness and justice should not countenance the creation of such an absurd dilemma.

Moreover, concerns about the reliability of these identifications should not be assuaged by evidence that was introduced in an attempt to corroborate the identification testimony. As the Majority explains, aside from eyewitness testimony, the Commonwealth presented testimony from Charles Thompson, who told detectives that he saw Dennis with a gun the night of the murder. Thompson identified an illustrative .32 chrome revolver (previously admitted as a Commonwealth exhibit) as being similar to the one he saw in Dennis's possession. As the Majority notes, Thompson had an open drug-possession charge at the time of trial, but testified that he was not expecting help from the Commonwealth in exchange for his testimony. Years after trial, Thompson recanted his testimony, averring that he had never seen Dennis with a gun and that his testimony at trial was false.

I realize, of course, that it can be argued that Thompson's recantation is not necessarily relevant to the force of the eyewitness identifications because it happened after trial. However, his testimony clearly corroborated the identification evidence, and it underscores the dangers of the inadequate identification instructions. The fact that the jurors were not given a sufficient basis to assess the identifications of Dennis severely undermined the potential force of Dennis' alibi testimony. Why would jurors believe such testimony (especially since it was offered by his father) when three neutral witnesses identified Dennis as the shooter? Had the jurors been able to assess the identifications with an appropriate understanding of the variables I have discussed, Dennis's alibi testimony may well *335 have had much greater force, and jurors would have been in a better position to weigh Dennis' alibi against Thompson's testimony that appeared to corroborate the three eyewitnesses. That is particularly true when we factor in the evidence of

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the Cason receipt that the Majority explains.[153] The Cason receipt could have further bolstered Dennis' alibi testimony and raised a reasonable doubt about the accuracy of the eyewitness identifications.

153 *See* Maj. Op. at 272–73, 274–75, 275–76.

IV. *Manson v. Brathwaite* and its Progeny

In 1977, the Supreme Court established a basic framework for determining whether admission of a particular identification violates a defendant's Fourteenth Amendment right to due process in *Manson v. Brathwaite.* [154] Under the *Manson* test, a court must first assess whether the eyewitness identification procedure at issue was, under the "totality of the circumstances," unnecessarily suggestive.[155] If the identification procedure was not unnecessarily suggestive, the inquiry ends. However, if it was unduly suggestive, a court must considers five factors to determine whether the resulting identification is nonetheless reliable. Those factors, drawn from the Supreme Court's prior decision in *Neil v. Biggers* ,[156] are: (1) "the opportunity of the witness to view the criminal at the time of the crime," (2) "the witness' degree of attention," (3) "the accuracy of the witness' prior description of the criminal," (4) "the level of certainty demonstrated by the witness at the confrontation," and (5) "the length of time between the crime and the confrontation."[157] These factors are weighed against "the corrupting effect of the suggestive identification itself."[158] *Manson* emphasizes that "reliability is the linchpin in determining the admissibility of identification testimony."[159]

154 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

155 *Id.* at 106, 97 S.Ct. 2243 (internal quotation marks omitted).

156 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

157 *Id.* at 199–200, 93 S.Ct. 375 ; *Manson* , 432 U.S. at 114, 97 S.Ct. 2243.

158 *Manson* , 432 U.S. at 114, 97 S.Ct. 2243.

159 *Id.*

Since *Manson* , more than 2,000 scientific studies have been conducted on the reliability of eyewitness identifications.[160] As I have explained, we now understand that even seemingly neutral identification procedures can lead to unreliable results due to a myriad of subtle variables. We also now know that a witness' subjective confidence in the accuracy of her identification has limited correlation to the reliability of her identification. As the National Research Council emphasized in its recent report on eyewitness identifications, the *Manson* test "treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors."[161]

160 *State v. Henderson* , 208 N.J. 208, 27 A.3d 872, 892 (2011), *holding modified by State v. Chen* , 208 N.J. 307, 27 A.3d 930 (2011) ; Morgan et al., *Accuracy of Eyewitness Memory* , *supra* , at 265.

161 National Research Council, *Identifying the Culprit* , *supra* , at 6.

The Supreme Court recently reaffirmed the approach laid out in *Manson* in *Perry v. New Hampshire* .[162] There, an eyewitness saw a man break into a car, called the police, and then told
336 the responding officer *336 that a man standing in the building's parking lot was the perpetrator.[163] That man was then arrested and convicted in state court. On appeal to the Supreme Court, he argued that the highly suggestive nature of the identification process entitled him to a suppression hearing prior to trial in order to determine the admissibility of the identification.[164] The Supreme Court rejected this argument. It held that the Due Process Clause of the Fourteenth Amendment only requires such a hearing when law enforcement *arranged* the unnecessarily suggestive circumstances under which the identification was obtained.[165] The Court "linked the due process check, not to suspicion of eyewitness testimony generally, but only to *improper police arrangement* of the circumstances surrounding an identification."[166]

162 —— U.S. ——, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012).

163 *Id.* at 721–22.

164 *Id.* at 722–23.

165 *Id.* at 730.

166 *Id.* at 726 (emphasis added).

In reaching this conclusion, the Court acknowledged the scientific research on eyewitness reliability.[167] It recognized the importance of this body of science and urged more robust jury instructions. As the Court explained, "[e]yewitness-specific jury instructions, which many federal and state courts have adopted, [ ] warn the jury to take care in appraising identification evidence."[168] The Court also stressed the importance of evidentiary rules "to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury."[169] Thus, instead of considering the relevant system and estimator variables "under the banner of due process,"[170] the Supreme Court advocated that courts incorporate the relevant scientific findings through other avenues, such as jury instructions and evidentiary rules.

167 *Id.* at 727 ("As one of Perry's *amici* points out, many other factors bear on "the likelihood of misidentification,"—for example, the passage of time between exposure to and identification of the defendant, whether the witness was under stress when he first encountered the suspect, how much time the witness had to observe the suspect, how far the witness was from the suspect, whether the suspect carried a weapon, and the race of the suspect and the witness." (internal citation omitted)).

168 *Id.* at 728–29 (internal footnote omitted).

169 *Id.* at 729.

170 *Id.* at 727 ("To embrace Perry's view would thus entail a vast enlargement of the reach of due process as a constraint on the admission of evidence.").

Some state courts have heeded *Perry* 's call and created new procedures and evidentiary frameworks that minimize the risks associated with erroneous eyewitness identifications. Most notably, in a unanimous decision, the Supreme Court of New Jersey re-wrote the state's rules governing the admission of eyewitness

identifications in *State v. Henderson* .[171] Prior to that decision, New Jersey courts relied on the *Manson* test to determine whether certain identifications were admissible.[172] *Henderson* , however, held that the *Manson* test did "not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct." The court also concluded that *Manson* "overstates the jury's
337 inherent ability to evaluate evidence *337 offered by eyewitnesses who honestly believe their testimony is accurate."[173]

171 208 N.J. 208, 27 A.3d 872 (2011), *holding modified by State v. Chen* , 208 N.J. 307, 27 A.3d 930 (2011).

172 *See id.* at 918 ; *State v. Madison* , 109 N.J. 223, 536 A.2d 254, 258–59 (1988)*holding modified by State v. Henderson* , 208 N.J. 208, 27 A.3d 872 (2011).

173 *Henderson* , 27 A.3d at 878.

To remedy these problems, the court pioneered a two-part revision to the judicial procedures related to eyewitness identifications. First, the court changed the requirements related to pre-trial hearings on the admissibility of eyewitness identifications. After *Henderson* , a defendant can now obtain a pre-trial hearing if she can show "some evidence of suggestiveness that could lead to a mistaken identification."[174] The court specified that this "evidence, in general, must be tied to a system—and not an estimator—variable."[175] The trial court can end this hearing at any time "if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless."[176] But if the defendant's claim is meritorious, the trial judge must weigh both system and estimator variables[177] to decide whether, under the "totality of the circumstances,"
338 the defendant *338 has "demonstrated a very substantial likelihood of irreparable misidentification."[178] If the trial court concludes that the defendant has met this burden, the court must suppress the identification evidence.[179]

174 *Id.* at 920.

175 *Id* . The New Jersey Supreme Court instructed courts to consider the following non-exhaustive list of system variables when deciding whether to hold a pre-trial hearing:

1. *Blind Administration.* Was the lineup procedure performed double-blind? If double-blind testing was impractical, did the police use a technique like the "envelope method" described above, to ensure that the administrator had no knowledge of where the suspect appeared in the photo array or lineup?

2. *Pre-identification Instructions.* Did the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification?

3. *Lineup Construction.* Did the array or lineup contain only one suspect embedded among at least five innocent fillers? Did the suspect stand out from other members of the lineup?

4. *Feedback.* Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?

5. *Recording Confidence.* Did the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?

6. *Multiple Viewings.* Did the witness view the suspect more than once as part of multiple identification procedures? Did police use the same fillers more than once?

7. *Showups.* Did the police perform a showup more than two hours after an event? Did the police warn the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification?

8. *Private Actors.* Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?

9. *Other Identifications Made.* Did the eyewitness initially make no choice or choose a different suspect or filler?

Id. at 920–21.

176 *Id.* at 920.

177 The New Jersey Supreme Court told courts to consider the following, non-exhaustive list of estimator variables in assessing the reliability of an eyewitness identification:

1. *Stress.* Did the event involve a high level of stress?

2. *Weapon focus.* Was a visible weapon used during a crime of short duration?

3. *Duration.* How much time did the witness have to observe the event?

4. *Distance and Lighting.* How close were the witness and perpetrator? What were the lighting conditions at the time?

5. *Witness Characteristics.* Was the witness under the influence of alcohol or drugs? Was age a relevant factor under the circumstances of the case?

6. *Characteristics of Perpetrator.* Was the culprit wearing a disguise? Did the suspect have different facial features at the time of the identification?

7. *Memory decay.* How much time elapsed between the crime and the identification?

8. *Race-bias.* Does the case involve a cross-racial identification?

...

9. *Opportunity to view the criminal at the time of the crime.*

10. *Degree of attention.*

11. *Accuracy of prior description of the criminal.*

12. *Level of certainty demonstrated at the confrontation.*

Did the witness express high confidence at the time of the identification before receiving any feedback or other information?

13. *The time between the crime and the confrontation.* (Encompassed fully by "memory decay" above.)

Id. at 921–22.

178 *Id.* at 920.

179 *Id.*

Second, the New Jersey Supreme Court directed the state judicial system to develop "enhanced jury charges on eyewitness identification for trial judges to use."[180] As the court explained, "[w]e anticipate that identification evidence will continue to be admitted in the vast majority of cases. To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability."[181]

180 *Id.* at 878.

181 *Id.*

Henderson also emphasized that the "factors that both judges and juries will consider are not etched in stone."[182] Rather, "the scientific research underlying them will continue to evolve, as it has

in the more than thirty years since *Manson* ."[183] Accordingly, the court clarified that its decision does not "limit trial courts from reviewing evolving, substantial, and generally accepted scientific research."[184]

182 *Id* .

183 *Id.*

184 *Id.* at 922.

Finally, the New Jersey Supreme Court suggested that, where appropriate, trial courts consider giving instructions during the trial *before* eyewitness identification testimony is elicited. Such instructions would help inform juries, up front, of the problems that can arise from seemingly unequivocal courtroom identifications.[185]

185 *Id.* at 924.

After *Henderson* , in July 2012,[186] the New Jersey Supreme Court released its expanded set of jury instructions governing evaluation of identifications. These instructions explain that scientific research has shown eyewitness identifications can be unreliable, and they emphasize that eyewitness evidence "must be scrutinized carefully."[187] To this end, the instructions identify a specific set of factors that jurors should consider when deciding whether eyewitness identification evidence is reliable, including estimator and system variables.[188] These instructions are consistent with the Supreme Court's analysis in *Perry* and will better equip jurors to evaluate the reliability of eyewitness identifications.[189] *339 The Supreme Court of Oregon has likewise reformed the state judicial system's approach to eyewitness identifications. However, Oregon has taken a slightly different approach. In *State v. Lawson* ,[190] the court addressed the reliability issue from an evidentiary standpoint as opposed to a due process one. Prior to *Lawson* , Oregon courts adhered to a rule under which trial courts could not consider whether an identification was unreliable until some evidence of suggestiveness was first introduced.[191] In rejecting that approach, the Oregon Supreme Court explained:

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186 These instructions were released a year after the opinion in *Henderson.*

187 Supreme Court of New Jersey, *New Jersey Criminal Model Jury Instructions* , *Identification: In-Court Identifications Only* 2 (2012), http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf.

188 *Id.* at 3-9.

189 New Jersey is not alone in its response to the vast body of research on the reliability of eyewitness identifications. In 2011, the Justices of the Massachusetts Supreme Judicial Court convened a study group to "offer guidance as to how our courts can most effectively deter unnecessarily suggestive identification procedures and minimize the risk of a wrongful conviction." Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence, *Report and Recommendations to the Justices* 1 (2013) (internal quotation marks omitted). The report made five recommendations aimed at minimizing misidentifications: (1) acknowledge variables affecting identification accuracy; (2) develop a model policy and implement best practices for police departments; (3) expand use of pretrial hearings; (4) expand use of improved jury instructions; and (5) offer continuing education to judges and bar leaders. *Id.* at 2-5. Like *Henderson* , the

Massachusetts report recommended that, when a defendant contests the reliability of an eyewitness identification, the trial judge should conduct a pretrial hearing to determine whether law enforcement used suggestive identification procedures to elicit that identification. *Id.* at 109-16. If a suggestive procedure was used, the report recommended that courts assess whether those procedures impacted the reliability of the identification. *Id.* at 111. The report suggested that courts consider both estimator and system variables in pre-trial hearings. *Id.*

190 352 Or. 724, 291 P.3d 673 (2012).

191 *See id.* at 688 ; *State v. Classen* , 285 Or. 221, 590 P.2d 1198 (1979).

Such a requirement [ ] conflates evidentiary principles with due process concerns. A constitutional due process analysis might properly consider suggestiveness as a separate prerequisite to further inquiry because the Due Process Clause is not implicated absent some form of state action, such as the state's use of a suggestive identification procedure. As a matter of state evidence law, however, there is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability.... A trial court tasked with determining a constitutional claim must necessarily assume that the evidence is otherwise admissible; were it inadmissible on evidentiary grounds, the court would never reach the constitutional question. However, a trial court tasked with considering a question of evidentiary admissibility clearly cannot begin by assuming admissibility.[192]

192 *Lawson* , 291 P.3d at 688–89 (citing *Perry v. New Hampshire* , —— U.S. ——, 132 S.Ct. 716, 730, 181 L.Ed.2d 694 (2012) ("[T]he Due Process Clause does not require a preliminary judicial inquiry into reliability of an eyewitness identification when the identification was not procured under unnecessary suggestive circumstances arranged by law enforcement.")).

Lawson then fashioned a new approach to examining eyewitness identifications from existing rules of evidence. Under this revised test, "when a criminal defendant files a pretrial motion to exclude eyewitness identification evidence, the *state* as the proponent of the eyewitness identification must establish all preliminary facts necessary to establish admissibility of the eyewitness evidence."[193] If the challenged eyewitness evidence implicates the Oregon equivalents of Federal Rules of Evidence 602 [194] and 701,[195] the state must prove that the eyewitness has personal knowledge of the matter on which she will testify, and *340 her identification "is both rationally based on [her] first-hand perceptions and helpful to the trier of fact."[196] This flips the burdens in due process cases such as *Manson* and *Henderson.* Rather than the defendant proving that the identification at issue is unreliable, the state must first prove that the identification meets the evidentiary requirements of Rules 602 and 701.

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193 *Id.* at 696–97 (emphasis added).

194 Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.").

195 Fed. R. Evid. 701 ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.").

196 *Lawson* , 291 P.3d at 697.

If the state successfully shows that the identification evidence is admissible, the burden then shifts to the defendant to establish that "the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."[197] Thus, Oregon courts now rely on the state equivalent of Federal Rule of Evidence 403 [198] to exclude unreliable eyewitness identifications that are otherwise admissible. If a trial court concludes that the defendant has made such a showing, "the trial court can either exclude the identification, or fashion an appropriate intermediate remedy short of exclusion to cure the unfair prejudice or other dangers attending the use of that evidence."[199]

197 *Id.*

198 Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

199 *Lawson* , 291 P.3d at 697.

State courts are not alone in their responses to the scientific research. Federal circuit courts of appeals have also acknowledged the unreliability of certain eyewitness testimony.[200] In *United States v. Brownlee* ,[201] we recognized the importance of expert testimony in safeguarding against unreliable eyewitness identifications. There, we held that a district court properly admitted expert testimony concerning the effects of race, hair covering, weapons focus, and exposure on the identification accuracy of multiple witnesses.[202] We further held that the district court *improperly* excluded expert testimony comparing the show-up procedure used in that case (a procedure where law enforcement presents a *single* individual arguably fitting a witness' description to that witness for identification) and other identification procedures and analyzing the suggestiveness of the show-up and its potential effect on the identifications. We also held that the district court improperly excluded expert testimony on confidence malleability, post-event suggestiveness, and confidence of accuracy.[203] In doing so, we joined the growing chorus in acknowledging that

200 *See, e.g.* , *United States v. Bartlett* , 567 F.3d 901, 906 (7th Cir. 2009), *cert. denied* , 558 U.S. 1147, 130 S.Ct. 1137, 175 L.Ed.2d 971 (2010) ; *United States v. Brownlee* , 454 F.3d 131, 141-44 (3d Cir. 2006).

201 454 F.3d 131 (2006).

202 *Id.* at 137.

203 *Id.* at 141.

> The recent availability of post-conviction DNA tests demonstrate that there have been an overwhelming number of false convictions stemming from uninformed reliance on eyewitness misidentifications.... In fact, mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined. Eyewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, *is among the least reliable forms of evidence.* [204]

204 *Id.* at 141–42 (internal quotation marks, citations, and alterations omitted).

341 *341

We then explained that expert testimony can play a crucial role in counteracting the falsely persuasive effect of unreliable eyewitness testimony.[205] As the National Research Council has recognized, expert testimony on eyewitness identifications may hold certain advantages over jury instructions as a method to explain the relevant science to juries.[206] Expert witnesses: (1) "can explain scientific research in a more flexible manner, by presenting only the relevant research to the jury"; (2) are more "familiar with the research and can describe it in detail"; (3) "can convey the state of the research at the time of the trial"; (4) "can be cross-examined by the other side"; and (5) "can more clearly describe the limitations of the research."[207] Therefore, expert testimony on eyewitness accuracy is a crucial tool for educating juries on the science surrounding identifications.

205 *See id.* at 144.

206 National Research Council, *Identifying the Culprit* , *supra* , at 40.

207 *Id* .

It is against this backdrop that we must assess the jurors' acceptance of the three eyewitness identifications of Dennis and the adequacy of the charge that guided their deliberations.

V. The Jury Charge

In *Watkins v. Sowders* , Justice Brennan wrote: "Surely jury instructions can *ordinarily* no more cure the erroneous admission of powerful identification evidence than they can cure the erroneous admission of a confession."[208] Although Justice Brennan was referring to the admissibility of certain eyewitness identifications rather than their reliability, his caution underscores the limited utility of a bare bones jury instruction that does not properly inform jurors about the many factors that can undermine courtroom identifications. This is particularly so given the powerful countervailing effect of jurors' predisposition to believe eyewitness testimony.

208 449 U.S. 341, 350, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J. dissenting) (emphasis added).

Studies have documented that jurors tend to misunderstand how memory works and often believe it to be much more reliable and less susceptible to outside influence than it actually is.[209] One survey of 1,000 potential jurors in Washington, D.C. found that almost two-thirds of the respondents thought the statement "I never forget a face" applied "very well" or "fairly well" to them.[210] Another thirty-seven percent thought the presence of a weapon would enhance the witness' reliability, while thirty-three percent either believed that the weapon would have no effect or were unsure what effect the weapon would have.[211] Finally, thirty-nine percent of respondents believed that when an event is violent, it makes a witness' memory for details more reliable, while thirty-three percent responded

either that this would have no effect or that they were unsure of the effect violence during the commission of the crime would have.[212] The studies I have discussed show how wrong these beliefs are. There is no reason to believe the jurors who convicted Dennis were any more enlightened about memory formation and recall than the
342 respondents in these studies.*342 Yet, the jurors who convicted James Dennis were only provided with a "plain vanilla" instruction. They had no knowledge of the potential distortion that can be caused by the factors discussed here. The trial court's entire jury instruction regarding how the jurors should evaluate the eyewitness identifications was as follows:

209 Epstein, *supra* , 46-48; Elizabeth F. Loftus, Timothy P. O'Toole, & Catharine F. Easterly, *Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia* l (2004).

210 Loftus, O'Toole, & Easterly, *supra* , at 6.

211 *Id.* at 8.

212 *Id.* at 9.

There have been several Commonwealth identification witnesses.... However, a mistake can be made in identifying a person even by a witness attempting to be truthful.

Where the *opportunity for positive identification is good and the witness is positive in his or her identification and his or her identification is not weakened by prior failure to identify* but remains, even after cross-examination, positive and unqualified, the *testimony as to identification need not be received with caution and can be treated as a statement of fact.*

On the other hand, where a witness is not in a position to clearly observe the assailant or is not positive, as to identify, or his or her positive statements as to identity are weakened by qualification or by inconsistencies or by failure to identify the defendant on one or more prior occasions, then the testimony as to identification must be received with caution. You have heard the testimony in this case to the effect, and I leave it to your judgment and for your determination, but my recollection is that there were some prior identifications that were less than unqualified or positive. I think that's been gone over at length by counsel. Under those circumstances, you should receive the testimony with caution. But it's for you to determine whether or not this is so, you decide whether the testimony was weakened and what the evidence was.

If, according to these rules, you decide that caution is required in determining whether or not to accept the testimony of the identifying witnesses, then you must take into consideration the following matters: A, whether the testimony of the

> identification witness is generally believable; B, whether his or her opportunity to observe was sufficient to allow him or her to make an accurate identification; C, how the identification was arrived at; D, all of the circumstances indicating whether or not the identification was accurate; and E, whether the identification testimony is supported by other evidence. And you must conclude that it is so supported before you can accept it as being accurate.
>
> My advice to you is this. In this case, my recollection, that's why I'm not being so emphatic, my recollection is that one of the witnesses said, "I think [,]"[ ] another witness, for example, said, at a certain time, "I can't be sure." Witnesses who testified that way, their testimony as to identification should be received with caution and you should follow the rules that I've given you.[213]

213 J.A. 1237-39.

Absent from this instruction is any explanation of the relevant system or estimator variables that so crucially impact the reliability of witness identifications. The caution the trial court urged is of precious little help given that omission. Jurors need to be informed of the applicable variables before they will be in a position to exercise the caution that this instruction urged. Without those detailed instructions, jurors simply are in no position to fully appreciate that "[t]he witness' recollection of [a] stranger can be distorted easily by the circumstances or by later actions of the police."*343 Moreover, as should be evident from my discussion, the italicized text instructing the jurors that they need not be cautious about accepting the identification of a witness who appears certain of her identification and had a good opportunity to observe the crime is extraordinarily dangerous. Contrary to the court's instruction, that testimony cannot be accepted as fact. Social science aside, one need only consider the professed certainty of the accusers of Ronald Cotton and John White to understand just how problematic such a charge is. We again face a familiar and problematic reality: How ill-equipped these jurors were to assess the accuracy of the three eyewitnesses who pointed to Dennis and said "that's the one."

343

VI. Conclusion: Un-Ringing the Bell

In 1977, Justice Marshall emphasized that " 'the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.' "[214] They are known far better today. As Justice Marshall continued: "It is, of course, impossible to control one source of such errors[—]the faulty perceptions and unreliable memories of witnesses[—]except through vigorously contested trials conducted by diligent counsel and judges."[215] Given the quantity and quality of research that has been conducted since Justice Marshall wrote those words, we judges must do a better job of educating ourselves and jurors about the dynamics of eyewitness identifications. Although no system so dependent on the limits of human abilities will ever be able to totally eliminate the problems endemic in eyewitness testimony, the integrity of the criminal justice system demands that we do better.

214 *Manson v. Brathwaite* , 432 U.S. 98, 119, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (Marshall, J., dissenting) (internal alteration omitted) (quoting *United States v. Wade* , 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)).

215 *Id* .

"[J]urors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable. Thus, while science has firmly established the inherent unreliability of human

perception and memory, this reality is outside the jury's common knowledge and often contradicts jurors' 'commonsense' understandings."[216] Therefore, thorough and appropriately focused jury instructions that reflect the scientific findings are critical to allowing jurors to discharge their solemn obligation to assess evidence.[217] Such instructions will also encourage police to use more neutral procedures in investigating crimes. If law enforcement officials know that juries will be informed about best practices for obtaining identifications, police will have a very strong incentive to adopt protocols consistent with those best practices. As the National Research Council
344 has explained, *344 such instructions therefore "create an incentive for agencies to adopt written eyewitness identification procedures and to document the identifications themselves."[218]

216 *United States v. Brownlee* , 454 F.3d 131, 142 (3d Cir. 2006) (internal quotation marks and citations omitted).

217 It is important to note that jury instructions are only one of several promising remedies. As we mentioned in our discussion of *Brownlee* , expert testimony regarding the reliability of eyewitness identifications can also help jurors accurately assess the reliability of such identifications. The National Research Council has also recommended that, where appropriate, trial judges make basic inquiries into eyewitness identification evidence. National Research Council, *Identifying the Culprit* , *supra* , at 109-10. As the National Research Council suggested, "while the contours of such an inquiry would need to be established on a case-by-case basis, at a minimum, the judge could inquire about prior lineups, what information had been given to the eyewitness before the lineup, what instructions had been given to the eyewitness in connection with administering the lineup, and whether the lineup had been administered 'blindly.' " *Id.* at 110.

218 *Id.* at 110.

It is difficult to un-ring the bell that an unreliable eyewitness identification tolls. Therefore, in the first instance, it is law enforcement—not the courts—that can best ensure against an undue risk of convicting the innocent. However, robust jury instructions can minimize the dangers associated with inaccurate eyewitness identifications. In this case, had the jury been appropriately informed of the problems associated with the procedures used to solicit the identifications, as well as the numerous estimator variables that could have affected them, the jurors may well have concluded that James Dennis was not the one who shot Chedell Williams.

AMBRO, Circuit Judge, joins in this concurring
345 opinion.*345 **APPENDIX: Eyewitness**
346 **Identifications** *346 JORDAN, Circuit Judge, concurring in part and concurring in the judgment:

To say this case is troubling is a serious understatement. James Dennis was convicted of murder and sentenced to death based almost entirely upon the testimony of three problematic eyewitnesses and despite a dearth of physical evidence. On direct appeal, the Pennsylvania Supreme Court affirmed his conviction and death sentence in an opinion that is no credit to that court's usual standards. *See Dennis I* , 552 Pa. 331, 715 A.2d 404 (1998). It rejected in a mere three sentences Dennis's *Brady* claim with respect to the Cason receipt, a piece of evidence thoroughly described in today's Majority opinion. Here is the entirety of the state court's analysis:

> Finally, it is clear that there clearly was no Brady violation. The DPW receipt was not exculpatory, because it had no bearing on Appellant's alibi, and there is no evidence that the Commonwealth withheld the receipt from the defense. Accordingly, Appellant's claims of ineffectiveness regarding Cason and the DPW receipt have no arguable merit.

Id . at 408.

Perhaps the most remarkable aspect of that drive-by discussion is the assertion that the Cason receipt was not exculpatory because "it had no bearing on [Dennis]'s alibi." *Id* . In reality, the pertinence and importance of the receipt could not be more glaring. It shows exactly what time witness Latanya Cason received her public assistance check, thus shifting the timeline of events that she laid out during her trial testimony so that, instead of contradicting Dennis's testimony, she almost perfectly corroborated his alibi. The previously-undisclosed receipt thus transforms Cason from a damning prosecution witness into a powerful witness for the defense.

Every judge of our en banc Court has now concluded that the Pennsylvania Supreme Court's contrary determination was not only wrong, but so obviously wrong that it cannot pass muster even under AEDPA's highly-deferential standard of review. In other words, it is the unanimous view of this Court that any fairminded jurist must disagree with the *Dennis I* court's assessment of the materiality and favorability of the Cason receipt. Yet somehow a majority of the Pennsylvania Supreme Court endorsed Dennis's conviction and death sentence. The lack of analytical rigor and attention to detail in that decision on direct appeal is all the more painful to contemplate because the proof against Dennis is far from overwhelming. He may be innocent.*347 But the strength of the case against James Dennis need not be the focus of our attention. This case can and should be resolved on a single point: the *Brady* claim concerning the Cason receipt. That is one reason why I cannot join the more expansive opinion of my colleagues in the Majority. Their correct conclusion that the error in *Dennis I* regarding the Cason receipt is by itself enough to warrant habeas relief means that we have no call to address the *Brady* claims with respect to the Howard police activity report and the Frazier documents. And, in fact, I disagree with the Majority's analysis of those latter two claims and fully agree with my dissenting colleagues' rejection of them, which is another reason I cannot join the Majority opinion.

Moreover, I also agree with the Dissent's position,[1] set forth in its discussion of the Cason receipt, that imposing a "reasonable diligence" requirement upon defense counsel does not violate a clearly established holding of the Supreme Court. The "reasonable diligence" requirement is, in effect, a rule that a *Brady* claim will not lie when the evidence in question was available to the defense by the exercise of reasonable diligence. *E.g.* , *Brown v. Cain* , 104 F.3d 744, 750 (5th Cir. 1997). We are obligated by AEDPA to uphold a state court's decision unless it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under AEDPA, whether any of us thinks that imposing a reasonable diligence requirement is a good idea or the best interpretation of *Brady* is irrelevant. What matters is that one can reasonably perceive such a requirement being allowed by Supreme Court jurisprudence.[2] We ourselves have applied it repeatedly,[3] so we can hardly *348 say that it constitutes an unreasonable application of federal law.

Of course, the Pennsylvania Supreme Court never said anything at all in its *Dennis I* decision about defense counsel's lack of diligence in locating the Cason receipt. But, under *Harrington v. Richter* , habeas review requires that we engage in so-called "gap-filling," and apply AEDPA deference to whatever reasonable "arguments or theories ...

could have supported[ ] the state court's decision," if that decision does not provide reasoning for its conclusions.[4] 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). Thus, despite the fact that the Pennsylvania Supreme Court never itself discussed diligence, *Richter* might prompt us to apply a reasonable diligence requirement and reject Dennis's Cason receipt *Brady* claim—exactly as the Dissent has suggested—*if* there were a gap in the state-court decision for us to fill. The problem I have with the Dissent is that I see no gap in the state court's reasoning, at least not in the sense contemplated in *Richter* . My dissenting colleagues are not filling a gap here; they are rewriting the opinion of the Pennsylvania Supreme Court, adding and then elaborating a theory that was never litigated in state court.

The reality of what happened in *Dennis I* is more straightforward. The Pennsylvania Supreme Court simply erred. Its opinion stated both that "the police came into possession of" the Cason receipt and that "there [was] no evidence that the Commonwealth withheld the receipt from the defense." *Dennis I* , 715 A.2d at 408. There was, however, no recognition that those statements are fundamentally at odds. Under the Supreme Court's opinion in *Kyles v. Whitley* , any evidence in the possession of the police is, for *Brady* purposes, also in the possession of the prosecution. 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). If a piece of favorable, material evidence is in the possession of the police but is not turned over to the defense, it is necessarily withheld by the prosecution in violation of *Brady* . *See id* . (prosecutors are responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police").

By entirely failing to apply *Kyles* , the Pennsylvania Supreme Court acted "contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[5] In light of the state court's error, I would review Dennis's *Brady* claim with respect to the Cason receipt "unencumbered by the deference AEDPA normally requires," *Panetti v. Quarterman* , 551 U.S. 930, 948, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007), to determine whether Dennis is "in custody in violation of the
349 Constitution or laws ... of the United *349 States." 28 U.S.C. § 2254(a).[6] On that *de novo* review, I would hold that the evidence in question meets all three requirements of *Brady* —the Cason receipt is material and favorable, and it was suppressed by the Commonwealth—for the reasons set out in Part III.A of the Majority opinion. I therefore concur in the judgment. I also agree with Part II of the Majority opinion and write separately to explain my view of the limits of *Richter* gap-filling and the proper scope of AEDPA deference.

Recall that in *Dennis I* , the Pennsylvania Supreme Court said, "there is no evidence that the Commonwealth withheld the [Cason] receipt from the defense." 715 A.2d at 408. My dissenting colleagues believe "it is not clear what the court meant by [that]." (J. Fisher Dissent Op. at 360.) They then proceed to fill the "gap" they think is created by the ambiguity they perceive, saying, "the Pennsylvania Supreme Court could have meant that the receipt was not withheld because it was available to the defense with reasonable diligence." (J. Fisher Dissent Op. at 362.)

The precedent that establishes a gap-filling requirement, *Richter* , dealt with a state court decision that was unsupported by any reasoning. 562 U.S. at 96–97, 131 S.Ct. 770. The state court issued a summary order, with no written opinion, denying a prisoner's ineffective assistance of counsel claim. *Id* . The gap in the state court's reasoning was obvious—there was no reasoning at all. The Supreme Court held that, even in those circumstances, "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id* . at 98, 131 S.Ct. 770. Thus federal courts must fill gaps in a state court's reasoning so that there is something against which to measure a

petitioner's efforts. In short, "a habeas court must determine what arguments or theories ... could have supported[ ] the state court's decision" and afford AEDPA deference to those theories. *Id* . at 102, 131 S.Ct. 770.

Premo v. Moore extended *Richter* 's gap-filling directive a bit beyond cases devoid of all reasoning. 562 U.S. 115, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011). There, a prisoner claimed ineffective assistance of counsel because his attorney had failed to file a motion to suppress a confession. *Id* . at 119, 131 S.Ct. 733. In concluding that such a motion "would have been fruitless," *id* . the state court's opinion expressly
350 referenced *350 trial counsel's explanation that "suppression would serve little purpose" because the defendant had made full and admissible confessions to others. *Id* . at 123, 131 S.Ct. 733. The state court did not, however, specify which of the two prongs of the ineffective assistance of counsel standard from *Strickland v. Washington* , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) —deficient performance or prejudice— formed the basis of its rejection of the claim. *Premo* , 562 U.S. at 123, 131 S.Ct. 733. The Supreme Court therefore held that the Court of Appeals for the Ninth Circuit had to fill that gap by assuming "that both findings would have involved an unreasonable application of clearly established federal law." *Id* . Critical to the ultimate denial of habeas relief, the Supreme Court believed that the state court's justification for rejecting the petitioner's claim was sufficient to address either prong of *Strickland* .[7] Accordingly, the Supreme Court's decision was not an exercise in speculation but was rooted in the state court's actual reasoning. *Premo* did not require consideration of an entirely new argument that had not already been identified and accepted by the state court. *See id* . at 124, 131 S.Ct. 733 ("[T]he [state court's] first and independent explanation— that suppression would have been futile— confirms that [counsel's] representation was adequate under *Strickland* ."). The "gap" that the Court filled was thus quite narrow.

The very next year, the Supreme Court put a limit on gap-filling. In *Lafler v. Cooper* , it upheld a grant of habeas corpus. —— U.S. ——, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). The petitioner, Anthony Cooper, had shot at a woman's head but missed, instead hitting her in the buttock, hip, and abdomen. *Id* . at 1383. The prosecution offered Cooper two plea deals, and Cooper expressed interest. *Id* . He ended up rejecting the offers, though, because (he later alleged) his attorney convinced him that the prosecution would be unable to establish intent to murder because he shot his victim below the waist. *Id* . After he was convicted on all charges, Cooper claimed ineffective assistance of counsel. *Id* . The Michigan Court of Appeals rejected his claim, analyzing it as follows:

> [T]he record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on [a] claim of self-defense and because he did not obtain a more favorable plea bargain for defendant.

People v. Cooper , No. 250583, 2005 WL 599740, at *1 (Mich. Ct. App. Mar. 15, 2005) (per curiam) (internal citations omitted). After the district court granted Cooper's petition for habeas relief, the Sixth Circuit affirmed, emphasizing the problem in the state court's decision with this comment: "it is not clear from the [state] court's abbreviated discussion (only two sentences of the opinion is even arguably responsive to petitioner's claim) what the court decided, or even whether the
351 correct *351 legal rule was identified." *Cooper v.*

Lafler , 376 Fed.Appx. 563, 568–69 (6th Cir. 2010), *vacated by* —— U.S. ——, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).

While it ultimately affirmed the habeas decision, the Supreme Court concluded that the state court's two-sentence analysis "may not be quite so opaque as the Court of Appeals for the Sixth Circuit thought...." *Lafler* , 132 S.Ct. at 1390. The state court had identified Cooper's ineffective-assistance-of-counsel claim, but had failed to apply the proper *Strickland* standard to assess it. Instead, the state court had "simply found that respondent's rejection of the plea was knowing and voluntary." *Id* . Although the Michigan court recited the *Strickland* standard, the Supreme Court concluded that the state court had mistakenly relied upon an entirely different standard (*i.e.* , the "knowing and voluntary" standard), which was contrary to *Strickland* . By relying upon the wrong standard altogether, "the state court's adjudication was contrary to clearly established federal law." *Id* . As a consequence, the Supreme Court declined to apply AEDPA deference to the state court decision and, instead, engaged in *de novo* review of Cooper's *Strickland* claim, concluding that his counsel's deficient performance and the prejudice therefrom required relief. *Id* . at 1390–91. The Supreme Court's analysis in *Lafler* suggests that we should be hesitant to deem a state court opinion to be so lacking in analysis that it is comparable to an "order ... unaccompanied by an opinion explaining [its] reasons." *Richter* , 562 U.S. at 98, 131 S.Ct. 770. In other words, we ought not engage in error correction under the guise of gap-filling.

That holds true here. In *Dennis I* , the Pennsylvania Supreme Court correctly identified *Brady* and its requirement that, for relief to be warranted, the evidence in question must be both exculpatory and withheld. Nevertheless, the court applied a standard contrary to *Brady* and its progeny when it concluded that the prosecution did not withhold evidence that the police had in their possession. *Cf* . *Sears v. Upton* , 561 U.S. 945, 952, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (per curiam) ("Although the court appears to have stated the proper ... standard, it did not correctly conceptualize how that standard applies to the circumstances of this case."). *Kyles* is very clear in explaining that, for purposes of a *Brady* analysis, the prosecution functionally possesses all favorable evidence in the possession of the police. *See* 514 U.S. at 437, 115 S.Ct. 1555 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). Just as the Michigan state court in *Lafler* failed to apply *Strickland* to assess an ineffective assistance claim, so too the Pennsylvania Supreme Court failed to apply *Kyles* to assess Dennis's *Brady* claim with respect to the Cason receipt. Rather than applying *Kyles* , the court simply found that there was no evidence that the prosecutor possessed the Cason receipt. *Compare* *Lafler* , 132 S.Ct. at 1390 ("Rather than applying *Strickland* , the state court simply found that respondent's rejection of the plea was knowing and voluntary. An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel."). *Lafler* implies a limit on the gap-filling called for by *Richter* and *Premo* . As was done in *Lafler* , we should take the state court's decision as written, rather than construct our own "not unreasonable" theory to justify that court's conclusion.

Justice Scalia's dissent in *Lafler* further supports the analogy between that case and this one. Indeed, his opinion reads much like the Dissent here. First, he pointed out that the Michigan state court *352 had recited the *Strickland* standard. *Lafler* , 132 S.Ct. at 1396 (Scalia, J., dissenting). He next read the subsequent paragraph of the state court's decision as an attempt to apply that standard. *Id* . He then concluded that the state court did not apply a standard "contrary to" federal law. Instead, by direct analogy to *Premo* ,

he argued that his colleagues should have assessed whether the state court opinion constituted an unreasonable application of clearly established federal law, subject to *Richter* 's gap filling requirement:

> Since it is ambiguous whether the state court's holding was based on a lack of prejudice or rather the court's factual determination that there had been no deficient performance, to provide relief under AEDPA this Court must conclude that *both* holdings would have been unreasonable applications of clearly established law.

Id . Justice Scalia's effort to salvage the state court decision in *Lafler* provides some support for the Dissent's approach here. But Justice Scalia was himself writing a dissent. Had the Supreme Court wanted us to save every problematic state court opinion by gap-filling and application of AEDPA deference, Justice Scalia's opinion would have been the majority position.

I can discern no ambiguity in the Pennsylvania Supreme Court's *Brady* analysis regarding the Cason receipt. The *Dennis I* opinion is clear about it. Very brief and very wrong, but clear. The analysis under the suppression prong of *Brady* can be distilled from two sentences of the opinion. First, the court says, "During their investigation ... the police came into possession of" the Cason receipt.[8] *Dennis I* , 715 A.2d at 408. It then says, "there is no evidence that the Commonwealth withheld the receipt from the defense." *Id* . If one follows the instruction of *Kyles* , those two statements are impossible to harmonize. But if one ignores *Kyles* and assumes there exists some dividing line between the police and the prosecution, the court's reasoning is plain. To the
353 Pennsylvania Supreme *353 Court, the fact that the *police* had the receipt does not mean that the *Commonwealth* had the receipt, and thus the Commonwealth did not suppress what it did not have. There is no hint that "reasonable diligence" was part of the analysis. The Commonwealth did not advance a reasonable diligence argument,[9] nor did the court reference a diligence requirement anywhere in its opinion. In failing to apply *Kyles* , the state court's opinion was "contrary to" and "involved an unreasonable application of[ ] clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

My dissenting colleagues treat the contradictory sentences in *Dennis I* like a "Magic Eye" image, staring past the obvious error until the illusion of a fillable gap materializes. They do so, I assume, because it is hard to accept that a court would make such a clear error of law: How could the state court possibly have concluded both that the police possessed the receipt *and* that the prosecution did not withhold it? That conclusion makes absolutely no sense if one assumes the state court knew of and applied *Kyles* . *See Lopez v. Schriro* , 491 F.3d 1029, 1046 (9th Cir. 2007) (Thomas, J., concurring in part and dissenting in part) (noting that we start with the "presumption that state judges know and follow the law"). But state courts, just like us, do sometimes err. And when they do, we are not free to label significant errors as "gaps" to be corrected under *Richter* and *Premo* .

Limiting our habeas review to the actual, expressed reasoning of a state court is itself a form of deference. The principles of comity and federalism underlying AEDPA's highly-deferential standard compel us to acknowledge the state court's reasoning if we can fairly discern it. *See Ylst v. Nunnemaker* , 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) (describing an "unexplained" state-court order as one from which that court's rationale is "undiscoverable").[10] We would do real damage to those principles were we to begin re-writing state court opinions to save them. Sometimes what appears to be a fundamental misstep is exactly that. Since the passage of AEDPA, the narrow purpose of federal habeas review has been to address just such

missteps. *See Richter* , 562 U.S. at 103, 131 S.Ct. 770 ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.").

There is yet another reason to think that *Dennis I* presents nothing more complicated *354 than a *Kyles* error: the Commonwealth advocated it. Before the Pennsylvania Supreme Court, the Commonwealth advanced the incorrect theory that it was not required to turn over favorable evidence in the possession of the police. It emphasized that, "even though Cason claims in her affidavit that [the receipt] was taken by the police," the failure to produce that document could not constitute a *Brady* violation because "there [wa]s no reason to believe it was in the Commonwealth's possession to be produced." (App. 2026.) That argument presupposes, contrary to *Kyles* , that there exists a divide between discoverable evidence taken by the police and discoverable evidence in the prosecutor's case file.

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At the time, that argument may have had some basis in Pennsylvania law, although it was already untenable because of *Kyles* . In 1995, when *Kyles* was decided, the Pennsylvania rules governing discovery and evidence disclosure were not based on the premise that evidence possessed by the police is possessed by the prosecution. *See* Pa. R. Crim. Pro. 305B (Repealed) (requiring mandatory disclosure of evidence favorable to the accused only when it "is within the possession or control of the attorney for the Commonwealth"). Even after *Kyles* was decided, the Pennsylvania Superior Court continued to hew to the outmoded state-law rule. *See Commonwealth v. McElroy* , 445 Pa.Super. 336, 665 A.2d 813, 819 (1995). The Pennsylvania Supreme Court likewise continued to apply its discovery rules as written. *See Commonwealth v. Gribble* , 550 Pa. 62, 703 A.2d 426, 435–36 (1997). It did not explicitly abrogate the faulty state rule of discovery until 2001. *See Commonwealth v. Burke* , 566 Pa. 402, 781 A.2d 1136, 1142 (2001). *Dennis I* was decided in 1998. Thus, the court was not leaving a gap in its *Dennis I* opinion. It was accepting the Commonwealth's unsound argument, and it practically said so.

The wisdom of *Richter* gap-filling is open to reasonable criticism. A widely respected judge has expressed the view that gap-filling is unfair and incentivizes unreasoned decisions; it is a perspective that my colleague Judge Hardiman evidently shares, as described in his Dissent. *See Mann v. Ryan* , 774 F.3d 1203, 1225 (9th Cir. 2014) (Kozinski, J., concurring in part and dissenting in part) (*Richter* "has the perverse effect of encouraging state courts to deny relief summarily, to insulate their orders from tinkering by the federal courts."), *on reh'g en banc* , No. 09–99017, 828 F.3d 1143, 2016 WL 3854234 (9th Cir. July 15, 2016). Given those criticisms, it has been suggested that we should engage in *Richter* gap-filling, and thus apply AEDPA deference, even when a state court *does* give a reasoned basis for its conclusions. *See id* . at 1224 (Kozinski, J., concurring in part and dissenting in part) ("After *Richter* , it seems clear that we should assess the reasonableness of a state court's decision, not its reasoning."). Judge Hardiman would follow that approach here. (*See* J. Hardiman Dissent Op. at 370 ("I would hold that regardless of the thoroughness—or even the correctness—of the Pennsylvania Supreme Court's stated reasoning, its judgment may not be upset so long as its *decision* did not contravene or unreasonably apply clearly established federal law....").) And, indeed, his approach may have some appeal as a matter of policy—he has identified those policy justifications well—but, as a matter of law, I do not believe we can go so far. *Lafler* does not accept that logic.

Nor does the Supreme Court's opinion in *Wetzel v. Lambert* , a post-*Richter* decision in which the Court dealt with a fully-reasoned (*i.e.* , gapless)

state court opinion. —— U.S. ——, 132 S.Ct. 1195, 182 L.Ed.2d 35 (2012) (per curiam). *Wetzel* described the required analytical path as follows:

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> Under § 2254(d), a habeas court must determine what arguments or theories supported ... the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Id . at 1198 (quoting *Richter* , 562 U.S. at 102, 131 S.Ct. 770). The ellipsis in that quotation is significant, as the Court wholly excised the "or, as here, could have supported" language from its quotation of *Richter* when describing how federal courts review a reasoned state-court decision. *Compare supra* note 4. Rather than extending *Richter* , both *Lafler* and *Wetzel* suggest that gap-filling is reserved for only those cases where we cannot discern the basis for the state court's conclusions.[11]

That is not the case here. Were Dennis in exactly
356 the same position but the *356 *Den nis I* opinion contained one or two fewer sentences, there would perhaps be a gap to fill and I would be joining my dissenting colleagues in applying AEDPA deference, but there is no gap. The *Dennis I* opinion suffers from erroneous and not opaque reasoning. It may seem odd that so much hinges on so little, with a man's life depending on the difference between bad reasoning and no reasoning. That, however, is the analytical distinction drawn by Supreme Court precedent, including *Richter* , *Premo* , and *Lafler* .[12]

Given the magnitude of the Pennsylvania Supreme
357 Court's error regarding the *357 Cason receipt, this case presents the sort of "extreme malfunction [ ] in the state criminal justice system" that demands our intervention. *Richter* , 562 U.S. at 102, 131 S.Ct. 770 (internal quotation marks omitted). I therefore concur in Part III.A of the Majority's opinion, insofar as it explains why it is proper to grant Dennis habeas relief on *de novo* review of the Cason receipt *Brady* claim, and I concur in Part II of the Majority opinion and in the judgment.

FISHER, Circuit Judge, dissenting, with whom SMITH, CHAGARES and HARDIMAN, Circuit Judges, join.

A Philadelphia jury convicted James Dennis of murder and sentenced him to death. The Pennsylvania Supreme Court affirmed his conviction and sentence. His petition for postconviction relief was denied, and, after several intervening decisions, this denial was affirmed by the Pennsylvania Supreme Court. The Majority overturns these state-court decisions by concluding that the prosecution failed to disclose to Dennis exculpatory material in violation of *Brady v. Maryland* , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Majority is particularly concerned about the reliability of eyewitness testimony and about a "shodd[y]" investigation by the Philadelphia police. Maj. Op. 307. By taking this approach, the Majority goes off course for two reasons. First, the evidence against Dennis was strong—it is hard to discount the identification testimony of three eyewitnesses. Second, and more importantly, the Majority fails to adhere to the narrowly circumscribed scope of habeas review. Congress has decreed that we may not grant a writ of habeas corpus unless the judgment of the state court was clearly unreasonable, not merely incorrect. Applying this standard of review to a case such as this one is difficult, but the Supreme Court has repeatedly reversed those courts of appeals that have not faithfully followed this mandate. The Pennsylvania Supreme Court did not unreasonably apply clearly established federal law, and for that reason I dissent.

I

On a sunny fall afternoon in 1991, Chedell Williams and her friend Zahra Howard got off the bus that had brought them from their high school and climbed the steps of the Fern Rock SEPTA station in Philadelphia. Two men accosted them and demanded their earrings. Williams ran into the street to escape. One of the men chased her, grabbed her, and ripped her earrings out of her ears. He raised a silver revolver and fired one shot into her neck from less than an inch away. Williams collapsed and died. The shooter fled. Three eyewitnesses, including Howard, observed the shooter at close range. They each identified the shooter in a photo array, in a lineup, and at trial: the shooter was James Dennis.

The Majority discusses in detail the testimony of the three eyewitnesses who testified at trial that Dennis shot Williams: Zahra Howard, Thomas Bertha, and James Cameron. The Majority calls out discrepancies between the eyewitnesses' descriptions of the shooter's height and weight (said to be 5'9? or 5'10? and 170 to 180 pounds) and Dennis's actual size (5'5?> and 125 to 135 pounds). The reliability of the eyewitness identifications is irrelevant to the legal question we must decide—which is whether the Pennsylvania Supreme Court unreasonably applied *Brady* and its progeny. Nevertheless, a few points about the identifications are worth mentioning. First, the visual conditions were excellent. The murder occurred in the afternoon and the weather was clear. Second, the witnesses saw the shooter at close range and had unobstructed views of his face. Howard was one
358 to two feet away *358 from the shooter and looked him in the face. Bertha and the shooter made eye contact from less than eight feet away, and Bertha was able to observe the expression on the shooter's face. Cameron saw the face of the shooter from eight to ten feet away. Third, none of the identifications was cross-racial. *See Arizona v. Youngblood* , 488 U.S. 51, 72 n.8, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (Blackmun, J., dissenting) (noting studies showing that cross-racial identifications are less accurate than same-race identifications). And fourth, witnesses generally overestimate the height and weight of men who are below population averages, as Dennis was. Christian A. Meissner et al., *Person Descriptions as Eyewitness Evidence* 3, 8, in 2 Handbook of Eyewitness Psychology (Rod C.L. Lindsay et al., eds. 2007) (noting a tendency for witnesses to underestimate the height of taller targets and overestimate the height of shorter targets); Rhona H. Flin & John W. Shepherd, *Tall Stories: Eyewitnesses' Ability to Estimate Height and Weight Characteristics* , 5 Human Learning 29, 34 (1986) (noting the same effect for both height and weight); *see id.* at 36 (citing a study finding that "witnesses tend to overestimate the height of criminals").

The defense vigorously cross-examined these witnesses and elicited some discrepancies between their testimony and prior statements and between estimates of the shooter's height and weight and Dennis's. Nevertheless, the jury found the eyewitnesses' testimony credible. In addition to that testimony, the prosecution called Charles Thompson, a member of Dennis's singing group, who testified that he saw Dennis with a small silver handgun several hours after the murder. Whatever one might feel about the testimony of these witnesses or the testimony of eyewitnesses in general, the evidence that convinced the jury to convict Dennis was not, as the district court described it, "scant evidence at best." *Dennis v. Wetzel* , 966 F.Supp.2d 489, 491 (E.D. Pa. 2013).

Dennis's *Brady* claims concern three documents that he asserts the prosecution should have turned over to him before trial: a receipt from the Department of Public Welfare (DPW), a police activity sheet reporting a conversation with Williams's aunt and uncle, and police records describing the investigation of a jailhouse tip. The receipt relates to a possible alibi witness, Latanya Cason. Dennis told police that he was riding a bus at the time of the murder—shortly before 2:00 p.m.—and that he saw Cason and waved to her as

he left the bus. Cason testified at trial that she saw Dennis at 4:00 or 4:30 p.m., which did not support his alibi. Cason visited the DPW before seeing Dennis that day. Dennis asserts that the police had a time-stamped receipt from Cason's DPW visit and that, had the receipt been turned over to the defense, Cason would have testified that she saw Dennis at 2:00 or 2:30 p.m. The subject of Dennis's second claim is a police activity sheet containing detectives' notes of an interview with Williams's aunt and uncle, Diane and Mannasett Pugh. According to the notes, the Pughs told detectives that Zahra Howard told them she recognized the shooter from her high school. This conflicts with Howard's statements to police and testimony at trial that she had never seen the shooter before. The third *Brady* claim concerns police records of an investigation of a tip by an inmate, William Frazier, who told police that his friend, Tony Brown, admitted to Frazier that Brown shot Williams. Police never located Tony Brown, and Frazier later admitted that he made up the entire story.

The district court concluded that the prosecution violated *Brady* by suppressing each of these three items and found that the Pennsylvania Supreme
359 Court's determinations *359 to the contrary unreasonably applied clearly established Supreme Court precedent. I disagree with the Majority's affirmance of the district court and will explain my reasons in detail.

II

The source of my disagreement with the Majority is its failure to apply the deferential standard of review prescribed by the Antiterrorism and Effective Death Penalty Act (AEDPA). When a state prisoner applies for a writ of habeas corpus on a claim that was adjudicated on the merits in state court, a federal court may not grant the application unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's application of the law or determination of the facts is not unreasonable merely because it is—in the eyes of the reviewing federal court—wrong. The decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement."*Harrington v. Richter* , 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

We must give state-court decisions "the benefit of the doubt." *Cullen v. Pinholster* , 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). This duty to give state-court decisions deference applies even when a state court does not give a reasoned explanation of its decision. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter* , 562 U.S. at 98, 131 S.Ct. 770. In such a situation, the reviewing federal court must consider arguments and theories that "could have supported" the decision. *Id.* at 102, 131 S.Ct. 770.

The AEDPA standard is intentionally difficult to meet. The standard reflects state courts' competence to resolve federal constitutional questions and states' strong interest in controlling their criminal justice systems. Federal habeas corpus is designed to " 'guard against extreme malfunctions in the state criminal justice systems,' not [to] substitute for ordinary error correction through appeal." *Id.* at 102–03, 131 S.Ct. 770 (quoting *Jackson v. Virginia* , 443 U.S. 307, 332 n.5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (Stevens, J., concurring)). Among the courts of appeals, however, there has been some reluctance to adhere to the AEDPA standard as defined by the Supreme Court. In recent terms, the Court has issued a string of reversals, many as summary per curiam opinions, for failure to apply the correct

standard of review under AEDPA. *See, e.g.* , *Woods v. Etherton* , —— U.S. ——, 136 S.Ct. 1149, 194 L.Ed.2d 333 (2016) (per curiam); *Woods v. Donald* , —— U.S. ——, 135 S.Ct. 1372, 191 L.Ed.2d 464 (2015) (per curiam); *Glebe v. Frost* , —— U.S. ——, 135 S.Ct. 429, 190 L.Ed.2d 317 (2014) ; *Lopez v. Smith* , —— U.S. ——, 135 S.Ct. 1, 190 L.Ed.2d 1 (2014) (per curiam); *Marshall v. Rodgers* , ——U.S. ——, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013) (per curiam); *Parker v. Matthews* , —— U.S. ——, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (per curiam); *Renico v. Lett* , 559 U.S. 766, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010). There are many more. I fear that this case may join that list.

The Majority holds that the Pennsylvania Supreme Court unreasonably applied the United States Supreme Court's decisions in the line of cases discussing prosecutors' duty to turn over favorable evidence to the defense. In *Brady v. Maryland* , the Court held that "the suppression *360 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." 373 U.S. at 87, 83 S.Ct. 1194. The Court later ruled that the duty to disclose exculpatory evidence applies whether a defendant requests it or not. *United States v. Agurs* , 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The Court explained that a *Brady* violation has three components: evidence that is (1) favorable to the defendant, (2) suppressed by the prosecution, and (3) material. *Strickler v. Greene* , 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Favorable evidence includes both exculpatory evidence and evidence that could be used to impeach prosecution witnesses. *United States v. Bagley* , 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Evidence can be suppressed even if it is only known to the police and not to the prosecutor—"the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley* , 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is material if "there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler* , 527 U.S. at 281, 119 S.Ct. 1936. The materiality of suppressed evidence must be assessed cumulatively, "not item by item." *Kyles* , 514 U.S. at 436, 115 S.Ct. 1555.

III

A

The Pennsylvania Supreme Court addressed the *Brady* claim based on Latanya Cason's DPW receipt (and an ineffective assistance of counsel claim based on his counsel's failure to investigate Cason) without providing much reasoning or detail. The court noted that Cason testified that she saw Dennis at around 4:00 or 4:30 p.m. the day of the murder based on her recollection that she had left work to cash her welfare check at about 2:00 p.m. "During their investigation, however, the police came into possession of a Department of Public Welfare (DPW) receipt showing that Cason cashed her check at 1:03 p.m." *Commonwealth v. Dennis* , 552 Pa. 331, 715 A.2d 404, 408 (1998) ("*Dennis I* "). The court found that the receipt was not material because even if the defense knew of the receipt, Cason's corrected testimony "would not support [Dennis's] alibi ... because the murder occurred at 1:50 p.m., forty minutes earlier than Cason's earliest estimate." *Id.* The court concluded: "Finally, it is clear that there clearly was no *Brady* violation. The DPW receipt was not exculpatory, because it had no bearing on [Dennis's] alibi, and there is no evidence that the Commonwealth withheld the receipt from the defense." *Id.*

I agree with the Majority that the Cason receipt was favorable to Dennis and was material, but I disagree with the Majority's conclusion that the receipt was suppressed. Despite the Pennsylvania Supreme Court's representations about clarity, it is not clear what the court meant by "there is no

evidence that the Commonwealth withheld the receipt from the defense." The Majority acknowledges that the Pennsylvania Supreme Court "provided no explanation." Maj. Op. 288. Yet the Majority assumes that the Pennsylvania Supreme Court made an unreasonable finding of fact or conclusion of law that the prosecution had no duty to disclose the receipt because it was in possession of the police—a finding clearly foreclosed by *Kyles* , 514 U.S. at 437–38, 115 S.Ct. 1555.

When a state court does not give a reasoned explanation, we are not permitted to assume or
361 guess what the most *361 likely explanation is. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was *no* reasonable basis for the state court to deny relief." *Richter* , 562 U.S. at 98, 131 S.Ct. 770 (emphasis added). In other words, when there is an analytical gap in a state court's reasoning, we must consider "what arguments or theories ... could have supported ... the state court's decision." *Id.* at 102, 131 S.Ct. 770.

Although the state-court decision at issue in *Richter* was a summary disposition, the Supreme Court's instruction to consider arguments that could have supported the state court's decision is not limited to summary dispositions. In *Premo v. Moore* , 562 U.S. 115, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011), which was decided the same day as *Richter* , the Supreme Court considered theories that could have supported a reasoned, written decision with an analytical gap. In state postconviction relief proceedings, Moore argued that his counsel had been unconstitutionally ineffective under *Strickland v. Washington* , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The state court rejected his *Strickland* argument, but, as the Supreme Court noted, the "state court did not specify" whether the ineffectiveness claim failed "because there was no deficient performance under *Strickland* or because Moore suffered no *Strickland* prejudice, or both." *Moore* , 562 U.S. at 123, 131 S.Ct. 733. In order for a federal court to grant habeas relief, both prongs would need to have involved an unreasonable application of clearly established federal law. *Id.* The Supreme Court found that the state court "reasonably could have concluded that Moore was not prejudiced by [his] counsel's actions. Under AEDPA, that finding ends federal review." *Id.* at 131, 131 S.Ct. 733.

Because the Pennsylvania Supreme Court provided no explanation for why it found that the receipt was not withheld from the defense, there is an analytical gap. This gap is more open-ended than the two possibilities the state court could have considered in *Moore* and narrower than a summary disposition, such as *Richter* , where the universe of possible theories is broad. But our obligation to consider what theories could have supported the Pennsylvania Supreme Court's decision is no less than in *Richter* and *Moore* .

Judge Jordan, in his opinion concurring in part and concurring in the judgment, takes the position that there is no gap to be filled under *Richter* and *Moore* . He believes that the only way to explain the Pennsylvania Supreme Court's statements that the police had the receipt but that the Commonwealth did not withhold the receipt is that the court failed to apply *Kyles* . Judge Jordan concludes that the Pennsylvania Supreme Court "simply found that there was no evidence that the prosecutor possessed the Cason receipt." Concurring Op. 351. This is a reasonable explanation, but it is not the only explanation. The Pennsylvania Supreme Court's opinion lacks sufficient analysis to tell what it meant by "there is no evidence the Commonwealth withheld the receipt from the defense." *Dennis I* , 715 A.2d at 408. If we "take the state court's decision as written," Concurring Op. 351, rather than assuming that the state court made a mistake, there is an analytical gap.

The Majority also takes the position that the Pennsylvania Supreme Court violated *Kyles* . The Majority notes, however, that "[t]he Pennsylvania Supreme Court provided no explanation for its ... statement [that there was 'no evidence that the Commonwealth withheld the receipt from the defense'], and we cannot be sure whether the court was assessing the facts or interpreting the law." Maj. Op. 288. Despite this lack of clarity, the
362 Majority is evidently *362 certain that it knows "the precise basis for the state court's ruling." *Id.* at 282. Unlike the Majority, I am unable to discern the precise basis for the state court's ruling, and, for that reason, this is one of those cases in which consideration of theories that could have supported the state court's decision is required.

This required consideration leads to the conclusion that there is a viable gap-filling theory here: the Pennsylvania Supreme Court could have meant that the receipt was not withheld because it was available to the defense with reasonable diligence. The reasonable diligence "branch of the *Brady* doctrine" is evident, albeit inconsistent, in our own precedents. *See United States v. Perdomo* , 929 F.2d 967, 973 (3d Cir. 1991) ("Evidence is not considered to be suppressed if the defendant either knew or *should have known* of the essential facts permitting him to take advantage of any exculpatory evidence." (emphasis added)); *United States v. Starusko* , 729 F.2d 256, 262 (3d Cir. 1984) ("[T]he government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." (quoting *United States v. Campagnuolo* , 592 F.2d 852, 861 (5th Cir. 1979))). *But see Wilson v. Beard* , 589 F.3d 651, 664 (3d Cir. 2009) ("[T]he fact that a criminal record is a public document cannot absolve the prosecutor of her responsibility to provide that record to defense counsel." (internal quotation mark omitted)).

Despite this inconsistency, we reinforced the conclusion that *Brady* has a reasonable diligence component in *Grant v. Lockett* , 709 F.3d 224, 231 (3d Cir. 2013). In *Grant* , the prosecution failed to disclose that its key witness—the only person who testified that Grant was the shooter—was on parole at the time of the shooting. Grant's postconviction relief counsel was able to discover that the witness was on parole, and his trial counsel could have looked up the witness's criminal history in records kept by the clerk of court. We concluded that Grant's *Brady* claim "lacked merit" because "trial counsel could have discovered [the witness's] parole status had he exercised reasonable diligence." *Id.* at 230, 231.

The Majority correctly notes that our case law on *Brady* reasonable diligence "is inconsistent and could easily confuse" and clarifies that reasonable diligence "plays no role in the *Brady* analysis." Maj. Op. 291. This clarification to our case law is helpful, and were we reviewing this case on direct appeal it would be entirely appropriate. The "no reasonable diligence" rule may indeed represent the best interpretation of the Supreme Court's *Brady* case law. But this rule is nonetheless an *interpretation* of Supreme Court precedent. It does not represent a clearly established holding of the Court, and it does not mean that any other interpretation is unreasonable.

The reasonableness of interpreting *Brady* to have a reasonable diligence component is supported by the decisions of other courts of appeals. The Majority notes with surprise that "several Courts of Appeals have endorsed some form of a due diligence requirement." Maj. Op. 291 n.20. "Several" understates the matter. A majority of the courts of appeals have applied a reasonable diligence requirement at one time or another.[1] The
363 number of courts *363 (including our court, ten out of the twelve regional courts of appeals) and decisions applying a reasonable diligence requirement hardly evince a clearly established Supreme Court rule that reasonable diligence plays no role in the *Brady* analysis. Even if the Majority is correct and all these decisions erroneously applied *Brady* , it is hard to conclude that the error is "well understood and

comprehended in existing law" and "beyond any possibility for fairminded disagreement." *Richter* , 562 U.S. at 103, 131 S.Ct. 770. Surely, given the number of federal circuit judges who have concluded that reasonable diligence is a consideration in the analysis of a *Brady* claim, "it is possible fairminded jurists could disagree" that reasonable diligence is inconsistent with Supreme Court precedent. *Id.* at 102, 131 S.Ct. 770.

Under the specific facts of this case, the Pennsylvania Supreme Court easily could have concluded that Latanya Cason's DPW receipt was available to Dennis's counsel had his counsel exercised reasonable diligence. Dennis was aware of Cason—the police only interviewed her after Dennis told them she had seen him. Dennis's appellate counsel obtained the receipt from the DPW. And Dennis argued that his trial counsel would have located the receipt with "minimal investigation."[2] (App. 1800.) It was not an unreasonable application of clearly established
364 Supreme *364 Court precedent for the Pennsylvania Supreme Court to conclude that there was no *Brady* violation where trial counsel could have discovered the evidence by exercising reasonable diligence and investigating his own client's alibi witness. *See United States v. Senn* , 129 F.3d 886, 893 (7th Cir. 1997) ("[T]he defendants are hoisted by their own petard: without having obtained the Broward County file they would not have a *Brady* argument, but the ease with which they obtained their file defeats their claim.").

The Majority contends the Supreme Court did "away with any belief that *Brady* imposes a due diligence requirement" in *Banks v. Dretke* , 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). Maj. Op. 291. But *Banks* , which was decided after the Pennsylvania Supreme Court's decision in *Dennis I* ,[3] is distinguishable. In *Banks* , the prosecution withheld evidence that one prosecution witness had been "intensively coached" by prosecutors before his testimony and another witness was a paid police informant. 540 U.S. at 677–78, 124 S.Ct. 1256. The prosecution failed to correct these witnesses' testimony when the witnesses denied talking to anyone about their testimony or receiving payments from police. *Id.* The Supreme Court refused to adopt a rule allowing the prosecution to "lie and conceal" evidence so long as the prisoner might have been able to detect the "potential existence" of prosecutorial misconduct. *Id.* at 696, 124 S.Ct. 1256. Unlike the DPW receipt at issue in the present case, the evidence in *Banks* of the witness coaching and police payments was solely in the hands of the prosecution. No amount of diligent investigation would have uncovered that evidence. *Banks* is not directly applicable to evidence that could have been discovered after "minimal investigation." *See Bell v. Bell* , 512 F.3d 223, 235 (6th Cir. 2008) (en banc) (concluding that *Banks* did not call into question precedents applying a reasonable diligence requirement).

Under these circumstances, I cannot conclude that the Pennsylvania Supreme Court's denial of Dennis's *Brady* claim based on the receipt was an unreasonable application of clearly established Supreme Court precedent.

B

The Pennsylvania Supreme Court reasonably determined that the Pugh statement was immaterial under *Brady* . The statement was found in a police activity sheet that showed that Chedell Williams's aunt and uncle, Diane and Mannasett Pugh, told police that Zahra Howard told them that she recognized the shooter from school. This alleged statement is contrary to what Howard repeatedly told police and testified about at trial—that she had never seen the shooter before he accosted Williams and her at the SEPTA station.

The postconviction relief court held an evidentiary hearing about this *Brady* claim. Howard testified that she never told Williams's family that she had seen the shooter before. When confronted by the purported statement in the police activity sheet, she denied ever having made it. Diane Pugh

testified that, as far as she could remember, Howard never said she recognized the shooter before the murder.

The Pennsylvania Supreme Court concluded that the police activity sheet showing the Pugh statement was not material under *Brady* because
365 there was no reasonable *365 probability of a different result had the sheet been turned over. *Commonwealth v. Dennis* , 609 Pa. 442, 17 A.3d 297, 308–09 (2011) ("*Dennis IV* "). The Pennsylvania Supreme Court noted that Howard "was extensively cross-examined at trial" about her identification of Dennis, including about whether she had ever seen the shooter before, and she steadfastly testified that Dennis was the shooter and that she had never seen him before. *Id.* at 309. Two eyewitnesses other than Howard identified Dennis in a photo array, in a line up, and at trial, and these witnesses would not have been affected by any impeachment of Howard. *Id.* For these reasons, the Pennsylvania Supreme Court held that Dennis "still received a fair trial resulting in a verdict worthy of confidence." *Id.* This conclusion was not an unreasonable interpretation of Supreme Court precedent.

The Majority correctly notes that heavy impeachment of a witness does not render further impeachment immaterial. *See Banks* , 540 U.S. at 702, 124 S.Ct. 1256. In *Banks* , the prosecution suppressed information that a key witness was a government informant, and the government argued this information was "merely cumulative" because the witness was heavily impeached at trial. *Id.* None of the testimony at trial concerned the witness's status as an informant, however. The Court concluded this missing information was material because the jury was ignorant of the witness's "true role" in the case. *Id.*

The impeachment value of the activity sheet in this case was minor. Howard's identification of Dennis was cross-examined at trial. She credibly testified in the postconviction relief hearing that she never made the statements attributed to her in the activity sheet. The activity sheet's double hearsay makes it inherently weak. This is not the kind of evidence considered material in *Banks* .

The Majority asserts that had the activity sheet been disclosed, "defense counsel could have impeached Howard in a manner that very well may have led her to admit she recognized the perpetrators from her high school." Maj. Op. 301. There is no basis in the record for this speculation, which is undercut by Howard's consistency in all her sworn testimony at trial and during the postconviction relief hearing. Such a dramatic courtroom reversal is more likely in a *Matlock* or *Perry Mason* script than in reality. The unlikely nature of this speculation does not create a reasonable probability of a different result or "undermine confidence in the outcome," as required for *Brady* materiality.[4] *Bag le y* , 473 U.S. at 682, 105 S.Ct. 3375.

The Pennsylvania Supreme Court's consideration of the strength of the other evidence against Dennis was also not unreasonable. The materiality of the activity sheet "must be evaluated in the context of the entire record." *Agurs* , 427 U.S. at 112, 96 S.Ct. 2392. And "evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict." *Smith v. Cain* , —— U.S. ——, 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012). The Pennsylvania Supreme Court could reasonably have concluded, in the context of the entire record, that any impeachment value of the activity sheet would not undermine confidence in the verdict. Bertha and Cameron also identified Dennis in a photo array, in a line up, and at trial. Impeachment
366 of Howard *366 would not have affected the weight of their testimony.

The Majority emphasizes the importance of Howard as "the eyewitness with the most significant exposure to the shooter" and minimizes Bertha and Cameron as "located farther away" with "only brief glimpses of the perpetrators" or "paying little attention." Maj. Op. 301. But in this

case, "farther away" was only eight feet from the shooter for Bertha and ten feet from the shooter for Cameron, and each had an unobstructed view of the shooter's face. To the extent Bertha and Cameron had not been paying attention to the commotion, the gunshot focused their view and spurred them into action. Bertha stepped into the street as the shooter ran past, stopped as the shooter raised his gun, and then followed behind him. Cameron and the shooter made eye contact. When the shooter fled, Cameron ran to aid Williams. The eyewitness testimony of Bertha and Cameron was powerful evidence of guilt.

The Majority criticizes the Pennsylvania Supreme Court for applying a "sufficiency of the evidence" standard in lieu of the appropriate *Brady* materiality standard. Nowhere, however, did the Pennsylvania Supreme Court articulate the wrong standard. The Pennsylvania Supreme Court recognized that *Brady* materiality is not a question of sufficiency of evidence in *Commonwealth v. Weiss* , 604 Pa. 573, 986 A.2d 808 (2009), and it cited *Weiss* in *Dennis IV* .[5]

The Majority nevertheless concludes that, even if the Pennsylvania Supreme Court knew the correct standard, it unreasonably applied that standard to the facts of this case. The Majority focuses on the Pennsylvania Supreme Court's statement that "disclosure of the activity sheet would have had no impact upon [Bertha's and Cameron's eyewitness] testimony." *Dennis IV* , 17 A.3d at 309. According to the Majority, this is evidence that the Pennsylvania Supreme Court was proceeding down a wrong "analytical path." Maj. Op. 303. But there is nothing inherently wrong with this analytical path. The United States Supreme Court has, at times, made similar statements.

For instance, in *Strickler v. Greene* , the prosecution withheld exculpatory materials that would have been "devastating ammunition for impeaching" the prosecution's key witness, Anne Stoltzfus. 527 U.S. 263, 296, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (Souter, J., dissenting). At the petitioner's capital murder trial, Stoltzfus testified "in vivid detail" about the abduction of the murder victim. *Id.* at 266, 119 S.Ct. 1936 (majority opinion). Stoltzfus was the only disinterested eyewitness who testified. The exculpatory materials were police notes of interviews with Stoltzfus and letters Stoltzfus wrote to the police that cast serious doubt on her testimony. The Court found all the elements of *Brady* met except for materiality. Although the Court recognized the importance of Stoltzfus's eyewitness testimony, that was not the only evidence before the jury. Other eyewitnesses placed the petitioner at the shopping mall where the abduction occurred, and "considerable forensic and other physical evidence" linked the petitioner to the crime. *Id.* at 293, 119 S.Ct. 1936. The Court concluded that "[t]he record provides strong support for the
367 conclusion *367 that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached." *Id.* at 294, 119 S.Ct. 1936. Thus, the petitioner did not convince the Court that there was "a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely." *Id.* at 296, 119 S.Ct. 1936. The Pennsylvania Supreme Court's reasoning in this case is not appreciably different from the reasoning in *Strickler* .

The Majority's remaining reason for concluding that the Pennsylvania Supreme Court unreasonably applied the facts is that the Majority considered the same facts and reached a different conclusion. This is not a proper basis for granting habeas relief. There is a reasonable *possibility* that impeachment of Howard might have produced a different result, but the Pennsylvania Supreme Court did not unreasonably apply the facts or law in concluding that Dennis did not establish a reasonable *probability* of a different result. *See id.* at 291, 119 S.Ct. 1936. I would not grant habeas relief on this claim.

C

Dennis's final *Brady* claim concerns documents about the police investigation of a lead from William Frazier. Frazier, an inmate at the Montgomery County Correctional Facility, contacted police and informed them that he knew who shot Chedell Williams. He told a story about a three-way call he received in jail with his aunt and a friend named Tony Brown. During the call, Tony Brown admitted that he accidentally shot Williams while robbing her. Tony Brown told Frazier that he was accompanied by his friend Ricky Walker, who was Frazier's cousin, and another man, "Skeet," who drove the car.

Despite Frazier's being a jailhouse informant who obviously wanted to parlay information for something in return (even if only a day out of jail), the police investigated his tip. They took Frazier on a ride-along to Tony Brown's house, Ricky Walker's house, the pawnshop where Tony Brown allegedly sold Williams's earrings, Skeet's house, and Frazier's girlfriend's house. Police interviewed Frazier's landlord and Walker. Walker told police that he never heard of anyone named Tony Brown or "Skeet." He explained that he "can't stand" Frazier, who racked up $1,000 in charges on a phone calling card Walker had lent to him. Despite this investigation, police found no trace of a Tony Brown. This is not surprising. Frazier later admitted that he concocted the entire story.[6]

The Pennsylvania Supreme Court rejected Dennis's *Brady* claim about the Frazier lead documents because the documents were inadmissible hearsay. *Commonwealth v. Dennis* , 597 Pa. 159, 950 A.2d 945, 968 (2008) ("*Dennis III* "). This conclusion is not an unreasonable application of clearly established Supreme Court precedent.

Authority is split about whether inadmissible evidence can be the basis for a *Brady* violation. Our court, along with the First, Second, Sixth, and Eleventh Circuit Courts of Appeals, has concluded
368 that admissibility *368 is not a prerequisite for a *Brady* claim. *See, e.g.* , *Johnson v. Folino* , 705 F.3d 117, 130 (3d Cir. 2013) ("[I]nadmissible evidence may be material if it could have led to the discovery of admissible evidence."). The Fourth and Seventh Circuits have concluded otherwise. *Jardine v. Dittmann* , 658 F.3d 772, 777 (7th Cir. 2011) ("Logically, inadmissible evidence is immaterial under this rule."); *Hoke v. Netherland* , 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) ("[T]hese statements may well have been inadmissible at trial ... and therefore, as a matter of law, 'immaterial' for *Brady* purposes.").

The Majority recognizes the contrary decisions of the Fourth and Seventh Circuits and "respectfully conclude[s] that they have erred." Maj. Op. 311 n.27. But in order to grant habeas relief, the Majority must conclude that these courts did more than err—the decisions must be so clearly wrong that they are objectively unreasonable. Does the Majority really believe that our fair-minded colleagues on the Fourth and Seventh Circuits are *that* wrong? As the Supreme Court has noted, the courts of appeals' "diverging approaches to [a] question illustrate the possibility of fairminded disagreement." *White v. Woodall* , ––– U.S. ––––, 134 S.Ct. 1697, 1703 n.3, 188 L.Ed.2d 698 (2014). Circuit precedent cannot create or refine clearly established Supreme Court law, and lower federal courts "may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme] Court, be accepted as correct." *Marshall v. Rodgers* , ––– U.S. ––––, 133 S.Ct. 1446, 1451, 185 L.Ed.2d 540 (2013) (per curiam). Although "[m]ost federal courts have concluded that suppressed evidence may be material for *Brady* purposes even where it is not admissible," Maj. Op. 310, that does not transform such a rule into clearly established Supreme Court precedent.

The Majority does not cite any direct holding of the Supreme Court establishing a rule that admissibility is irrelevant under *Brady* . The Majority instead relies on "the Supreme Court's

repeated consideration of impeachment material in *Brady* cases." Maj. Op. 309. The Supreme Court's consideration of impeachment material does not compel the broad conclusion that admissibility is irrelevant.

Because reasonable judges could—and indeed do—disagree about whether *Brady* material must be admissible, the Pennsylvania Supreme Court did not unreasonably apply clearly established Supreme Court precedent when it found that the inadmissibility of the Frazier lead documents prevented Dennis's *Brady* claim.[7]

IV

The Majority asserts that the Cason receipt, Pugh statement, and Frazier documents "effectively gutted the Commonwealth's case against Dennis" and that the failure to turn over these documents denied Dennis a fair trial. Maj. Op. 269. Not true. Dennis's inability to obtain the Cason receipt before trial was, as Dennis himself argued, due to his trial counsel's failure to conduct even a minimal investigation. The double hearsay Pugh statement was credibly refuted by Howard. Even if Howard were impeached, based on the eyewitness testimony of Bertha and Cameron, there was not a reasonable probability of a jury's returning a different verdict. Frazier's story was fabricated. It was not an unreasonable application of clearly
369 established federal *369 law to consider the inadmissibility of the Frazier documents. In granting habeas relief for each of these *Brady* claims, the Majority failed to correctly apply the deferential AEDPA standard. I respectfully dissent.

HARDIMAN, Circuit Judge, dissenting, joined by SMITH and FISHER, Circuit Judges.

At the outset of its analysis of James Dennis's *Brady* claims, the Majority notes that the Antiterrorism and Effective Death Penalty Act (AEDPA) "dictates" our review. Majority Op. 280. The opinion describes with precision AEDPA's strictures. Federal courts are prohibited from granting habeas corpus relief unless the state-court adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* (quoting 28 U.S.C. § 2254(d)). These fetters on our review, the Majority notes, come close to "imposing a complete bar on federal-court relitigation of claims already rejected in state-court proceedings." *Id.* at 281 (quoting *Harrington v. Richter* , 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)).

It is one thing to recite these demanding limits; it is quite another to abide by them.[1] And as Judge Fisher's dissenting opinion cogently explains, they
370 quickly fall *370 by the wayside once the Majority turns to actually reviewing Dennis's claims. I join Judge Fisher's opinion in full, but write separately to note that I would reverse the District Court's judgment even if there were no "analytical gap[s]" in the Pennsylvania Supreme Court's decision rejecting Dennis's *Brady* claims. Fisher Dissent 360–61. Consistent with the text of AEDPA and the precedents of the United States Supreme Court, I would hold that regardless of the thoroughness—or even the correctness—of the Pennsylvania Supreme Court's stated reasoning, its judgment may not be upset so long as its *decision* did not contravene or unreasonably apply clearly established federal law and did not rest on an unreasonable determination of the facts. Whatever its flaws, the state court's decision passes this test.

I

It is a virtue of our judicial system that courts explain their decisions in writing. When an explanation is not good enough—whether due to a legal, logical, factual, or other defect—the decision it supports is often reversed. AEDPA

displaces this traditional approach to error review by imposing strict constraints on the writ of habeas corpus designed to stay the hand of federal courts over all but the most glaring of state-court errors. We may issue the writ only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" the precedents of the Supreme Court. *Harrington v. Richter* , 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). For a prisoner in state custody to obtain habeas relief from a federal court, he must demonstrate that the state court's decision on the claim presented before the federal court "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103, 131 S.Ct. 770. "If this standard is *371 difficult to meet," the Supreme Court has explained, "that is because it was meant to be." *Id.* at 102, 131 S.Ct. 770.

A

By its terms, AEDPA applies to federal review of state-court *decisions* —not to the specific explanations that support them. *See* 28 U.S.C. § 2254(d). This distinction might seem technical, but the Supreme Court's decision in *Harrington v. Richter* rendered it critical. There, the Court was faced with the question of AEDPA's application to a state-court decision that dismissed in a one-sentence summary order a habeas petitioner's ineffective assistance of counsel claim. 562 U.S. at 96–97, 131 S.Ct. 770. The Court was presented with two issues: whether the state-court decision constituted an "adjudicat [ion] on the merits" under AEDPA, and if so, how the Court should go about determining whether the decision was unreasonable under AEDPA given that the opinion provided no reasoning. *Id.* at 97–102, 131 S.Ct. 770.

The Court's answer to the first question rested on a straightforward application of AEDPA. Since the text of AEDPA "refers only to a 'decision' " resulting from an "adjudication"—making no mention of the need for a "statement of reasons"—the Court held that summary decisions unaccompanied by an explanation usually qualify as merits adjudications under AEDPA. *Id.* at 98, 131 S.Ct. 770. Hence, even where the state-court decision under federal review is devoid of reasoning, AEDPA's deference requirements apply. It followed that "the habeas petitioner's burden still must be met by showing there was *no reasonable basis* for the state court to deny relief." *Id.* (emphasis added). This rule obtains regardless of "whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Id.*

The Court's answer to the second question in *Richter* —how to assess the reasonableness of a summary state-court decision under AEDPA—is particularly instructive here. The Court held that AEDPA requires federal courts to consider what explanations would nevertheless support the decision under federal law. As the Court explained, "a habeas court must determine what arguments or theories supported *or, as here, could have supported* , the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 102, 131 S.Ct. 770 (emphasis added). At a minimum, then, when a state-court decision is unaccompanied by an explanation, *Richter* requires us to ascertain whether it was reasonable.

Circuit courts of appeals have divided over whether *Richter* extends beyond the precise circumstances of that case.[2] Those courts that have chosen to cabin *Richter* can readily point to a limiting principle: *single-sentence* decisions versus *multiple-sentence* decisions. That distinction strikes me as unprincipled, however, because neither *Richter* 's logic nor AEDPA's text limits the reason-supplying rule to cases in which the state-court "decision" is expressed in just one sentence. A decision is a decision, after all, and

AEDPA does not distinguish among one-sentence decisions, one-paragraph decisions, or ten-page decisions; all of them are subject to the same
372 deferential standard. Although the first *372 portion of *Richter* focused on the fact that the state-court decision provided no explanation for the outcome, the reasonableness standard articulated in the rest of the opinion is tied to AEDPA's general standard itself. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden *still* must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* (emphasis added). In other words, regardless of how extensive or sparse the reasoning of a state-court opinion, the same AEDPA reasonableness test applies to all decisions on the merits.

This approach to AEDPA's reasonableness standard finds support in *Premo v. Moore* . There, the petitioner claimed his counsel was ineffective for failing to move for suppression of the petitioner's confession before advising him regarding a guilty plea. 562 U.S. 115, 119, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011). The state court concluded that the petitioner had not established ineffective assistance of counsel under *Strickland v. Washington* , reasoning that a "motion to suppress would have been fruitless in light of the other admissible confession by [the petitioner], to which two witnesses could testify." *Id.* at 119, 131 S.Ct. 733 (internal quotation marks omitted). Even though the state court "did not specify whether this was because there was no deficient performance under *Strickland* or because [the petitioner] suffered no *Strickland* prejudice, or both," the Supreme Court stated that for a federal habeas court to properly eschew AEDPA deference, it "had to conclude that both findings *would have involved* an unreasonable application of clearly established federal law." *Id.* at 131, 131 S.Ct. 733 (emphasis added).

Although the state court's reasoning was quite bare and did not explicitly engage the *Strickland* prongs, the Court held that its decision was entitled to AEDPA deference because reasons existed that *would have* supported the decision. Specifically, it highlighted that counsel had explained in state court that his decision to discuss plea bargaining before challenging the petitioner's confession was based on his rationale that "suppression would serve little purpose in light of [the petitioner's] other full and admissible confession." *Id.* at 123–24, 131 S.Ct. 733. "The state court," the Supreme Court explained, "*would not have been unreasonable* to accept this explanation." *Id.* at 124, 131 S.Ct. 733 (emphasis added). Indeed, the Court found it unnecessary to consider a second justification that counsel had offered in the underlying proceedings because the first "confirms that his representation was adequate under *Strickland* , or at least that it *would have been reasonable* for the state court to reach that conclusion." *Id.* (emphasis added). In short, presented with a state-court decision that was not a summary disposition but that provided only some vague reasoning for its decision, the *Premo* Court looked to the record to posit a rationale that would have supported that decision, finding it not to be an unreasonable application of federal law.[3] We should approach Dennis's case the same way.[4]

373 *373 B

My understanding of *Richter* is supported by notions of consistency and coherence as well. If we were to limit *Richter* to cases involving one-sentence decisions, the outcome of federal review would turn on the state court's opinion-writing technique. Consider a federal court faced with a state-court decision that rejected a petitioner's claim that his conviction was invalid because it stemmed from an illegal arrest. Assume the record was unclear with respect to whether the arresting officer had probable cause, but that fairminded jurists could disagree as to whether a Supreme Court precedent demanded the conclusion that there was no probable cause. If the state court
374 rejected *374 the petitioner's claim via summary disposition, *Richter* requires the reviewing federal court to infer the supportive rationale. Because the

record would arguably support probable cause for the arrest, the conviction would be affirmed. But what if the very same claim had been rejected in a partially reasoned state-court opinion with problematic gaps in the logic from which adverse inferences could be drawn or in an opinion that gave incorrect reasons to justify the decision (say, by stating that the arrest was valid because there was "reasonable suspicion")? Absurdly, appellate courts that circumscribe *Richter* in the way the Majority has here would require the reviewing federal court to ignore the supportive rationale on de novo review (where a weak case for probable cause wouldn't be enough) and grant relief.

The asymmetry illustrated by my hypothetical makes a mess of the scheme established by AEDPA. How could a state-court decision be "reasonable" under AEDPA where the state court gives no reasons to explain itself but where we can think of one, yet be "unreasonable" under AEDPA where—although the very same good reason to support the decision exists—the decision is supported by undeveloped or incorrect reasons?[5] *See Mann* , 774 F.3d at 1224–25 (Kozinski, J., concurring and dissenting) ("A habeas petitioner is not entitled to any reasoning at all, so reversing a state court's reasonable decision on the grounds of incorrect reasoning risks treating defendants inconsistently: Those who are given incorrect reasoning get relief while those who aren't given any reasoning do not."). To make AEDPA reasonableness turn on a state court's drafting decision is inconsistent with AEDPA's directive that federal courts review the reasonableness of *decisions* , not opinions. And because it makes AEDPA deference *inversely* proportional to the amount of information the state court provides, it creates a perverse incentive for state courts to earn the deference of federal courts by saying less.[6]

II

To sum up, I would hold that when gaps or errors afflict a state court's habeas adjudication, federal courts may not reverse unless the *decision* itself is unreasonable. In Dennis's case, this principle is most pertinent to the Cason receipt. As Judge Fisher explains, the reasons proffered by the Pennsylvania Supreme Court for rejecting Dennis's *Brady* claims regarding the Howard police activity report and the Frazier documents are themselves sufficient to pass AEDPA review without any inference from us. The Pennsylvania Supreme Court's analysis of the Cason receipt, on the other hand, is incomplete and might ungenerously be read as incorrect. For the reasons explained by Judge Fisher, however, a rationale consistent with Supreme Court precedent supports the decision, and so it must stand. I would simply add that AEDPA would require us to supply this rationale *even if* the state court's treatment of the Cason receipt were in fact wrong. After all, "[a] 375 state court could *375 write that it rejected a defendant's claim because Tarot cards dictated that result, but its decision might nonetheless be a sound one." *Brady* , 711 F.3d at 827 (Wood, J.).

In my view, AEDPA requires federal courts to take the following approach to habeas review. Where the state court denies relief summarily, *Richter* requires federal courts to consider what arguments or theories could have supported the state court's decision such that fairminded jurists could disagree whether those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court. Where the state court denies relief but addresses only certain prongs of a test or components of a claim, the reviewing federal court should likewise consider what reasons regarding an unaddressed prong or component could have supported the decision. And where, as here, the state court denies relief through vague, ambiguous, incomplete, or even incorrect reasoning, AEDPA still requires the reviewing federal court to consider what theories could have supported the decision under AEDPA.[7]

By ignoring these principles, the Majority empowers itself to reweigh evidence that is decades old. Like the District Court, the Majority takes a fresh look at the evidence and concludes,

contrary to the consistent testimony of three eyewitnesses, that the alleged *Brady* violations "effectively *gutted* the Commonwealth's case against Dennis." Majority Op. 269 (emphasis added). AEDPA proscribes such searching review. Because fairminded jurists could disagree as to whether the *376 Pennsylvania Supreme Court's decision was inconsistent with federal law, we owe it our deference. I respectfully dissent from the Majority's decision to do otherwise.

376

Docket No. 14-3878
United States Court of Appeals, Second Circuit.

Fuentes v. Griffin

829 F.3d 233 (2d Cir. 2016)
Decided Jul 15, 2016

Docket No. 14-3878 August Term, 2015

07-15-2016

Jose Alex Fuentes, Petitioner–Appellant, v. T. Griffin, Superintendent, Respondent–Appellee.

Colleen P. Cassidy, New York, New York (Federal Defenders of New York, Inc., Appeals Bureau, New York, New York, on the brief), for Petitioner–Appellant. Amy Appelbaum, Assistant District Attorney, Brooklyn, New York (Kenneth P. Thompson, District Attorney of Kings County, Leonard Joblove, Assistant District Attorney, Brooklyn, New York, on the brief), for Respondent–Appellee.

KEARSE, Circuit Judge

Colleen P. Cassidy, New York, New York (Federal Defenders of New York, Inc., Appeals Bureau, New York, New York, on the brief), for Petitioner–Appellant.

Amy Appelbaum, Assistant District Attorney, Brooklyn, New York (Kenneth P. Thompson, District Attorney of Kings County, Leonard Joblove, Assistant District Attorney, Brooklyn, New York, on the brief), for Respondent–Appellee.

Before: KEARSE, STRAUB, and WESLEY, Circuit Judges.

Opinion

Judge Wesley dissents in a separate opinion.

KEARSE, Circuit Judge:

Petitioner Jose Alex Fuentes, a New York State ("State") prisoner convicted of rape in the first degree and sodomy in the first degree, appeals from a judgment of the United States District Court for the Eastern District of New York, Sandra L. Townes, Judge , denying his amended petition pursuant to 28 U.S.C. § 2254 for a writ of habeas corpus on the grounds that the prosecution suppressed a psychiatric record of an evaluation of the complainant, in violation of Fuentes's due process rights, see Brady v. Maryland , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that Fuentes's trial counsel rendered ineffective assistance by failing to prepare cross-examination or call expert witnesses to counter expert testimony introduced by the prosecution. The district court denied the petition on the ground that the State courts' rejections of Fuentes's constitutional claims were neither contrary to nor unreasonable applications of clearly established federal law, the standard set by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). On appeal, Fuentes contends principally that the rejection by the New York Court of Appeals of his Brady claim was an unreasonable application of the materiality standard established by Kyles v. Whitley , 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), and that the decision of the Kings County Supreme Court—the highest State court to address his ineffective-assistance-of-counsel claim on the merits—was an unreasonable application of Strickland v. Washington , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). For the reasons that follow, we conclude, without need to assess the

claim of ineffective assistance of counsel, that Fuentes's petition should have been granted with respect to the Brady claim. The contents of the suppressed psychiatric record provided information with which to impeach the complaining witness and to support the
237 defendant's version of *237 the events. The New York Court of Appeals, as the State concedes, misread the psychiatric record. And although the State argues that the error was harmless, the Court's conclusion that suppression of the document had no prejudicial effect resulted from its lack of understanding of what the psychiatric record stated, along with its failure to balance the evidence in light of the record as a whole and its inability to appreciate the import of the document in the unique context of this case, where (a) the issue was not whether an alleged rapist was the defendant but instead whether what occurred was a rape rather than a sexual encounter in which the complainant participated willingly, (b) the complainant provided the only evidence that what occurred was a crime, and (c) the withheld document was the only evidence by which the defense could have impeached the complainant's credibility as to her mental state. We reverse the decision of the district court and instruct that a new judgment be entered, ordering that Fuentes be released unless the State affords him a new trial within 90 days.

I. BACKGROUND

The present case arises out of the alleged sexual assault by Fuentes on a woman—referred to herein as "G.C."—on the roof of her apartment building in the early morning hours of January 27, 2002. It is undisputed that Fuentes and G.C. had oral and vaginal intercourse on that roof; but the only persons present were G.C. and Fuentes, and the issue for trial was whether the sex was consensual. As set out in greater detail below, G.C., who was 22 years old in January 2002, testified that in the wee hours of January 27 she had gone to an arcade with friends; that a few hours later she left with the same friends to go home; and that when she exited the subway alone near her home, a stranger—later identified as Fuentes—followed her home, threatened her with a knife, and raped and sodomized her. In contrast, Fuentes, 23 years old in January 2002, testified that he and G.C. had met in a bar at the arcade, hit it off, left together, went to G.C.'s building for the mutual purpose of having sex, and had done so; however, when G.C. suggested that they see each other again and Fuentes demurred, she became angry and self-deprecating and said he would be sorry. The principal issue on this appeal is whether Fuentes was denied a fair trial by the prosecution's nondisclosure of the psychiatric record made with respect to G.C. later on January 27.

A. The State's Evidence at Trial

The State's trial evidence included G.C.'s medical records and the testimony of several witnesses. In addition to G.C., the State's witnesses included one of the friends who had been with G.C. at the arcade on January 27, two police officers, and expert witnesses.

1. G.C.'s Testimony

G.C. testified that just after midnight on January 27 she, her friend Tammy Little (or "Tammy"), and Tammy's sister, cousin, and mother were in Manhattan at an arcade in Times Square. Some three hours later, G.C. and her friends left to go home to Brooklyn by subway. At the appropriate stop, G.C. left the others and switched to a G train to the Flushing Avenue station, near the Marcy Projects where she lived with her mother and three sisters. While walking home from that subway station, G.C. noticed a man—identified at trial as Fuentes—walking behind her.

When G.C. entered her building, Fuentes followed her inside. Having "a bad feeling," G.C. declined
238 to get into the *238 building's elevator with Fuentes, intending to use it after he had used it. (Trial Transcript ("Tr.") 368-69.) However, when the elevator returned to the ground floor, Fuentes was still inside. He appeared to be exiting, but as

G.C. was entering, he pushed her in and followed her; Fuentes put a knife to her neck, and told her, " 'don't do nothing stupid or I'll cut you.' " (Id . at 369–70.) They took the elevator to the sixth floor, the top floor and the floor on which G.C.'s apartment was located; they then walked up a flight of stairs to the roof. Once on the roof, Fuentes forced G.C. to engage in oral and vaginal sex. G.C. did not see a condom and did not recall that one was used. (See id . at 375, 426.)

They then took the stairs and elevator down, with Fuentes holding his knife to G.C.'s neck. After they exited the building, Fuentes put the knife away, put his arm around G.C.'s shoulders as if she "was his girlfriend," and "asked [G.C.] to walk with him to the train station." (Id . at 377.) On the way, Fuentes apologized and said "he was going through something." (Id . at 377–78.) Fuentes told G.C. his mother was from Honduras, and G.C. testified that she "must have" told him she too was Honduran. (Id . at 403.) Fuentes told G.C. his name was "Alex." (Id . at 378, 428.)

When they arrived at the subway station and went down the stairs, Fuentes took G.C.'s cell phone, powered it down, wiped its surface, and returned it to her. He warned G.C. not to call the police. (See id . at 379.) When Fuentes asked G.C. " 'which side goes to Queens?' " she informed him they were on the wrong side; they went back up to the street, and Fuentes crossed to the side on which the G train goes to Queens. (See id .)

G.C. watched Fuentes descend toward the Queens-bound platform; she then walked back to her apartment and went to sleep. (See id . at 380–81.) She did not tell her mother she had been raped. Asked why, G.C. responded, "[b]ecause she wouldn't have believed me." (Id . at 381.)

When G.C. awoke around noon, she got dressed and went to Tammy's home, where she told Tammy and Tammy's sister and mother that she had been raped. After about an hour, G.C. left and went to Woodhull Hospital and reported that she had been raped. A rape kit was prepared, and hospital personnel informed the police. (See id . at 383.) G.C. described her attacker to the police.

2. Testimony of Tammy Little

Tammy Little, G.C.'s good friend since high school, testified that she, her mother, and her sister were at the arcade in Times Square with G.C. in the early morning hours of January 27; Tammy testified that the four of them eventually left Manhattan together via subway. (See Tr. 501-02). Tammy did not see Fuentes that night, nor did she see G.C. talk to any men while they were at the arcade. (See id . at 504–05.)

Tammy testified that G.C. came to her house in the afternoon on January 27 and told Tammy and Tammy's mother that she had been raped "when she was home, she was going into the building." (Id . at 503.) Tammy testified that G.C. did not provide any other details; she "didn't tell [them] she got raped at knifepoint" (id . at 507):

> Q. And when she told you she got raped, what did she say to you? What did she say?
>
> A. That was it, that she was raped.

(Id .) In response, Tammy and her mother were in shock, did not tell G.C. to call the police, and said nothing. (See id . ("I didn't say anything.").) G.C. departed; Tammy did not know where she went (see id . at 504):

239 *239

> Q. So she came in, told you she was raped and just left?
>
> A. Yes.

(Id . at 508.)

3. Police Witness Testimony

Police officer Kevin Fedynak and his partner interviewed G.C. at Woodhull Hospital on January 27. Fedynak testified that G.C. described her

attacker as a well-dressed "male Hispanic, light skin, about six foot two, 200 pounds, going by the name of Alex." (Tr. 456; see id . at 465.)

Police detective Steven Litwin testified that two years later, in January 2004, he was informed that the male DNA collected in G.C.'s rape kit matched that of Fuentes. He arrested Fuentes in June of that year. (See id . at 676–78.)

Litwin had interviewed G.C. in September of 2002—her first police interview since January 27, 2002, another detective having made several unsuccessful attempts to interview her in the interim. (See id . at 675–76, 682–83; see also id . at 405–08 (testimony of G.C.).) Litwin testified—after reviewing the record of his September 2002 interview of G.C.—that in describing the January 27 events to him, G.C. told him that Fuentes was not on her building's elevator when it returned to the ground floor; instead, she got on the empty elevator alone, but the elevator then stopped at the second floor. (See id . at 684–85.) (G.C., in her testimony, denied having given Litwin this version of the event (see id . at 419–20).)

4. Medical and Expert Evidence

The record of G.C.'s physical examination at the hospital on January 27 indicated that her appearance was within normal limits, as were her skin, sensory organs, and alertness. (See Tr. 568-71, 573.) The examination did not reveal any bruises, swelling, or lacerations anywhere on her body, or any marks on her neck to indicate any trauma. (See id . at 571–72, 576–77, 586–87 ("no signs of trauma to any" "parts of [G.C.'s] body that were examined").) On "the assumption that she [had been] sexually assaulted," G.C. "was given prophylactic antibiotics for sexually transmitted diseases." (Id . at 565.) The examination had revealed "no external or internal trauma ... in the pelvic area." (Id . at 564.)

The State called two expert witnesses with respect to the effects of rapes on victims. One, Daniel McSwiggan, was a Woodhull Hospital nurse who was certified in sexual assault forensic examination. McSwiggan, who had not examined G.C., testified that "the absence of visible trauma to [G.C.'s] vaginal area," noted during her January 27 pelvic examination, did not mean that she had not been raped. (Id . at 565–66.)

The other, Dr. Eileen Treacy, was a psychologist who also had not examined G.C. She testified that "a recognizable pattern of behavior that is exhibited by victims of sexual assault," called "rape trauma syndrome " (id . at 646), may include delayed reporting of the event. However, rapes by strangers are "reported with higher frequency" than non-stranger rapes. (Id . at 653, 659.)

B. Fuentes's Defense

Fuentes testified in his own defense and called one additional witness. The latter was Aubry Weekes, a private investigator who was a retired New York City detective and who interviewed G.C. for the defense in February 2005. Weekes testified that G.C. told him she had met Fuentes at the arcade and had left with him; she "[s]aid Mr. Fuentes took her home." (Tr. 711.) (G.C., in her testimony, denied having told Weekes that she met Fuentes at the arcade (see id . at 430–31).) Weekes testified
240 *240 that G.C. did not tell him she had left the arcade with Tammy (see id . at 711); she did not tell him she was raped at knifepoint (see id . at 698); she did not tell him she was raped (see id .).

Fuentes testified that in the early morning hours of January 27, 2002, he and two friends were at the arcade in Times Square, and there he met G.C. in the bar on the second floor. (See id . at 716–18.) Fuentes told G.C. his name was "Alex Fuentes" (id . at 759); he testified that he is called "Alex" although his first name is "Jose," because all of the males in his family have the first name Jose and they all go by their middle names (id . at 716). Fuentes testified that he and G.C. conversed, discussing school, their jobs, their birthdays, their

shared connection to Honduras, music, and the Honduran singer "Lisa Left Eye Lopez" [sic]. (Id . at 719–20.)

Around 4 a.m., Fuentes said he was leaving; G.C. said she was leaving too, and Fuentes suggested that they go to a place near where he lived in Queens, or to his apartment. He and G.C. left the arcade together, taking the R train to Queens, and engaging in kissing, heavy petting, and giggling en route (see id . at 742, 744). However, when Fuentes mentioned that they would need to be quiet in his apartment because a relative was living with him, G.C. told him that "she had a better spot [for them] to go to." (Id . at 723.) Fuentes and G.C. changed trains at Queens Plaza and took the G train to the Flushing Avenue stop. G.C. led Fuentes from the subway station to her apartment building, where she took him to the roof. Once on the roof, Fuentes and G.C. engaged in oral and vaginal intercourse. Fuentes stated that he put on a condom prior to the vaginal intercourse, but that it broke during the act; in the heat of the moment, with G.C.'s encouragement, he continued without one.

When they were done, Fuentes asked G.C. how to get back to the subway, and she offered to walk with him. (See id . at 754–55.) On the way, G.C. suggested that the two of them "go to South Street Seaport and basically hang out again." (Id . at 755.) Fuentes, however, preoccupied with thoughts of the need to get an STD test because he had had unprotected sex with someone he had just met, did not immediately respond. G.C. asked Fuentes if he was listening to her and pointed out that he had not yet asked for her phone number. When Fuentes suggested that they just " 'leave things the way they are,' " G.C. asked if Fuentes thought she was " 'a ho.' " (Id . at 757.) Fuentes assured G.C. that he was not judging her, but reiterated that it was a " 'one-night stand' " and that he would like to " 'leave it at that.' " (Id .) Now upset, G.C. told Fuentes that he must think she was " 'a ho' " and that he was " 'going to be sorry.' " (Id . at 757–58.) Fuentes testified that G.C. was so vehement that a subway employee in the booth looked up at them. Because G.C. "was acting erratic" and seemed "unstable," Fuentes told G.C. that he was leaving and did not want her phone number. (Id . at 758.) When he walked away, G.C. cursed at him.

C. The Undisclosed Psychiatric Record

While in the middle of his closing argument, Fuentes's attorney was leafing through the trial exhibits, including the medical records the State had introduced. He discovered among G.C.'s medical records a page—titled "Record of Consultation"—that the prosecution had not produced to the defense. The Record of Consultation (or "ROC") disclosed that when G.C. was at Woodhull Hospital on January 27 having
241 reported she had been *241 raped, she had a psychiatric consultation. In pertinent part, the Record of Consultation reads as follows:

> [G.C.] is a 22 y-o Black female, single, living w/ mothe[r], working in McDonalds x 2m, reporting depression x 2y and ideas of killing herself since then , because she has "family problems" feeling mistreated by mother, frequent crying spells , withdrawn, lack of energy—Now, she feels angry at herself "because she went home late and put herself a[t] risk"—Fair sleep —She has no SI currently and her depression is "as usual"
>
> -PPH: (-)—Substance Abuse Hx: Marijuana use x 2, last y
>
> -PMH: Asthma—LMP: 1/02
>
> -MSE: A + 0 x3, mood depressed, denies S/H ideations or A/V hallucinations, no delusions elicited.
>
> IMP: I Dysthymic Disorder : Pt wants someone to talk to about her problems.—Cannabis Abuse.
>
> Suggest: Refer to Psych Clinic upon D/C.

(Court Exhibit A-1 (emphases added).)

Upon discovering the previously undisclosed Record of Consultation, Fuentes's attorney requested a sidebar, and he later moved for a mistrial on the ground that the nondisclosure of the ROC constituted a Brady due process violation. Fuentes's attorney had been assured by the prosecutor that all of G.C.'s medical records had been turned over (see , e.g. , Tr. 843-44), and yet the defense had not been given the Record of Consultation (see , e.g. , id . at 844–45). He argued that the cross-examination he could have conducted if he had known of the ROC "would have had a major effect on th[e] jury's opinion of [G.C.'s] credibility in this case." (Id . at 847.) Further, G.C.'s mental health history as shown in the ROC would have substantiated Fuentes's account of G.C.'s erratic behavior at the subway station, and thus supported Fuentes's version of the events. (See , e.g. , id . at 863–64.) Counsel also pointed out that during her trial testimony, G.C. "broke down on the stand and cried many times. And the jury could have very easily been led to believe the reason she was crying was the result of this incident. Now, after looking at this psych. record, we find she was crying well before the events of that evening ...." (Id . at 851.)

The prosecutor admitted to the judge that she had intentionally withheld the Record of Consultation from discovery but stated that she did so out of concern for psychiatrist-patient privilege. The court admonished the prosecutor for failing to at least disclose the document to the court to obtain a ruling on discoverability; it reserved judgment on Fuentes's mistrial motion until after return of the verdict.

The jury, on its second day of deliberations, found Fuentes guilty of first-degree rape and first-degree sodomy. The court did not grant a mistrial, having concluded (see id . at 866–67) that the Record of Consultation was not Brady evidence because the document did not contain anything exculpatory. After denying a posttrial motion to set aside the verdict because of the asserted Brady violation, inter alia , the court sentenced Fuentes principally to 25 years' imprisonment.

D. The State-Court Appeals

Fuentes appealed his conviction, renewing his contention, inter alia , that the State's deliberate suppression of the Record of Consultation constituted a Brady violation that denied him a fair trial. The Appellate Division affirmed, stating that "[w]hile the People unquestionably have a duty to disclose exculpatory material in their control, a defendant's constitutional right to a fair trial is not violated when, as here, he is given a meaningful
242 opportunity *242 to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case ...." People v. Fuentes , 48 A.D.3d 479, 479, 851 N.Y.S.2d 628,

628 (2d Dep't 2008), aff'd on other grounds , 12 N.Y.3d 259, 879 N.Y.S.2d 373, 907 N.E.2d 286 (2009).

The New York Court of Appeals, in a 5-2 decision, affirmed, concluding that "the undisclosed document is not material," and that therefore, "the People's nondisclosure, while ill-advised, does not constitute a Brady violation." People v. Fuentes , 12 N.Y.3d at 260, 879 N.Y.S.2d at 374, 907 N.E.2d 286. The Court of Appeals majority (or "Majority") recognized that although all of G.C.'s medical records had supposedly been disclosed to the defense pursuant to the State's open-file discovery agreement, and they were all introduced in evidence by the State during its direct case, the Record of Consultation, made by a hospital psychiatrist who interviewed G.C. on January 27, had been withheld from discovery. See id . at 261–62, 879 N.Y.S.2d at 375, 907 N.E.2d 286. Thus, "[u]naware of its existence, defense counsel did not cross-examine any of the People's witnesses regarding the information contained in the consultation note." Id . at 262, 879 N.Y.S.2d at 375, 907 N.E.2d 286. The Majority stated that

> [t]he Due Process Clauses of the Federal and State Constitutions both guarantee a criminal defendant the right to discover favorable evidence in the People's possession material to guilt or punishment (see Brady , 373 U.S. at 87–88, 83 S.Ct. 1194 ; People v Bryce , 88 N.Y.2d 124, 128, 643 N.Y.S.2d 516, 666 N.E.2d 221 [1996]). Impeachment evidence falls within the ambit of a prosecutor's Brady obligation (see Giglio v United States , 405 U.S. 150, 154–155, 92 S.Ct. 763, 31 L.Ed.2d 104 [1972]). To establish a Brady violation, a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material (see Strickler v Greene , 527 U.S. 263, 281–282, 119 S.Ct. 1936, 144 L.Ed.2d 286 [1999]).

People v. Fuentes , 12 N.Y.3d at 263, 879 N.Y.S.2d at 376, 907 N.E.2d 286 (emphases added).

The Court noted that, under New York law, if the accused has "ma[de] a specific request for a document" that is withheld, the appropriate standard to measure materiality is whether there is "a reasonable possibility" that the failure to disclose the exculpatory evidence contributed to the verdict. Id ., 879 N.Y.S.2d at 376, 907 N.E.2d 286 (internal quotation marks omitted). The Majority assumed the applicability to Fuentes of the "reasonable possibility " standard—a burden lower than the federal standard of "reasonable probability ," see People v. Vilardi , 76 N.Y.2d 67, 72, 75–77, 556 N.Y.S.2d 518, 520, 522–23, 555 N.E.2d 915 (1990) (internal quotation marks omitted) (emphases in Vilardi)—but concluded that Fuentes had not shown materiality, as it found that the document would have been more valuable to the prosecution than the defense:

> [D]isclosure of this one-page document would not have altered the outcome of the case. Significantly , the document notes that the victim was upset because she placed herself in danger when she walked home from the train by herself in the early morning hours preceding her attack . That information would have undoubtedly strengthened the People's case by corroborating the victim's testimony that she walked home alone when defendant accosted her at knifepoint.

243 *243

People v. Fuentes , 12 N.Y.3d at 263–64, 879 N.Y.S.2d at 376–77, 907 N.E.2d 286 (footnote omitted) (emphases added). In concluding that the document's value to the defense, in contrast, would have been "at best, minimal," the Court stated that

> [a]lthough the document notes that the victim had experienced suicidal thoughts, it is unclear whether these thoughts were the result of having been raped only hours earlier, or due to more general feelings of depression, stemming from a strained relationship with her mother . Further, the record of consultation does not note that the victim was suffering from any serious psychiatric conditions creating hallucinations or delusions; in fact it indicates that the victim had no previous psychiatric history ....
>
> Defendant argues that the statement in the document noting the victim's "cannabis abuse" would have changed the outcome of the case. The report explains that the victim only used marijuana twice during the past year, and nowhere does it state that she took any other substances that could have seriously impacted or impaired her perceptions of reality. Therefore, in the context of this case, the value of the undisclosed information as admissible impeachment evidence would have been, at best, minimal .

Id . at 264, 879 N.Y.S.2d at 377, 907 N.E.2d 286 (emphases added). The Court stated further that

> defendant's version of events was contradicted in several key respects . The friend's testimony refuted defendant's version because she testified that the victim left Manhattan and boarded a train with her and her family without defendant ever being present. Further, the victim testified in specific detail regarding how defendant took steps to avoid apprehension, including turning her cell phone off and wiping it clean of fingerprints. It is also contrary to common sense to believe that the victim would have invented a rape and subjected herself to an invasive hospital examination in the hope of getting revenge for defendant's supposed refusal of her advances . She did not have a way of leading the police to defendant, or any reason to be confident he would ever be caught; he was not identified until the DNA match was found years later.

Id . at 264–65, 879 N.Y.S.2d at 377, 907 N.E.2d 286 (emphases added).

The Majority concluded that disclosure of the Record of Consultation "would not have changed the outcome of the trial," and hence did not meet the Brady materiality standard because of what the Majority viewed as the "strength of the People's case," "the implausibility of defendant's version of [the] events," and the "document's extremely limited utility as impeachment evidence." Id . at 265, 879 N.Y.S.2d at 377, 907 N.E.2d 286.

E. The Federal Habeas Proceedings

In 2011, Fuentes, proceeding pro se , timely commenced the present habeas case, raising multiple constitutional claims. In 2012, following exhaustion of his claims in state court, the district court appointed counsel to represent him, and the amended habeas petition was filed, asserting only the Brady claim and a Sixth Amendment claim of ineffective assistance of counsel. Both claims were rejected by the district court.

The magistrate judge to whom the district court referred Fuentes's petition for report and recommendation recommended that the petition be granted on the ground that the New York Court of Appeals unreasonably applied the materiality
244 standard for Brady claims set by the Supreme *244 Court in Kyles v. Whitley , 514 U.S. 419, 115 S.Ct. 1555. The magistrate judge concluded principally that the New York Court of Appeals majority erred (a) in not realizing that the Record of Consultation stated that G.C. had been in a state of depression for two years, (b) in apparently not recognizing that the prosecution's failure to produce this document deprived Fuentes of the opportunity to investigate and cross-examine G.C. with regard to her mental health history, and (c) in unreasonably discounting the importance of this impeachment material, given that G.C.'s testimony was the only inculpating evidence.

The district court, in a Memorandum and Order dated September 30, 2014 ("D.Ct. Ord."), denied habeas, rejecting the recommendation to grant the writ on the basis of the Brady claim. Although agreeing with the magistrate judge that the New York Court of Appeals misread the Record of Consultation with respect to the duration of G.C.'s depression, the district court concluded that "it was not clearly established by federal law that the information contained in the ROC was material for Brady purposes," D.Ct. Ord. at 10-11, because "[t]he Supreme Court has not addressed whether mental health information such as the type contained in the ROC is considered 'material' for Brady purposes," id . at 12. The district court also stated that the Record of Consultation in no way suggested that G.C. was unable to accurately and truthfully perceive and recall events. Id .

II. DISCUSSION

Fuentes moved in this Court for a certificate of appealability, arguing that the New York Court of Appeals' rejection of his Brady claim was an unreasonable application of federal law, and that the State Supreme Court's rejection of his

ineffective-assistance-of-counsel claim was an unreasonable application of Strickland v. Washington , 466 U.S. 668, 104 S.Ct. 2052. This Court granted the motion. As we now conclude that the writ should have been granted on the basis of the Brady claim, awarding Fuentes release or a new trial, we do not further address his claim of ineffective assistance of counsel.

A. AEDPA Principles

To the extent pertinent here, AEDPA provides that "with respect to any claim that was adjudicated on the merits in State court proceedings," a federal court may not grant a state prisoner's petition for habeas corpus relief unless the state court's adjudication of the claim

> resulted in a decision that was contrary to , or involved an unreasonable application of , clearly established Federal law, as determined by the Supreme Court of the United States,

28 U.S.C. § 2254(d)(1) (emphases added). " '[C]learly established Federal law' under § 2254(d)(1) " refers to "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade , 538 U.S. 63, 71–72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) ("Andrade ").

A state-court decision is "contrary to" clearly established federal law " 'if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases' or 'if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent.' " Id . at 73, 123 S.Ct. 1166 (quoting Williams [Terry] v. Taylor , 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("Williams [Terry] ")). A state-court decision is an "unreasonable application of" clearly established *245 federal law " 'if the state court identifies the correct governing legal principle from th[e Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.' " Andrade , 538 U.S. at 75, 123 S.Ct. 1166 (quoting Williams [Terry] , 529 U.S. at 413, 120 S.Ct. 1495).

In order to hold that a state court's adjudication constituted "an unreasonable application of" a Supreme Court holding, a federal court must find more than just "that the relevant state-court decision applied clearly established federal law erroneously or incorrectly," Williams [Terry] , 529 U.S. at 411, 120 S.Ct. 1495, for "the purpose of AEDPA is to ensure that federal habeas relief functions ... not as a means of error correction," but rather "as a 'guard against extreme malfunctions in the state criminal justice systems,' " Greene v. Fisher , —— U.S. ——, 132 S.Ct. 38, 43, 181 L.Ed.2d 336 (2011) (quoting Harrington v. Richter , 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) ("Richter ") (other internal quotation marks omitted)). Thus, "[r]elief is available under § 2254(d)(1) only if the state court's decision is objectively unreasonable." Yarborough v. Alvarado , 541 U.S. 652, 665, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) ("Alvarado "); see , e.g. , Williams [Terry] , 529 U.S. at 410–13, 120 S.Ct. 1495 ; Andrade , 538 U.S. at 75, 123 S.Ct. 1166.

Ultimately, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter , 562 U.S. at 103, 131 S.Ct. 770. In applying this principle, we bear in mind that

> the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

Alvarado , 541 U.S. at 664, 124 S.Ct. 2140. But "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." Id . at 666, 124 S.Ct. 2140.

B. Due Process and the Prosecutorial Duty of Disclosure

The due process principles applicable here are well and clearly established. "The prosecution [has an] affirmative duty to disclose evidence favorable to a defendant ...." Kyles , 514 U.S. at 432, 115 S.Ct. 1555. That duty

> can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with th[e Supreme] Court's decision in Brady v. Maryland , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See id ., at 86, 83 S.Ct. 1194 (relying on Mooney v. Holohan , 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935), and Pyle v. Kansas , 317 U.S. 213, 215–216, 63 S.Ct. 177, 87 L.Ed. 214 (1942)).

Kyles , 514 U.S. at 432, 115 S.Ct. 1555. The contours of the duty have progressively been refined. In Brady , the Supreme Court held "that the suppression by the prosecution of evidence
246 favorable to an *246 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." 373 U.S. at 87, 83 S.Ct. 1194. In United States v. Agurs , 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Court held that the duty to disclose such evidence is applicable irrespective of whether the accused made a request. In United States v. Bagley , 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court held that the duty to disclose exists irrespective of whether the information bears on the defendant's innocence or a witness's impeachment. And if the withheld evidence contains material for impeachment, it falls within the Brady principles even if it may also be inculpatory: "Our cases make clear that Brady 's disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness." Strickler v. Greene , 527 U.S. 263, 282 n. 21, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) ; see , e.g. , Bagley , 473 U.S. at 676, 105 S.Ct. 3375.

However, the withholding of such evidence does not violate the accused's due process right unless the evidence is "material," in the sense that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id . at 682, 105 S.Ct. 3375. In Banks v. Dretke , 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), the Supreme Court stated,

> [o]ur touchstone on materiality is Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Kyles instructed that the materiality standard for Brady claims is met when "the favorable 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, 115 S.Ct. 1555.

Banks , 540 U.S. at 698, 124 S.Ct. 1256 (emphases ours). Thus, the Brady materiality

> 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 . A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial ." Bagley , 473 U.S. at 678, 105 S.Ct. 3375.

Kyles , 514 U.S. at 434, 115 S.Ct. 1555 (emphases ours). The "defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id . at 434–435, 115 S.Ct. 1555. He need only show, considering the record as a whole, a "reasonable probability"—and "the adjective is important," id . at 434, 115 S.Ct. 1555 (internal quotation marks omitted) (emphasis ours)—of a different result great enough to "undermine [ ] confidence" that the jury would have found him guilty beyond a reasonable doubt, id . (internal quotation marks omitted).

In Strickler , in which the petitioner had been convicted of capital murder, one issue at trial was the identity of the robbers/murderers, and evidence for impeachment of an eyewitness to the robbery had been suppressed. The Supreme Court noted that there was "considerable forensic and other physical evidence linking petitioner to the crime," including: the petitioner's fingerprints on the inside and outside of the victim's car; "shoe impressions," near where the victim's body was found, "match[ing] the soles of shoes belonging to petitioner"; a bag at petitioner's mother's house containing identification cards belonging to the victim; and hairs near the victim's body that "were
247 *247 microscopically alike in all identifiable characteristics to petitioner's hair." Strickler , 527 U.S. at 293 & n. 41, 268–69, 119 S.Ct. 1936 (internal quotation marks omitted). The Strickler Court approved the rejection of the petitioner's Brady claim because it was "not convinced ... that there [wa]s a reasonable probability that the jury would have returned a different verdict" if the testimony of the eyewitness in question "had been either severely impeached or excluded entirely." Id . at 296, 119 S.Ct. 1936. In sum, "in Strickler , considerable forensic and other physical evidence link[ed] [the defendant] to the crime and supported the capital murder conviction," Banks , 540 U.S. at 701, 124 S.Ct. 1256 (internal quotation marks omitted), and "[t]he witness whose impeachment was at issue in Strickler gave testimony that was in the main cumulative," id . at 700, 124 S.Ct. 1256. "In contrast" in Banks , the Court's confidence in the verdict was undermined where the testimony of the witness who could have been impeached by the withheld evidence was "the centerpiece" of the relevant phase of the prosecution's case. Id . at 701, 124 S.Ct. 1256.

With these principles in mind, and reviewing the decision of the district court de novo , see , e.g. , Contreras v. Artus , 778 F.3d 97, 106 (2d Cir. 2015), we conclude (1) that the district court erred in ruling that federal law as set forth by the Supreme Court did not sufficiently clearly establish that records as to a witness's mental health may be Brady material, and (2) that the decision of the New York Court of Appeals was an unreasonable application of the above Brady standards.

C. The Applicability of Brady to Available Psychiatric Records as Clearly Established by the Supreme Court of the United States

The district court ruled that AEDPA precludes habeas relief to Fuentes on his Brady claim on the ground that the United States Supreme Court has not sufficiently clearly addressed whether records as to a witness's mental health, such as the Record of Consultation here showing G.C.'s depression and Dysthymic Disorder, may properly be

considered Brady material. We disagree. Based on clearly established fundamental rights and principles, we think it indisputable that if the prosecution has a witness's psychiatric records that are favorable to the accused because they provide material for impeachment, those records fall within Brady principles, and that the Supreme Court has so recognized.

The Confrontation Clause of the Sixth Amendment, made applicable to the states by the Fourteenth Amendment, see Pointer v. Texas , 380 U.S. 400, 403–06, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), guarantees the defendant in a criminal prosecution the right to confront the witnesses against him. This "means more than being allowed to confront the witness physically," for "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination," Davis v. Alaska , 415 U.S. 308, 315–16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (internal quotation marks and emphasis omitted), and "the cross-examiner has traditionally been allowed to impeach, i.e. , discredit, the witness," id . at 316, 94 S.Ct. 1105.

In particular, a witness's "credibility" may be attacked "by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand ." Id . (emphases added); see , e.g. , United States v. Abel , 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) ("[b]ias is a term used ... to
248 describe the *248 relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise , his testimony in favor of or against a party" (emphasis added)). Cross-examination is especially "important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness , intolerance, prejudice, or jealousy." Greene v. McElroy , 360 U.S. 474, 496, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) (emphases added). "A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony." Abel , 469 U.S. at 51, 105 S.Ct. 465.

These principles are sufficiently fundamental that their applicability to available psychiatric evidence raising questions about the witness's biases and the reliability of his or her testimony is beyond doubt. In Williams [Michael] v. Taylor , 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) ("Williams [Michael] "), one of the Supreme Court's earliest opinions exploring AEDPA, the Court dealt with a habeas claim that "the prosecution had violated Brady v. Maryland , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in failing to disclose a report of a ... psychiatric examination" of Jeffrey Alan Cruse, the petitioner's collaborator in robbery and murder who was the main witness against the petitioner at trial. Williams [Michael] , 529 U.S. at 427, 120 S.Ct. 1479. The report described Cruse as having feelings of worthlessness and constant suicidal thoughts, see id . at 439, 120 S.Ct. 1479 ; and at Cruse's sentencing, his attorney cited the report's statement that Cruse was suffering from, inter alia , severe depression, see id . at 438, 120 S.Ct. 1479. There was no question that the prosecution's failure to disclose the psychiatric report could be a proper basis for a habeas petition under Brady : The Supreme Court noted that when Cruse was sentenced, there were "repeated references to a 'psychiatric' or 'mental health' report in [the sentencing] transcript .... with details that should have alerted counsel to a possible Brady claim ." Id . (emphases added).

Rather, the question facing the Supreme Court was whether, under AEDPA, the petitioner could be given a federal-court evidentiary hearing on the claim, see 28 U.S.C. § 2254(e)(2) (limiting the right to such a hearing "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings"). The Supreme Court noted that although "[t]he transcript put

petitioner's state habeas counsel on notice of the report's existence and possible materiality," Williams [Michael] , 529 U.S. at 439, 120 S.Ct. 1479 —indeed, "state habeas counsel" had "attached [a copy of the transcript] to the state habeas petition he filed," id . at 438, 120 S.Ct. 1479 —"[p]etitioner did not develop, or raise, ... the prosecution's alleged Brady violation regarding Cruse's psychiatric report until he filed his federal habeas petition," id . at 429, 120 S.Ct. 1479. The Court thus concluded that Williams was not entitled to an evidentiary hearing because he had "not exercise[d] the diligence required to preserve the claim that nondisclosure of Cruse's psychiatric report was in contravention of Brady ." Williams [Michael] , 529 U.S. at 437–38, 120 S.Ct. 1479.

We think it beyond doubt that the Supreme Court recognizes the application of Brady principles to a witness's psychiatric records, possessed by the prosecution, that may be used to impeach his credibility, particularly where, as here, the witness's testimony is the only evidence that there was in fact a crime and the State's other evidence is not strong enough to sustain confidence in the
249 verdict.*249 D. The Decision of the New York Court of Appeals

Although the New York Court of Appeals recognized that Brady principles are applicable to impeachment evidence in available psychiatric records, we conclude that its ultimate determination in this case—that the suppression of the Record of Consultation was not prejudicial—constituted an unreasonable application of Supreme Court principles for several reasons.

First, a materiality analysis requires a careful, balanced examination of the nature and strength of the evidence presented, as well as an evaluation of the potential impact of the evidence on the witness's credibility. Entirely missing from the Majority's reasoning is any analysis of how the ROC might have benefited the defense. That failure was due in large part to the fact that the Court of Appeals' assessment of the Record of Consultation itself was fundamentally flawed because the Majority misread the document. The Majority found that the psychiatric record had "extremely limited utility as impeachment evidence," People v. Fuentes , 12 N.Y.3d at 265, 879 N.Y.S.2d at 377, 907 N.E.2d 286, believing that it was "unclear" that G.C.'s suicidal thoughts mentioned in that document were not simply "the result of having been raped only hours earlier," id . at 264, 879 N.Y.S.2d at 377, 907 N.E.2d 286. However, the Record of Consultation stated precisely that G.C. "report[ed] depression x 2y and ideas of killing herself since then " (Court Exhibit A-1 (emphases added)), and the State concedes that "x 2y" means extending for "two years" (State's brief on appeal at 48 ("Fuentes is correct that New York Court of Appeals mistakenly concluded that the record of consultation was unclear as to whether the complainant's suicidal thoughts were present before the incident .... [T]he record of consultation shows that her suicidal thoughts were present as early as two years before the incident.")).

Thus, the suppressed psychiatric record stated unambiguously that on January 27, 2002, G.C. told the hospital psychiatrist that she had been depressed and suicidal for two years. This information was consistent with the Record of Consultation's notation of "Dysthymic Disorder " (Court Exhibit A-1), a condition whose "essential feature," according to the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders (Fourth Edition) ("DSM-IV ")—which is "an objective authority on the subject of mental disorders," Fuller v. J.P. Morgan Chase & Co. , 423 F.3d 104, 107 (2d Cir. 2005) —is a "chronically depressed mood that occurs for most of the day more days than not for at least 2 years," DSM-IV at 345, with symptoms that may include "low self-esteem," id . at 345, 347. Among "the most commonly encountered symptoms in Dysthymic Disorder may be feelings of inadequacy" and "excessive anger," id . at 346;

and the "chronic mood symptoms may contribute to interpersonal problems or be associated with distorted self-perception," id. at 347.

Thus, while the Court of Appeals majority, not recognizing the actual content of the psychiatric record, viewed its impeachment value as "at best, minimal," the information as to G.C.'s chronic depression and Dysthymic Disorder would have, inter alia , provided a way to cross-examine G.C. as to her mental state, and potentially corroborated Fuentes's account of her behavior as "unstable" and "erratic" when he declined to see her again, to wit, being angry and volubly upset at being rejected. (Tr. 757-58.) And, importantly, timely disclosure of the ROC would have provided defense counsel with an opportunity to seek an
250 expert opinion with regard to the ROC's *250 indication of other significant symptoms, in order to establish reasonable doubt in the minds of the jurors because of G.C.'s predisposition toward emotional instability and retaliation—an opinion he was able to obtain after he eventually learned of the psychiatric record but not in time to present it to the jury.

In short, given the Majority's inaccurate reading of the ROC, its application of the Brady principles to the instant case was objectively unreasonable because of its inability to make a reasonable assessment of the benefits to the defense of exploring G.C.'s mental state as revealed in the ROC.

Second, the Majority also found that suppression of the Record of Consultation did not result in prejudice in part because of "the strength of the People's case," stating that Fuentes's version of the events was "implausib[le]," People v. Fuentes , 12 N.Y.3d at 265, 879 N.Y.S.2d at 377, 907 N.E.2d 286, and "was contradicted in several key respects," id . at 264, 879 N.Y.S.2d at 377, 907 N.E.2d 286. This did not reflect a careful, balanced, or fair examination of the nature and strength of the evidence presented, for it both overstated the strength of the State's case and disregarded evidence that supported the plausibility of Fuentes's version.

Contrary to the Majority's depiction, the State's other evidence was not overwhelming. In only one respect was Fuentes's version contradicted by evidence other than the testimony of G.C. herself. As there was no disagreement that intercourse in fact occurred, the presence of semen in G.C.'s vagina did not contradict Fuentes's version. As the State's DNA expert testified, "there isn't" a test for whether a sexual encounter was "consensual" (Tr. 618-19); "[a]ll I can tell you is his semen is present" (id . at 619).

Nor did the other medical evidence contradict Fuentes's version, for there was no affirmative scientific evidence that force had been used against G.C. The hospital examination revealed no trauma or abnormality, external or internal, in G.C.'s pelvic area—or indeed anywhere on her body. Instead, the State's expert medical evidence consisted of testimony that the "absence" of trauma (and the lack of a prompt rape report) did not mean that there had not been rape.

Tammy Little's testimony that G.C. left Manhattan with Tammy and family was the only evidence, other than G.C.'s own testimony, that contradicted Fuentes's version of the events. As the Court of Appeals dissenters noted, credibility was central; and indeed, the jury, during its deliberations, requested rereading of the testimonies of various witnesses, including Tammy (see Tr. 859, 872). If the jury had also had before it the information from G.C.'s psychiatric record that was consistent with Fuentes's testimony, it could well have questioned the credibility of Tammy, especially in light of her description of G.C. as coming to Tammy's home and announcing—without detail—that she had been raped (see id . at 507 (Tammy's testimony that G.C. said "that she was raped"; "[t]hat was it"); id . at 508 ("she came in, told [us]

she was raped and just left"))—and of the response of Tammy and her mother, doing nothing and saying nothing (id . at 507).

The only other evidence that the Court of Appeals could cite as contradicting Fuentes's version of the events was the testimony of G.C. herself. The Majority cited Strickler in mentioning the materiality element of a Brady claim; but this case was nothing like Strickler , where there was ample forensic evidence on the key issue (see , e.g. , Part II.B. above) and the testimony of the witness in question was cumulative. Here, there was no
251 forensic *251 evidence of rape; G.C.'s testimony was the sine qua non of the State's case. Without her testimony, there could be no prosecution at all. The Majority could not properly conclude that the suppression of evidence impeaching G.C. would be of little value because of G.C.'s own testimony.

This is particularly so in light of several significant red flags in G.C.'s testimony, which were nowhere adverted to in the Majority's opinion. For example, the Majority did not mention that G.C. admitted on cross-examination that she had shared some of her personal details with Fuentes, including her Honduran descent and probably her birthday (see Tr. 402-03). That testimony could be viewed in a different light had the jury been aware of the ROC. In addition, there were aspects of G.C.'s trial testimony describing the event that were contrary to what other witnesses testified G.C. had told them. For example, she testified at trial that Fuentes pushed her into the elevator on the ground floor (id . at 369–70); but Detective Litwin testified that G.C., when interviewed, told him that when the elevator returned to the ground floor it was empty, that she got in, but then it stopped on the second floor (see id . at 684–85; but see id . at 419–20 (G.C. denying that she had given Litwin that version)). Further, G.C. testified that Fuentes had taken her cell phone, powered it down, and used his sleeve to wipe it clean of his fingerprints after they went into the subway station (see Tr. 379); but Officer Fedynak testified that when he and his partner interviewed G.C. on January 27, she had not described that action as taking place in the subway; instead, G.C. told them Fuentes took her phone and wiped it off in the elevator on the way down after she and Fuentes had left the roof (see id . at 465)—action that would seem to have been impossible if, as G.C. testified at trial (see id . at 376–77), he was holding a knife to her neck during that entire time. In addition, Weekes, a retired police detective, testified that G.C. told him (though at trial she denied so telling him (see id . at 430–31)) that she had met Fuentes at the arcade, and that Fuentes "took her home" (id . at 711). Nor is it clear how Fuentes would have known to take G.C. to the roof of her building, had he just been a stranger following her home.

Lastly, in assessing Fuentes's version of the events as implausible, the Majority made no mention whatever of the fact that Fuentes told G.C. his name . G.C. testified that he told her his name was "Alex" (Tr. 378, 428); she so informed the police officers who interviewed her at the hospital (see id . at 456 (testimony of Officer Fedynak)); and Fuentes testified he had told her his name (see id . at 759). It was thus beyond dispute that Fuentes told G.C. his name; what was in dispute was where and when that occurred. And, as an objective matter, it seems more plausible that he would have told her his name when meeting and talking with her in a bar than after stalking her from the subway and raping her.

The Majority thus significantly overstated the strength of the State's case, and it concluded unreasonably that Fuentes's version of the events was "contrary to common sense," People v. Fuentes , 12 N.Y.3d at 265, 879 N.Y.S.2d at 377, 907 N.E.2d 286. At trial, the jury deliberated for two days considering which version to accept, asking for, inter alia , read-backs of the testimonies of G.C., Fuentes, and Tammy. As the Court of Appeals dissenters noted, "the issue of credibility was central to the jury's consideration of the case," id . at 266, 879 N.Y.S.2d at 378, 907 N.E.2d 286. See United States v. Gil , 297 F.3d 93,

104 (2d Cir. 2002) (noting, where the key "question hinged on credibility," that the jury's "struggl[e]" with that question—evinced by its
252 request for read-backs of *252 testimony—was relevant to the determination of materiality). Accordingly, far from evaluating the "trial testimony as a whole," People v. Fuentes , 12 N.Y.3d at 264 n.*, 879 N.Y.S.2d at 376 n.*, 907 N.E.2d 286, the Majority ignored substantial aspects of the testimony, thereby overstating the strength of the State's case, and in so doing failed to make a reasonable assessment of how the ROC could benefit the defense.

Third, the Majority's assessment of the Record of Consultation as having "at best, minimal" value was based in part on its view that the ROC would have "strengthened" the State's case by corroborating G.C.'s testimony that she had walked home from the subway alone. Id . at 264, 879 N.Y.S.2d at 376–77, 907 N.E.2d 286. But reliance on potentially inculpatory aspects of the suppressed document is not a proper application of Brady principles. See , e.g. , Strickler , 527 U.S. at 282 n. 21, 119 S.Ct. 1936 (rejecting the prosecution's contention that documents were not Brady material because they were "inculpatory," stating that "[o]ur cases make clear that Brady 's disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness" (internal quotation marks omitted)).

Finally, the Majority failed to consider the unique importance of this evidence. We do not suggest that a prior history of depression or even suicidality by itself necessarily constitutes material impeachment evidence. But the Majority focused on the absence of any indication that G.C. suffered from hallucinations or delusions, see People v. Fuentes , 12 N.Y.3d at 264, 879 N.Y.S.2d at 377, 907 N.E.2d 286 ; the lack of notation as to a cognitive disorder, however, was not significant in the circumstances here, where the key issue at trial was not whether G.C. was impaired as to her perceptions. The question was not G.C.'s ability to identify Fuentes as the man in question but rather her motivation for accusing Fuentes of engaging in conduct to which she had not consented; and the Record of Consultation was pertinent to the issue of her motivation because it identified a relevant mood disorder.

At bottom, the trial record presented two diametrically opposing versions of what happened, and the jury had to decide whether G.C.'s version of the events, despite Fuentes's version, should be believed beyond a reasonable doubt. G.C.'s testimony was the only evidence that what occurred on the rooftop was a rape rather than a sexual encounter in which she was a willing participant; Fuentes's version was that the encounter was consensual and that G.C. thereafter became angry and vindictive when it became clear that he did not want to see her again. If the jury had been aware of the psychiatric record revealing that G.C. suffered from a chronic disorder characterized by low self-esteem, feelings of inadequacy, and excessive anger—and if counsel had been able to develop this line of defense further by obtaining in time for trial a psychiatric opinion that was obtainable only after the belated discovery of the withheld Record of Consultation —the jury could well have given greater credence to Fuentes's version of the events.

In sum, the suppressed psychiatric record provided the only evidence with which the defense could have impeached G.C. as to her mental state and explained why she might have fabricated a claim of rape. The Majority's failure to consider the context of this impeachment evidence renders its Brady -materiality analysis objectively unreasonable.

Accordingly, we conclude that the Court of Appeals majority's determination that G.C.'s psychiatric record had no more than minimal
253 value was based principally on (a) *253 its failure to understand what that Record of Consultation stated, (b) its failure to recognize weaknesses in the State's case, (c) its impermissible reliance on

the fact that the ROC also contained information that could be considered consistent with G.C.'s accusation, (d) its reliance on the content of the testimony of G.C. herself, the witness to be impeached, and (e) its failure to consider the uniquely important nature of the ROC in these circumstances, where G.C. provided the only evidence that Fuentes's conduct was a crime and where the ROC was the only evidence by which the defense could have impeached G.C.'s credibility as to her mental state. In light of these failures and in light of evidence in the record as a whole that was not mentioned by the Majority and that was consistent with Fuentes's version of the events, we conclude that the Court of Appeals' decision that the State's suppression of G.C.'s psychiatric record was not prejudicial was an objectively unreasonable application of Supreme Court law. The State's suppression of the psychiatric record, which would have revealed a disorder that both provided a basis for questioning G.C.'s credibility and provided further support for Fuentes's version of the events, undermines confidence in the outcome of Fuentes's trial.

CONCLUSION

We have considered all of the State's arguments in support of the New York Court of Appeals' decision and have found them to be without merit. The judgment of the district court is reversed, and the matter is remanded for entry of a new judgment ordering that Fuentes be released unless the State affords him a new trial within 90 days.

Wesley, Circuit Judge, dissenting:

Today, the majority holds that a young woman's struggle with a minor depressive disorder is so obviously damaging to her credibility in the prosecution of her alleged rapist that there is no room for fairminded disagreement. The majority reaches this conclusion by speculating about the victim's emotional state based on symptoms nowhere present in the record; instead, the majority extrapolates them from a medical text's general description of symptoms that may be—but are not always—present in people who suffer from the same disorder. The majority's opinion misapplies Supreme Court precedent and creates facts for its AEDPA analysis where none exist in the record. I therefore dissent.

"The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson* , 394 U.S. 286, 290–91, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969). Yet it also "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter* , 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). Accordingly, in an effort to protect both individual liberty and federalism, a federal court may grant a writ of habeas corpus in disagreement with a state court's decision only if that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). In order to hold that a state court's decision was an "unreasonable application" of federal law, a federal court must conclude "that there was no reasonable basis for the state court to deny relief," *Harrington* , 562 U.S. at 98, 131 S.Ct. 770, and that "there [was] no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] 254 Court's precedents," *254 *id.* at 102, 131 S.Ct. 770. When considering the consistency of the state court decision with Supreme Court precedent, "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado* , 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

Accordingly, in reviewing Fuentes's petition for habeas relief under a *Brady* claim, we grant the state court "a deference and latitude that are not in operation when the case involves review under the [*Brady*] standard itself." *Harrington* , 562 U.S. at 101, 131 S.Ct. 770. Critically, our review must

defer to the decision, *i.e.* , the substantive conclusion, reached by the state court—not the reasoning it employed to reach that decision. Our Circuit adopted this position in 2001, stating candidly, "[W]e are determining the reasonableness of the state courts' 'decision,' not grading their papers." *Cruz v. Miller* , 255 F.3d 77, 86 (2d Cir. 2001) (citation omitted) (quoting 28 U.S.C. § 2254(d)(1)); *accord Cotto v. Herbert* , 331 F.3d 217, 248 (2d Cir. 2003) ; *see also Sellan v. Kuhlman* , 261 F.3d 303, 311 (2d Cir. 2001) ("Nowhere does [§ 2254(d)] make reference to the state court's process of reasoning."). The Supreme Court has reinforced this approach in two cases applying deferential review to state court decisions entirely lacking any explanation of their reasoning. *See Johnson v. Williams* , —— U.S. ——, 133 S.Ct. 1088, 1094, 185 L.Ed.2d 105 (2013) ; *Harrington* , 562 U.S. at 96–97, 131 S.Ct. 770. Further, in *Premo v. Moore*, decided on the same day as *Harrington*, the Court framed habeas review of a state court's *Strickland* analysis not as whether the state court had properly conducted the analysis but "whether there [was] *any* reasonable argument that counsel satisfied *Strickland*'s deferential standard." 562 U.S. 115, 123, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011) (emphasis added).[1] Likewise, our sister circuits have overwhelmingly interpreted § 2254 to require deference to the state court's result, not to the presence or the particulars of its reasoning. *See, e.g., Holland v. Rivard* , 800 F.3d 224, 236–37 (6th Cir. 2015) ; *Makiel v. Butler* , 782 F.3d 882, 906 (7th Cir. 2015) ; *Williams v. Roper* , 695 F.3d 825, 831–32 (8th Cir. 2012) ; *Gill v. Mecusker* , 633 F.3d 1272, 1291–92 (11th Cir. 2011) ; *Clements v. Clarke* , 592 F.3d 45, 55 (1st Cir. 2010) ; *Hernandez v. Small* , 282 F.3d 1132, 1140 (9th Cir. 2002) ; *Neal v. Puckett* , 239 F.3d 683, 696 (5th Cir. 2001) ; *Bell v. Jarvis* , 236 F.3d 149, 159 (4th Cir. 2000) (en banc); *Aycox v. Lytle* , 196 F.3d 1174, 1177–78 (10th Cir. 1999).[2]

[1] Though *Cruz* left open the possibility that the state court's analysis may be "so flawed as to undermine confidence that the constitutional claim had been fairly adjudicated," 255 F.3d at 86, this dicta cannot survive *Harrington –Premo*, in which the Supreme Court essentially applied the same "any reasonable argument" standard regardless of whether the state court had offered its reasoning (*Premo*) or not (*Harrington*). *See Premo* , 562 U.S. at 123, 131 S.Ct. 733 ; *Harrington* , 562 U.S. at 102, 131 S.Ct. 770.

[2] Judge Posner has aptly explained the flaws of a reasoning-focused review:

> [It] would place the federal court in just the kind of tutelary relation to the state courts that the [AEDPA] amendments are designed to end.... A federal court in a habeas corpus proceeding cannot remand the case to the state appellate court for a clarification of that court's opinion; all it can do is order a new trial, though the defendant may have been the victim not of any constitutional error but merely of a failure of judicial articulateness.

Hennon v. Cooper , 109 F.3d 330, 335 (7th Cir. 1997).

As the majority acknowledges, the availability of writs of habeas corpus in federal court "is a guard against extreme malfunctions in the state criminal
255 justice systems, *255 not a substitute for ordinary error correction through appeal." *Harrington* , 562 U.S. at 102–03, 131 S.Ct. 770 (internal quotation marks omitted). Therefore, to obtain habeas relief,

> a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id. at 103, 131 S.Ct. 770. This standard is "difficult to meet ... because it was meant to be"; it is grounded in respect for the State's sovereignty, its "good-faith attempts to honor constitutional rights," and its "significant interest in repose for concluded litigation." *Id* . at 102–03, 131 S.Ct. 770 (internal quotation marks omitted); *accord Burt v. Titlow* , —— U.S. ——, 134 S.Ct. 10, 16, 187 L.Ed.2d 348 (2013) ("We will not lightly conclude that a State's criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy." (alteration and internal quotation marks omitted)). As our Court has explained in the past, "we cannot grant habeas relief where a petitioner's claim pursuant to applicable federal law, or the U.S. Constitution, has been adjudicated on its merits in state court proceedings in a manner that is not manifestly contrary to common sense." *Anderson v. Miller* , 346 F.3d 315, 324 (2d Cir. 2003).

The majority bases its decision in this case on what it identifies as errors in the New York State Court of Appeals majority's reasoning, including misreading of the record of consultation ("ROC"), improperly weighing the trial evidence, and failing to consider the "uniquely important nature of the ROC in these circumstances." Majority Op., *ante* , at 253. But, as discussed above, we are to determine whether there is "any reasonable argument" that the ROC was not material under the *Brady* standard, *Premo* , 562 U.S. at 123, 131 S.Ct. 733, not parse the state court opinion for "deficient reasoning," *Cruz* , 255 F.3d at 86. In other words, we must conclude not only that the suppression of the ROC creates a " 'reasonable probability' of a different result" and "undermines confidence in the outcome of the trial," *Kyles v. Whitley* , 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *United States v. Bagley* , 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)), but that a contrary conclusion would be "so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility for fairminded disagreement* ." *Harrington* , 562 U.S. at 103, 131 S.Ct. 770 (emphasis added).

The majority attempts to vault over this high barrier on the assertion that G.C.'s psychiatric report is unquestionably material to her motives and credibility—an assertion premised exclusively on the thin straw of two words contained in the ROC: "Dysthymic Disorder," App. 536. By way of overview, dysthymic disorder is "a chronically depressed mood," accompanied by "at least two of the following additional symptoms": "poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and feelings of hopelessness." DSM-IV, at 345. In other words, a chronically depressed mood is the only symptom that exists in every diagnosis of dysthymic disorder ; to make a diagnosis, a doctor must conclude that two (or more) of the other listed symptoms are present, but the specific two may vary among individual cases. Importantly, therefore, the existence of a diagnosis alone does not indicate which of the possible additional
256 symptoms are present.*256 Furthermore, although "chronic" carries a connotation of severity in common parlance, in the context of dysthymic disorder, it simply means "present for more days than not over a period of at least 2 years." DSM-IV, at 343; *see also Persistent Depressive Disorder (Dysthymia*), The Mayo Clinic, http://www.mayoclinic.org/diseases-conditions/persistent-depressive-disorder/home/ovc-20166590 (last visited July 11, 2016) (characterizing dysthymia as "a continuous long-term (chronic) form of depression"). Dysthymic disorder is considered "less severe"

than "Major Depressive Disorder," which involves episodes of at least two weeks in which the depressive mood is "present for most of the day, nearly every day." DSM-IV, at 343. The DSM-IV estimates that, at any given time, three percent of the population suffers from dysthymia, and another three percent has suffered from it in the past. *See id.* at 347.

The majority's analysis takes the general description of this disorder and runs with it. Without any evidence that G.C. actually experienced any such symptoms, the majority ominously warns that dysthymic disorder "may" also be accompanied by "feelings of inadequacy," "excessive anger," "interpersonal problems," or "distorted self-perception." Majority Op., *ante* , at 249 (internal quotation marks omitted). It then converts generally associated features that "may be" present in people who suffer from this disorder into a conclusion that "G.C. suffered from a chronic disorder *characterized by* low self-esteem, feelings of inadequacy, and excessive anger." *Id.* at 252 (emphasis added). This analytical leap is simply untenable: these symptoms are not part of the "Diagnostic Features" of the disorder, DSM-IV, at 345–46, but instead are part of the DSM-IV's "Associated Features" category, *id.* at 346–47, which is a category describing "clinical features that are frequently associated with the disorder but that are not considered essential to making the diagnosis," *id.* at 256. In other words, the fact that these symptoms *may* appear in individuals with the disorder cannot be extrapolated as characteristics of the disorder for every individual suffering from dysthymic disorder.[3] No aspect of the record here indicates that the doctor diagnosed G.C. with these specific associated features; while the ROC mentions that G.C. experienced difficulty with her mother, frequently cried, and was angry at herself "because she went home late and put herself at risk," J.A. 536 (internal quotation marks omitted), these statements are hardly diagnoses of "excessive" anger or systemic "interpersonal problems."

[3] It bears repeating that, even of the diagnostic symptoms, only a chronically depressed mood is present in all cases of the disorder and therefore is the only symptom that can be logically extrapolated from the fact of diagnosis alone.

The majority then says, incredibly, that this generic description of the possible associated features of a minor depressive disorder—a disorder that between roughly 4.5 and 9.5 million people will experience this year[4] —"potentially corroborated Fuentes's account of her behavior as 'unstable' and 'erratic' when he declined to see her again, to wit, being angry and volubly upset at being rejected." Majority Op., *ante* , at 249 (emphasis added). First, there is simply no connection between the symptoms actually diagnosed in the ROC and this conclusion. Second, potentially corroborating Fuentes's account is not enough. To grant habeas relief, the majority *257 has to conclude not only that the suppression of this record "undermines confidence" in the verdict, *Kyles* , 514 U.S. at 434, 115 S.Ct. 1555 (internal quotation marks omitted), but also that it does so to such an overwhelming level of objective certainty that no fairminded jurist could disagree, *see Harrington* , 562 U.S. at 102, 131 S.Ct. 770.

[4] *See* DSM-IV, at 347; *Dysthymic Disorder Among Adults* , National Institute for Mental Health, http://www.nimh.nih.gov/health/statistics/prevalence/dysthymic-disorder-among-adults.shtml (last visited July 11, 2016).

Some psychiatric history evidence unquestionably will be so material to witness or victim credibility that the only objectively reasonable conclusion is that its suppression violates *Brady*. This evidence,

however, is not in that category. Cases in which courts have held mental health histories so clearly material under *Brady* that habeas relief is warranted—including all the ones on which Fuentes relies—uniformly show a significantly higher severity of diagnosis and a significantly stronger nexus between the nature of the disorder and its effect on the particular witness's credibility. In *Browning v. Trammell*, for example, the psychiatric report described "a severe mental disorder" that made the prosecution's "indispensable witness" "hostile, assaultive, combative, and even potentially homicidal" with a tendency to "blur reality and fantasy and project blame onto others." 717 F.3d 1092, 1106 (10th Cir. 2013) ; *see also Gonzalez v. Wong* , 667 F.3d 965, 982–84 (9th Cir. 2011) (holding psychiatric reports to be material where they detailed a history of deceitful and manipulative behavior by a witness as well as symptoms of schizophrenia, implicating his "competency to perceive accurately and testify truthfully"). The Third Circuit found a mental health evaluation of an eyewitness showing blackouts, dissociative tendencies, poor judgment, and distorted perceptions of reality to constitute material impeachment evidence. *See Wilson v. Beard* , 589 F.3d 651, 665–66 (3d Cir. 2009) ; *cf. United States v. Pryce* , 938 F.2d 1343, 1346 (D.C. Cir. 1991) (reversing conviction based on failure to permit cross-examination of an eyewitness on the basis of recent hallucinations). The Ninth Circuit held that the withholding of expert reports on a developmentally disabled victim's ability to understand consent was sufficiently material to warrant habeas relief. *See Bailey v. Rae* , 339 F.3d 1107, 1114–15 (9th Cir. 2003). Into the company of mental health characteristics that are clearly and expressly tied to a critical component of witness credibility, the majority adds "a chronically depressed mood that occurs for most of the day more days than not for at least 2 years." DSM-IV, at 345. One of these things is not like the others.

Despite Fuentes's arguments to the contrary, this case is not analogous to a single-eyewitness case containing a withheld witness statement that the witness " 'would not know [the perpetrators] if [he] saw them,' " directly contradicting the witness's statement on the stand that he had "[n]o doubt" about the defendant's identity, *Smith v. Cain* , —— U.S. ——, 132 S.Ct. 627, 629–30, 181 L.Ed.2d 571 (2012) (second and third alterations in original) (internal quotation marks omitted). Here, each side presented one corroborating witness: the prosecution presented Tammy Little, who testified that Fuentes had not met G.C. at the arcade as he claimed, and the defense presented a private investigator, who testified that G.C. had told him that the sexual activity was consensual. Though the majority recounts at length ways in which G.C.'s version of events could be attacked, *see* Majority Op., *ante,* at 249–53, these facts were all known to the jury as a basis for contesting G.C.'s testimony. Nothing in the ROC contradicted her testimony, nor did it provide non-speculative evidence that G.C.'s mental state included a propensity to react in an emotionally disturbed or
258 vindictive manner *258 to a one-night stand's refusal to see her again.[5]

[5] Fuentes's argument that the ROC's reference to frequent crying could have been used to portray G.C.'s tears on the stand as unrelated to her retelling an account of sexual assault, *see* Majority Op., *ante* , at 243, strikes me as far-fetched.

Instead, both Fuentes and the majority rely on rampant speculation about symptoms not diagnosed in the psychiatric report in order to claim its materiality. None of the suppositions made about G.C.—that she would become irrational after rejection or that whatever emotional reaction she had would manifest in a false accusation of rape—is supported by the record that was before the state court. *See Cullen v. Pinholster* , 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) ("[R]eview under §

2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). Although Fuentes appeals to the potential for further investigation by defense counsel, as did the state court dissenters, the record provides no basis to think that further investigation *would* —as opposed to *might* —have uncovered actual symptoms in G.C. supporting Fuentes's characterization of her as emotionally volatile or manipulative. *See Wood v. Bartholomew* , 516 U.S. 1, 6, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) (per curiam) (reversing Ninth Circuit's grant of habeas relief on *Brady* grounds "based on mere speculation" that suppressed polygraph results "might have led respondent's counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized").[6] A speculative appeal to possible symptoms—which the excluded document gives us no reason to believe G.C. experienced—is simply not a basis on which to hold a state court's decision "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* , 562 U.S. at 103, 131 S.Ct. 770.

[6] Not until his federal habeas proceeding did Fuentes provide a report by a psychiatric expert—though not the one who examined G.C. in the hospital—suggesting what further investigation might have revealed. Fuentes wisely does not rely on this report on appeal because, in addition to its speculative content, *Cullen* limits our review to the record before the state court, *see* 563 U.S. at 181, 131 S.Ct. 1388.

The majority opinion identifies no Supreme Court precedent that squarely addresses psychiatric reports in the *Brady* context, such that finding no materiality here can be truly be called "an unreasonable application of[ ] clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) ; *see also Smith v. Wenderlich* , No. 14–3920, 826 F.3d 641, 648–50, 2016 WL 3457618, at *6 (2d Cir. June 24, 2016) (Kearse, *J.*) ("When there is no Supreme Court holding on a given issue, 'it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law' within the meaning of AEDPA." (alterations in original) (quoting *Carey v. Musladin* , 549 U.S. 70, 77, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006))). Its only attempt is to cite *Williams [Michael] v. Taylor* , 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000), a case in which the Court decided the petitioner could not receive an evidentiary hearing on, *inter alia* , his claims of suppression of a psychiatric report. *Williams [Michael]*, however, did not examine the materiality of a psychiatric report; rather, it concerned whether the petitioner had developed the factual basis for his arguments in state court under § 2254(e)(2). *See id.* at 440, 120 S.Ct. 1479. It is well established in federal habeas law that we must consider only the holdings, *259 not the dicta, of Supreme Court cases. *See, e.g.* , *Musladin* , 549 U.S. at 74, 127 S.Ct. 649 (citing *Williams [Terry] v. Taylor* , 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Concluding that *Williams [Michael]* implies the *Brady* materiality of all psychiatric reports is not applying clearly established federal law. Even if the case were about materiality, however, the psychiatric report in *Williams [Michael]* showed severe mental health conditions, possessed by the specific witness and with an indisputable impact on his credibility: the report detailed the main cooperating eyewitness's "little recollection of the [murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time" and also detailed his post-traumatic stress disorder, major depression, and overwhelming guilt and shame for his participation in the murders. *Williams [Michael]* , 529 U.S. at 438–39, 120 S.Ct. 1479 (internal quotation marks omitted). Like the examples from other circuits cited above, there can be no reasonable disagreement that such

information about a key eyewitness seriously calls into question the credibility of his testimony. The same cannot be said for the ROC, which itself contains no information tending to impeach G.C.'s testimony or to portray her as emotionally volatile or vindictive. *Williams [Michael]* simply does not create a clearly established rule on the materiality of psychiatric reports and especially not of those that do not facially impeach witness testimony.

The majority has, in essence, grounded its decision on concerns with what it views to be analytical errors in the Court of Appeals' opinion. But even a clearly erroneous decision does not satisfy the standard for granting the writ. *See Lockyer v. Andrade* , 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). While focusing on whether or not the Court of Appeals accurately analyzed the record, the majority has "all but ignored the only question that matters under § 2254(d)(1) "—namely, "whether it is possible fairminded jurists could disagree that [the state court's decision] [is] inconsistent with the holding in a prior decision of th[e] [Supreme] Court." *Harrington* , 562 U.S. at 102, 131 S.Ct. 770 (internal quotation marks omitted). As a result, the majority has committed the same error for which the Supreme Court criticized the Ninth Circuit in *Harrington* :

> The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review: Because the Court of Appeals had little doubt that [the petitioner's] claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it. **This analysis overlooks arguments that would otherwise justify the state court's result and ignores further limitations of § 2254(d), including its requirement that the state court's decision be evaluated according to the precedents of this Court. It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.**

Id. (emphasis added) (citations omitted). Given that there is no specific holding from the Supreme Court on psychiatric records under *Brady*, we are left with the highly general *Kyles* standard, which by necessity creates "more leeway ... in reaching outcomes in case-by-case determinations." *Yarborough* , 541 U.S. at 664, 124 S.Ct. 2140. A decision that the ROC does not create a reasonable probability of a different verdict is simply not outside of that leeway.

Perhaps it is the prosecutor's intentional decision to exclude the ROC from a purported open-file discovery without disclosing that fact to the
260 defendant or to the *260 court that draws the majority's ire. It is certainly inexcusable for a prosecutor to represent that everything has been produced when it has not—and even more inexcusable to answer a direct question by the court by detailing G.C.'s various physical examinations in the hospital but omitting the psychological evaluation. *See* J.A. 177–78.[7] But—for better or for worse—the Supreme Court has told us that no greater remedy is available under *Brady* for a prosecutor's intentional violation of constitutional standards than for an inadvertent one. *See Brady v. Maryland* , 373 U.S. 83, 87, 83

S.Ct. 1194, 10 L.Ed.2d 215 (1963). Thus, we are bound to the narrow questions of whether the evidence was favorable, suppressed, and material. *See Poventud v. City of New York* , 750 F.3d 121, 133 (2d Cir. 2014) (en banc). In no universe does a conclusion that this one-page, minimally probative document is not prejudicial under *Brady* constitute an "extreme malfunction[ ] in the state criminal justice system[ ]"; instead, the majority has engaged in "ordinary error correction" of the kind we are forbidden by Congress to undertake. *Harrington* , 562 U.S. at 102, 131 S.Ct. 770 (internal quotation marks omitted). And in making just such an error correction, the majority's dissatisfaction with the prosecutor's conduct and the state courts' treatment of the record has led to its misapplication of § 2254(d)(1) and Supreme Court precedent framing the deferential nature of our habeas review.

[7] Indeed, such conduct could certainly form the basis of professional discipline for ethical violations. *See* 22 N.Y.C.R.R. § 1200, Rule 3.3(a) ("A lawyer shall not knowingly ... make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer ...."); *id.* Rule 3.4(a)(1) ("A lawyer shall not ... suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce ...."); *id.* Rule 3.8(b) ("A prosecutor ... shall make timely disclosure ... of the existence of evidence or information known to the prosecutor ... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal."); *id.* Rule 4.1 ("[A] lawyer shall not knowingly make a false statement of fact or law to a third person."). Accordingly, I have directed the Clerk of the Court to forward copies of the majority opinion and this dissent to the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts in the Second Department in order that they may consider whether the prosecutor in this case breached her ethical obligations in a manner warranting professional discipline.

Accordingly, I dissent.

No. 93-7927
U.S.

Kyles v. Whitley

514 U.S. 419 (1995) · 115 S. Ct. 1555
Decided Apr 19, 1995

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 93-7927.

Argued November 7, 1994 Decided April 19, 1995

Petitioner Kyles was convicted of first-degree murder by a Louisiana jury and sentenced to death. Following the affirmance of his conviction and sentence on direct appeal, it was revealed on state collateral review that the State had never disclosed certain evidence favorable to him. That evidence included, *inter alia*, (1) contemporaneous eyewitness statements taken by the police following the murder; (2) various statements made to the police by an informant known as "Beanie," who was never called to testify; and (3) a computer print-out of license numbers of cars parked at the crime scene on the night of the murder, which did not list the number of Kyles's car. The state trial court nevertheless denied relief, and the State Supreme Court denied Kyles's application for discretionary review. He then sought relief on federal habeas, claiming, among other things, that his conviction was obtained in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, which held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. The Federal District Court denied relief, and the Fifth Circuit affirmed.

Held:

1. Under *United States* v. *Bagley*, 473 U.S. 667, four aspects of materiality for *Brady* purposes bear emphasis. First, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Thus, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. 473 U.S., at 682, 685. *United States* v. *Agurs*, 427 U.S. 97, 112-113, distinguished. Second, *Bagley* materiality is not a sufficiency of evidence test. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but 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. Third, contrary to the Fifth Circuit's assumption, once a reviewing court applying *Bagley* has found constitutional error, there is no need for further harmless-error review, since the constitutional standard for materiality 420 *420 under *Bagley* imposes a higher burden than the harmless-error standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 623. Fourth, the state's disclosure obligation turns on the cumulative effect of all suppressed

evidence favorable to the defense, not on the evidence considered item by item. 473 U.S., at 675, and n. 7. Thus, the prosecutor, who alone can know what is undisclosed, must be assigned the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. To hold otherwise would amount to a serious change of course from the *Brady* line of cases. As the more likely reading of the Fifth Circuit's opinion shows a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, it is questionable whether that court evaluated the significance of the undisclosed evidence in this case under the correct standard. Pp. 432-441.

2. Because the net effect of the state-suppressed evidence favoring Kyles raises a reasonable probability that its disclosure would have produced a different result at trial, the conviction cannot stand, and Kyles is entitled to a new trial. Pp. 441-454.

(a) A review of the suppressed statements of eyewitnesses — whose testimony identifying Kyles as the killer was the essence of the State's case — reveals that their disclosure not only would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense, but also would have substantially reduced or destroyed the value of the State's two best witnesses. Pp. 441-445.

(b) Similarly, a recapitulation of the suppressed statements made to the police by Beanie — who, by the State's own admission, was essential to its investigation and, indeed, "made the case" against Kyles — reveals that they were replete with significant inconsistencies and affirmatively self-incriminating assertions, that Beanie was anxious to see Kyles arrested for the murder, and that the police had a remarkably uncritical attitude toward Beanie. Disclosure would therefore have raised opportunities for the defense to attack the thoroughness and even the good faith of the investigation, and would also have allowed the defense to question the probative value of certain crucial physical evidence. Pp. 445-449.

(c) While the suppression of the prosecution's list of the cars at the crime scene after the murder does not rank with the failure to disclose the other evidence herein discussed, the list would have had some value as exculpation of Kyles, whose license plate was not included thereon, and as impeachment of the prosecution's arguments to the jury that the killer left his car at the scene during the investigation and that a grainy *421 photograph of the scene showed Kyles's car in the background. It would also have lent support to an argument that the police were irresponsible in relying on inconsistent statements made by Beanie. Pp. 450-451.

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(d) Although not every item of the State's case would have been directly undercut if the foregoing *Brady* evidence had been disclosed, it is significant that the physical evidence remaining unscathed would, by the State's own admission, hardly have amounted to overwhelming proof that Kyles was the murderer. While the inconclusiveness of that evidence does not prove Kyles's innocence, and the jury might have found the unimpeached eyewitness testimony sufficient to convict, confidence that the verdict would have been the same cannot survive a recap of the suppressed evidence and its significance for the prosecution. Pp. 451-454.

5 F.3d 806, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 454. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined, *post*, p. 456.

James S. Liebman argued the cause for petitioner. On the briefs were *George W. Healy III, Nicholas J. Trenticosta, Denise Leboeuf*, and *Gerard A. Rault, Jr.*

Jack Peebles argued the cause for respondent. With him on the brief was *Harry F. Connick*.

JUSTICE SOUTER delivered the opinion of the Court.

After his first trial in 1984 ended in a hung jury, petitioner Curtis Lee Kyles was tried again, convicted of first-degree murder, and sentenced to death. On habeas review, we follow the established rule that the state's obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. Because the net effect of the evidence withheld by the State in this case raises *422 a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial.

I

Following the mistrial when the jury was unable to reach a verdict, Kyles's subsequent conviction and sentence of death were affirmed on direct appeal. *State* v. *Kyles*, 513 So.2d 265 (La. 1987), cert. denied, 486 U.S. 1027 (1988). On state collateral review, the trial court denied relief, but the Supreme Court of Louisiana remanded for an evidentiary hearing on Kyles's claims of newly discovered evidence. During this state-court proceeding the defense was first able to present certain evidence, favorable to Kyles, that the State had failed to disclose before or during trial. The state trial court nevertheless denied relief, and the State Supreme Court denied Kyles's application for discretionary review. *State ex rel. Kyles* v. *Butler*, 566 So.2d 386 (La. 1990).

Kyles then filed a petition for habeas corpus in the United States District Court for the Eastern District of Louisiana, which denied the petition. The Court of Appeals for the Fifth Circuit affirmed by a divided vote. 5 F.3d 806 (1993). As we explain, *infra*, at 21-22, there is reason to question whether the Court of Appeals evaluated the significance of undisclosed evidence under the correct standard. Because "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case," *Burger* v. *Kemp*, 483 U.S. 776, 785 (1987),[1] we granted certiorari, 511 U.S. 1051 (1994), and now reverse. *423

1 The dissent suggests that *Burger* is not authority for error correction in capital cases, at least when two previous reviewing courts have found no error. *Post*, at 457. We explain, *infra*, at 21-22, that this is not a case of simple error correction. As for the significance of prior review, *Burger* cautions that this Court should not "substitute speculation" for the "considered opinions" of two lower courts. 483 U.S., at 785. No one could disagree that "speculative" claims do not carry much weight against careful evidentiary review by two prior courts. There is nothing speculative, however, about Kyles's *Brady* claim.

II A

The record indicates that, at about 2:20 p.m. on Thursday, September 20, 1984, 60-year-old Dolores Dye left the Schwegmann Brothers' store (Schwegmann's) on Old Gentilly Road in New Orleans after doing some food shopping. As she put her grocery bags into the trunk of her red Ford LTD, a man accosted her and after a short struggle drew a revolver, fired into her left temple, and killed her. The gunman took Dye's keys and drove away in the LTD.

New Orleans police took statements from six eyewitnesses,[2] who offered various descriptions of the gunman. They agreed that he was a black man, and four of them said that he had braided hair. The witnesses differed significantly, however, in their descriptions of height, age, weight, build, and hair length. Two reported seeing a man of 17 or 18, while another described the gunman as looking as old as 28. One witness described him as 5'4" or 5'5", medium build, 140-150 pounds; another described the man as slim and close to six feet. One witness said he had a mustache; none of the others spoke of any facial hair at all. One witness said the murderer had shoulder-length hair; another described the hair as "short."

2 The record reveals that statements were taken from Edward Williams and Lionel Plick, both waiting for a bus nearby; Isaac Smallwood, Willie Jones, and Henry Williams, all working in the Schwegmann's parking lot at the time of the murder; and Robert Territo, driving a truck waiting at a nearby traffic light at the moment of the shooting, who gave a statement to police on Friday, the day after the murder.

Since the police believed the killer might have driven his own car to Schwegmann's and left it there when he drove off in Dye's LTD, they recorded the license numbers of the cars remaining in the parking lots around the store at 9:15 p.m. on the evening of the murder. Matching these numbers with registration records produced the names and addresses of the owners of the cars, with a notation of any owner's police *424 record. Despite this list and the eyewitness descriptions, the police had no lead to the gunman until the Saturday evening after the shooting.

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At 5:30 p.m., on September 22, a man identifying himself as James Joseph called the police and reported that on the day of the murder he had bought a red Thunderbird from a friend named Curtis, whom he later identified as petitioner, Curtis Kyles. He said that he had subsequently read about Dye's murder in the newspapers and feared that the car he purchased was the victim's. He agreed to meet with the police.

A few hours later, the informant met New Orleans Detective John Miller, who was wired with a hidden body microphone, through which the ensuing conversation was recorded. See App. 221-257 (transcript). The informant now said his name was Joseph Banks and that he was called Beanie. His actual name was Joseph Wallace.[3]

3 Because the informant had so many aliases, we will follow the convention of the court below and refer to him throughout this opinion as Beanie.

His story, as well as his name, had changed since his earlier call. In place of his original account of buying a Thunderbird from Kyles on Thursday, Beanie told Miller that he had not seen Kyles at all on Thursday, *id*., at 249-250, and had bought a red LTD the previous day, Friday, *id*., at 221-222, 225. Beanie led Miller to the parking lot of a nearby bar, where he had left the red LTD, later identified as Dye's.

Beanie told Miller that he lived with Kyles's brother-in-law (later identified as Johnny Burns),[4] whom Beanie repeatedly called his "partner." *Id*., at 221. Beanie described Kyles as slim, about 6 feet tall, 24 or 25 years old, with a "bush" hairstyle. *Id*., at 226, 252. When asked if Kyles
425 ever wore *425 his hair in plaits, Beanie said that he did but that he "had a bush" when Beanie bought the car. *Id*., at 249.

> 4 Johnny Burns is the brother of a woman known as Pinky Burns. A number of trial witnesses referred to the relationship between Kyles and Pinky Burns as a common-law marriage (Louisiana's civil law notwithstanding). Kyles is the father of several of Pinky Burns's children.

During the conversation, Beanie repeatedly expressed concern that he might himself be a suspect in the murder. He explained that he had been seen driving Dye's car on Friday evening in the French Quarter, admitted that he had changed its license plates, and worried that he "could have been charged" with the murder on the basis of his possession of the LTD. *Id*., at 231, 246, 250. He asked if he would be put in jail. *Id*., at 235, 246. Miller acknowledged that Beanie's possession of the car would have looked suspicious, *id*., at 247, but reassured him that he "didn't do anything wrong," *id*., at 235.

Beanie seemed eager to cast suspicion on Kyles, who allegedly made his living by "robbing people," and had tried to kill Beanie at some prior time. *Id*., at 228, 245, 251. Beanie said that Kyles regularly carried two pistols, a .38 and a .32, and that if the police could "set him up good," they could "get that same gun" used to kill Dye. *Id*., at 228-229. Beanie rode with Miller and Miller's supervisor, Sgt. James Eaton, in an unmarked squad car to Desire Street, where he pointed out the building containing Kyles's apartment. *Id*., at 244-246.

Beanie told the officers that after he bought the car, he and his "partner" (Burns) drove Kyles to Schwegmann's about 9 p.m. on Friday evening to pick up Kyles's car, described as an orange four-door Ford.[5] *Id*., at 221, 223, 231-232, 242. When asked where Kyles's car had been parked, Beanie replied that it had been "[o]n the same side [of the lot] where the woman was killed at." *Id*., at 231. The officers later drove Beanie to Schwegmann's, where he indicated the space where he claimed Kyles's car had been parked. Beanie went on to say that when he and Burns had brought Kyles to
426 pick *426 up the car, Kyles had gone to some nearby bushes to retrieve a brown purse, *id*., at 253-255, which Kyles subsequently hid in a wardrobe at his apartment. Beanie said that Kyles had "a lot of groceries" in Schwegmann's bags and a new baby's potty "in the car." *Id*., at 254-255. Beanie told Eaton that Kyles's garbage would go out the next day and that if Kyles was "smart" he would "put [the purse] in [the] garbage." *Id*., at 257. Beanie made it clear that he expected some reward for his help, saying at one point that he was not "doing all of this for nothing." *Id*., at 246. The police repeatedly assured Beanie that he would not lose the $400 he paid for the car. *Id*., at 243, 246.

> 5 According to photographs later introduced at trial, Kyles's car was actually a Mercury and, according to trial testimony, a two-door model. Tr. 210 (Dec. 7, 1984).

After the visit to Schwegmann's, Eaton and Miller took Beanie to a police station where Miller interviewed him again on the record, which was transcribed and signed by Beanie, using his alias "Joseph Banks." See *id*., at 214-220. This statement, Beanie's third (the telephone call being

the first, then the recorded conversation), repeats some of the essentials of the second one: that Beanie had purchased a red Ford LTD from Kyles for $400 on Friday evening; that Kyles had his hair "combed out" at the time of the sale; and that Kyles carried a .32 and a .38 with him "all the time."

Portions of the third statement, however, embellished or contradicted Beanie's preceding story and were even internally inconsistent. Beanie reported that after the sale, he and Kyles unloaded Schwegmann's grocery bags from the trunk and back seat of the LTD and placed them in Kyles's own car. Beanie said that Kyles took a brown purse from the front seat of the LTD and that they then drove in separate cars to Kyles's apartment, where they unloaded the groceries. *Id.*, at 216-217. Beanie also claimed that, a few hours later, he and his "partner" Burns went with Kyles to Schwegmann's, where they recovered Kyles's car and a "big brown pocket book" from "next to a building." *Id.*, at 218. Beanie did not explain how Kyles could have picked up his car and recovered
427 the purse at Schwegmann's, after Beanie *427 had seen Kyles with both just a few hours earlier. The police neither noted the inconsistencies nor questioned Beanie about them.

Although the police did not thereafter put Kyles under surveillance, Tr. 94 (Dec. 6, 1984), they learned about events at his apartment from Beanie, who went there twice on Sunday. According to a fourth statement by Beanie, this one given to the chief prosecutor in November (between the first and second trials), he first went to the apartment about 2 p.m., after a telephone conversation with a police officer who asked whether Kyles had the gun that was used to kill Dye. Beanie stayed in Kyles's apartment until about 5 p.m., when he left to call Detective John Miller. Then he returned about 7 p.m. and stayed until about 9:30 p.m., when he left to meet Miller, who also asked about the gun. According to this fourth statement, Beanie "rode around" with Miller until 3 a.m. on Monday, September 24. Sometime during those same early morning hours, detectives were sent at Sgt. Eaton's behest to pick up the rubbish outside Kyles's building. As Sgt. Eaton wrote in an interoffice memorandum, he had "reason to believe the victims *[sic]* personal papers and the Schwegmann's bags will be in the trash." Record, Defendant's Exh. 17.

At 10:40 a.m., Kyles was arrested as he left the apartment, which was then searched under a warrant. Behind the kitchen stove, the police found a .32 caliber revolver containing five live rounds and one spent cartridge. Ballistics tests later showed that this pistol was used to murder Dye. In a wardrobe in a hallway leading to the kitchen, the officers found a homemade shoulder holster that fit the murder weapon. In a bedroom dresser drawer, they discovered two boxes of ammunition, one containing several .32 caliber rounds of the same brand as those found in the pistol. Back in the kitchen, various cans of cat and dog food, some of them of the brands Dye typically purchased, were found in Schwegmann's
428 sacks. No other groceries were identified as *428 possibly being Dye's, and no potty was found. Later that afternoon at the police station, police opened the rubbish bags and found the victim's purse, identification, and other personal belongings wrapped in a Schwegmann's sack.

The gun, the LTD, the purse, and the cans of pet food were dusted for fingerprints. The gun had been wiped clean. Several prints were found on the purse and on the LTD, but none was identified as Kyles's. Dye's prints were not found on any of the cans of pet food. Kyles's prints were found, however, on a small piece of paper taken from the front passenger-side floorboard of the LTD. The crime laboratory recorded the paper as a Schwegmann's sales slip, but without noting what had been printed on it, which was obliterated in the chemical process of lifting the fingerprints. A second Schwegmann's receipt was found in the trunk of the LTD, but Kyles's prints were not

found on it. Beanie's fingerprints were not compared to any of the fingerprints found. Tr. 97 (Dec. 6, 1984).

The lead detective on the case, John Dillman, put together a photo lineup that included a photograph of Kyles (but not of Beanie) and showed the array to five of the six eyewitnesses who had given statements. Three of them picked the photograph of Kyles; the other two could not confidently identify Kyles as Dye's assailant.

B

Kyles was indicted for first-degree murder. Before trial, his counsel filed a lengthy motion for disclosure by the State of any exculpatory or impeachment evidence. The prosecution responded that there was "no exculpatory evidence of any nature," despite the government's knowledge of the following evidentiary items: (1) the six contemporaneous eyewitness statements taken by police following the murder; (2) records of Beanie's initial call to the police; (3) the tape recording of the Saturday conversation between Beanie and officers Eaton and Miller; (4) the
429 typed and signed statement *429 given by Beanie on Sunday morning; (5) the computer print-out of license numbers of cars parked at Schwegmann's on the night of the murder, which did not list the number of Kyles's car; (6) the internal police memorandum calling for the seizure of the rubbish after Beanie had suggested that the purse might be found there; and (7) evidence linking Beanie to other crimes at Schwegmann's and to the unrelated murder of one Patricia Leidenheimer, committed in January before the Dye murder.

At the first trial, in November, the heart of the State's case was eyewitness testimony from four people who were at the scene of the crime (three of whom had previously picked Kyles from the photo lineup). Kyles maintained his innocence, offered supporting witnesses, and supplied an alibi that he had been picking up his children from school at the time of the murder. The theory of the defense was that Kyles had been framed by Beanie, who had planted evidence in Kyles's apartment and his rubbish for the purposes of shifting suspicion away from himself, removing an impediment to romance with Pinky Burns, and obtaining reward money. Beanie did not testify as a witness for either the defense or the prosecution.

Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested. Even so, after four hours of deliberation, the jury became deadlocked on the issue of guilt, and a mistrial was declared.

After the mistrial, the chief trial prosecutor, Cliff Strider, interviewed Beanie. See App. 258-262 (notes of interview). Strider's notes show that Beanie again changed important elements of his story. He said that he went with Kyles to retrieve Kyles's car from the Schwegmann's lot on Thursday, the day of the murder, at some time between 5 and 7:30 p.m., not on Friday, at 9 p.m., as he had said in his second and third statements. (Indeed, in his second statement, Beanie said that he had not seen Kyles at all on Thursday. *Id.*, at
430 *430 249-250.) He also said, for the first time, that when they had picked up the car they were accompanied not only by Johnny Burns but also by Kevin Black, who had testified for the defense at the first trial. Beanie now claimed that after getting Kyles's car they went to Black's house, retrieved a number of bags of groceries, a child's potty, and a brown purse, all of which they took to Kyles's apartment. Beanie also stated that on the Sunday after the murder he had been at Kyles's apartment two separate times. Notwithstanding the many inconsistencies and variations among Beanie's statements, neither Strider's notes nor any of the other notes and transcripts were given to the defense.

In December 1984, Kyles was tried a second time. Again, the heart of the State's case was the testimony of four eyewitnesses who positively identified Kyles in front of the jury. The prosecution also offered a blown-up photograph

taken at the crime scene soon after the murder, on the basis of which the prosecutors argued that a seemingly two-toned car in the background of the photograph was Kyles's. They repeatedly suggested during cross-examination of defense witnesses that Kyles had left his own car at Schwegmann's on the day of the murder and had retrieved it later, a theory for which they offered no evidence beyond the blown-up photograph. Once again, Beanie did not testify.

As in the first trial, the defense contended that the eyewitnesses were mistaken. Kyles's counsel called several individuals, including Kevin Black, who testified to seeing Beanie, with his hair in plaits, driving a red car similar to the victim's about an hour after the killing. Tr. 209 (Dec. 7, 1984). Another witness testified that Beanie, with his hair in braids, had tried to sell him the car on Thursday evening, shortly after the murder. *Id*., at 234-235. Another witness testified that Beanie, with his hair in a "Jheri curl," had attempted to sell him the car on Friday. *Id*., at 249-251. One witness, Beanie's "partner," Burns, testified that he had seen Beanie on Sunday at Kyles's apartment, 431 stooping down near *431 the stove where the gun was eventually found, and the defense presented testimony that Beanie was romantically interested in Pinky Burns. To explain the pet food found in Kyles's apartment, there was testimony that Kyles's family kept a dog and cat and often fed stray animals in the neighborhood.

Finally, Kyles again took the stand. Denying any involvement in the shooting, he explained his fingerprints on the cash register receipt found in Dye's car by saying that Beanie had picked him up in a red car on Friday, September 21, and had taken him to Schwegmann's, where he purchased transmission fluid and a pack of cigarettes. He suggested that the receipt may have fallen from the bag when he removed the cigarettes.

On rebuttal, the prosecutor had Beanie brought into the courtroom. All of the testifying eyewitnesses, after viewing Beanie standing next to Kyles, reaffirmed their previous identifications of Kyles as the murderer. Kyles was convicted of first-degree murder and sentenced to death. Beanie received a total of $1,600 in reward money. See Tr. of Hearing on Post-Conviction Relief 19-20 (Feb. 24, 1989); *id*., at 114 (Feb. 20, 1989).

Following direct appeal, it was revealed in the course of state collateral review that the State had failed to disclose evidence favorable to the defense. After exhausting state remedies, Kyles sought relief on federal habeas, claiming, among other things, that the evidence withheld was material to his defense and that his conviction was thus obtained in violation of *Brady*. Although the United States District Court denied relief and the 432 Fifth Circuit affirmed,[6] Judge *432 King dissented, writing that "[f]or the first time in my fourteen years on this court . . . I have serious reservations about whether the State has sentenced to death the right man." 5 F.3d, at 820.

6 Pending appeal, Kyles filed a motion under Federal Rules of Civil Procedure 60(b)(2) and (6) to reopen the District Court judgment. In that motion, he charged that one of the eyewitnesses who testified against him at trial committed perjury. In the witness's accompanying affidavit, Darlene Kersh (formerly Cahill), the only such witness who had not given a contemporaneous statement, swears that she told the prosecutors and Page 432 detectives she did not have an opportunity to view the assailant's face and could not identify him. Nevertheless, Kersh identified Kyles untruthfully, she says, after being "told by some people . . . [who] I think . . . were district attorneys and police, that the murderer would be the guy seated at the table with the attorney and that that was the one I should identify as the murderer. One of the people there was at the D.A.'s table at the trial. To the best of my knowledge there was only one black man sitting at the counsel table and I pointed him out as the one I had seen shoot the lady." Kersh claims to have agreed to

the State's wishes only after the police and district attorneys assured her that "all the other evidence pointed to [Kyles] as the killer." Affidavit of Darlene Kersh 5, 7.

The District Court denied the motion as an abuse of the writ, although its order was vacated by the Court of Appeals for the Fifth Circuit with instructions to deny the motion on the ground that a petitioner may not use a Rule 60(b) motion to raise constitutional claims not included in the original habeas petition. That ruling is not before us. After denial of his Rule 60(b) motion, Kyles again sought state collateral review on the basis of Kersh's affidavit. The Supreme Court of Louisiana granted discretionary review and ordered the trial court to conduct an evidentiary hearing; all state proceedings are currently stayed pending our review of Kyles's federal habeas petition.

III

The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963). See *id*., at 86 (relying on *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), and *Pyle* v. *Kansas*, 317 U.S. 213, 215-216 (1942)). *Brady* held "that 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." 373 U.S., at 87; see *Moore* v. *Illinois*, 408 U.S. 786, 794-795
433 *433 (1972). In *United States* v. *Agurs*, 427 U.S. 97 (1976), however, it became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation. There, the Court distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, 427 U.S., at 103-104;[7] second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, *id*., at 104-107; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id*., at 108.

[7] The Court noted that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S., at 103 (footnote omitted). As the ruling pertaining to Kersh's affidavit is not before us, we do not consider the question whether Kyles's conviction was obtained by the knowing use of perjured testimony and our decision today does not address any claim under the first *Agurs* category. See n. 6, *supra*.

In the third prominent case on the way to current *Brady* law, *United States* v. *Bagley*, 473 U.S. 667 (1985), the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, *i.e*., the "specific-request" and "general- or no-request" situations. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the
434 proceeding would have been different." *434 473 U.S., at 682 (opinion of Blackmun, J.); *id*., at 685 (White, J., concurring in part and concurring in judgment).

Four aspects of materiality under *Bagley* bear emphasis. Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). *Id*., at 682 (opinion of Blackmun, J.) (adopting formulation announced in *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984)); *Bagley*, *supra*, at 685 (White, J., concurring in part and concurring in judgment) (same); see *id*., at 680 (opinion of Blackmun, J.) (*Agurs* "rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal"); cf. *Strickland*, *supra*, at 693 ("[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case"); *Nix* v. *Whiteside*, 475 U.S. 157, 175 (1986) ("[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*"). *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. 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. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S., at 678.

The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate
435 that after discounting the inculpatory *435 evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but 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.[8]

[8] This rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone. And yet the dissent appears to assume that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed. See *post*, at 463 (possibility that Beanie planted evidence "is perfectly consistent" with Kyles's guilt), *ibid*. ("[T]he jury could well have believed [portions of the defense theory] and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses were similarly mistaken"), 14 (the *Brady* evidence would have left two prosecution witnesses "totally untouched"), 15 (*Brady* evidence "can be logically separated from the incriminating evidence that would have remained unaffected").

Third, we note that, contrary to the assumption made by the Court of Appeals, 5 F.3d, at 818, once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming, *arguendo*, that a harmless error enquiry were to apply, a *Bagley* error could not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," 473 U.S., at 682 (opinion of Blackmun, J.); *id*., at 685 (White, J., concurring in part and concurring in judgment), necessarily entails the conclusion that the suppression must have had "`substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht* v. *Abrahamson*, 507 U.S.

619, 623 (1993) quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). This is amply confirmed by the development of the respective
436 governing standards. Although *436 *Chapman* v. *California*, 386 U.S. 18, 24 (1967), held that a conviction tainted by constitutional error must be set aside unless the error complained of "was harmless beyond a reasonable doubt," we held in *Brecht* that the standard of harmlessness generally to be applied in habeas cases is the *Kotteakos* formulation (previously applicable only in reviewing nonconstitutional errors on direct appeal), *Brecht*, *supra*, at 622-623. Under *Kotteakos* a conviction may be set aside only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, *supra*, at 776. *Agurs*, however, had previously rejected *Kotteakos* as the standard governing constitutional disclosure claims, reasoning that "the constitutional standard of materiality must impose a higher burden on the defendant." *Agurs*, 427 U.S., at 112. *Agurs* thus opted for its formulation of materiality, later adopted as the test for prejudice in *Strickland*, only after expressly noting that this standard would recognize reversible constitutional error only when the harm to the defendant was greater than the harm sufficient for reversal under *Kotteakos*. In sum, once there has been *Bagley* error as claimed in this case, it cannot subsequently be found harmless under *Brecht*.[9]

[9] See also *Hill* v. *Lockhart*, 28 F.3d 832, 839 (CA8 1994) ("[I]t is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel").

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.[10] As Justice Blackmun emphasized in the portion of his opinion written for the Court,
437 the Constitution is not violated every time the *437 government fails or chooses not to disclose evidence that might prove helpful to the defense. *Id.*, at 675, and n. 7. We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

[10] The dissent accuses us of overlooking this point and of assuming that the favorable significance of a given item of undisclosed evidence is enough to demonstrate a *Brady* violation. 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, at Part IV-D, *infra*.

While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, 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 in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a
438 failure to disclose is in good faith *438 or bad faith, see *Brady*, 373 U.S., at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, Brief for Respondent 25, 27, 30, 31, and it suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor.[11] To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio* v. *United States*, 405 U.S. 150, 154 (1972). Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

[11] The State's counsel retreated from this suggestion at oral argument, conceding that the State is "held to a disclosure standard based on what all State officers at the time knew." Tr. of Oral Arg. 40.

Short of doing that, we were asked at oral argument to raise the threshold of materiality because the *Bagley* standard "makes it difficult . . . to know" from the "perspective [of the prosecutor at] trial . . . exactly what might become important later on." Tr. of Oral Arg. 33. The State asks for "a certain amount of leeway in making a judgment call" as to the disclosure of any given piece of
439 evidence. *Ibid*. *439

Uncertainty about the degree of further "leeway" that might satisfy the State's request for a "certain amount" of it is the least of the reasons to deny the request. At bottom, what the State fails to recognize is that, with or without more leeway, the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act. Indeed, even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence (leaving harmless error as the government's only fallback), the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record. Since the prosecutor would have to exercise some judgment even if the State were subject to this most stringent disclosure obligation, it is hard to find merit in the State's complaint over the responsibility for judgment under the existing system, which does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality. Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, 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 as to destroy confidence in its result.

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*
440 *States*, 295 U.S. 78, 88 (1935). *440 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. *See Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986); *Estes* v. *Texas*, 381 U.S. 532, 540 (1965); *United States* v. *Leon*, 468 U.S. 897, 900-901 (1984) (recognizing general goal of establishing "procedures under which criminal defendants are `acquitted or convicted on the basis of all the evidence which exposes the truth'" (quoting *Alderman* v. *United States*, 394 U.S. 165, 175 (1969)). The prudence of the careful prosecutor should not therefore be discouraged.

There is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence. Although the 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. See, *e.g.*, *id.*, at 812 ("We do not agree that this statement made the transcript material and so mandated disclosure . . . . Beanie's statement . . . is itself not decisive"), 814 ("The nondisclosure of this much of the transcript was insignificant"), 815 ("Kyles has not shown on this basis that the three statements were material"), 815 ("In light of the entire record . . . we cannot conclude that [police reports relating to discovery of the purse in the trash] would, in reasonable probability, have moved the jury to embrace the theory it otherwise discounted"), 816 ("We are not persuaded that these notes [relating to discovery of the gun] were material"), 816 ("[W]e are not persuaded that [the printout of the license plate numbers] would, in reasonable probability, have induced reasonable doubt where the jury did not find it. . . . the rebuttal of the
441 photograph would have made no difference"). *441 The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, as the ensuing discussion will show.

IV

In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.

A

As the District Court put it, "the essence of the State's case" was the testimony of eyewitnesses, who identified Kyles as Dye's killer. 5 F.3d, at 853 (Appendix A). Disclosure of their statements would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. To begin with, the value of two of those witnesses would have been substantially reduced or destroyed.

The State rated Henry Williams as its best witness, who testified that he had seen the struggle and the actual shooting by Kyles. The jury would have found it helpful to probe this conclusion in the light of Williams's contemporaneous statement, in which he told the police that the assailant was "a black male, about 19 or 20 years old, about 5'4" or 5'5", 140 to 150 pounds, medium build" and that "his hair looked like it was platted." App. 197. If cross-examined on this description, Williams would have had trouble explaining how he could have described Kyles, 6-feet tall and thin, as a man more than half a foot shorter with a medium

build.[12] Indeed, since Beanie was 22 years old, 442 5'5" tall, and 159 pounds, *442 the defense would have had a compelling argument that Williams's description pointed to Beanie but not to Kyles.[13]

12 The record makes numerous references to Kyles being approximately six feet tall and slender; photographs in the record tend to confirm these descriptions. The description of Beanie in the text comes from his police file. Record photographs of Beanie also depict a man possessing a medium build.

13 The defense could have further underscored the possibility that Beanie was Dye's killer through cross-examination of the police on their failure to direct any investigation against Beanie. If the police had disclosed Beanie's statements, they would have been forced to admit that their informant Beanie described Kyles as generally wearing his hair in a "bush" style (and so wearing it when he sold the car to Beanie), whereas Beanie wore his in plaits. There was a considerable amount of such *Brady* evidence on which the defense could have attacked the investigation as shoddy. The police failed to disclose that Beanie had charges pending against him for a theft at the same Schwegmann's store and was a primary suspect in the January 1984 murder of Patricia Leidenheimer, who, like Dye, was an older woman shot once in the head during an armed robbery. (Even though Beanie was a primary suspect in the Leidenheimer murder as early as September, he was not interviewed by the police about it until after Kyles's second trial in December. Beanie confessed his involvement in the murder, but was never charged in connection with it.) These were additional reasons for Beanie to ingratiate himself with the police and for the police to treat him with a suspicion they did not show. Indeed, notwithstanding JUSTICE SCALIA'S suggestion that Beanie would have been "stupid" to inject himself into the investigation, post, at 461, the *Brady* evidence would have revealed at least two motives for Beanie to come forward: he was interested in reward money and he was worried that he was already a suspect in Dye's murder (indeed, he had been seen driving the victim's car, which had been the subject of newspaper and television reports). See *supra*, at 425-426. For a discussion of further *Brady* evidence to attack the investigation, see especially Part IV-B, *infra*.

The trial testimony of a second eyewitness, Isaac Smallwood, was equally damning to Kyles. He testified that Kyles was the assailant, and that he saw him struggle with Dye. He said he saw Kyles take a ".32, a small black gun" out of his right pocket, shoot Dye in the head, and drive off in her LTD. When the prosecutor asked him whether he actually saw Kyles shoot Dye, Smallwood answered "Yeah." Tr. 41-48 (Dec. 6, 1984).

Smallwood's statement taken at the parking lot, however, was vastly different. Immediately after 443 the crime, Smallwood *443 claimed that he had not seen the actual murder and had not seen the assailant outside the vehicle. "I heard a lound *[sic]* pop," he said. "When I looked around I saw a lady laying on the ground, and there was a red car coming toward me." App. 189. Smallwood said that he got a look at the culprit, a black teenage male with a mustache and shoulder-length braided hair, as the victim's red Thunderbird passed where he was standing. When a police investigator specifically asked him whether he had seen the assailant outside the car, Smallwood answered that he had not; the gunman "was already in the car and coming toward me." *Id*., at 188-190.

A jury would reasonably have been troubled by the adjustments to Smallwood's original story by the time of the second trial. The struggle and shooting, which earlier he had not seen, he was able to describe with such detailed clarity as to identify the murder weapon as a small black .32 caliber pistol, which, of course, was the type of weapon used. His description of the victim's car had gone from a "Thunderbird" to an "LTD"; and

he saw fit to say nothing about the assailant's shoulder-length hair and moustache, details noted by no other eyewitness. These developments would have fueled a withering cross-examination, destroying confidence in Smallwood's story and raising a substantial implication that the
444 prosecutor had coached him to give it.[14] *444

[14] The implication of coaching would have been complemented by the fact that Smallwood's testimony at the second trial was much more precise and incriminating than his testimony at the first, which produced a hung jury. At the first trial, Smallwood testified that he looked around only after he heard something go off, that Dye was already on the ground, and that he "watched the guy get in the car." Tr. 50-51 (Nov. 26, 1984). When asked to describe the killer, Smallwood stated that he "just got a glance of him from the side" and "couldn't even get a look in the face." *Id*., at 52, 54.

The State contends that this change actually cuts in its favor under *Brady*, since it provided Kyles's defense with grounds for impeachment Page 443 without any need to disclose Smallwood's statement. Brief for Respondent 17-18. This is true, but not true enough; inconsistencies between the two bodies of trial testimony provided opportunities for chipping away on cross-examination but not for the assault that was warranted. While Smallwood's testimony at the first trial was similar to his contemporaneous account in some respects (for example, he said he looked around only after he heard the gunshot and that Dye was already on the ground), it differed in one of the most important: Smallwood's version at the first trial already included his observation of the gunman outside the car. Defense counsel was not, therefore, clearly put on notice that Smallwood's capacity to identify the killer's body type was open to serious attack; even less was he informed that Smallwood had answered "no" when asked if he had seen the killer outside the car. If Smallwood had in fact seen the gunman only after the assailant had entered Dye's car, as he said in his original statement, it would have been difficult if not impossible for him to notice two key characteristics distinguishing Kyles from Beanie, their heights and builds. Moreover, in the first trial, Smallwood specifically stated that the killer's hair was "kind of like short . . . knotted up on his head." Tr. 60 (Nov. 26, 1984). This description was not inconsistent with his testimony at the second trial but directly contradicted his statement at the scene of the murder that the killer had shoulder-length hair. The dissent says that Smallwood's testimony would have been "barely affected" by the expected impeachment, *post*, at 468; that would have been a brave jury argument.

Since the evolution over time of a given eyewitness's description can be fatal to its reliability, cf. *Manson* v. *Brathwaite*, 432 U.S. 98, 114 (1977) (reliability depends in part on the accuracy of prior description); *Neil* v. *Biggers*, 409 U.S. 188, 199 (1972) (reliability of identification following impermissibly suggestive lineup depends in part on accuracy of witness's prior description), the Smallwood and Williams identifications would have been severely undermined by use of their suppressed statements. The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses. See Tr. of Closing Arg. 49 (Dec. 7, 1984) (After discussing Territo's and Kersh's testimony: "Isaac Smallwood, have you ever seen a better witness[?] . . . What's better than that is Henry Williams. . . .
445 Henry Williams was the closest of them all *445 right here"). Nor, of course, would the harm to the State's case on identity have been confined to their testimony alone. The fact that neither Williams nor Smallwood could have provided a consistent eyewitness description pointing to Kyles would have undercut the prosecution all the more

because the remaining eyewitnesses called to testify (Territo and Kersh) had their best views of the gunman only as he fled the scene with his body partly concealed in Dye's car. And even aside from such important details, the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before. See *Agurs*, 427 U.S., at 112-113, n. 21.

B

Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. By the State's own admission, Beanie was essential to its investigation and, indeed, "made the case" against Kyles. Tr. of Closing Arg. 13 (Dec. 7, 1984). Contrary to what one might hope for from such a source, however, Beanie's statements to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder. Their disclosure would have revealed a remarkably uncritical attitude on the part of the police.

If the defense had called Beanie as an adverse witness, he could not have said anything of any significance without being trapped by his inconsistencies. A short recapitulation of some of them will make the point. In Beanie's initial meeting with the police, and in his signed statement, he said he bought Dye's LTD and helped Kyles retrieve his car from the Schwegmann's lot on Friday. In his first call to the police, *446 he said he bought the LTD on Thursday, and in his conversation with the prosecutor between trials it was again on Thursday that he said he helped Kyles retrieve Kyles's car. Although none of the first three versions of this story mentioned Kevin Black as taking part in the retrieval of the car and transfer of groceries, after Black implicated Beanie by his testimony for the defense at the first trial, Beanie changed his story to include Black as a participant. In Beanie's several accounts, Dye's purse first shows up variously next to a building, in some bushes, in Kyles's car, and at Black's house.

Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted. See, *e.g.*, *Bowen* v. *Maynard*, 799 F.2d 593, 613 (CA10 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"); *Lindsey* v. *King*, 769 F.2d 1034, 1042 (CA5 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld *Brady* evidence "carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case").[15] *447

[15] The dissent, *post*, at 464, suggests that for jurors to count the sloppiness of the investigation against the probative force of the State's evidence would have been irrational, but of course it would have been no such thing. When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it. See discussion of purse and gun, *infra*, at 29-31.

By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the

foundation for a vigorous argument that the police had been guilty of negligence. In his initial meeting with police, Beanie admitted twice that he changed the license plates on the LTD. This admission enhanced the suspiciousness of his possession of the car; the defense could have argued persuasively that he was no bona fide purchaser. And when combined with his police record, evidence of prior criminal activity near Schwegmann's, and his status as a suspect in another murder, his devious behavior gave reason to believe that he had done more than buy a stolen car. There was further self-incrimination in Beanie's statement that Kyles's car was parked in the same part of the Schwegmann's lot where Dye was killed. Beanie's apparent awareness of the specific location of the murder could have been based, as the State contends, on television or newspaper reports, but perhaps it was not. Cf. App. 215 (Beanie saying that he knew about the murder because his brother-in-law had seen it "on T.V. and in the paper" and had told Beanie). Since the police admittedly never treated Beanie as a suspect, the defense could thus have used his statements to throw the reliability of the investigation into doubt and to sully the credibility of Detective Dillman, who testified that Beanie was never a suspect, Tr. 103-105, 107 (Dec. 6, 1984), and that he had "no knowledge" that Beanie had changed the license plate, *id*., at 95.

The admitted failure of the police to pursue these pointers toward Beanie's possible guilt could only have magnified the effect on the jury of explaining how the purse and the gun happened to be recovered. In Beanie's original recorded statement, he told the police that "[Kyles's] garbage goes out tomorrow," and that "if he's smart he'll put [the purse] in [the] garbage." App. 257. These statements, along with the internal memorandum stating that the police had "reason to believe" Dye's personal effects and Schwegmann's bags
448 *448 would be in the garbage, would have supported the defense's theory that Beanie was no mere observer, but was determining the investigation's direction and success. The potential for damage from using Beanie's statement to undermine the ostensible integrity of the investigation is only confirmed by the prosecutor's admission at one of Kyles's postconviction hearings, that he did not recall a single instance before this case when police had searched and seized garbage on the street in front of a residence, Tr. of Hearing on Post-Conviction Relief 113 (Feb. 20, 1989), and by Detective John Miller's admission at the same hearing that he thought at the time that it "was a possibility" that Beanie had planted the incriminating evidence in the garbage, Tr. of Hearing on Post-Conviction Relief 51 (Feb. 24, 1989). If a police officer thought so, a juror would have, too.[16]

16 The dissent, rightly, does not contend that Beanie would have had a hard time planting the purse in Kyles's garbage. See *post*, at 471 (arguing that it would have been difficult for Beanie to plant the gun and homemade holster). All that would have been needed was for Beanie to put the purse into a trash bag out on the curb. See Tr. 97, 101 (Dec. 6, 1984) (testimony of Detective Dillman; garbage bags were seized from "a common garbage area" on the street in "the early morning hours when there wouldn't be anyone on the street").

To the same effect would have been an enquiry based on Beanie's apparently revealing remark to police that "if you can set [Kyles] up good, you can get that same gun."[17] App. 228-229. While the jury might have understood that Beanie meant simply that if the police investigated Kyles, they would probably find the murder weapon, the jury could also have taken Beanie to have been making
449 the more sinister *449 suggestion that the police "set up" Kyles, and the defense could have argued that the police accepted the invitation. The prosecutor's notes of his interview with Beanie would have shown that police officers were asking Beanie the whereabouts of the gun all day Sunday, the very day when he was twice at Kyles's apartment and was allegedly seen by Johnny

Burns lurking near the stove, where the gun was later found.[18] Beanie's same statement, indeed, could have been used to cap an attack on the integrity of the investigation and on the reliability of Detective Dillman, who testified on cross-examination that he did not know if Beanie had been at Kyles's apartment on Sunday. Tr. 93, 101 (Dec. 6, 1984).[19] *450

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17 The dissent, *post*, at 461-462, argues that it would have been stupid for Beanie to have tantalized the police with the prospect of finding the gun one day before he may have planted it. It is odd that the dissent thinks the *Brady* reassessment requires the assumption that Beanie was shrewd and sophisticated: the suppressed evidence indicates that within a period of a few hours after he first called police Beanie gave three different accounts of Kyles's recovery of the purse (and gave yet another about a month later).

18 The dissent would rule out any suspicion because Beanie was said to have worn a "tank-top" shirt during his visits to the apartment, *post*, at 17; we suppose that a small handgun could have been carried in a man's trousers, just as a witness for the State claimed the killer had carried it, Tr. 52 (Dec. 6, 1984) (Williams). Similarly, the record photograph of the homemade holster indicates that the jury could have found it to be constructed of insubstantial leather or cloth, duct tape, and string, concealable in a pocket.

19 In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officers, would have made the defense's case more plausible and reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibers, including a .32, and that he was testifying for the defense even though Beanie was his "best friend." Tr. 260, 262-263, 279, 280 (Dec. 7, 1984). On each of these points, Burns's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner," had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime, rendering his use of guns more likely. With this information, the defense could have challenged the Page 450 prosecution's good faith on at least some of the points of cross-examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.

JUSTICE SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post*, at 471-472. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

C

Next to be considered is the prosecution's list of the cars in the Schwegmann's parking lot at mid-evening after the murder. While its suppression does not rank with the failure to disclose the other evidence discussed here, it would have had some value as exculpation and impeachment, and it

counts accordingly in determining whether *Bagley*'s standard of materiality is satisfied. On the police's assumption, argued to the jury, that the killer drove to the lot and left his car there during the heat of the investigation, the list without Kyles's registration would obviously have helped Kyles and would have had some value in countering an argument by the prosecution that a grainy enlargement of a photograph of the crime scene showed Kyles's car in the background. The list would also have shown that the police either knew that it was inconsistent with their informant's second and third statements (in which Beanie described retrieving Kyles's car after the time the list was compiled) or never even bothered to check the informant's story against known fact. Either way, the defense would have had further support for arguing that the police were irresponsible in relying on Beanie to tip them off to the location of evidence damaging to Kyles.

The State argues that the list was neither impeachment nor exculpatory evidence because Kyles could have moved his car before the list was
451 created and because the list does *451 not purport to be a comprehensive listing of all the cars in the Schwegmann's lot. Such argument, however, confuses the weight of the evidence with its favorable tendency, and even if accepted would work against the State, not for it. If the police had testified that the list was incomplete, they would simply have underscored the unreliability of the investigation and complemented the defense's attack on the failure to treat Beanie as a suspect and his statements with a presumption of fallibility. But however the evidence would have been used, it would have had some weight and its tendency would have been favorable to Kyles.

D

In assessing the significance of the evidence withheld, one must of course bear in mind that not every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed. It is significant, however, that the physical evidence remaining unscathed would, by the State's own admission, hardly have amounted to overwhelming proof that Kyles was the murderer. See Tr. of Oral Arg. 56 ("The heart of the State's case was eye-witness identification"); see also Tr. of Hearing on Post-Conviction Relief 117 (Feb. 20, 1989) (testimony of chief prosecutor Strider) ("The crux of the case was the four eye-witnesses"). Ammunition and a holster were found in Kyles's apartment, but if the jury had suspected the gun had been planted the significance of these items might have been left in doubt. The fact that pet food was found in Kyles's apartment was consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id*., at 188. Although Kyles was wrong in describing the cat food as being on sale the day he said he bought
452 it, he *452 was right in describing the way it was priced at Schwegmann's market, where he commonly shopped.[20]

20 Kyles testified that he believed the pet food to have been on sale because "they had a little sign there that said three for such and such, two for such and such at a cheaper price. It wasn't even over a dollar." Tr. 341 (Dec. 7, 1984). When asked about the sign, Kyles said it "wasn't big. . . [i]t was a little bitty piece of slip . . . on the shelf." *Id*., at 342. Subsequently, the prices were revealed as in fact being "[t]hree for 89 [cents]" and "two for 77 [cents]," *id*., at 343, which comported exactly with Kyles's earlier description. The director of advertising at Schwegmann's testified that the items purchased by Kyles had not been on sale, but also explained that the multiple pricing was thought to make the products "more attractive" to the customer. *Id*., at 396. The advertising director stated that store policy was to not have signs on the shelves, but he also admitted that

salespeople sometimes disregarded the policy and put signs up anyway, and that he could not say for sure whether there were signs up on the day Kyles said he bought the pet food. *Id.*, at 398-399. The dissent suggests, *post*, at 473, that Kyles must have been so "very poor" as to be unable to purchase the pet food. The total cost of the 15 cans of pet food found in Kyles's apartment would have been $5.67. See Tr. 188, 395 (Dec. 7, 1984). Rather than being "damning," *post*, at 472, the pet food evidence was thus equivocal and, in any event, was not the crux of the prosecution's case, as the State has conceded. See *supra*, at 451.

Similarly undispositive is the small Schwegmann's receipt on the front passenger floorboard of the LTD, the only physical evidence that bore a fingerprint identified as Kyles's. Kyles explained that Beanie had driven him to Schwegmann's on Friday to buy cigarettes and transmission fluid, and he theorized that the slip must have fallen out of the bag when he removed the cigarettes. This explanation is consistent with the location of the slip when found and with its small size. The State cannot very well argue that the fingerprint ties Kyles to the killing without also explaining how the 2-inch-long register slip could have been the receipt for a week's worth of groceries, which Dye had gone to Schwegmann's to purchase. *Id.*, at 453 181-182.[21] *453

[21] The State's counsel admitted at oral argument that its case depended on the facially implausible notion that Dye had not made her typical weekly grocery purchases on the day of the murder (if she had, the receipt would Page 453 have been longer), but that she had indeed made her typical weekly purchases of pet food (hence the presence of the pet food in Kyles's apartment, which the State claimed were Dye's). Tr. of Oral Arg. 53-54.

The inconclusiveness of the physical evidence does not, to be sure, prove Kyles's innocence, and the jury might have found the eyewitness testimony of Territo and Kersh sufficient to convict, even though less damning to Kyles than that of Smallwood and Williams.[22] But the 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. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution. The jury would have been entitled to find

[22] See *supra*, at 445. On remand, of course, the State's case will be weaker still, since the prosecution is unlikely to rely on Kersh, who now swears that she committed perjury at the two trials when she identified Kyles as the murderer. See n. 6, *supra*.

(a) that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent to the point, for example, of including four different versions of the discovery of the victim's purse, and whose own behavior was enough to raise suspicions of guilt;

(b) that the lead police detective who testified was either less than wholly candid or less than fully informed;

(c) that the informant's behavior raised suspicions that he had planted both the murder weapon and the victim's purse in the places they were found;

(d) that one of the four eyewitnesses crucial to the State's case had given a description that did not match the defendant and better described the informant;

(e) that another eyewitness had been coached, since he had first stated that he had not seen the killer outside the getaway car, or the killing itself, whereas at trial he
454 *454 claimed to have seen the shooting, described the murder weapon exactly, and omitted portions of his initial description that would have been troublesome for the case;

(f) that there was no consistency to eyewitness descriptions of the killer's height, build, age, facial hair, or hair length.

Since all of these possible findings were precluded by the prosecution's failure to disclose the evidence that would have supported them, "fairness" cannot be stretched to the point of calling this a fair trial. Perhaps, confidence that the verdict would have been the same could survive the evidence impeaching even two eyewitnesses if the discoveries of gun and purse were above suspicion. Perhaps those suspicious circumstances would not defeat confidence in the verdict if the eyewitnesses had generally agreed on a description and were free of impeachment. But confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid. This is not the "massive" case envisioned by the dissent, *post*, at 475; it is a significantly weaker case than the one heard by the first jury, which could not even reach a verdict.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

As the Court has explained, this case presents an important legal issue. See *ante*, at 440-441.
455 Because JUSTICE *455 SCALIA so emphatically disagrees, Iadd this brief response to his criticism of the Court's decision to grant certiorari.

Proper management of our certiorari docket, as JUSTICE SCALIA notes, see *post*, at 456-460, precludes us from hearing argument on the merits of even a "substantial percentage" of the capital cases that confront us. Compare *Coleman* v. *Balkcom*, 451 U.S. 949 (1981) (STEVENS, J., concurring in denial of certiorari), with *id*., at 956 (REHNQUIST, J., dissenting). Even aside from its legal importance, however, this case merits "favored treatment," cf. *post*, at 457, for at least three reasons. First, the fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial. Second, cases in which the record reveals so many instances of the state's failure to disclose exculpatory evidence are extremely rare. Even if I shared JUSTICE SCALIA's appraisal of the evidence in this case — which I do not — I would still believe we should independently review the record to ensure that the prosecution's blatant and repeated violations of a well-settled constitutional obligation did not deprive petitioner of a fair trial. Third, despite my high regard for the diligence and craftsmanship, of the author of the majority opinion in the Court of Appeals, my independent review of the case left me with the same degree of doubt about petitioner's guilt expressed by the dissenting judge in that court.

Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law. The current popularity

of capital punishment makes this "generalizable principle," *post*, at 460, especially important. Cf. *Harris* v. *Alabama*, 513 U.S. 504, 519-520, and n. 5 (1995) (STEVENS, J., dissenting). I wish such review were unnecessary, but I cannot agree that our position in the judicial hierarchy makes it inappropriate. Sometimes the performance of an
456 unpleasant *456 duty conveys a message more significant than even the most penetrating legal analysis.

JUSTICE SCALIA, with whom the CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

In a sensible system of criminal justice, wrongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety (for example, the requirement that guilt be proved beyond a reasonable doubt) — not by providing recurrent and repetitive appellate review of whether the facts in the record show those lines to have been narrowly crossed. The defect of the latter system was described, with characteristic candor, by Justice Jackson:

> "Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done." *Brown* v. *Allen*, 344 U.S. 443, 540 (1953) (opinion concurring in result).

Since this Court has long shared Justice Jackson's view, today's opinion — which considers a fact-bound claim of error rejected by every court, state and federal, that previously heard it — is, so far as I can tell, wholly unprecedented. The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (*i.e.*, except in cases of the plainest error) be denied. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). That policy has been observed even when the fact-bound assessment of the federal court of appeals has differed from that of the district court, *Sumner* v. *Mata*, 449 U.S. 539, 543 (1981); and under what we have called the "two-court rule," the policy has been applied with particular rigor when district
457 *457 court and court of appeals are in agreementas to what conclusion the record requires. See, *e.g.*, *Graver Tank Mfg. Co*. v. *Linde Air Products Co*., 336 U.S. 271, 275 (1949). How much the more should the policy be honored in this case, a federal habeas proceeding where not only both lower federal courts but also the state courts on postconviction review have all reviewed and rejected precisely the fact-specific claim before us. Cf. 28 U.S.C. § 2254(d) (requiring federal habeas courts to accord a presumption of correctness to state-court findings of fact); *Sumner*, *supra*, at 550, n. 3. Instead, however, the Court not only grants certiorari to consider whether the Court of Appeals (and all the previous courts that agreed with it) was correct as to what the facts showed in a case where the answer is far from clear, but in the process of such consideration renders new findings of fact and judgments of credibility appropriate to a trial court of original jurisdiction. See, *e.g., ante*, at 425 ("Beanie seemed eager to cast suspicion on Kyles"); *ante*, at 441, n. 12 ("Record photographs of Beanie . . . depict a man possessing a medium build"); *ante*, at 449, n. 18 ("the record photograph of the homemade holster indicates . . .").

The Court says that we granted certiorari " [b]ecause `[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case,' *Burger* v. *Kemp*, 483 U.S. 776, 785 (1987)." *Ante*, at 422. The citation is perverse, for the reader who looks up the quoted opinion will discover that the very next sentence confirms the traditional practice from which the Court today glaringly departs: "Nevertheless, when the lower courts have found that [no constitutional error occurred], . . . deference to the

shared conclusion of two reviewing courts prevent[s] us from substituting speculation for their considered opinions." *Burger* v. *Kemp*, 483 U.S. 776, 785 (1987).

The greatest puzzle of today's decision is what could have caused *this* capital case to be singled out for favored treatment. Perhaps it has been
458 randomly selected as a symbol, *458 to reassure America that the United States Supreme Court is reviewing capital convictions to make sure no factual error has been made. If so, it is a false symbol, for we assuredly do not do that. At, and during the week preceding, our February 24 Conference, for example, we considered and disposed of 10 petitions in capital cases, from seven States. We carefully considered whether the convictions and sentences in those cases had been obtained in reliance upon correct principles of federal law; but if we had tried to consider, in addition, whether those correct principles had been applied, not merely plausibly, but *accurately*, to the particular facts of each case, we would have done nothing else for the week. The reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere — with trial judges and juries, state appellate courts, and the lower federal courts; we do nothing but encourage foolish reliance to pretend otherwise.

Straining to suggest a legal error in the decision below that might warrant review, the Court asserts that "[t]here is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence," *ante*, at 440. In support of this it quotes isolated sentences of the opinion below that supposedly "dismiss[ed] particular items of evidence as immaterial," *ibid*. This claim of legal error does not withstand minimal scrutiny. The Court of Appeals employed *precisely* the same legal standard that the Court does. Compare 5 F.3d 806, 811 (CA5 1993) ("We apply the [*United States* v.] *Bagley*[, 473 U.S. 667 (1985),] standard here by examining whether it is reasonably probable that, had the undisclosed information been available to Kyles, the result would have been different"), with *ante*, at 441 ("In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable"). Nor did the Court of Appeals announce a rule of law, that might have precedential force in later cases, to the effect that
459 *Bagley* *459 requires a series of independent materiality evaluations; in fact, the court said just the contrary. See 5 F.3d, at 817 ("[W]e are not persuaded that it is reasonably probable that the jury would have found in Kyles' favor if exposed to any *or all* of the undisclosed materials") (emphasis added). If the decision is read, shall we say, cumulatively, it is clear beyond cavil that the court assessed the cumulative effect of the *Brady* evidence in the context of the whole record. See 5 F.3d, at 807 (basing its rejection of petitioner's claim on "a complete reading of the record"); *id*., at 811 ("Rather than reviewing the alleged *Brady* materials in the abstract, we will examine the evidence presented at trial and how the extra materials would have fit"); *id*., at 813 ("We must bear [the eyewitness testimony] in mind while assessing the probable effect of other undisclosed information"). It is, in other words, the Court itself which errs in the manner that it accuses the Court of Appeals of erring: failing to consider the material under review as a whole. The isolated snippets it quotes from the decision merely do what the Court's own opinion acknowledges must be done: to "evaluate the tendency and force of the undisclosed evidence item by item; there is no other way." *Ante*, at 436, n. 10. Finally, the Court falls back on this: "The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*," *ante*, at 441. In other words, even though the Fifth Circuit plainly enunciated the *correct* legal rule, since the outcome it reached would not properly follow from that rule, the Fifth Circuit must in fact (and unbeknownst to itself) have been applying an

incorrect legal rule. This effectively eliminates all distinction between mistake in law and mistake in application.

What the Court granted certiorari to review, then, is not a decision on an issue of federal law that conflicts with a decision of another federal or state court; nor even a decision announcing a rule of
460 federal law that because of its novelty *460 or importance might warrant review despite the lack of a conflict; nor yet even a decision that *patently* errs in its application of an old rule. What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err — precisely the type of case in which we are *most* inclined to deny certiorari. But despite all of that, I would not have dissented on the ground that the writ of certiorari should be dismissed as improvidently granted. Since the majority is as aware of the limits of our capacity as I am, there is little fear that the grant of certiorari in a case of this sort will often be repeated — which is to say little fear that today's grant has any generalizable principle behind it. I am still forced to dissent, however, because, having improvidently decided to review the facts of this case, the Court goes on to get the facts wrong. Its findings are in my view clearly erroneous, cf. Fed. Rule Civ. Proc. 52(a), and the Court's verdict would be reversed if there were somewhere further to appeal.

I

Before proceeding to detailed consideration of the evidence, a few general observations about the Court's methodology are appropriate. It is fundamental to the discovery rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), that the materiality of a failure to disclose favorable evidence "must be evaluated in the context of the entire record." *United States* v. *Agurs*, 427 U.S. 97, 112 (1976). It is simply not enough to show that the undisclosed evidence would have allowed the defense to weaken, or even to "destro[y]," *ante*, at 441, the *particular* prosecution witnesses or items of prosecution evidence to which the undisclosed evidence relates. It is petitioner's burden to show that in light of all the evidence, including that untainted by the *Brady* violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner's guilt. See *United States* v. *Bagley*, 473 U.S. 667, 682 (1985);
461 *Agurs*, *461 *supra*, at 112-113. The Court's opinion fails almost entirely to take this principle into account. Having spent many pages assessing the effect of the *Brady* material on two prosecution witnesses and a few items of prosecution evidence, *ante*, at 441-451, it dismisses the remainder of the evidence against Kyles in a quick page-and-a-half, *ante*, at 451-453. This partiality is confirmed in the Court's attempt to "recap . . . *the suppressed evidence* and its significance for the prosecution," *ante*, at 453 (emphasis added), which omits the required comparison between that evidence and the evidence that was disclosed. My discussion of the record will present the half of the analysis that the Court omits, emphasizing the evidence concededly unaffected by the *Brady* violation which demonstrates the immateriality of the violation.

In any analysis of this case, the desperate implausibility of the theory that petitioner put before the jury must be kept firmly in mind. The first half of that theory — designed to neutralize the physical evidence (Mrs. Dye's purse in his garbage, the murder weapon behind his stove) — was that petitioner was the victim of a "frame-up" by the police informer and evil genius, Beanie. Now it is not unusual for a guilty person who knows that he is suspected of a crime to try to shift blame to someone else; and it is less common, but not unheard of, for a guilty person who is neither suspected nor subject to suspicion (because he has established a perfect alibi), to call attention to himself by coming forward to point the finger at an innocent person. But petitioner's theory is that the guilty Beanie, who *could* plausibly be accused of the crime (as petitioner's brief amply demonstrates), but who was *not* a suspect any more than Kyles was (the police as yet had no

leads, see *ante*, at 424), injected both Kyles and himself into the investigation in order to get the innocent Kyles convicted.[1] If this were not stupid
462 enough, the *462 wicked Beanie is supposed to have suggested that the police search his victim's premises *a full day before he got around to planting the incriminating evidence on the premises*.

[1] The Court tries to explain all this by saying that Beanie mistakenly thought that he had become a suspect. The only support it provides for this is the fact that, *after having come forward with the admission that he* Page 462 *he had driven the dead woman's car*, Beanie repeatedly inquired whether he himself was a suspect. See *ante*, at 442, n. 13. Of course at that point he well *should* have been worried about being a suspect. But there is no evidence that he erroneously considered himself a suspect beforehand. Moreover, even if he did, the notion that a guilty person would, on the basis of such an erroneous belief, come forward for the reward or in order to "frame" Kyles (rather than waiting for the police to approach him first) is quite simply implausible.

The second half of petitioner's theory was that he was the victim of a quadruple coincidence, in which four eyewitnesses to the crime mistakenly identified him as the murderer — three picking him out of a photo array without hesitation, and all four affirming their identification in open court after comparing him with Beanie. The extraordinary mistake petitioner had to persuade the jury these four witnesses made was not simply to mistake the real killer, Beanie, for the very same innocent third party (hard enough to believe), but in addition to mistake him *for the very man Beanie had chosen to frame* — the last and most incredible level of coincidence. However small the chance that the jury would believe any one of those improbable scenarios, the likelihood that it would believe them all together is far smaller. The Court concludes that it is "reasonably probable" the undisclosed witness interviews would have persuaded the jury of petitioner's implausible theory of mistaken eyewitness testimony, and then argues that it is "reasonably probable" the undisclosed information regarding Beanie would have persuaded the jury of petitioner's implausible theory regarding the incriminating physical evidence. I think neither of those conclusions is remotely true, but even if they were the Court would still be guilty of a fallacy in declaring victory on each implausibility in turn,
463 and thus victory on the whole, *463 without considering the infinitesimal probability of the jury's swallowing the entire concoction of implausibility squared.

This basic error of approaching the evidence piecemeal is also what accounts for the Court's obsessive focus on the credibility or culpability of Beanie, who did not even testify at trial and whose credibility or innocence the State has never once avowed. The Court's opinion reads as if either petitioner or Beanie must be telling the truth, and any evidence tending to inculpate or undermine the credibility of the one would exculpate or enhance the credibility of the other. But the jury verdict in this case said only that petitioner was guilty of the murder. That is perfectly consistent with the possibilities that Beanie repeatedly lied, *ante*, at 445, that he was an accessory after the fact, cf. *ante*, at 445-446, or even that he planted evidence against petitioner, *ante*, at 448. Even if the undisclosed evidence would have allowed the defense to thoroughly impeach Beanie and to suggest the above possibilities, the jury could well have believed *all* of those things and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses were similarly mistaken.[2]

[2] There is no basis in anything I have said for the Court's charge that "the dissent appears to assume that Kyles must lose because there would still have been adequate [*i.e.* sufficient] evidence to convict even if the favorable evidence had

> been disclosed." *Ante*, at 435, n. 8. I do assume, indeed I expressly argue, that petitioner must lose because there was, is, and will be *overwhelming* evidence to convict, so much evidence that disclosure would not "have made a different result reasonably probable." *Ante*, at 441.

Of course even that much rests on the premise that competent counsel would run the terrible risk of calling Beanie, a witness whose "testimony almost certainly would have inculpated [petitioner]" and whom "any reasonable attorney would perceive . . . as a `loose cannon.'" 5 F.3d, at 818. Perhaps because that premise seems so implausible, the Court retreats to the possibility that petitioner's
464 counsel, *464 even if not calling Beanie tothe stand, could have used the evidence relating to Beanie to attack "the reliability of the investigation." *Ante*, at 446. But that is distinctly less effective than substantive evidence bearing on the guilt or innocence of the accused. In evaluating *Brady* claims, we assume jury conduct that is both rational and obedient to the law. We do not assume that even though the whole mass of the evidence, both disclosed and undisclosed, shows petitioner guilty beyond a reasonable doubt, the jury will punish sloppy investigative techniques by setting the defendant free. Neither Beanie nor the police were on trial in this case. Petitioner was, and no amount of collateral evidence could have enabled his counsel to move the mountain of direct evidence against him.

II

The undisclosed evidence does not create a "`reasonable probability' of a different result." *Ante*, at 434 (quoting *United States* v. *Bagley*, 473 U.S., at 682). To begin with the eyewitness testimony: Petitioner's basic theory at trial was that the State's four eyewitnesses happened to mistake Beanie, the real killer, for petitioner, the man whom Beanie was simultaneously trying to frame. Police officers testified to the jury, and petitioner has never disputed, that three of the four eyewitnesses (Territo, Smallwood, and Williams) were shown a photo lineup of six young men four days after the shooting and, without aid or duress, identified petitioner as the murderer; and that all of them, plus the fourth eyewitness, Kersh, reaffirmed their identifications at trial after petitioner and Beanie were made to stand side by side.

Territo, the first eyewitness called by the State, was waiting at a red light in a truck 30 or 40 yards from the Schwegmann's parking lot. He saw petitioner shoot Mrs. Dye, start her car, drive out onto the road, and pull up just behind Territo's truck. When the light turned green petitioner
465 pulled *465 beside Territo and stopped while waiting to make a turn. Petitioner looked Territo full in the face. Territo testified, "I got a good look at him. If I had been in the passenger seat of the little truck, I could have reached out and not even stretched my arm out, I could have grabbed hold of him." Tr. 13-14 (Dec. 6, 1984). Territo also testified that a detective had shown him a picture of Beanie and asked him if the picture "could have been the guy that did it. I told him no." *Id.*, at 24. The second eyewitness, Kersh, also saw petitioner shoot Mrs. Dye. When asked whether she got "a good look" at him as he drove away, she answered "yes." *Id.*, at 32. She also answered "yes" to the question whether she "got to see the side of his face," *id.*, at 31, and said that while petitioner was stopped she had driven to within reaching distance of the driver's-side door of Mrs. Dye's car and stopped there. *Id.*, at 34. The third eyewitness, Smallwood, testified that he saw petitioner shoot Mrs. Dye, walk to the car, and drive away. *Id.*, at 42. Petitioner drove slowly by, within a distance of 15 or 25 feet, *id.*, at 43-45, and Smallwood saw his face from the side. *Id.*, at 43. The fourth eyewitness, Williams, who had been working outside the parking lot, testified that "the gentleman came up the side of the car," struggled with Mrs. Dye, shot her, walked around to the driver's side of the car, and drove away. *Id.*, at 52. Williams not only "saw him before he shot her," *id.*, at 54, but watched petitioner drive slowly by

"within less than ten feet." *Ibid*. When asked " [d]id you get an opportunity to look at him good?", Williams said, "I did." *Id*., at 55.

The Court attempts to dispose of this direct, unqualified, and consistent eyewitness testimony in two ways. First, by relying on a theory so implausible that it was apparently not suggested by petitioner's counsel until the oral-argument-*cum* -evidentiary-hearing held before us, perhaps because it is a theory that only the most removed
466 appellate court could *466 love. This theory is that there is a reasonable probability that the jury would have changed its mind about the eyewitness identification because the *Brady* material would have permitted the defense to argue that the eyewitnesses only got a good look at the killer when he was sitting in Mrs. Dye's car, and thus could identify him, not by his height and build, but *only by his face*. Never mind, for the moment, that this is factually false, since the *Brady* material showed that only *one* of the four eyewitnesses, Smallwood, did not see the killer outside the car.[3] And never mind, also, the dubious premise that the build of a man 6 feet tall (like petitioner) is indistinguishable, when seated behind the wheel, from that of a man less than 5 1/2 feet tall (like Beanie). To that unhesitant and categorical identification by four witnesses who viewed the killer, close-up and with the sun high in the sky, would not eliminate reasonable doubt if it were based *only* on *facial* characteristics, and not on height and build, is quite simply absurd. Facial features are *the primary means* by which human beings recognize one another. That is why police departments distribute "mug" shots of wanted felons, rather than Ivy-League-type posture pictures; it is why bank robbers wear stockings over their faces instead of floor-length capes over their shoulders; it is why the Lone Ranger wears a mask instead of a poncho; and it is why a criminal
467 defense lawyer who seeks to destroy an *467 identifying witness by asking "You admit that you saw only the killer's face?" will be laughed out of the courtroom.

3 Smallwood and Williams were the only eyewitnesses whose testimony was affected by the *Brady* material, and Williams's was affected not because it showed he did not observe the killer standing up, but to the contrary because it showed that his estimates of height and weight based on that observation did not match Kyles. The other two witnesses did observe the killer in full. Territo testified that he saw the killer running up to Mrs. Dye before the struggle began, and that after the struggle he watched the killer bend down, stand back up, and then "stru[t]" over to the car. Tr. 12 (Dec. 6, 1984). Kersh too had a clear opportunity to observe the killer's body type; she testified that she saw the killer and Mrs. Dye arguing, and that she watched him walk around the back of the car after Mrs. Dye had fallen. *Id*., at 29-30.

It would be different, of course, if there were evidence that Kyles's and Beanie's faces looked like twins, or at least bore an unusual degree of resemblance. That facial resemblance *would* explain why, if Beanie committed the crime, all four witnesses picked out Kyles at first (though not why they continued to pick him out when he and Beanie stood side-by-side in court), and would render their failure to observe the height and build of the killer relevant. But without evidence of facial similarity, the question "You admit that you saw only the killer's face?" draws no blood; it does not explain *any* witness's identification of petitioner as the killer. While the assumption of facial resemblance between Kyles and Beanie underlies all of the Court's repeated references to the partial concealment of the killer's body from view, see, *e.g., ante*, at 442-443, 443-444, n. 14, 445, the Court never actually says that such resemblance exists. That is because there is not the slightest basis for such a statement in the record. *No* court has found that Kyles and Beanie bear any facial resemblance. In fact, quite the opposite: *every* federal and state court that has reviewed the record photographs, or seen the two men, has found that they do not resemble each

other in any respect. See 5 F.3d, at 813 ("Comparing photographs of Kyles and Beanie, it is evident that the former is taller, thinner, and has a narrower face"); App. 181 (District Court opinion) ("The court examined all of the pictures used in the photographic line-up and compared Kyles' and Beanie's pictures; it finds that they did not resemble one another"); *id*., at 36 (state trial court findings on postconviction review) ("[Beanie] clearly and distinctly did *not resemble* the defendant in this case") (emphasis in original). The District Court's finding controls because it is not clearly erroneous, Fed. Rule Civ. Proc. 52(a), and the state court's finding, because fairly supported by the record, must be presumed correct on habeas review. See 28 U.S.C. § 2254(d). *468

The Court's second means of seeking to neutralize the impressive and unanimous eyewitness testimony uses the same "build-is-everything" theory to exaggerate the effect of the State's failure to disclose the contemporaneous statement of Henry Williams. That statement would assuredly have permitted a sharp cross-examination, since it contained estimations of height and weight that fit Beanie better than petitioner. *Ante*, at 441-442. But I think it is hyperbole to say that the statement would have "substantially reduced or destroyed" the value of Williams' testimony. *Ante*, at 441. Williams saw the murderer drive slowly by less than 10 feet away, Tr. 54 (Dec. 6, 1984), and unhesitatingly picked him out of the photo lineup. The jury might well choose to give greater credence to the simple fact of identification than to the difficult estimation of height and weight.

The Court spends considerable time, see *ante*, at 443, showing how Smallwood's testimony could have been discredited to such a degree as to "rais[e] a substantial implication that the prosecutor had coached him to give it." *Ibid*. Perhaps so, but that is all irrelevant to this appeal, since *all* of that impeaching material (except the "facial identification" point I have discussed above) was available to the defense independently of the *Brady* material. See *ante*, at 443-444, n. 14.

In sum, the undisclosed statements, credited with everything they could possibly have provided to the defense, leave two prosecution witnesses (Territo and Kersh) totally untouched; one prosecution witness (Smallwood) barely affected (he saw "only" the killer's face); and one prosecution witness (Williams) somewhat impaired (his description of the killer's height and weight did not match Kyles). We must keep all this in due perspective, remembering that the relevant question in the materiality inquiry is not how many points the defense could have scored off the prosecution witnesses, but whether it is reasonably probable that the new evidence would have caused the jury to accept the basic thesis that all four witnesses were mistaken. I think it plainly is not. *No* witness involved in the case ever identified *anyone* but petitioner as the murderer. Their views of the crime and the escaping criminal were obtained in bright daylight from close at hand; and their identifications were reaffirmed before the jury. After the side-by-side comparison between Beanie and Kyles, the jury heard Territo say that there was "[n]o doubt in my mind" that petitioner was the murderer, Tr. 378 (Dec. 7, 1984); heard Kersh say "I know it was him. . . . I seen his face and I know the color of his skin. I know it. I know it's him," *id*., at 383; heard Smallwood say "I'm positive . . . [b]ecause that's the man who I seen kill that woman," *id*., at 387; and heard Williams say "[n]o doubt in my mind," *id*., at 391. With or without the *Brady* evidence, there could be no doubt in the mind of the jury either. *469

There remains the argument that is the major contribution of today's opinion to *Brady* litigation; with our endorsement, it will surely be trolled past appellate courts in all future failure-to-disclose cases. The Court argues that "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." *Ante*, at 445 (citing *Agurs* v. *United States*, 427 U.S., at 112-113, n. 21). It would be startling if we *had*

"said [this] before," since it assumes irrational jury conduct. The weakening of one witness's testimony does not weaken the unconnected testimony of another witness; and to entertain the possibility that the jury will give it such an effect is incompatible with the whole idea of a materiality standard, which presumes that the incriminating evidence that would have been destroyed by proper disclosure can be logically separated from the incriminating evidence that would have remained unaffected. In fact we have said nothing like what the Court suggests. The opinion's only authority for its theory, the cited footnote from *Agurs*, was appended to the proposition that "[a *Brady*] omission must be
470 evaluated in the context of the entire record," *470 427 U.S., at 112. In accordance with that proposition, the footnote recited a hypothetical that shows how a witness's testimony could have been destroyed by withheld evidence *that contradicts the witness*.[4] That is worlds apart from having it destroyed by the corrosive effect of withheld evidence that impeaches (or, as here, merely weakens) *some other corroborating witness*.

> [4] "`If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only a brief glimpse, the result might well be different.'" *Agurs*, 427 U.S., at 112-113, n. 21 (quoting Comment, *Brady v. Maryland* and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 125 (1972)).

The physical evidence confirms the immateriality of the nondisclosures. In a garbage bag outside petitioner's home the police found Mrs. Dye's purse and other belongings. Inside his home they found, behind the kitchen stove, the .32 caliber revolver used to kill Mrs. Dye; hanging in a wardrobe, a homemade shoulder holster that was "a perfect fit" for the revolver, Tr. 74 (Dec. 6, 1984) (Detective Dillman); in a dresser drawer in the bedroom, two boxes of gun cartridges, one containing only .32 caliber rounds of the same brand found in the murder weapon, another containing .22, .32, and .38 caliber rounds; in a kitchen cabinet, eight empty Schwegmann's bags; and in a cupboard underneath that cabinet, one Schwegmann's bag containing 15 cans of pet food. Petitioner's account at trial was that Beanie planted the purse, gun, and holster, that petitioner received the ammunition from Beanie as collateral for a loan, and that petitioner had bought the pet food the day of the murder. That account strains
471 credulity to the breaking point. *471

The Court is correct that the *Brady* material would have supported the claim that Beanie planted Mrs. Dye's belongings in petitioner's garbage and (to a lesser degree) that Beanie planted the gun behind petitioner's stove. *Ante*, at 448. But we must see the whole story that petitioner presented to the jury. Petitioner would have it that Beanie did not plant the incriminating evidence until the day *after* he incited the police to search petitioner's home. Moreover, he succeeded in surreptitiously placing the gun behind the stove, and the matching shoulder holster in the wardrobe, while *at least 10 and as many as 19 people* were present in petitioner's small apartment.[5] Beanie, who was wearing blue jeans and either a "tank-top" shirt, Tr. 302 (Dec. 7, 1984) (Cathora Brown), or a short-sleeved shirt, *id.*, at 351 (petitioner), would have had to be concealing about his person not only the shoulder holster and the murder weapon, but also a different gun with tape wrapped around the barrel that he showed to petitioner. *Id.*, at 352. Only appellate judges could swallow such a tale.

Petitioner's only supporting evidence was Johnny Burns's testimony that he saw Beanie stooping behind the stove, presumably to plant the gun. *Id*., at 262-263. Burns's credibility on the stand can perhaps best be gauged by observing that the state judge who presided over petitioner's trial stated, in a postconviction proceeding, that "[I] ha[ve] chosen to totally disregard everything that [Burns] has said," App. 35. See also *id*., at 165 (District Court opinion) ("Having reviewed the entire record, this court without hesitation concurs with the trial court's determination concerning the credibility of [Burns]"). Burns, by the way, who repeatedly stated at trial that Beanie was his "best friend," Tr. 279 (Dec. 7, 1984), has since been
472 *472 tried and convicted for killing Beanie. See *State* v. *Burnes*, 533 So.2d 1029 (La.App. 1988).[6]

5 The estimates varied. See Tr. 269 (Dec. 7, 1984) (Johnny Burns) (18 or 19 people); *id*., at 298 (Cathora Brown) (6 adults, 4 children); *id*., at 326 (petitioner) ("about 16 . . . about 18 or 19"); *id*., at 340 (petitioner) (13 people).

6 The Court notes that "neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials." *Ante*, at 450, n. 19. That is obviously true. But it is just as obviously true that because we have no findings about Burns's credibility from the jury and no direct method of asking what they thought, the only way that *we* can assess the jury's appraisal of Burns's credibility is by asking (1) whether the state trial judge, who saw Burns's testimony along with the jury, thought it was credible; and (2) whether Burns was in fact credible — a question on which his later behavior towards his "best friend" is highly probative.

Petitioner did not claim that the ammunition had been planted. The police found a .22 caliber rifle under petitioner's mattress and two boxes of ammunition, one containing .22, .32, and .38 caliber rounds, another containing only .32 caliber rounds of the same brand as those found loaded in the murder weapon. Petitioner's story was that Beanie gave him the rifle and the .32 caliber shells as security for a loan, but that he had taken the .22 caliber shells out of the box. Tr. 353, 355 (Dec. 7, 1984). Put aside that the latter detail was contradicted by the facts; but consider the inherent implausibility of Beanie's giving petitioner collateral in the form of a box containing *only* .32 shells, if it were true that petitioner did not own a .32 caliber gun. As the Fifth Circuit wrote, "[t]he more likely inference, apparently chosen by the jury, is that [petitioner] possessed .32 caliber ammunition because he possessed a .32 caliber firearm." 5 F.3d, at 817.

We come to the evidence of the pet food, so mundane and yet so very damning. Petitioner's confused and changing explanations for the presence of 15 cans of pet food in a Schwegmann's bag under the sink must have fatally undermined his credibility before the jury. See App. 36 (trial judge finds that petitioner's "obvious lie" concerning the pet food "may have been a crucial bit of evidence in the minds of the jurors which caused them to discount the entire
473 defense *473 in this case"). The Court disposes of the pet food evidence as follows:

> "The fact that pet food was found in Kyles's apartment was consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id*., at 188. Although Kyles was wrong in describing the cat food as being on sale the day he said he bought it, he was right in describing the way it was priced at Schwegmann's market, where he commonly shopped." *Ante*, at 451-452; see also *ante*, at 452, n. 20.

The full story is this. Mr. and Mrs. Dye owned two cats and a dog, Tr. 178 (Dec. 7, 1984), for which she regularly bought varying brands of pet food, several different brands at a time. *Id*., at 179, 180. Found in Mrs. Dye's home after her murder were the brands Nine Lives, Kalkan, and Puss n' Boots. *Id*., at 180. Found in petitioner's home were eight cans of Nine Lives, four cans of Kalkan, and three cans of Cozy Kitten. *Id*., at 188. Since we know that Mrs. Dye had been shopping that day and that the murderer made off with her goods, petitioner's possession of these items was powerful evidence that he was the murderer. Assuredly the jury drew that obvious inference. Pressed to explain why he just happened to buy *15 cans* of pet food that very day (keep in mind that petitioner was a very poor man, see *id*., at 329, who supported a common-law wife, a mistress, and four children), petitioner gave the reason that "it was on sale." *Id*., at 341. The State, however, introduced testimony from the Schwegmann's advertising director that the pet food was *not* on sale that day. *Id*., at 395. The dissenting judge below tried to rehabilitate
474 petitioner's testimony *474 by interpreting the "on sale" claim as meaning "for sale," a reference to the pricing of the pet food (*e.g.*, "3 for 89 cents"), which petitioner claimed to have read on a shelf sign in the store. *Id*., at 343. But unless petitioner was parodying George Leigh Mallory, "because it was *for* sale" would have been an irrational response to the question it was given in answer to: Why did you buy *so many* cans? In any event, the Schwegmann's employee also testified that store policy was not to put signs on the shelves at all. *Id*., at 398-399. The sum of it is that petitioner, far from explaining the presence of the pet food, doubled the force of the State's evidence by perjuring himself before the jury, as the state trial judge observed. See *supra*, at 472-473.[7]

> [7] I have charitably assumed that petitioner had a pet or pets in the first place, although the evidence tended to show the contrary. Petitioner claimed that he owned a dog or puppy, that his son had a cat, and that there were "seven or eight more cats around there." Tr. 325 (Dec. 7, 1984). The dog, according to petitioner, had been kept "in the country" for a month and half, and was brought back just the week before petitioner was arrested. *Id*., at 337-338. Although petitioner claimed to have kept the dog tied up in a yard behind his house before it was taken to the country, *id*., at 336-337, two *defense* witnesses contradicted this story. Donald Powell stated that he had not seen a dog at petitioner's home since at least six months before the trial, *id*., at 254, while Cathora Brown said that although Pinky, petitioner's wife, sometimes fed stray pets, she had no dog tied up in the back yard. *Id*., at 304-305. The police found no evidence of any kind that any pets lived in petitioner's home at or near the time of the murder. *Id*., at 75 (Dec. 6, 1984).

I will not address the list of cars in the Schwegmann's parking lot and the receipt, found in the victim's car, that bore petitioner's fingerprints. These were collateral matters that provided little evidence of either guilt or innocence. The list of cars, which did not contain petitioner's automobile, would only have served to

rebut the State's introduction of a photograph purporting to show petitioner's car in the parking lot; but petitioner does not contest that the list was not comprehensive, and that the photograph was taken about six hours before the list was compiled. 475 See 5 F.3d, at 816. *475 Thus its rebuttal value would have been marginal at best. The receipt — although it showed that petitioner must at some point have been both in Schwegmann's and in the murdered woman's car — was as consistent with petitioner's story as with the State's. See *ante*, at 452.

* * *

The State presented to the jury a massive core of evidence (including four eyewitnesses) showing that petitioner was guilty of murder, and that he lied about his guilt. The effect that the *Brady* materials would have had in chipping away at the edges of the State's case can only be called immaterial. For the same reasons I reject petitioner's claim that the *Brady* materials would have created a "residual doubt" sufficient to cause the sentencing jury to withhold capital punishment.

I respectfully dissent.

476 *476

No. 15-1503
SUPREME COURT OF THE UNITED STATES

Turner v. U.S.

137 S. Ct. 1885 (2017) · 198 L. Ed. 2d 443
Decided Jun 22, 2017

Nos. 15–1503 15–1504.

06-22-2017

Charles S. TURNER, et al., Petitioners v. UNITED STATES. Russell L. Overton, Petitioner v. United States.

John S. Williams, Washington, DC, for Petitioner in No. 15–1503. Deanna M. Rice, Washington, DC, for Petitioner in No. 15–1504. Michael R. Dreeben, Washington, DC, for Respondent. Shawn Armbrust, Mid–Atlantic Innocence Project, The George Washington University Law School, Washington, DC, for Petitioner Christopher D. Turner. Robert M. Cary, Kannon K. Shanmugam, John S. Williams, Barrett J. Anderson, Eden Schiffmann, Kristin Saetveit, Williams & Connolly LLP, Washington, DC, for Petitioner Clifton E. Yarborough. Barry J. Pollack, Miller & Chevalier Chartered, Washington, DC, for Petitioner Christopher D. Turner. Veronice A. Holt, Washington, DC, for Petitioner Levy Rouse. Jenifer Wicks, Law Offices of Jenifer Wicks, Washington, DC, for Petitioner Charles S. Turner. Donald P. Salzman, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC, for Petitioner Kelvin Smith. Cory Lee Carlyle, Washington, DC, for Petitioner Timothy Catlett. Michael E. Antalics, Jonathan D. Hacker, Kevin D. Feder, Deanna M. Rice, Samantha M. Goldstein, Wyatt Fore, O'Melveny & Myers LLP, Washington, DC, for Petitioner. Noel J. Francisco, Acting Solicitor General, Kenneth A. Blanco, Acting Assistant Attorney General, Michael R. Dreeben, Deputy Solicitor General, Ann O'Connell, Assistant to the Solicitor General, Elizabeth D. Collery, Attorney, Department of Justice, Washington, DC, for Respondent.

Justice BREYER delivered the opinion of the Court.

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Shawn Armbrust, Mid–Atlantic Innocence Project, The George Washington University Law School, Washington, DC, for Petitioner Christopher D. Turner.

Robert M. Cary, Kannon K. Shanmugam, John S. Williams, Barrett J. Anderson, Eden Schiffmann, Kristin Saetveit, Williams & Connolly LLP, Washington, DC, for Petitioner Clifton E. Yarborough.

Barry J. Pollack, Miller & Chevalier Chartered, Washington, DC, for Petitioner Christopher D. Turner.

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Donald P. Salzman, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC, for Petitioner Kelvin Smith.

Cory Lee Carlyle, Washington, DC, for Petitioner Timothy Catlett.

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Justice BREYER delivered the opinion of the Court.

In *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), this Court held that the government violates the Constitution's Due Process Clause "if it withholds evidence that is favorable to the defense and *material* to the defendant's guilt or punishment." *Smith v. Cain,* 565 U.S. 73, 75, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012) (emphasis added) (summarizing *Brady* holding). In 1985 the seven petitioners in these cases were tried together in the Superior Court for the District of Columbia for the kidnaping, armed robbery, and murder of Catherine Fuller. Long after petitioners' convictions became final, it emerged that the Government possessed certain evidence that it failed to disclose to the defense. The only question before us here is whether that withheld evidence was "material" under *Brady* . The D.C. Superior Court, after a 16–day evidentiary hearing, determined that the withheld evidence was not material. *Catlett v. United States,* Crim. No. 8617–FEL–84 etc. (Aug. 6, 2012), App. to Pet. for Cert. in No. 15–1503, pp. 84a, n. 4, 81a–131a. The D.C. Court of Appeals reviewed the record, reached the same conclusion, and affirmed the Superior Court. 116 A.3d 894 (2015). After reviewing the record, we reach the same conclusion as did the lower courts.

I

In these fact-intensive cases, we set out here only a basic description of the record facts along with our reasons for reaching our conclusion. We refer those who wish more detail to the opinions of the lower courts. App. to Pet. for Cert. in No. 15–1503, at 81a–131a; 116 A.3d 894.*1889 A

1889

The Trial

On March 22, 1985, a grand jury indicted the seven petitioners—Timothy Catlett, Russell Overton, Levy Rouse, Kelvin Smith, Charles Turner, Christopher Turner, and Clifton Yarborough—and several others for the kidnaping, robbery, and murder of Catherine Fuller. The evidence produced at their joint trial showed that on October 1, 1984, at around 4:30 p.m., Catherine Fuller left her home to go shopping. At around 6 p.m., William Freeman, a street vendor, found Fuller's body inside an alley garage between Eighth and Ninth Street N. E., just a few blocks from Fuller's home. See Appendix, *infra* (showing a map of the area in which the murder was committed). Fuller had been robbed, severely beaten, and sodomized with an object that caused extensive internal injuries.

The Government advanced the theory at trial that Fuller had been attacked in the alley by a large group of individuals, including petitioners; codefendants Steve Webb, Alfonso Harris, and Felicia Ruffin; as well as by Calvin Alston and Harry Bennett. The Government's evidentiary centerpiece consisted of testimony by Alston and Bennett, who confessed to participating in the offense and who cooperated with the Government in return for leniency. Although the testimony of Alston and Bennett diverged on minor details, it was consistent in stating that, and describing how, Fuller was attacked by a sizable group of individuals, including petitioners and they themselves.

Alston testified that at about 4:10 p.m. on the day of the murder, he arrived in a park located on H Street between Eighth and Ninth Streets. He said

he found a group of people gathered there. It included petitioners Levy Rouse, Russell Overton, Christopher Turner, Charles Turner, Kelvin Smith, Clifton Yarborough, and Timothy Catlett, as well as several codefendants and others. Those in the group were talking and singing while Catlett was banging out a beat. Alston suggested "getting paid" by robbing someone. App. A467. Catlett, Overton, Rouse, Smith, Charles Turner, Christopher Turner, Yarborough, and several others agreed. Alston pointed at Catherine Fuller, who was walking on the other side of H Street near the corner of H and Eighth Streets. Those in the group said they were "game for getting paid." *Id.,* at A471–A472. Alston, Rouse, Yarborough, and Charles Turner crossed H Street moving toward Eighth Street and followed Fuller down Eighth Street. The rest of the group crossed H Street and moved toward Ninth Street. When Alston's group approached Fuller, Charles Turner shoved her into an alley that runs between Eighth and Ninth Streets. Charles Turner, Rouse, and Alston began punching Fuller. They were soon joined by Christopher Turner, Smith, and others. All of them continued to hit and kick Fuller until she fell to the ground. Rouse and Charles Turner then carried Fuller to the center of the alley and dropped her in front of a garage located at the point where the alley joins another, perpendicular alley that runs toward I Street. Someone dragged Fuller into the garage. Alston, Rouse, Charles Turner, Overton, Yarborough, and Catlett followed. Others stood outside. Members of the group tore Fuller's clothes off and struggled over her change purse. Overton and Charles Turner then held Fuller's legs, and Alston, Catlett, Harris, and Yarborough stood around her while Rouse sodomized her with a foot-long pipe. Shortly after, the group dispersed and left the alley.

Harry Bennett's testimony was similar. Bennett also described a group attack. He said that he had 1890 gone to the H Street *1890 park, where he saw Rouse, Overton, Christopher Turner, Smith, Catlett, and others gathered. Alston was talking to the group about "[g]etting paid" and said "let's go get that lady." *Id.,* at A368–A370. At that point Alston, Rouse, Overton, and Webb crossed H Street and approached Fuller, while Catlett, Christopher Turner, Charles Turner, and Harris followed in a separate group. Bennett added that he himself went to the corner of Eighth and H Streets to watch for police. He then went into the alley and joined the group in kicking and beating Fuller. He testified that at least 12 people were there, with some beating Fuller and others watching or picking up her jewelry. Overton then dragged Fuller into the garage, and Bennett, Rouse, Christopher Turner, Charles Turner, Catlett, Smith, Harris, and Webb followed, as did some "girls." *Id.,* at A402–A405. Alston and Steve Webb held Fuller's legs, and Rouse sodomized her with a pole. The group then dispersed from the garage and alley.

The Government presented several other witnesses who corroborated aspects of Alston's and Bennett's testimony, including the fact that Fuller was attacked by a group. Melvin Montgomery testified that he was in the H Street park on the afternoon of the murder. He saw Overton, Catlett, Rouse, Charles Turner, and others gathered there. The group was being noisy and singing a song about needing money. Somebody then said they were "going to get that one," and Montgomery saw that Overton was pointing to a woman standing on the corner of Eighth Street. *Id.,* at 77–79. Overton, Catlett, Rouse, Charles Turner, and others crossed H Street. Some headed toward Eighth Street while others went toward Ninth Street. Montgomery did not follow them.

Maurice Thomas, then 14 years old, testified that he witnessed the attack itself. Thomas lived in the neighborhood and knew many of the defendants. As he was walking home, he glanced down the Eighth Street alley and saw a group surrounding Fuller. Thomas saw Catlett pat Fuller down and then hit her. He then saw everyone in the group join in hitting her. Thomas said he knew Catlett, Yarborough, Rouse, Charles Turner, Christopher

Turner, and Smith and recognized them in the group. Thomas heard Fuller calling for help. He ran home where he found his aunt, who told him not to tell anyone what he saw. Later that day, Thomas saw Catlett at a corner store, and heard Catlett say to someone that they "had to kill her" because "she spotted someone he was with." *Id.,* at 127–128.

On the afternoon of the murder, Carrie Eleby and Linda Jacobs were looking for petitioner Smith, who was Eleby's boyfriend, near the corner of H and Eighth Streets. They heard screams coming from where a "gang of boys" was beating somebody near the garage in the alley. *Id.,* at A539–A541. Eleby and Jacobs approached the group. Eleby recognized Christopher Turner, Smith, Catlett, Rouse, Overton, Alston, and Webb kicking Fuller while Yarborough stood nearby. Both Eleby and Jacobs testified that they saw Rouse sodomize Fuller with a pole. Eleby added that Overton held Fuller's legs.

Finally, the Government played a videotape of a recorded statement that Yarborough, one of the petitioners, had given to detectives on December 9, 1984, approximately two months after the murder. Names were redacted. The video shows Yarborough describing in detail how he was part of a large group that forced Fuller into the alley, jointly robbed and assaulted her, and dragged her into the garage.

None of the defendants testified, nor did any of them try, through witnesses or *1891 other evidence, to rebut the prosecution witnesses' claim that Fuller was killed in a group attack. Rather, each petitioner pursued what was essentially a "not me, maybe them" defense, namely, that he was not part of the group that attacked Fuller. Each tried to establish this defense by impeaching witnesses who had placed that particular petitioner at the scene. Some, for example, provided evidence that Eleby and Jacobs had used PCP the day of Fuller's murder. Some also tried to establish alibis for the time of Fuller's death.

The jury convicted all seven petitioners, along with codefendant Steve Webb (who subsequently died). The jury acquitted codefendants Alfonso Harris and Felicia Ruffin. On direct appeal, the D.C. Court of Appeals affirmed petitioners' convictions, though it remanded for resentencing. 545 A.2d 1202, 1219 (1988). The trial court resentenced petitioners to the same amount of prison time. App. to Pet. for Cert. in No. 15–1503, at 82a, n. 2.

B

The Brady *Claims*

Beginning in 2010, petitioners pursued postconviction proceedings in which they sought to vacate their convictions or to be granted a new trial. App. to Pet. for Cert. in No. 15–1503, at 84a, n. 4. After petitioners' convictions became final, it emerged that the Government possessed certain evidence that it had withheld from the defense at the time of trial. Petitioners discovered other withheld evidence in their review of the trial prosecutor's case file, which the Government turned over to petitioners in the course of the postconviction proceedings. Among other postconviction claims, petitioners contended that the withheld evidence was both favorable and material, entitling them to relief under *Brady* .

The D.C. Superior Court considered petitioners' *Brady* claims as part of a 16–day evidentiary hearing. It rejected those claims, finding that "none of the undisclosed information was material." App. to Pet. for Cert. in No. 15–1503, at 130a. The D.C. Court of Appeals affirmed. 116 A.3d, at 901. It similarly concluded that the withheld evidence was not material under *Brady* . 116 A.3d, at 913–926. At issue in those proceedings were the following seven specific pieces of evidence:

1. *The identity of James McMillan.* Freeman, the vendor who discovered Fuller's body in the alley garage, testified at trial that, while he was waiting for police to arrive, he saw two men run into the

alley and stop near the garage for about five minutes before running away when an officer approached. One of the men had a bulge under his coat. Early in the trial, codefendant Harris' counsel had requested the identity of the two men to confirm that her client was not one of them. But the Government refused to disclose the men's identity.

In their postconviction review of the prosecutor's files, petitioners learned that Freeman had identified the two men he saw in the alley as James McMillan and Gerald Merkerson. McMillan lived in a house which opens in the back onto a connecting alley. In the weeks following Fuller's murder, but before petitioners' trial, McMillan was arrested for beating and robbing two women in the neighborhood. Neither attack included a sexual assault. Separately, petitioners learned that seven years after petitioners' trial, McMillan had robbed, sodomized, and murdered a young woman in an alley.

2. *The interview with Willie Luchie.* The prosecutor's notes also recorded an undisclosed interview with Willie Luchie, who told the prosecutor that he and three others walked through
1892 the alley on their *1892 way to an H Street liquor store between 5:30 and 5:45 p.m. on the evening of the murder. As the group walked by the garage, Luchie "heard several groans" and "remembers the doors to the garage being closed." App. 25. Another person in the group recalled "hear[ing] some moans," while the other two persons did not recall hearing anything unusual. *Id.,* at 27, 53; *id.,* at A992. The group continued walking without looking into the garage or otherwise investigating the source of the sounds. They did not see McMillan or any other person in the alley when they passed through.

3. *The interviews with Ammie Davis.* Undisclosed notes written by a police officer and the prosecutor refer to two interviews with Ammie Davis, who had been arrested for disorderly conduct a few weeks after Fuller's murder. Davis initially told a police investigator that she had seen another individual, James Blue, beat Fuller to death in the alley. Shortly thereafter, she said she only saw Blue grab Fuller and push her into the alley. Davis also said that a girlfriend, whom she did not name, accompanied her. She promised to call the investigator with more details, but she did not do so.

About 9 months later (after petitioners were indicted but approximately 11 weeks before their trial), a prosecutor learned of the investigator's notes and interviewed Davis. The prosecutor's notes state that Davis did not provide any more details, except to say that the girlfriend who accompanied her was nicknamed " ‘Shorty.’ " *Id.,* at 267–268. About two months later, which was shortly before petitioners' trial, Blue murdered Davis in an unrelated drug dispute.

During the postconviction evidentiary hearing, the prosecutor who interviewed Davis testified that he did not disclose Davis' statement because she acted "playful" and "not serious" during the interview and he found her to be "totally incredible." *Id* ., at 269–272. Additionally, the prosecutor stated that he knew Davis had previously falsely accused Blue of a different murder, and on another occasion had falsely accused a different individual of a different murder.

4. *Impeachment of Kaye Porter and Carrie Eleby.* Kaye Porter accompanied Eleby during an initial interview with homicide detectives. Porter agreed with Eleby that she had also heard Alston state that he was involved in robbing Fuller. An undisclosed prosecutorial note states that in a later interview with detectives, Porter stated that she did not actually recall hearing Alston's statement and just went along with what Eleby said. The note also states that Eleby likewise admitted that she had lied about Porter being present during Alston's statement and had asked Porter to support her.

5. *Impeachment of Carrie Eleby.* A prosecutor's undisclosed note revealed that Eleby said she had been high on PCP during a January 9, 1985, meeting with investigators.

6. *Impeachment of Linda Jacobs.* An undisclosed note of an interview with Linda Jacobs said that the detective had "question[ed] her hard," and that she had "vacillated" about what she saw. *Id.,* at A1009. The prosecutor recalled that the detective "kept raising his voice" and was "smacking his hand on the desk" during the interview. *Id.,* at A2298–A2299.

7. *Impeachment of Maurice Thomas.* An undisclosed note of an interview with Maurice Thomas' aunt stated that she "does not recall Maurice ever telling her anything such as this." *Id*
1893 ., at A1010; see *id.,* at 295–296.*1893 II

A

The Government does not contest petitioners' claim that the withheld evidence was "favorable to the accused, either because it is exculpatory, or because it is impeaching." *Strickler v. Greene,* 527 U.S. 263, 281–282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Neither does the Government contest petitioners' claim that it "suppressed" the evidence, "either willfully or inadvertently." *Id* ., at 282, 119 S.Ct. 1936. It does, as it must, concede that the *Brady* rule's " 'overriding concern [is] with the justice of the finding of guilt,' " *United States v. Bagley,* 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (quoting *United States v. Agurs,* 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)), and that the Government's " 'interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done,' " *Kyles v. Whitley,* 514 U.S. 419, 439, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)). Consistent with these principles, the Government assured the Court at oral argument that subsequent to petitioners' trial, it has adopted a "generous policy of discovery" in criminal cases under which it discloses any "information that a defendant might wish to use." Tr. of Oral Arg. 47–48. As we have recognized, and as the Government agrees, *ibid.,* " [t]his is as it should be." *Kyles, supra,* at 439, 115 S.Ct. 1555 (explaining that a " 'prudent prosecutor['s]' " better course is to take care to disclose any evidence favorable to the defendant (quoting *Agurs, supra,* at 108, 96 S.Ct. 2392)).

Petitioners and the Government, however, do contest the materiality of the undisclosed *Brady* information. "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell,* 556 U.S. 449, 469–470, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) (citing *Bagley, supra,* at 682, 105 S.Ct. 3375). "A 'reasonable probability' of a different result" is one in which the suppressed evidence " 'undermines confidence in the outcome of the trial.' " *Kyles, supra,* at 434, 115 S.Ct. 1555 (quoting *Bagley, supra,* at 678, 105 S.Ct. 3375). In other words, petitioners here are entitled to a new trial only if they "establis[h] the prejudice necessary to satisfy the 'materiality' inquiry." *Strickler, supra,* at 282, 119 S.Ct. 1936.

Consequently, the issue before us here is legally simple but factually complex. We must examine the trial record, "evaluat[e]" the withheld evidence "in the context of the entire record," *Agurs, supra,* at 112, 96 S.Ct. 2392, and determine in light of that examination whether "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone, supra,* at 470, 129 S.Ct. 1769 (citing *Bagley, supra,* at 682, 105 S.Ct. 3375). Having done so, we agree with the lower courts that there was no such reasonable probability.

B

Petitioners' main argument is that, had they known about McMillan's identity and Luchie's statement, they could have challenged the Government's basic theory that Fuller was killed in a group

attack. Petitioners contend that they could have raised an alternative theory, namely, that a single perpetrator (or two at most) had attacked Fuller. According to petitioners, the groans that Luchie and his companion heard when they walked through the alley between 5:30 and 5:45 p.m. suggest that the attack was taking place inside the 1894 garage *1894 at that moment. The added facts that the garage was small and that Luchie's group saw no one in the alley could bolster a "single attacker" theory. Freeman's recollection that one garage door was open when he found Fuller's body at around 6 p.m., combined with Luchie's recollection that both doors were shut around 5:30 or 5:45 p.m., could suggest that one or two perpetrators were in the garage when Luchie walked by but left before Freeman arrived. McMillan's identity as one of the men Freeman saw enter the alley after Freeman discovered Fuller's body would have revealed McMillan's criminal convictions in the months before petitioners' trial. Petitioners argue that together, this evidence would have permitted the defense to knit together a theory that the group attack did not occur at all—and that it was actually McMillan, alone or with an accomplice, who murdered Fuller. They add that they could have used the investigators' failure to follow up on Ammie Davis' claim about James Blue, and the various pieces of withheld impeachment evidence, to suggest that an incomplete investigation had ended up accusing the wrong persons.

Considering the withheld evidence "in the context of the entire record," however, *Agurs, supra,* at 112, 96 S.Ct. 2392, we conclude that it is too little, too weak, or too distant from the main evidentiary points to meet *Brady* 's standards. As petitioners recognize, McMillan's guilt (or that of any other single, or near single, perpetrator) is inconsistent with petitioners' guilt only if there was no group attack. But a group attack was the very cornerstone of the Government's case. The witnesses may have differed on minor details, but virtually every witness to the crime itself agreed as to a main theme: that Fuller was killed by a large group of perpetrators. The evidence at trial was such that, even though petitioners knew that Freeman saw two men enter the alley after he discovered Fuller's body, that one appeared to have a bulky object hidden under his coat, and that both ran when the police arrived, none of the petitioners attempted to mount a defense that implicated those men as alternative perpetrators acting alone.

Is it reasonably probable that adding McMillan's identity, and Luchie's ambiguous statement that he heard groans but saw no one, could have led to a different result at trial? We conclude that it is not. The problem for petitioners is that their current alternative theory would have had to persuade the jury that both Alston and Bennett falsely confessed to being active participants in a group attack that never occurred; that Yarborough falsely implicated himself in that group attack and, through coordinated effort or coincidence, gave a highly similar account of how it occurred; that Thomas, a disinterested witness who recognized petitioners when he happened upon the attack and heard Catlett refer to it later that night, wholly fabricated his story; that both Eleby and Jacobs likewise testified to witnessing a group attack that did not occur; and that Montgomery in fact did not see petitioners and others, as a group, identify Fuller as a target and leave the park to rob her.

With respect to the undisclosed impeachment evidence, the record shows that it was largely cumulative of impeachment evidence petitioners already had and used at trial. For example, the jury heard multiple times about Eleby's frequent PCP use, including Eleby's own testimony that she and Jacobs had smoked PCP shortly before they witnessed Fuller's attack. In this context, it would not have surprised the jury to learn that Eleby used PCP on yet another occasion. Porter was a minor witness who was also impeached at trial with evidence about changes in her testimony over 1895 time, leaving little added significance *1895 to the note that she changed her mind about having

agreed with Eleby's claims. The jury was also well aware of Jacobs' vacillation, as she was impeached on the stand with her shifting stories about what she witnessed. Knowledge that a detective raised his voice during an interview with her would have added little more. Nor do we see how the note about the statement by Thomas' aunt could have mattered much, given the facts that neither side chose to call the aunt as a witness and that the jury already knew, from Thomas' testimony, that his aunt had told him not to tell anyone what he saw. As for James Blue, petitioners argue that the investigators' delay in following up on Ammie Davis' statement could have led the jury to doubt the thoroughness of the investigation. But this likelihood is seriously undercut by notes about Davis' demeanor and lack of detail, and by her prior false accusations that Blue committed a different murder and that yet another person committed yet a different murder.

We of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence. See *Wearry v. Cain,* 577 U.S. ——, —— – ——, 136 S.Ct. 1002, 1006–1007, 194 L.Ed.2d 78 (2016) (*per curiam*). We conclude only that in the context of this trial, with respect to these witnesses, the cumulative effect of the withheld evidence is insufficient to " 'undermine confidence' " in the jury's verdict, *Smith,* 565 U.S., at 75–76, 132 S.Ct. 627 (quoting *Kyles,* 514 U.S., at 434, 115 S.Ct. 1555 ; brackets omitted).

III

On the basis of our review of the record, we agree with the lower courts that there is not a "reasonable probability" that the withheld evidence would have changed the outcome of petitioners' trial, *id.,* at 434, 115 S.Ct. 1555 (internal quotation marks omitted). The judgment of the D.C. Court of Appeals, accordingly, is affirmed.

It is so ordered.

Justice GORSUCH took no part in the consideration or decision of these cases.*1896

APPENDIX

Justice KAGAN, with whom Justice GINSBURG joins, dissenting.

Consider two criminal cases. In the first, the government accuses ten defendants of acting together to commit a vicious murder and robbery. At trial, each defendant accepts that the attack occurred almost exactly as the government describes—contending only that *he* wasn't part of the rampaging group. The defendants thus undermine each other's arguments at every turn. In the second case, the government makes the same arguments as before. But this time, all of the accused adopt a common defense, built around an alternative account of the crime. Armed with new evidence that someone else perpetrated the murder, the defendants vigorously dispute the government's gang-attack narrative and challenge the credibility of its investigation. The question this case presents is whether such a unified defense, relying on evidence unavailable in the first scenario, had a "reasonable *1897 probability" (less than a preponderance) of shifting even one juror's vote. *Cone v. Bell,* 556 U.S. 449, 452, 470, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) ; see *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

That is the relevant question because the Government here knew about but withheld the evidence of an alternative perpetrator—and so prevented the defendants from coming together to press that theory of the case. If the Government's non-disclosure was material, in the sense just described, this Court's decision in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), demands a new trial. The Court today holds it was not material: In light of the evidence the Government offered, the majority argues, the transformed defense stood little chance of persuading a juror to vote to acquit. That conclusion is not indefensible: The Government

put on quite a few witnesses who said that the defendants committed the crime. But in the end, I think the majority gets the answer in this case wrong. With the undisclosed evidence, the whole tenor of the trial would have changed. Rather than relying on a "not me, maybe them" defense, *ante,* at 1891, all the defendants would have relentlessly impeached the Government's (thoroughly impeachable) witnesses and offered the jurors a way to view the crime in a different light. In my view, that could well have flipped one or more jurors—which is all *Brady* requires.

Before explaining that view, I note that the majority and I share some common ground. We agree on the universe of exculpatory or impeaching evidence suppressed in this case: The majority's description of that evidence, and of the trial held without it, is scrupulously fair. See *ante,* at 1888 – 1891, 1891 – 1893. We also agree—as does the Government—that such evidence ought to be disclosed to defendants as a matter of course. See *ante,* at 1893. Constitutional requirements aside, turning over exculpatory materials is a core responsibility of all prosecutors—whose professional interest and obligation is not to win cases but to ensure justice is done. See *Kyles,* 514 U.S., at 439, 115 S.Ct. 1555. And finally, we agree on the legal standard by which to assess the materiality of undisclosed evidence for purposes of applying the constitutional rule: Courts are to ask whether there is a "reasonable probability" that disclosure of the evidence would have led to a different outcome—*i.e.,* an acquittal or hung jury rather than a conviction. See *ante,* at 1893.

But I part ways with the majority in applying that standard to the evidence withheld in this case. That evidence falls into three basic categories, discussed below. Taken together, the materials would have recast the trial significantly—so much so as to "undermine[ ] confidence" in the guilty verdicts reached in their absence. *Kyles,* 514 U.S., at 434, 115 S.Ct. 1555.

First, the Government suppressed information identifying a possible alternative perpetrator. The defendants knew that, shortly before the police arrived, witnesses had observed two men acting suspiciously near the alleyway garage where Catherine Fuller's body was found. But they did not know—because the Government never told them—that a witness had identified one of those men as James McMillan. Equipped with that information, the defendants would have discovered that in the weeks following Fuller's murder, McMillan assaulted and robbed two other women of comparable age in the same neighborhood. And using *that* information, the defendants would have united around a common defense. They would all have pointed their fingers 1898 at McMillan (rather than at each *1898 other), arguing that he committed Fuller's murder as part of a string of similar crimes.

Second, the Government suppressed witness statements suggesting that one or two perpetrators —not a large group—carried out the attack. Those statements were given by two individuals who walked past the garage around the time of Fuller's death. They told the police that they heard groans coming from inside the garage; and one remarked that the garage's doors were closed at the time. Introducing that evidence at trial would have sown doubt about the Government's group-attack narrative, because that many people (as everyone agrees) couldn't have fit inside the small garage. And the questions thus raised would have further supported the defendants' theory that McMillan (and perhaps an accomplice) had committed the murder.

Third and finally, the Government suppressed a raft of evidence discrediting its investigation and impeaching its witnesses. Undisclosed files, for example, showed that the police took more than nine months to look into a witness's claim that a man named James Blue had murdered Fuller. Evidence of that kind of negligence could easily have led jurors to wonder about the competence of all the police work done in the case. Other

withheld documents revealed that one of the Government's main witnesses was high on PCP when she met with investigators to identify participants in the crime—and that she also encouraged a friend to lie to the police to support her story. Using that sort of information, see also *ante,* at 1892 – 1893, the defendants could have undercut the Government's witnesses—even while presenting their own account of the murder.

In reply to all this, the majority argues that "none of the [accused] attempted to mount [an alternative-perpetrator] defense" and that such a defense would have challenged "the very cornerstone of the Government's case." *Ante,* at 1894. But that just proves my point. The defendants didn't offer an alternative-perpetrator defense because the Government prevented them from learning what made it credible: that one of the men seen near the garage had a record of assaulting and robbing middle-aged women, and that witnesses would back up the theory that only one or two individuals had committed the murder. Moreover, that defense had game-changing potential exactly *because* it challenged the cornerstone of the Government's case. Without the withheld evidence, each of the defendants had little choice but to accept the Government's framing of the crime as a group attack—and argue only that *he* wasn't there. That meant the defendants often worked at cross-purposes. In particular, each defendant not identified by a Government witness sought to bolster that witness's credibility, no matter the harm to his co-defendants. As one defense lawyer remarked after another's supposed cross-examination of a Government witness: "They've got [an extra] prosecutor[ ] in the courtroom now." Saperstein & Walsh, 10 Defendants Complicate Trial, Washington Post, Nov. 17, 1985, p. A14, col. 1. Credible alternative-perpetrator evidence would have allowed the defendants to escape this cycle of mutually assured destruction. By enabling the defendants to jointly attack the Government's "cornerstone" theory, the withheld evidence would have reframed the case presented to the jury.

Still, the majority claims, an alternative-perpetrator defense would have had no realistic chance of changing the outcome because the Government had ample evidence of a group attack, including five witnesses who testified that they had participated in it or seen it happen. See *ante,* at 1894 – 1895. But the Government's case wasn't nearly the slam-dunk the majority suggests. No physical evidence tied any of the defendants to
1899 the crime—a highly *1899 surprising fact if, as the Government claimed, more than ten people carried out a spur-of-the-moment, rampage-like attack in a confined space. And as even the majority recognizes, the Government's five eyewitnesses had some serious credibility deficits. See *ibid.* Two had been charged as defendants, and agreed to testify only in exchange for favorable plea deals. See 116 A.3d 894, 902 (D.C.2015). Two admitted they were high on PCP at the time. See *id.,* at 903, 911 ; App. A535–A536, A649. (As noted above, one was also high when she later met with police to identify the culprits.) One was an eighth-grader whose own aunt contradicted parts of his trial testimony. See 116 A.3d, at 903, 911. Even in the absence of an alternative account of the crime, the jury took more than a week—and many dozens of votes—to reach its final verdict. Had the defendants offered a unified counter-narrative, based on the withheld evidence, one or more jurors could well have concluded that the Government had not proved its case beyond a reasonable doubt.

Again, the issue here concerns the difference between two criminal cases. The Government got the case it most wanted—the one in which the defendants, each in an effort to save himself, formed something of a circular firing squad. And the Government avoided the case it most feared—the one in which the defendants acted jointly to show that a man known to assault women like Fuller committed her murder. The difference

between the two cases lay in the Government's files—evidence of obvious relevance that prosecutors nonetheless chose to suppress. I think it could have mattered to the trial's outcome. For that reason, I respectfully dissent.

No. 19-10289
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States v. Bruce

984 F.3d 884 (9th Cir. 2021)
Decided Jan 12, 2021

No. 19-10289

01-12-2021

UNITED STATES of America, Plaintiff-Appellee, v. David G. BRUCE II, aka David G. Bruce, Defendant-Appellant.

Amanda K. Moran (argued) and Janay D. Kinder, Moran Law Firm, Fresno, California, for Defendant-Appellant. Vincenza Rabenn (argued), Assistant United States Attorney; Camil A. Skipper, Appellate Chief; McGregor W. Scott, United States Attorney; United States Attorney's Office, Sacramento, California; for Plaintiff-Appellee.

CHRISTEN, Circuit Judge

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Amanda K. Moran (argued) and Janay D. Kinder, Moran Law Firm, Fresno, California, for Defendant-Appellant.

Vincenza Rabenn (argued), Assistant United States Attorney; Camil A. Skipper, Appellate Chief; McGregor W. Scott, United States Attorney; United States Attorney's Office, Sacramento, California; for Plaintiff-Appellee.

Before: Michael Daly Hawkins and Morgan Christen, Circuit Judges, and James E. Gritzner,* District Judge.

* The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa, sitting by designation.

CHRISTEN, Circuit Judge:

David Bruce appeals his convictions for conspiracy, 18 U.S.C. § 371, Attempt to Possess with Intent to Distribute Heroin or Marijuana, 21 U.S.C. §§ 846, 841(a)(1), and Bribery: Public Official Accepting a Bribe, 18 U.S.C. § 201(b)(2)(C). The 888 *888 charges arose from Bruce's involvement in a drug smuggling scheme at the United States Penitentiary at Atwater, California, where Bruce worked as a correctional officer. After a jury trial, Bruce was convicted and sentenced to 78 months in prison.

Bruce raises two issues on appeal. First, he argues the district court erred by admitting testimony from another participant in the smuggling scheme who identified Bruce from a Facebook photo. We conclude the district court did not abuse its discretion by admitting the government's identification evidence. Second, Bruce argues he is entitled to a new trial because the government violated the discovery obligations imposed by *Brady v. Maryland* , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In particular, Bruce argues the government violated his right to due process because it failed to disclose evidence of another prison guard's alleged malfeasance. We agree with Bruce that at least some of the withheld evidence was exculpatory, but conclude it was not material within the meaning of *Brady* . The district court did not err by denying Bruce's motion for a new trial.

I.

On December 12, 2015, Thomas and Tracy Jones were on their way to visit an inmate at the United States Penitentiary in Atwater, California

(Atwater), when guards conducting random car searches stopped them at a checkpoint. As the officers began their search, Jones admitted there were drugs in the car he was driving. The officers found four vacuum-packed bags of marijuana, a package of heroin, and three marijuana cigarettes.

Jones agreed to cooperate after investigators suggested that if he did not do so, he and his wife could face a lengthy incarceration, and he spoke to the investigators at length. Jones told the investigators that he and his wife had developed an online relationship with an inmate named Devonne Randolph over the course of the preceding year, and that they began visiting Randolph at Atwater. After Jones and his wife agreed to receive packages and cash for Randolph, packages containing money and "little medicated strips" began to arrive at their home. Jones also reported receiving transfers of cash from people associated with other Atwater inmates, and he told the officers that Randolph gave him a telephone number to send text messages to someone he referred to as "Officer Johnson" when packages arrived. According to Jones, Randolph said that Officer Johnson would deliver the packages to Randolph in prison. Jones admitted making a delivery to Officer Johnson in September 2015, and another in November. Both deliveries took place in a parking lot near Atwater. Jones recounted entering Officer Johnson's black Jeep Cherokee, handing him the packages, and leaving.

When asked to describe Officer Johnson, Jones said Johnson was "Hispanic looking" with dark curly hair. Jones also described Officer Johnson wearing a Pittsburgh Steelers hat and having a raspy voice, a heavyset build, and dark skin. One of the officers recalled seeing another correctional officer sporting a Steelers hat at an off-duty event. He showed Jones a Facebook photo from the event that included David Bruce and one other person. Bruce was the only one in the photo wearing a Steelers hat. Without hesitation, Jones identified Bruce as Officer Johnson.

In the days following the checkpoint interview, Jones assisted Atwater agents in setting up an additional meeting. An agent went to the parking lot as Jones had done before and sent a text message announcing his arrival. Within a few minutes, Bruce appeared driving one of two cars
889 he owned. Though there was "[p]lenty of *889 parking available," Bruce circled the parking lot twice and slowed down each time he passed Jones's car. The agents stopped Bruce, who denied being there for a drug deal but surrendered his telephone for a forensic examination. Approximately fifteen months later, in March 2017, Bruce was arrested and indicted for conspiracy, attempted possession with intent to distribute heroin or marijuana, and accepting a bribe as a public officer.

As Bruce's case proceeded toward trial, the government filed an ex parte motion for in camera review. The motion sought permission to not disclose certain information about two Atwater officers, including Officer Paul Hayes. The motion informed the district court that Hayes was present during the initial search of Jones's vehicle, but explained the government did not intend to call him as a trial witness. The motion disclosed to the court that Hayes's personnel file contained incriminating information, including more than seventy inmate complaints about him, and that he was under investigation for smuggling drugs into another prison. The court granted the government's motion and the information concerning Hayes was not produced to defense counsel. Also pretrial, the court denied Bruce's motion in limine to exclude all testimony concerning Jones's identification of Bruce.

The government's trial witnesses included Jones, who told the jury he was testifying in the hope that he would not be charged, and Robert Rush, an Atwater inmate who described himself as Bruce's friend. Rush testified that he helped Bruce orchestrate the smuggling scheme, that Bruce smuggled contraband into the prison, and that Rush sold it to other inmates and split the

proceeds with Bruce. Rush also testified that Atwater guards pressured him to testify against Bruce.

The government's other witnesses included a Western Union representative who linked money transfers from Rush's friends and family to Bruce, and established that Bruce collected at least some of the money transfers using his California driver's license. A T-Mobile representative testified that someone purchased a prepaid cell phone within the same time frame as the investigation into the smuggling ring and within the same geographic market as Atwater. The witness explained that this type of phone did not require verification of the purchaser's full name, Social Security number, or address. Federal agents linked calls and texts from the cell phone to associates of various inmates and to Jones. Officers from Atwater corroborated Jones's account of the events on the day he and his wife were stopped at the checkpoint, and described the investigation that followed the checkpoint stop.

The defense trial theory focused on demonstrating reasonable doubt about Bruce's participation in the narcotics smuggling ring. Bruce chose to testify, and although he conceded he was financially involved with inmates, he claimed these financial ties were limited to sports betting. Bruce testified that he drove a black Jeep Cherokee—the same kind of car Jones described Officer Johnson driving—and admitted that he knowingly violated prison policy by having a financial relationship with Rush. Bruce also admitted that he passed messages to inmates from outside the prison, and that he received money from Rush's girlfriend. Bruce testified that he viewed this payment as a "kind gesture" from Rush for his assistance with Rush's sports gambling. Bruce denied any other wrongdoing. The jury convicted Bruce on all counts.

Shortly after Bruce's verdict, the government indicted Hayes for taking part in a drug smuggling
890 scheme at Victorville, a *890 different federal prison in California. Hayes had transferred to work at Victorville prison after participating in the investigation at Atwater. The indictment charged Hayes with similar crimes and revealed that the investigation into Hayes's actions at Victorville began in July of 2018, approximately sixteen months after Bruce was indicted and seven months before Bruce's trial started. Bruce's defense team immediately investigated the charges against Hayes by conducting follow-up interviews at Atwater. This time, inmate Rush provided significantly more detail about the guards' efforts to get him to cooperate with their investigation and their efforts to persuade him to testify against Bruce.

Rush told the defense team that Hayes was part of a group of officers who threatened to keep Rush in segregated housing unless he testified at Bruce's trial. According to Rush, the same group threatened to arrest Rush's family and friends. Devonne Randolph, the inmate Jones and his wife intended to visit on the day they were stopped at the checkpoint, did not testify at Bruce's trial but Randolph told the defense team in a post-trial interview that rumors among inmates and staff suggested it was "common knowledge" that Hayes also smuggled drugs into Atwater while he was employed there. Randolph described correctional officers at Atwater using much more extreme measures to persuade him to give information about "whatever cops was allegedly breaking the law"—including threatening to physically assault him if he did not cooperate with the investigation. But Randolph told the defense team that he had no personal interactions with anyone called Officer Johnson, and that he did not know David Bruce.

Bruce moved for a new trial based on *Brady v. Maryland* , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), arguing the government violated its obligation to produce exculpatory evidence. Bruce argued the government purposely failed to disclose that Hayes was a target in the Victorville investigation, and that many inmates had lodged complaints against Hayes while he

worked at Atwater. The government urged the court to deny the motion. It argued it had no obligation to produce the evidence concerning Hayes because Federal Rule of Evidence 608 would have prevented Bruce from using it for impeachment purposes. The government also argued the evidence of Hayes' misconduct did not negate the plethora of evidence against Bruce, and that the government had no reason to know the extent of Hayes's involvement in the Atwater investigation because the investigation reports contained little mention of Hayes. The district court agreed with the government. It ruled the previously undisclosed information did not undermine the court's confidence in Bruce's verdict, and denied the motion for a new trial. Bruce timely appealed.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court's orders admitting the identification evidence and denying Bruce's motion for new trial.

II.

We review de novo "[t]he constitutionality of pretrial identification procedures." *United States v. Carr* , 761 F.3d 1068, 1073 (9th Cir. 2014). We likewise review de novo the denial of a motion for a new trial arising from the government's duty to produce exculpatory evidence pursuant to *Brady* .[1] *United States v. Pelisamen* , 641 F.3d 399, 408 (9th Cir. 2011).*891 III.

[1] We recognize there is some tension in our case law concerning the correct standard of review for these appeals. *See United States v. Endicott* , 803 F.2d 506, 514 (9th Cir. 1986). The outcome here does not depend on the standard of review.

We first address Bruce's argument that the district court erred by allowing the government to admit evidence that Jones identified Bruce. In the district court, Bruce argued Jones's identification was unreliable because Jones identified Bruce under circumstances that were impermissibly suggestive. Specifically, after Jones described Officer Johnson wearing a Steelers' hat, he was shown a Facebook photo in which Bruce was the only one wearing a Steelers' hat, and he selected Bruce from the photo.[2] The district court was not convinced, and it denied the motion to exclude Jones's identification of Bruce. The court reasoned the circumstances in Bruce's case were unlike those in which witnesses testify after one brief exposure to a suspect during the commission of a crime or while witnessing a startling event. Rather than resting on a single, quick view, Jones was in close proximity to "Officer Johnson" on at least two prior occasions when the two met to pass contraband. The court determined Jones was capable of providing reliable testimony about whether Bruce was the person he met without being unduly influenced by the Facebook photo.

[2] Tracy Jones did not testify and the record is silent as to whether she accompanied Thomas to the meetings with Officer Johnson, or was otherwise able to identify him.

To review the constitutionality of a pretrial identification procedure, we consider whether the "procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States* , 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) ; *see also Neil v. Biggers* , 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) ("It is the likelihood of misidentification which violates a defendant's right to due process ...."). Three factors guide our review: (1) whether "the pretrial identification procedure was impermissibly suggestive"; (2) whether "it was sufficiently reliable such that it does not implicate the defendant's due process rights"; and (3) "even if the pretrial identification procedure was suggestive and the identification was unreliable, this court [ ] examine[s] the district court's failure to exclude the identification for harmless error." *Carr* , 761 F.3d at 1074–75 (citing *Ocampo v. Vail* , 649 F.3d 1098, 1114 (9th Cir. 2011)).

An identification procedure is suggestive when it focuses upon a single individual thereby increasing the likelihood of misidentification. *United States v. Montgomery* , 150 F.3d 983, 992 (9th Cir. 1998). We examine the totality of the circumstances to determine whether an identification procedure was unduly suggestive. *United States v. Bagley* , 772 F.2d 482, 492 (9th Cir. 1985) ; *Neil* , 409 U.S. at 196, 93 S.Ct. 375. Among other factors, we have considered the witness's opportunity to view the person being identified, the witness's degree of attention, the accuracy of the witness's prior description, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the prior observation of the suspect and the confrontation. *Neil* , 409 U.S. at 199–200, 93 S.Ct. 375. "Any weaknesses in eyewitness identification testimony can ordinarily be revealed by counsel's careful cross-examination of the eyewitnesses." *United States v. Labansat* , 94 F.3d 527, 530 (9th Cir. 1996).

Bruce argues that the use of the single Facebook photo violates longstanding precedent
892 condemning identification techniques *892 that focus attention on only one person. He argues such techniques are inherently suggestive and that the use of the Facebook photo was especially suggestive in this case because, according to Bruce, he and Hayes look alike: both have Hawaiian and Caucasian ancestry and "nearly identical body styles." Bruce points out that Jones's trial testimony was inconsistent about whether he told the Atwater officers that Officer Johnson always wore a hat, and he argues that Jones must have guessed about Johnson's height because Johnson was sitting in his car both times Jones met with him.

Bruce is correct that Jones was uncertain in his trial testimony about whether he told the officers who stopped him that Officer Johnson always wore a hat. Jones was also unsure about whether he had said the hat was a Steelers hat. And Jones testified that Officer Johnson was about "five-four, five-five," only to later admit that he could not be sure of this detail because he had never seen Officer Johnson standing.[3] Bruce contends these inconsistencies in Jones's trial testimony show he was never sure of his identification and that the evidence of Jones's identification should have been excluded for this reason. We disagree.

[3] The record indicates Bruce is five-feet ten-inches tall.

We are persuaded the district court reasonably concluded the use of the Facebook photo was not so suggestive that it rendered Jones's identification unreliable. *See Neil* , 409 U.S. at 199–200, 93 S.Ct. 375. Unlike witnesses who are startled by a crime in progress, Jones ventured out to meet with "Officer Johnson" on two occasions and voluntarily got into his car both times. The two men were in close proximity and the second meeting took place just 15 days before Jones was stopped and questioned at the checkpoint. The Atwater officers testified that Jones identified Bruce from the photo without hesitation, and Jones testified that he was certain of the identification at the time he made it in 2015. Jones explained to the jury that before he was shown the Facebook photo, he accurately described details concerning Officer Johnson's beard, hair color, body type, and clothing. Jones also recalled that Officer Johnson drove a black Jeep Cherokee.

More than three years passed between the day Jones identified Bruce from the Facebook photo and the day Jones testified at Bruce's trial. The jury was able to consider whether the passage of time may have accounted for the discrepancies between the identification Jones made in 2015 and the details he was able to recall at trial. The jury was also able to consider defense counsel's cross-examination of Jones and it heard the testimony of other witnesses who had been present during the interview following the checkpoint stop. *See United States v. Higginbotham* , 539 F.2d 17, 23 (9th Cir. 1976) (finding no prejudice resulted from admission of identification evidence because jury

heard cross-examination of identifying witness). Certainly, the jury had reason to question Jones's credibility because it knew investigators suggested to Jones that he and his wife could avoid charges if Jones cooperated, and the jury knew Jones was eager to cooperate. Bruce contends that Jones's description of Johnson matched Hayes as well as Bruce, but he did little to develop or support this argument in the district court and the record does not allow us to meaningfully assess this comparison on appeal. Even if the Facebook photo was suggestive, our consideration of the totality of the circumstances persuades us that the district court did not err by admitting this identification
893 evidence.*893 IV.

Bruce next argues the district court erred by denying his motion for a new trial because the government violated *Brady* by failing to produce evidence of Hayes's misconduct.[4] The government's pretrial motion sought an order permitting it to not disclose: (1) over seventy inmate complaints about Hayes, including some that alleged physical abuse; (2) that Hayes had been charged with domestic violence and was arrested for violating a protective order; (3) that two other investigations against Hayes were pending for physical abuse of inmates and for threatening inmates; and (4) that as of July 2018, Hayes was being investigated for smuggling contraband drugs into an unspecified prison, and had been observed meeting an inmate's girlfriend in a Home Depot parking lot and accepting a small package from her. The motion disclosed that an inmate instructed his girlfriend to meet an orange SUV with "Vegas plates" in a parking lot and that the description of the vehicle matched one that Hayes owned. The motion acknowledged that Hayes had been present at the Atwater checkpoint in 2015 and helped search Jones's car, but it argued the information about Hayes's alleged malfeasance need not be disclosed because other witnesses could testify about the contraband found in Jones's car.[5] Under a heading titled "Expected Defense Arguments," the government's motion only stated that if the evidence regarding Hayes were disclosed to the defense, the defense might seek to call him for the sole purpose of bringing out impeachment evidence. The government asserted that Evidence Rule 608 would not allow the evidence to be used in this way. The motion did not anticipate any other arguments the defense might raise regarding the discoverability of the withheld evidence.[6]

4 Bruce also made passing mention of *Giglio v. United States* , 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *United States v. Henthorn* , 931 F.2d 29 (9th Cir. 1991), but on appeal, he frames his claim as a *Brady* argument.

5 On appeal, Bruce repeatedly asserts that Hayes found the contraband in Jones's car, but as the district court recognized, the record shows a different officer found the drugs.

6 *But see* Dep't of Justice, Policy Regarding Disclosure of Exculpatory and Impeachment Information: Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required , 9-5.001(C) (2020), https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings#:~:text=Brady%20v.,material%20to%20guilt%20or%20punishment. (requiring disclosure of qualifying evidence without regard to admissibility). The same policy requires disclosure of qualifying evidence without regard to materiality. *Id.*

Bruce filed a motion for new trial after Hayes was indicted. The motion argued the government had been aware that Hayes was a target in the Victorville investigation and that it violated its duty to disclose this information. More specifically, Bruce charged the government "purposefully crafted" its case to avoid relying on Hayes so it could withhold evidence reinforcing Bruce's theory that a different culprit was

responsible for smuggling contraband into Atwater. *See U.S. v. Bagley* , 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Bruce cited post-trial interviews with inmates Rush and Randolph as proof that Hayes had been extensively involved in the Atwater investigation and contended the government's pre-trial motion left the district court in the dark by minimizing Hayes's involvement in the investigation into Bruce's smuggling. In response, the government conceded it had intentionally avoided calling Hayes as a witness because it knew Hayes was 894 subject *894 to being impeached, but the government maintained it had complied with *Brady* .

During the hearing on Bruce's motion for new trial, the district court took issue with the government's pre-trial description of the role Hayes played in the Atwater investigation. The court described the government's pretrial motion as creating "the impression that ... Hayes was just one of the officers who happened to be present at the ... checkpoint," and observed that the government's pre-trial motion "le[ft] out any other involvement by Hayes" in the investigation. The court questioned why the government presented such sparse details in its pre-trial motion, and suggested that it might have "thought a little harder" about the motion had it known the full extent of Hayes's involvement. The government again conceded that "additional facts [ ] could have been provided" in the ex parte motion, but it argued the undisclosed information did not satisfy *Brady* 's materiality test because it did not negate any of the evidence against Bruce. The government stressed that it understood Hayes had played only a small role in developing the case against Bruce at the time it prepared its ex parte motion. The government also repeated its argument that Bruce would not have been able to introduce evidence of Hayes's misconduct.

The district court agreed with the government that there had been no *Brady* violation. The court ruled there was "overwhelming evidence that support[ed] the jury's verdict [against Bruce] completely and totally," and it pointed out that no witness had recanted his trial testimony, and that the post-trial interviews did not controvert any of the government's other evidence. The court found "nothing to support" Bruce's theory that Hayes was the real perpetrator at Atwater, and it denied Bruce's motion for new trial.

A.

In *Brady v. Maryland* , the Supreme Court held that prosecutors must disclose to the defense "evidence favorable to an accused ... [that] is material either to guilt or to punishment" prior to trial. 373 U.S. at 87, 83 S.Ct. 1194. This duty extends "irrespective of the good faith or bad faith of the prosecution." *Id.* We have explained that failing to disclose material, favorable evidence violates due process because it compromises the integrity of the defendant's trial. *United States v. Shaffer* , 789 F.2d 682, 687 (9th Cir. 1986). For this reason, "[t]he prosecution's duty to disclose favorable evidence is not dependent upon a request from the accused, and even an inadvertent failure to disclose may constitute a violation." *Bailey v. Rae* , 339 F.3d 1107, 1113 (9th Cir. 2003) (citing *United States v. Agurs* , 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

The second part of the *Brady* test—that the non-disclosed evidence be "material"—limits *Brady's* reach. *See id.* ("To be sure, not every violation of the duty to disclose constitutes a *Brady* violation."). "[T]here is never a real ‘ *Brady* violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene* , 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). "A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome." *Bagley* , 473 U.S. at 682, 105 S.Ct. 3375 ; *see also Kyles v. Whitley* , 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

To succeed on his *Brady* claim, Bruce was required to show: (1) the evidence at issue was favorable to him, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and
895 *895 (3) that he was prejudiced. *Shelton v. Marshall* , 796 F.3d 1075, 1083 (9th Cir.) (quoting *Strickler* , 527 U.S. at 281–82, 119 S.Ct. 1936) *amended on reh'g* , 806 F.3d 1011 (9th Cir. 2015). Because there is no doubt the government did not disclose the challenged evidence, we consider only whether it was exculpatory and material.

B.

Bruce identifies two categories of undisclosed information from the government's motion in limine that he contends are exculpatory: (1) evidence that Hayes was a target of an investigation into a very similar smuggling ring at Victorville; and (2) evidence showing that numerous inmate complaints had been made against Hayes prior to the Bruce investigation. Somewhat more obliquely, Bruce suggests the government should have disclosed that Hayes pressured some inmates to offer evidence against Bruce.

Exculpatory evidence includes evidence that is favorable to the defense, meaning "evidence that tends to prove the innocence of the defendant." *Amado v. Gonzalez* , 758 F.3d 1119, 1134 (9th Cir. 2014) ; *United States v. Cano* , 934 F.3d 1002, 1023 (9th Cir. 2019) (observing that *Brady* requires the government disclose "material, exculpatory, or otherwise helpful" evidence). "Any evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes." *Milke v. Ryan* , 711 F.3d 998, 1012 (9th Cir. 2013) (citing *Strickler* , 527 U.S. at 290, 119 S.Ct. 1936); *see also United States v. Bundy* , 968 F.3d 1019, 1038–39 (9th Cir. 2020) (citing *Kyles* , 514 U.S. at 437, 115 S.Ct. 1555) (evidence showing tactical units surrounding property where defendants were engaged in standoff with federal officers, and evidence showing government surveillance of the property, was exculpatory because it rebutted government's theory that defendants did not fear government snipers). "To say that evidence is 'exculpatory' does not mean that it benefits the defense in every regard or that the evidence will result in the defendant's acquittal." *Bailey* , 339 F.3d at 1115. Rather, "exculpatory" connotes a broader category of evidence that, "if disclosed and used effectively, [ ] may make the difference between conviction and acquittal." *Bagley* , 473 U.S. at 676, 105 S.Ct. 3375 ; *see Bailey* , 339 F.3d at 1115 (granting new trial where government failed to disclose reports casting doubt on star witness's testimony, and rejecting argument that certain passages "somehow negate[d] the documents' exculpatory nature").

The obligations imposed by *Brady* are not limited to evidence prosecutors are aware of, or have in their possession. Rather, individual prosecutors have "the duty to learn of any favorable evidence known to others acting on the government's behalf" as part of their "responsibility to gauge the likely net effect of all such evidence" to the case at hand. *Kyles* , 514 U.S. at 437, 115 S.Ct. 1555.

Here, the government argues the withheld evidence concerning Hayes was not exculpatory because it "was not material to Bruce's guilt or innocence" and did not negate the other evidence against Bruce. This conflates *Brady* 's exculpatory and materiality requirements.[7] *Bagley* , 473 U.S. at
896 676, 105 S.Ct. 3375. On appeal, the *896 government suggests the evidence would not have been admissible pursuant to Rule of Evidence 401 or Rule 403, but this argument also misses the mark. The standard for relevance is easily met because evidence that one of Bruce's co-workers was accused of engaging in a very similar prison smuggling ring makes it somewhat more probable that a third party was responsible for the crimes Bruce was accused of committing. Fed. R. Evid. 401. The government did not raise a Rule 403 objection in the trial court, thereby forfeiting that issue.

7 The government cites *United States v. Agurs* , 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) in support of its argument. *Agurs* addresses materiality, not the standard for determining whether evidence is exculpatory, and the three materiality standards articulated in *Agurs* have since been overruled. *United States v. Shaffer* , 789 F.2d 682, 687 (9th Cir. 1986).

In the trial court and on appeal, the government's response failed to acknowledge its broader ethical responsibility. *See Turner v. United States* , ––– U.S. ––––, 137 S. Ct. 1885, 1893, 198 L.Ed.2d 443 (2017) (observing "government's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done"); *see also Kyles* , 514 U.S. at 437–40, 115 S.Ct. 1555 (recognizing "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable" and for that reason, "a prosecutor anxious about tacking too close to the wind" will err on the side of disclosure in order to "justify trust in the prosecutor" and to "preserve the criminal trial ... as the chosen forum for ascertaining the truth about criminal accusations"); *see also id.* (observing the ABA Standards for Criminal Justice "call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate").

Bruce persuasively argues that evidence of Hayes's smuggling at Victorville was exculpatory because it supported the defense theory that a third party was responsible for the crimes he was accused of committing. *See United States v. Jernigan* , 492 F.3d 1050, 1054 (9th Cir. 2007) ; *Kyles* , 514 U.S. at 421, 115 S.Ct. 1555 (observing that *Brady* "turns on the cumulative effect of all such evidence suppressed"). He argues this is particularly so if the evidence that Hayes was a target in the Victorville investigation is viewed in conjunction with the other withheld evidence concerning Hayes.

The government strenuously argues it was entitled to structure its case to avoid producing evidence that could have been used to impeach Hayes and that it was free to do so because it had no obligation to call Hayes as a witness. But the fact the government took the step of filing an ex parte motion seeking the court's permission not to disclose evidence of Hayes's misconduct undercuts the suggestion that the government had no reason to question whether the undisclosed evidence was exculpatory. *See Kyles* , 514 U.S. at 439, 115 S.Ct. 1555 (explaining the prudent prosecutor's better course is to take care to disclose any evidence favorable to the defendant in order to comply with *Brady*). We agree the government had no obligation to call Hayes as a witness, but the government still bore the burden of investigating whether potentially exculpatory evidence existed. *See Browning v. Baker* , 875 F.3d 444, 459 (9th Cir. 2017) (quoting *Strickler* , 527 U.S. at 280, 119 S.Ct. 1936) (emphasizing prosecution's special status in criminal justice system heightens its burden of disclosure).

The government separately argues it cannot be held responsible for disclosing the extent of Hayes's involvement in the Atwater investigation because the government had no way of knowing that Hayes had contact with Atwater inmates who witnessed or participated in the Atwater scheme. Our case law also forecloses this argument. "Because prosecutors are in a 'unique position to obtain information known to other agents of the government,' " they have an obligation to
897 "disclose *897 what they do not know but could have learned." *Cano* , 934 F.3d at 1023 (alterations omitted). Prosecutors cannot turn a blind eye to their discovery obligations.

We are not persuaded by the government's separate contention that because Hayes and Rush were identified in the documents the government did produce, it was incumbent upon the defense to investigate Hayes and Rush and uncover potentially favorable evidence itself. This argument overlooks that Bruce's counsel had no

reason to suspect that further discovery into Hayes's participation in the Atwater investigation could have yielded information supporting the defense theory. *Kyles* , 514 U.S. at 437, 115 S.Ct. 1555.

Our conclusion that the government fell short of meeting its *Brady* discovery obligation here is influenced by the ex parte motion the government filed before trial. In it, the government memorialized its awareness that Hayes was present when Jones's vehicle was stopped and that Hayes was under investigation for introducing contraband into another federal prison in a very similar smuggling operation. Hayes was observed meeting an inmate's girlfriend in a Home Depot parking lot and accepting a small package from her. The motion also disclosed to the court that the government possessed an email exchange in which the inmate instructed his girlfriend to meet an SUV matching the description of Hayes's SUV. In short, by the time the government filed its motion seeking permission to withhold evidence of Hayes's alleged misconduct, it knew Hayes was suspected of running a prison smuggling ring using the same method Bruce was accused of using at Atwater. In addition, the government was undoubtedly aware that Hayes held a supervisory position at Atwater while Bruce's investigation was ongoing, and the government knew that its main trial witness, Rush, had been moved to segregated housing and questioned by prison officials. Whether memorialized in an investigation report or not, the government was certainly in a position to know Hayes was one of the officers who questioned Rush. Indeed, Rush volunteered in his trial testimony that Hayes was one of the officers who moved him to segregated housing and threatened to keep him there if Rush did not testify against Bruce. Despite the stark similarities between the Atwater scheme and what was known about the smuggling at Victorville, the record does not show, and the government does not argue, that it ever followed up to learn what role Hayes played in the Atwater investigation, nor that the government took any steps to determine whether the two smuggling rings were in fact unrelated.[8]

[8] Post-trial, Randolph suggested it was "common knowledge" Hayes was involved in smuggling at Atwater. But the record on appeal does not show whether Randolph ever admitted to having personal knowledge about any smuggling. Nevertheless, contrary to the government's suggestion, it is plain the government knew the Victorville operation was remarkably similar to the one at Atwater and the government could have learned that Hayes played a role in the Atwater investigation that went beyond the checkpoint stop and included having contact with inmates who were accused or admitted to participating in the scheme.

The government's pretrial submission to the district court limited its "Expected Defense Arguments" to a one-sentence assertion that if the evidence were produced, the defense might seek to call Hayes for the sole purpose of bringing out impeachment information. Neither the ex parte motion nor the transcript of the argument held on Bruce's motion for new trial show the government ever took any steps to 898 *898 verify that the two smuggling rings were separate. Nor does the government argue on appeal that it considered whether exculpatory material might exist. The government collapses *Brady* 's three-part test into an examination of materiality.

The district court was not persuaded the withheld evidence was exculpatory, largely because Hayes was accused of smuggling after Bruce's smuggling had been uncovered and because Hayes was accused of smuggling at Victorville rather than Atwater. Respectfully, we disagree. The responsibility imposed by *Brady* includes looking beyond evidence in the prosecutor's file; there were striking similarities between the two smuggling operations; Hayes was directly involved in the Atwater investigation that led to

Bruce's arrest and had access to some of the witnesses who testified against Bruce; and Bruce's trial theory argued someone else was responsible for the smuggling at Atwater. Under the facts presented, we conclude this evidence was exculpatory within the meaning of *Brady* and at the very least the government was required to investigate it.

C.

We evaluate the trial as a whole to determine whether the "admission of the suppressed evidence would have created a reasonable probability of a different result." *United States v. Price* , 566 F.3d 900, 911 (9th Cir. 2009) (internal quotation marks omitted). "In considering whether the failure to disclose exculpatory evidence undermines confidence in the outcome, judges must undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial." *Jernigan* , 492 F.3d at 1054 (internal quotation marks omitted); *see Comstock v. Humphries* , 786 F.3d 701, 711–12 (9th Cir. 2015) (reversing conviction where lack of direct evidence combined with suppression of a witness's "expressed doubts and recollections" "substantially diminished, if not defeated" the state's ability to prove guilt beyond a reasonable doubt). Evidence is sometimes considered material if the government's other evidence at trial is circumstantial, or if defense counsel is able to point out significant gaps in the government's case through cross-examination, or if witnesses provided inconsistent and inaccurate testimony. *See Bailey* , 339 F.3d at 1115–16 (granting new trial where suppressed report went "to the heart of [the accused's] defense and without it" the verdict was not "worthy of confidence").

Our decisions in *Jernigan* and *Price* are instructive. In *Jernigan* , we remanded for a new trial because the government did not disclose the existence of another bank robber for whom the defendant "may well have been mistaken." 492 F.3d at 1055. When considered with other inconsistencies in witness testimony and the lack of direct evidence against Jernigan, the omitted evidence suggested the defendant may have been innocent. In *Price* , our court remanded for a new trial because the prosecution failed to disclose its star witness's past convictions, which could have been used to undermine his credibility. The government's only direct evidence of Price's guilt came from this witness's testimony and in its closing argument, the government urged that the witness had no reason to lie. We explained that this created a "central weakness" for the defense. 566 F.3d at 913–14. Coupled with Price's showing that the government's other evidence was circumstantial and inconsistent, we concluded the undisclosed information was material. *Id.*

Bruce argues the information the government failed to disclose was material because it would
899 have allowed the jury to *899 find reasonable doubt about whether Hayes was responsible for the smuggling operation at Atwater. He contends there is a substantial likelihood the verdict would have been different if the jury had heard that Hayes was suspected of smuggling at Victorville and knew that, as a supervisor at Atwater, Hayes had access to the witnesses who testified against him. Bruce also suggests the investigation reports suspiciously failed to document Hayes's involvement in the Atwater investigation, and maintains this fact could have been used to buttress his defense theory that there was reasonable doubt about his guilt. *See Kyles* , 514 U.S. at 420, 115 S.Ct. 1555 (holding the State's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense).

Our task is to compare the evidence against Bruce with the gaps in the evidence presented to the jury to determine whether the undisclosed evidence undermines our confidence in the outcome. *See Price* , 566 F.3d at 911. We conclude it does not. First, though the jury did not have all the details, it

was aware that Rush was pressured to testify against Bruce. Rush told the jury as much, volunteering that Hayes was one of the officers who moved Rush into segregated housing and threatened to keep him there if he did not testify. Rush also testified that he felt additional pressure because officials interviewed his girlfriend and his relatives during their investigation. The jury was not left with conflicting testimony about the prison officials' efforts to uncover the extent of the smuggling ring. The investigators corroborated Rush's account that he was moved to segregated housing, and they testified that another inmate expressed that investigators threatened his mother and brother during follow-up questioning.

The evidence against Bruce was substantial and we agree with the district court that in their post-trial interviews neither Jones nor Rush recanted their testimony about Bruce's involvement. By the district court's account, Rush "very credibly claimed" at trial that he and Bruce were friends, which was why Rush resisted cooperating with investigators. The district court described Rush as demonstrating "no joy in testifying against Mr. Bruce," and observed that Jones was "quite, quite credible," and that his testimony had been "devastating" to Bruce. Considerable circumstantial evidence also implicated Bruce. Atwater investigators described Jones's account of the checkpoint stop and that Bruce showed up, at the appointed time, for the meeting Jones arranged after he agreed to cooperate. Representatives from Western Union and T-Mobile linked Bruce to monetary transactions from Atwater inmates' friends and family members, and also linked Bruce to the cell phone used to communicate with Jones.

Bruce testified that his financial dealings with inmates showed only that he engaged in sports gambling with them, but the jury was not required to credit this testimony. Bruce did not deny that he had accepted money from inmates, or that the cell phone was used to arrange meetings to pass the contraband. Unlike *Price* , the government's case did not bank on a single star witness; Rush and Jones corroborated each other's accounts and their testimony was heavily corroborated by other evidence. 566 F.3d at 913–14 ; *see, e.g.* , *Comstock* , 786 F.3d at 711–12 ; *Bailey* , 339 F.3d at 1115–16. The weight and force of the evidence against Bruce sets this case apart from others in which we have found *Brady* 's materiality element satisfied.

Though Bruce suggests the withheld evidence would have opened the door for the jury to hear that Hayes was smuggling drugs into Atwater, he offers no real evidence that Hayes did smuggle
900 contraband *900 into Atwater. Bruce's speculation that Hayes may have been left alone with Jones or his wife fares no better. He implies that Hayes may have had an opportunity to influence their statements, but the investigating officers' testimony suggests several investigators were present when Jones and his wife were questioned.

Because we view the trial as a whole, our confidence in the verdict is not undermined by the government's failure to disclose that Hayes was a subject of an investigation at Victorville, that numerous inmates had complained about him, and the extent of his involvement in the Bruce investigation. The district court did not err by denying Bruce's motion for a new trial.

AFFIRMED .

No. 01-595
U.S.

United States v. Ruiz

536 U.S. 622 (2002) · 122 S. Ct. 2450
Decided Jun 24, 2002

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-595.

Argued April 24, 2002 Decided June 24, 2002

After immigration agents found marijuana in respondent Ruiz's luggage, federal prosecutors offered her a "fast track" plea bargain, whereby she would waive indictment, trial, and an appeal in exchange for a reduced sentence recommendation. Among other things, the prosecutors' standard "fast track" plea agreement acknowledges the Government's continuing duty to turn over information establishing the defendant's factual innocence, but requires that she waive the right to receive impeachment information relating to any informants or other witnesses, as well as information supporting any affirmative defense she raises if the case goes to trial. Because Ruiz would not agree to the latter waiver, the prosecutors withdrew their bargaining offer, and she was indicted for unlawful drug possession. Despite the absence of a plea agreement, Ruiz ultimately pleaded guilty. At sentencing, she asked the judge to grant her the same reduced sentence that the Government would have recommended had she accepted the plea bargain. The Government opposed her request, and the District Court denied it. In vacating the sentence, the Ninth Circuit took jurisdiction under 18 U.S.C. § 3742; noted that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial; decided that this obligation entitles defendants to the information before they enter into a plea agreement; ruled that the Constitution prohibits defendants from waiving their right to the information; and held that the "fast track" agreement was unlawful because it insisted upon such a waiver.

Held:

1. Appellate jurisdiction was proper under § 3742(a)(1), which permits appellate review of a sentence "imposed in violation of law." Respondent's sentence would have been so imposed if her constitutional claim were sound. Thus, if she had prevailed on the merits, her victory would also have confirmed the Ninth Circuit's jurisdiction. Although this Court ultimately concludes that respondent's sentence was not "imposed in violation of law" and therefore that § 3742(a)(1) does not authorize an appeal in a case of this kind, it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction. See *United States* v. *Mine Workers*, 330 U.S. 258, 291. In order to make that determination, 623 *623 it was necessary for the Ninth Circuit to address the merits. Pp. 626-628.

2. The Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. Although the Fifth and Sixth Amendments provide, as part of the Constitution's "fair trial" guarantee, that defendants have the right to receive exculpatory impeachment material from prosecutors, see, *e.g., Brady* v. *Maryland*, 373 U.S. 83, 87, a defendant who pleads guilty forgoes a fair trial as well as various other accompanying constitutional guarantees, *Boykin* v. *Alabama*, 395 U.S. 238, 243. As a result, the Constitution insists that the defendant enter a guilty plea that is "voluntary" and make related waivers "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." See, *e.g., id.*, at 242. The Ninth Circuit in effect held that a guilty plea is not "voluntary" (and that the defendant could not, by pleading guilty, waive his right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that 624 they would have had to make had the defendant insisted upon a trial. Several considerations, taken together, demonstrate that holding's error. First, impeachment information is special in relation to *a trial's fairness*, not in respect to whether a plea is *voluntary*. It is particularly difficult to characterize such information as critical, given the random way in which it may, or may not, help a particular defendant. The degree of help will depend upon the defendant's own independent knowledge of the prosecution's potential case — a matter that the Constitution does not require prosecutors to disclose. Second, there is no legal authority that provides significant support for the Ninth Circuit's decision. To the contrary, this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See, *e.g.*, *Brady* v. *United States*, 397 U.S. 742, 757. Third, the very due process considerations that have led the Court to find trial-related rights to exculpatory and impeachment information — *e.g.*, the nature of the private interest at stake, the value of the additional safeguard, and the requirement's adverse impact on the Government's interests, *Ake* v. *Oklahoma*, 470 U.S. 68, 77 — argue against the existence of the "right" the Ninth Circuit found. Here, that right's added value to the defendant is often limited, given that the Government will provide information establishing factual innocence under the proposed plea agreement, and that the defendant has other guilty-plea safeguards, see Fed. Rule Crim. Proc. 11. Moreover, the Ninth Circuit's rule could seriously *624 interfere with the Government's interest in securing guilty pleas by disrupting ongoing investigations and exposing prospective witnesses to serious intimidation and harm, thereby forcing the Government to modify its current practice, devote substantially more resources to preplea trial preparation, or abandon its heavy reliance on plea bargaining. Due process cannot demand so radical a change in order to achieve so comparatively small a constitutional benefit. Pp. 628-633.

3. Although the "fast track" plea agreement requires a defendant to waive her right to affirmative defense information, the Court does not believe, for most of the foregoing reasons, that the Constitution requires provision of this information to the defendant prior to plea bargaining. Pp. 633.

241 F.3d 1157, reversed.

Solicitor General Olson argued the cause for the United States. With him on the brief were Assistant Attorney General Chertoff, Deputy Solicitor General Dreeben, Irving L. Gornstein, and Jonathan L. Marcus.

Steven F. Hubacheck, by appointment of the Court, 534 U.S. 1126, argued the cause for respondent. With him on the brief was Benjamin L. Coleman.–

– A brief of amici curiae urging reversal was filed for the State of Ohio et al. by Betty D. Montgomery, Attorney General of Ohio, David M. Gormley, State Solicitor, Stephen P. Carney, Associate Solicitor, Diane M. Welsh, and Dan Schweitzer, and by the Attorneys General for their respective jurisdictions as follows: Bill Pryor of Alabama, Bruce M. Botelho of Alaska, Ken Salazar of Colorado, M. Jane Brady of Delaware, Carla J. Stovall of Kansas, Thomas F. Reilly of Massachusetts, Mike Moore of Mississippi, Mike McGrath of Montana, Don Stenberg of Nebraska, Frankie Sue Del Papa of Nevada, Eliot Spitzer of New York, W. A. Drew Edmondson of Oklahoma, Hardy Myers of Oregon, D. Michael Fisher of Pennsylvania, Anabelle Rodriquez of Puerto Rico, Paul G. Summers of Tennessee, Mark L. Shurtleff of Utah, William H. Sorrell of Vermont, and Hoke MacMillan of Wyoming.

John T. Philipsborn and David M. Porter filed a brief for the National Association of Criminal Defense Lawyers et al. as amici curiae.

625 *625

Breyer, J., delivered the opinion of the Court, in which **Rehnquist, C. J.**, and **Stevens, O'Connor, Scalia, Kennedy, Souter**, and **Ginsburg, JJ.**, joined. **Thomas, J.**, filed an opinion concurring in the judgment, post, p. 633.

JUSTICE BREYER delivered the opinion of the Court.

In this case we primarily consider whether the Fifth and Sixth Amendments require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose "impeachment information relating to any informants or other witnesses." App. to Pet. for Cert. 46a. We hold that the Constitution does not require that disclosure.

I

After immigration agents found 30 kilograms of marijuana in Angela Ruiz's luggage, federal prosecutors offered her what is known in the Southern District of California as a "fast track" plea bargain. That bargain — standard in that district — asks a defendant to waive indictment, trial, and an appeal. In return, the Government agrees to recommend to the sentencing judge a two-level departure downward from the otherwise applicable United States Sentencing Guidelines sentence. In Ruiz's case, a two-level departure downward would have shortened the ordinary Guidelines-specified 18-to-24-month sentencing range by 6 months, to 12-to-18 months. 241 F.3d 1157, 1161 (2001).

The prosecutors' proposed plea agreement contains a set of detailed terms. Among other things, it specifies that "any [known] information establishing the factual innocence of the defendant" "has been turned over to the

defendant," and it acknowledges the Government's "continuing duty to provide such information." App. to Pet. for Cert. 45a-46a. At the same time it requires that the defendant "waiv[e] the right" to receive "impeachment information relating to any informants or other witnesses" as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial. *Id.*, at 46a. Because Ruiz would not agree to this last-mentioned waiver, the prosecutors withdrew their bargaining offer. The Government then indicted Ruiz for unlawful drug possession. 626 And despite *626 the absence of any agreement, Ruiz ultimately pleaded guilty.

At sentencing, Ruiz asked the judge to grant her the same two-level downward departure that the Government would have recommended had she accepted the "fast track" agreement. The Government opposed her request, and the District Court denied it, imposing a standard Guideline sentence instead. 241 F.3d, at 1161.

Relying on 18 U.S.C. § 3742, see *infra*, at 4-6, Ruiz appealed her sentence to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit vacated the District Court's sentencing determination. The Ninth Circuit pointed out that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial. 241 F.3d, at 1166. It decided that this obligation entitles defendants to receive that same information before they enter into a plea agreement. *Id.*, at 1164. The Ninth Circuit also decided that the Constitution prohibits defendants from waiving their right to that information. *Id.*, at 1165-1166. And it held that the prosecutors' standard "fast track" plea agreement was unlawful because it insisted upon that waiver. *Id.*, at 1167. The Ninth Circuit remanded the case so that the District Court could decide any related factual disputes and determine an appropriate remedy. *Id.*, at 1169.

The Government sought certiorari. It stressed what it considered serious adverse practical implications of the Ninth Circuit's constitutional holding. And it added that the holding is unique among courts of appeals. Pet. for Cert. 8. We granted the Government's petition. 534 U.S. 1074 (2002).

II

At the outset, we note that a question of statutory jurisdiction potentially blocks our consideration of the Ninth Circuit's constitutional holding. The 627 relevant statute says that a *627

> "defendant may file a notice of appeal . . . for review . . . if the sentence
>
> "(1) was imposed in violation of law;
>
> "(2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> "(3) is greater than [the Guideline] specified [sentence] . . .; or
>
> "(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." 18 U.S.C. § 3742(a).

Every Circuit has held that this statute does *not* authorize a defendant to appeal a sentence where the ground for appeal consists of a claim that the district court abused its discretion in refusing to depart. See, *e.g.*, *United States* v. *Conway*, 81 F.3d 15, 16 (CA1 1996); *United States* v. *Lawal*, 17 F.3d 560, 562 (CA2 1994); *United States* v. *Powell*, 269 F.3d 175, 179 (CA3 2001); *United States* v. *Ivester*, 75 F.3d 182, 183 (CA4 1996); *United States* v. *Cooper*, 274 F.3d 230, 248 (CA5 2001); *United States* v. *Scott*, 74 F.3d 107, 112 (CA6 1996); *United States* v. *Byrd*, 263 F.3d 705, 707 (CA7 2001); *United States* v. *Mora-Higuera*, 269 F.3d 905, 913 (CA8 2001); *United States* v. *Garcia-Garcia*, 927 F.2d 489, 490 (CA9 1991); *United States* v. *Coddington*, 118 F.3d 1439, 1441

(CA10 1997); *United States* v. *Calderon*, 127 F.3d 1314, 1342 (CA11 1997); *In re Sealed Case No. 98-3116*, 199 F.3d 488, 491-492 (CADC 1999).

The statute does, however, authorize an appeal from a sentence that "was imposed in violation of law." Two quite different theories might support appellate jurisdiction pursuant to that provision. First, as the Court of Appeals recognized, if the District Court's sentencing decision rested on a mistaken belief that it lacked the legal power to grant a departure, the quoted provision would apply. 241 F.3d, at 1162, n. 2. Our reading of the record, however, convinces us that the District Judge correctly understood that he had such discretion but decided not to exercise it. We 628 therefore reject *628 that basis for finding appellate jurisdiction. Second, if respondent's constitutional claim, discussed in Part III, *infra*, were sound, her sentence would have been "imposed in violation of law." Thus, if she had prevailed on the merits, her victory would also have confirmed the jurisdiction of the Court of Appeals.

Although we ultimately conclude that respondent's sentence was not "imposed in violation of law" and therefore that § 3742(a)(1) does not authorize an appeal in a case of this kind, it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction. See *United States* v. *Mine Workers*, 330 U.S. 258, 291 (1947). In order to make that determination, it was necessary for the Ninth Circuit to address the merits. We therefore hold that appellate jurisdiction was proper.

III

The constitutional question concerns a federal criminal defendant's waiver of the right to receive from prosecutors exculpatory impeachment material — a right that the Constitution provides as part of its basic "fair trial" guarantee. See U.S. Const., Amdts. 5, 6. See also *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) (Due process requires prosecutors to "avoi[d] . . . an unfair trial" by making available "upon request" evidence "favorable to an accused . . . where the evidence is material either to guilt or to punishment"); *United States* v. *Agurs*, 427 U.S. 97, 112-113 (1976) (defense request unnecessary); *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995) (exculpatory evidence is evidence the suppression of which would "undermine confidence in the verdict"); *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) (exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' "reliability" is likely "determinative of guilt or innocence").

When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other 629 accompanying constitutional *629 guarantees. *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969) (pleading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one's accusers, and the Sixth Amendment right to trial by jury). Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is "voluntary" and that the defendant must make related waivers "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970); see also *Boykin*, *supra*, at 242.

In this case, the Ninth Circuit in effect held that a guilty plea is not "voluntary" (and that the defendant could not, by pleading guilty, waive her right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that the prosecutors would have had to make had the defendant insisted upon a trial. We must decide whether the Constitution requires that preguilty plea disclosure of impeachment information. We conclude that it does not.

First, impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* ("knowing,"

"intelligent," and "sufficient[ly] aware"). Of course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be. But the Constitution does not require the prosecutor to share all useful information with the defendant. *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case"). And the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances — even though the defendant may not know the *specific detailed* consequences of invoking it. A defendant, for example, may waive his right to remain silent, his
630 *630 right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide. Cf. *Colorado* v. *Spring*, 479 U.S. 564, 573-575 (1987) (Fifth Amendment privilege against self-incrimination waived when defendant received standard *Miranda* warnings regarding the nature of the right but not told the specific interrogation questions to be asked).

It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant. The degree of help that impeachment information can provide will depend upon the defendant's own independent knowledge of the prosecution's potential case — a matter that the Constitution does not require prosecutors to disclose.

Second, we have found no legal authority embodied either in this Court's past cases or in cases from other circuits that provides significant support for the Ninth Circuit's decision. To the contrary, this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See *Brady* v. *United States*, 397 U.S., at 757 (defendant "misapprehended the quality of the State's case"); *ibid*. (defendant misapprehended "the likely penalties"); *ibid*. (defendant failed to "anticipate" a change in the law regarding" relevant "punishments"); *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970) (counsel "misjudged the admissibility" of a "confession"); *United States* v. *Broce*, 488 U.S. 563, 573 (1989) (counsel failed to point out a potential defense);
631 *Tollett* v. *Henderson*, 411 U.S. 258, 267 *631 (1973) (counsel failed to find a potential constitutional infirmity in grand jury proceedings). It is difficult to distinguish, in terms of importance, (1) a defendant's ignorance of grounds for impeachment of potential witnesses at a possible future trial from (2) the varying forms of ignorance at issue in these cases.

Third, due process considerations, the very considerations that led this Court to find trial-related rights to exculpatory and impeachment information in *Brady* and *Giglio*, argue against the existence of the "right" that the Ninth Circuit found here. This Court has said that due process considerations include not only (1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests. *Ake* v. *Oklahoma*, 470 U.S. 68, 77 (1985). Here, as we have just pointed out, the added value of the Ninth Circuit's "right" to a defendant is often limited, for it depends upon the defendant's independent awareness of the details of the Government's case. And in any case, as the proposed plea agreement at issue here specifies, the Government will provide "any information establishing the factual innocence of the

defendant" regardless. That fact, along with other guilty-plea safeguards, see Fed. Rule Crim. Proc. 11, diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty. Cf. *McCarthy* v. *United States*, 394 U.S. 459, 465-467 (1969) (discussing Rule 11's role in protecting a defendant's constitutional rights).

At the same time, a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice. The Ninth Circuit's rule risks premature disclosure of Government witness information, which, the
632 Government tells us, could "disrupt ongoing *632 investigations" and expose prospective witnesses to serious harm. Brief for United States 25. Cf. Amendments to Federal Rules of Criminal Procedure: Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., 92 (1975) (statement of John C. Keeney, Acting Assistant Attorney General, Criminal Div., Dept. of Justice) (opposing mandated witness disclosure three days before trial because of documented instances of witness intimidation). And the careful tailoring that characterizes most legal Government witness disclosure requirements suggests recognition by both Congress and the Federal Rules Committees that such concerns are valid. See, *e.g.*, 18 U.S.C. § 3432 (witness list disclosure required in capital cases three days before trial with exceptions); § 3500 (Government witness statements ordinarily subject to discovery only after testimony given); Fed. Rule Crim. Proc. 16(a)(2) (embodies limitations of 18 U.S.C. § 3500). Compare 156 F.R.D. 460, 461-462 (1994) (congressional proposal to significantly broaden § 3500) with 167 F. R. D. 221, 223, n. (judicial conference opposing congressional proposal).

Consequently, the Ninth Circuit's requirement could force the Government to abandon its "general practice" of not "disclos[ing] to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses." Brief for United States 25. It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. Or it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number — 90% or more — of federal criminal cases. We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit.
633 *633

These considerations, taken together, lead us to conclude that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.

In addition, we note that the "fast track" plea agreement requires a defendant to waive her right to receive information the Government has regarding any "affirmative defense" she raises at trial. App. to Pet. for Cert. 46a. We do not believe the Constitution here requires provision of this information to the defendant prior to plea bargaining — for most (though not all) of the reasons previously stated. That is to say, in the context of this agreement, the need for this information is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea; the value in terms of the defendant's added awareness of relevant circumstances is ordinarily limited; yet the added burden imposed upon the Government by requiring its provision well in advance of trial (often before trial preparation begins) can be serious, thereby significantly interfering with the administration of the plea-bargaining process.

For these reasons the judgment of the Court of Appeals for the Ninth Circuit is Reversed.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the Constitution does not require the Government to disclose either affirmative defense information or impeachment information relating to informants or other witnesses before entering into a binding plea agreement with a criminal defendant. The Court, however, suggests that the constitutional analysis turns in some part on the "degree of help" such information would provide to the defendant at the plea stage, see *ante*, at 6-7, 8, a distinction that is neither necessary nor accurate. To the extent that the Court is implicitly drawing a line based on a
634 *634 flawed characterization about the usefulness of certain types of information, I can only concur in the judgment. The principle supporting *Brady* was "avoidance of an unfair trial to the accused." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). That concern is not implicated at the plea stage
635 regardless. *635

No. 70-29
U.S.

Giglio v. United States

405 U.S. 150 (1972) · 92 S. Ct. 763
Decided Feb 24, 1972

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 70-29.

Argued October 12, 1971 Decided February 24, 1972

Petitioner filed a motion for a new trial on the basis of newly discovered evidence contending that the Government failed to disclose an alleged promise of leniency made to its key witness in return for his testimony. At a hearing on this motion, the Assistant United States Attorney who presented the case to the grand jury admitted that he promised the witness that he would not be prosecuted if he testified before the grand jury and at trial. The Assistant who tried the case was unaware of the promise. *Held:* Neither the Assistant's lack of authority nor his failure to inform his superiors and associates is controlling, and the prosecution's duty to present all material evidence to the jury was not fulfilled and constitutes a violation of due process requiring a new trial. Pp. 153-155.

Reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

James M. La Rossa argued the cause and filed a brief for petitioner.

Harry R. Sachse argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit*, and *Beatrice Rosenberg*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioner was convicted of passing forged money orders and sentenced to five years' imprisonment. While appeal was pending in the Court of Appeals, defense counsel discovered new
151 evidence indicating that the Government *151 had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government. We granted certiorari to determine whether the evidence not disclosed was such as to require a new trial under the due process criteria of *Napue* v. *Illinois*, 360 U.S. 264 (1959), and *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The controversy in this case centers around the testimony of Robert Taliento, petitioner's alleged coconspirator in the offense and the only witness linking petitioner with the crime. The Government's evidence at trial showed that in June 1966 officials at the Manufacturers Hanover Trust Co. discovered that Taliento, as teller at the bank, had cashed several forged money orders. Upon questioning by FBI agents, he confessed supplying petitioner with one of the bank's customer signature cards used by Giglio to forge $2,300 in money orders; Taliento then processed these money orders through the regular channels of the bank. Taliento related this story to the grand jury

and petitioner was indicted; thereafter, he was named as a coconspirator with petitioner but was not indicted.

Trial commenced two years after indictment. Taliento testified, identifying petitioner as the instigator of the scheme. Defense counsel vigorously cross-examined, seeking to discredit his testimony by revealing possible agreements or arrangements for prosecutorial leniency:

> "[Counsel.] Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?

"[Taliento.] Nobody told me I wouldn't be prosecuted.

"Q. They told you you might not be prosecuted?

"A. I believe I still could be prosecuted.

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> "Q. Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?

"A. Not at that particular time.

> "Q. To this date, have you been charged with any crime?
>
> "A. Not that I know of, unless they are still going to prosecute."

In summation, the Government attorney stated, "[Taliento] received no promises that he would not be indicted."

The issue now before the Court arose on petitioner's motion for new trial based on newly discovered evidence. An affidavit filed by the Government as part of its opposition to a new trial confirms petitioner's claim that a promise was made to Taliento by one assistant, DiPaola,[1] that if he testified before the grand jury and at trial he would not be prosecuted.[2] DiPaola presented the Government's case to the grand jury but did not try the case in the District Court, and Golden, the assistant who took over the case for trial, filed an affidavit stating that DiPaola assured him before the trial that no promises of immunity had been
153 made to Taliento.[3] The United *153 States Attorney, Hoey, filed an affidavit stating that he had personally consulted with Taliento and his attorney shortly before trial to emphasize that Taliento would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the "good judgment and conscience of the Government" as to whether he would be prosecuted.[4]

1 During oral argument in this Court it was stated that DiPaola was on the staff of the United States Attorney when he made the affidavit in 1969 and remained on that staff until recently.

2 DiPaola's affidavit reads, in part, as follows:

> "It was agreed that if ROBERT EDWARD TALIENTO would testify before the Grand Jury as a witness for the Government, . . . he would not be . . . indicted. . . . It was further agreed and understood that he, ROBERT EDWARD TALIENTO, would sign a Waiver of Immunity from prosecution before the Grand Jury, and that if he eventually testified as a witness for the Government at the trial of the defendant, JOHN GIGLIO, he would not be prosecuted."

3 Golden's affidavit reads, in part, as follows: "Mr. DiPaola . . . advised that Mr. Taliento had not been granted immunity but that he had not indicted him because Robert Taliento was very young at the time of the alleged occurrence and obviously had been overreached by the defendant Giglio."

4 The Hoey affidavit, standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency.

The District Court did not undertake to resolve the apparent conflict between the two Assistant United States Attorneys, DiPaola and Golden, but proceeded on the theory that even if a promise had been made by DiPaola it was not authorized and its disclosure to the jury would not have affected its verdict. We need not concern ourselves with the differing versions of the events as described by the two assistants in their affidavits. The heart of the matter is that one Assistant United States Attorney — the first one who dealt with Taliento — now states that he promised Taliento that he would not be prosecuted if he cooperated with the Government.

As long ago as *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), 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." This was reaffirmed in *Pyle* v. *Kansas*, 317 U.S. 213 (1942). In *Napue* v. *Illinois*, 360 U.S. 264 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269. Thereafter *Brady* v. *Maryland*, 373 U.S., at 87, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad
154 faith of the prosecution." See American *154 Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra*, at 269. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ." *United States* v. *Keogh*, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady, supra*, at 87. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." *Napue, supra*, at 271.

In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency § 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a
155 witness was therefore *155 an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

For these reasons, the due process requirements enunciated in *Napue* and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

156 *156

No. 08-11108
United States Court of Appeals, Eleventh Circuit

Hammond v. Hall

586 F.3d 1289 (11th Cir. 2009)
Decided Nov 4, 2009

No. 08-11108.

1290November 4, 2009. *1290

Brian Mendelsohn (Court-Appointed), Fed. Def. Program, Inc., Atlanta, GA, for Petitioner-Appellant.

Susan V. Boleyn, Atlanta, GA, for Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before CARNES, MARCUS and PRYOR, Circuit Judges.

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CARNES, Circuit Judge:

Julie Love was driving a red Mustang convertible through the upscale Buckhead section of Atlanta around 10:00 p.m. on July 11, 1988, one of those typically not summer nights in Georgia. The petite 27-year-old preschool fitness teacher had been to her regular Monday night "career chat" meeting. She had also gotten engaged the week before and may have been thinking about that. Whatever was on her mind, her thoughts were interrupted by the reality of her car slowing to a stop, as cars do when they run out of gas. She steered it over to the side of the road.

This was back before everyone had a cell phone, so Love got out of her stranded car and started walking to get help. After she had gone only a short distance down Howell Mill Road, a maroon Cutlass sedan pulled up beside her. There were two men and a woman inside. They offered Love a ride, but she declined the offer, waving the group on and telling them that she lived in a house just up a nearby driveway. Love didn't live in the house she pointed out or even on that road, but she started walking up the driveway of that house anyway. The Cutlass drove off.

Before the Cutlass had driven completely out of sight of Julie Love, someone in it looked around in time to see her coming back down the driveway to the street. Realizing that she had tricked them about where she lived, Emanuel Hammond, one of the men in the car, ordered the driver to turn 1298around, dim the headlights, and drive *1298 slowly back toward the young woman. After the car crept close, Hammond leaped from it with a sawed-off shotgun. He grabbed Love and threw her into the car, face down onto the rear floorboard. While she screamed and begged him not to hurt her, a wild-eyed Hammond beat her with the steel barrel of the shotgun. Any woman in Love's position would have been terrified, and even more so if she had known what Hammond had done to other women.

About six-and-a-half years before, in February 1982, a young woman named Janet[1] was returning home to the Virginia Highlands section of Atlanta around 1:00 a.m., after having a late dinner with her friends. A man named Antonio Stephney came up behind her with a gun. He forced Janet into a dark alley. While Stephney was robbing Janet, Emanuel Hammond appeared on the scene. Hammond told Stephney that it was supposed to be Hammond's robbery. And he suggested to

Stephney that "we rob some more places." Stephney agreed. He rooted through Janet's purse, found her keys, and tossed them to Hammond, telling him to go get Janet's car and bring it around. While Hammond went to get her car, Stephney raped Janet. When Hammond got back with the car, the two men forced Janet into the back seat, covered her with a blanket, took her to several ATM machines in search of cash, and beat her. While this was going on, Hammond was armed with a sawed-off shotgun.

[1] We use only this woman's first name in order to protect her privacy.

Hammond drove the car around while Stephney raped Janet a second time and talked about killing her. Hammond, who was only sixteen at the time, evidently did not yet have the stomach for murder. Kidnapping maybe, but not murder. At one point when the car was stopped and Stephney had stepped outside for awhile, Janet begged Hammond to drive away. He hesitated but then sped away as Stephney stood in the street and shot at them with a pistol. After a side trip to his grandfather's house where he got rid of the shotgun, Hammond took Janet to the police station.

By the time Hammond and Janet arrived at the police station, she had been held hostage for three-and-a-half hours and had been raped twice. According to her, Hammond "d[id] the talking" to the police, describing the ordeal in a way that "ma[d]e the people there think that [he and Janet] were both victims." Even so, he was charged with rape and aggravated sodomy. Those charges against him were dismissed in December 1982. The reason probably was that despite his involvement in the crimes against Janet, Hammond's belatedly appearing conscience may have saved her life. As far as the record shows, that was the last time his conscience would make an appearance, belatedly or otherwise.

The dismissal of the charges against him provided Hammond with an opportunity to straighten out his life. He quickly failed to take advantage of it. Ten days after the rape and sodomy charges against him were dismissed, Hammond put his apprenticeship with Antonio Stephney behind him and struck out on his own. On the night of December 17, 1982, Hammond came upon a woman as she arrived at her apartment on Briarcliff Road in Atlanta. Because this woman, named Trinh, [2] had worked the late shift, she did not get home until 1:30 a.m. As she tried to get out of her car, Hammond loomed over her, stuck a knife to her neck, and forced her back into the car. When she resisted, he beat her and slashed her hand with the knife. He grabbed her purse and
1299 demanded her *1299 credit cards. For the next hour Hammond terrorized Trinh. He drove her around, telling her he was going to rape her and kill her and stuff her body in the trunk of her car. She escaped with her life when Hammond had to pull the car into a service station to get some gas. When he did that, Trinh jumped out of the car and ran to the attendant for help. Hammond was quickly caught and charged. He pleaded guilty to kidnapping with bodily injury and armed robbery. He was sentenced to eight years in prison.

[2] As we did with Janet, we use only Trinh's first name in order to protect her privacy.

Prison life did not suit Hammond. He was taught some vocational skills in prison, but the main lesson he took from the experience was not a constructive one. Hammond vowed to his girlfriend that he would never let another of his victims live to send him back to prison. With each victim, he would come closer to fulfilling that vow.

In 1987 Hammond was released after serving less than half of his sentence for attacking Trinh. In May 1988 he saw a woman, whose name was Ellen, [3] entering her Rock Springs Circle apartment in Atlanta around lunch time. Hammond grabbed Ellen from behind, put her into

a headlock and dragged her at knife point down two flights of stairs to her car. He rifled through Ellen's purse, found her bank cards, and drove her around the city forcing her to make withdrawals from several ATM machines. When Ellen had withdrawn the limit on her card, Hammond drove her to a trash-filled wooded area on a steep incline. There he raped her. Then he stabbed her repeatedly and slit her throat. Ellen had the presence of mind to fake convulsions so Hammond would think she was dying. After terrorizing and abusing her for three-and-a-half hours and seeing her convulse, Hammond hid Ellen's body under a blanket in the trash and left her for dead.

[3] As we did with Janet and Trinh, we use only Ellen's first name in order to protect her privacy.

Thinking that he had succeeded in killing Ellen, Hammond bragged to his girlfriend, Janice Weldon, that he had killed a woman. He took her by the wooded area to show her where he had done it, and then he took her to see Ellen's car, which he had stolen. While looking into that car, Weldon noticed a Mother's Day card inside, all addressed and ready to be mailed.

After Hammond left Ellen, she pulled off the blanket, which he had intended to be her burial shroud, and she dragged herself from the wooded area to a street where she found help. We don't know when Hammond found out Ellen had survived. We do know that only two months after kidnapping, robbing, raping, and attempting to kill Ellen, Hammond abducted Julie Love. This time he was accompanied by his girlfriend Weldon and by his own apprentice, his 18-year-old cousin Maurice Porter.

As she lay on the floorboard of his car, Julie Love could not have known that Hammond's crimes against her were the latest in a series of his increasingly violent attacks on women. She could not have known about his vow to make sure that no more of his victims would live to testify against him. She did know, however, that Hammond was cruel, violent, and dangerous. Love, who was only five feet tall and weighed just a hundred pounds, knew that because Hammond kept beating her. She was screaming.

After he finished beating Julie Love, Hammond wanted a cigarette. He told Weldon, who was driving, to take them to a service station in the Bankhead section of Atlanta so he could get something to *1300 smoke. Leaving Love in the back seat of the car with Porter, Hammond rested the shotgun against the front seat and went into the store. Weldon, Porter, and Love sat in the car in silence.

When Hammond returned to the Cutlass, he slid into the front seat next to Weldon and told her to drive the group to his grandmother's house in northwest Atlanta. As they pulled up near the house and stopped, Hammond tossed Love's purse to Weldon and ordered her to go through it. Weldon rummaged through the purse, finding a little cash and some ATM cards. Hammond took the cards. He asked Love how much money she had in her bank account. She told him that she did not have much. Love begged Hammond not to hurt her.

She told him she kept cash at her apartment, and they could go get it. She also pleaded with him to call her boyfriend, who would give them anything they wanted if they would just not hurt her.

Worried that Love's boyfriend might be at the apartment, the group went to a pay phone where Weldon called Love's apartment. She got Love's answering machine. She heard Love's voice say: "Hi, this is Julie, and I can't come to the phone right now, but if you leave your name and number, I'll be glad to get in touch with you as soon as I can. Have a nice day, and thanks for calling." Satisfied that Love's boyfriend was not there, the group drove to the apartment complex. Once there, however, they saw a security kiosk out front and turned away.

The group doubled back to northwest Atlanta. Hammond directed Weldon to drive to Grove Park Elementary School, which was just down the street from his grandmother's house. Standing on the steps of the school, his sawed-off shotgun in hand, Hammond forced Love to tell him the pin number for her ATM cards. She was so nervous that she gave him the wrong number.

Holding Love at gunpoint at the school, Hammond sent Porter and Weldon to withdraw money using her ATM cards. Weldon drove Porter to a bank in the West End area of town, where he punched the pin number Love had given into two different ATM machines. Because it was the wrong number, the machines gave no money and kept the cards. Realizing they would be returning empty-handed, Weldon (calling Hammond by his nickname) told Porter: "Demon going to be mad."

He was. When Porter and Weldon returned to the school with neither the cash nor the cards, Hammond became enraged. Standing over a seated Love, Hammond called her "bitch," hit her hard in the back with the shotgun barrel, and began beating her again. Because the beating "looked painful" to Porter and he no longer wanted to see it, he asked Hammond to "let [him] talk to [Love] for a minute." Hammond agreed.

The "talk" started out innocently enough. Porter took Love to the side and told her to "do nothing to make [Hammond] mad." Porter, however, had more than Love's best interests in mind. After advising her to avoid Hammond's temper, Porter proceeded to rape her. Love was, according to Weldon, "scared to death" and begged Porter "Please don't hurt me."

As Porter was raping Julie Love, Weldon and Hammond approached them. Weldon grinned at Porter, called him by his nickname, "Gooney," and told him he was "a fool." Hammond told Porter to "come on" because "that was enough." Porter and Love pulled their clothes back on, and all four of them got back into the Cutlass. It was between 1 and 2 a.m. At that point Love had been at the
1301 group's mercy for more than three hours. *1301

Sitting once again behind the wheel of the Cutlass, Weldon decided that she "didn't want to be involved" anymore. She asked Hammond to let her go home. Weldon's wanting out made Hammond "real angry," but because she was "getting on his nerves" he told Weldon to "go on." She drove the group to her apartment in College Park, on the south side of Atlanta. Hammond and Weldon got out of the car, leaving Porter alone with Julie Love. Standing in the doorway of the apartment, Hammond gave Love's purse to Weldon and told her to "get rid of it." She put the purse in a paper sack and threw it into a dumpster.

Leaving Weldon behind, Hammond, Porter, and Love continued their crisscross of the city. Hammond directed Porter, who was driving, to Hammond's mother's house in Cobb County. The three went inside where they found Hammond's mother standing in her kitchen reading a newspaper. Despite the late hour and the unknown white woman with her son and nephew, Hammond's mother barely acknowledged them when they greeted her. Hammond walked Porter and Love back to his bedroom. For five minutes he left them sitting alone, apparently while he talked with his mother. When Hammond returned, the three of them left in the Cutlass.

Hammond ordered Porter to take them back to Grove Park Elementary. As they neared the school, he had Porter turn onto a side street and cut off the car. Then Hammond got out and walked to the trunk, where he got three clothes hangers and a sheet. He unraveled the hangers and forced Love to lie on her stomach across the back seat of the sedan. Hammond then ordered her to put her feet together, and when she did he tied them with one of the unraveled coat hangers. Then he tied her hands together behind her back with another hanger. Face down and bound, Love lay

on the rear seat while Hammond covered her head and body with the sheet. Then he wrapped the third hanger around her neck.

Hammond handed one end of the hanger to Porter and told him to pull. He did while Hammond pulled in the opposite direction. As the wire tightened around her neck, Julie Love struggled, kicked, screamed, and fought for her life. Small as she was, the fitness teacher managed to free her hands. As Hammond wrestled to get Love under control, she thrashed about and pleaded, "Don't do it." Calling her a bitch, he told her to "[s]hut up before I kill you right here."

Hammond's threat scared Love into submission long enough for him to rebind her hands with the coat hangers. As she lay there bound, Hammond sat and thought for awhile. Then he had Porter start the Cutlass and drive them to a wooded area off Grove Park Place, about two miles from the school. Once they were there, Hammond had Porter drive up and down the street several times. When he settled on a spot, Hammond ordered Porter to pull over and raise the car's hood.

Hammond removed the bindings from Love's feet, and then he marched her through trash-strewn bushes down into the woods. Three or four minutes later Porter got out of the car to lower the hood. He heard a gunshot. Porter hung his head for a moment, and when he looked up he saw Hammond coming up out of the woods alone. Hammond was holding the sawed-off shotgun and had blood spots on his face. Porter said: "You didn't do what I think you did." Hammond's only response was that he "had to."

At Hammond's direction, Porter drove back to Weldon's apartment on the south side. They arrived as the sun was coming up. Porter dropped onto the sofa and dozed off for a few hours. When
1302 he *1302 awoke, Hammond called him into a back bedroom where he was waiting with Weldon. Hammond made it clear that if either one of them ever told anybody what he had done to Julie Love, he would kill them both. Then he described the murder. He told them that as he was about to shoot Love she raised her hands in front of her face, and he "blew her head off" with an "execution style" shotgun blast. The shot, he said, "blew the side of her face off." Hammond boasted, "You should have seen how I did it."

Shortly after Hammond killed Julie Love, Weldon told him her children needed "something to eat in the house." He gave Weldon a pair of small, diamond-and-gold earrings to pawn. Hammond described to Weldon how he had taken the earrings from Love while the two waited for Weldon and Porter to return from the bank. Love had begged him not to take them because they had belonged to her mother, who had died a few years before, and she cherished them. He took them from her anyway. Even so, Hammond told Weldon: "I didn't get a damn thing from the lady and I took her life."

Meanwhile, Julie Love's friends and family had no idea where she was. All they knew was that on July 11, 1988, she had met with a group of people for a career chat, as she did every Monday night. Then she disappeared.

Love and Mark Kaplan had become engaged on the Fourth of July, just a week before she went missing. Kaplan had last seen her earlier that day when he kissed her as he left for work. He called Love's apartment later that night, expecting her to be back from her regular Monday meeting. When he got her answering machine Kaplan left a message. He phoned Love again on each of the next two days. When he was unable to locate her after two days, Kaplan reported her disappearance to the police, and an officer followed him back to Love's apartment. They could not get in. The police were not yet willing to launch an investigation into Love's disappearance, so Kaplan launched one himself. After calling her family and friends for help and information, Kaplan eventually discovered the red Mustang Love had been driving. It was on the road half a mile from

his home, jutting diagonally out from the curb, abandoned. The formal police investigation began when Kaplan showed police the abandoned car.

On Thursday morning, three days after Love's disappearance, an officer went with Kaplan to her apartment so they could listen to her answering machine tape. The tape was full of unplayed messages, starting with one Kaplan had left around 9:45 p.m. on the night Love had disappeared. There were messages from him: "Give me a call whenever you get home. Just want to hear your voice. Okay?" "You got me worried. Whenever you get home tonight, give me a buzz." There were also messages from Love's family: "Hey, Doodle . . . it's Daddy again. . . . I'll keep trying." And from her colleagues at work: "We were just wondering if . . . something had happened or what. . . . We'll be out on the playground. Give me a call at home if you need to." "I'm concerned because we haven't heard from you and we've been expecting you in the playroom at the sporting club." And from her friends: "Got me worried about you. Where are you, Julie? We haven't talked to you in two days." "Just call me sometime, let me know that you're alive and well, which I hope you are, and I'm sure you are, but let me hear from you." "Everybody's trying to find you. . . . So give me a call no matter what time you come in and call your Dad so he knows you're okay." In all, the tape held thirty-one messages from people worried because Julie Love had vanished. *1303

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After getting the police investigation started, Kaplan did more. He made flyers. He organized rallies. He opened his home to hundreds of volunteers who tried everything from "ask[ing] questions" to "comb[ing] the woods." He appealed "to anyone who knew anything to please come forward and share information that would help [him] find Julie." For more than a year no one did. During all of that time, none of the many people who cared about Julie Love knew that her body lay beneath some garbage in a northwest Atlanta trash pile. They might never have known but for the fact that Hammond made the mistake of abusing his girlfriend, Janice Weldon, one time too many.

On a July night in 1989, a year after he had brutally murdered Julie Love, Hammond was choking Janice Weldon during an argument about some cocaine. When he finally loosened his grip on her neck, and as Weldon was gasping for air, Hammond pointed his gun at her. She pleaded for her life. It was not the first time Hammond had done that sort of thing to Weldon, but it was to be the last. Although she was scared of Hammond, Weldon decided she'd had enough. She went to the police station and "took a warrant out on him" for the assault. Because Weldon was sure that Hammond would kill her for getting the warrant, she felt she had nothing to lose from telling the police about the murder of Julie Love. So she did.

In order to corroborate what Weldon had told them about Love's murder, investigators outfitted Weldon with a recording device and sent her to talk to Maurice Porter. What Porter said during that conversation, which he did not know was being recorded, corroborated Weldon's statements to the police. Porter and Hammond were arrested. Investigators questioned Porter, who admitted his participation in the crimes against Julie Love and identified Hammond as her killer. Porter then took officers to the area where Love's body had been left more than a year before. The officers found her remains within thirty yards of where Porter had told them they would be.

In September 1989, Hammond and Porter were charged with murder, felony murder, kidnapping, and armed robbery. Porter was also charged with rape. He pleaded guilty. The State recommended that Porter receive three life sentences instead of a death sentence in exchange for his testimony at Hammond's trial in February and March 1990. Janice Weldon was given immunity in return for her testimony.

In addition to the eyewitness accounts provided by Porter and Weldon at trial, the State presented the testimony of Phillip Williams, who had been an inmate in the jail where Hammond was held on charges of assaulting Weldon. Williams testified that Hammond had offered him $20,000 and help establishing himself on the outside if he would kill Weldon. Hammond had told him that Weldon "knowed too much." Hammond also told Williams that he had killed someone. He gave Williams a piece of paper with his name and address written on it.

Janet, Trinh, and Ellen, three of Hammond's other victims, all testified about their encounters with Hammond. Each woman told of her hours-long ordeal of being abducted, assaulted, and robbed. Each woman's story foreshadowed what happened to Julie Love. And each woman's account showed how Hammond's violence against women had been intensifying.

The State presented more evidence. Michael Dominick testified that Hammond had sold him a sawed-off shotgun for "about $20" and "around five rocks" of cocaine. Dominick identified the 1304 shotgun *1304 shown to him by the prosecutor as the one he bought from Hammond; he recognized a string he had tied to it after the purchase. He testified that the gun had been in his possession from the time he bought it until it was confiscated by police during a drug bust. Kelly Fite, a firearms examiner for the Georgia Bureau of Investigation's crime laboratory, testified that wadding found near Julie Love's remains had been discharged from a sawed-off 12-gauge shotgun.

The State also presented the testimony of Dr. Randy Hanzlick, a medical examiner for Fulton County, who told of finding and analyzing some remains of Julie Love's body. He described the area where most of the skeletal remains were found as a sloped bank that contained "an old broken television case" resting "part way up on a pile of tires." On top of the broken television was a woman's blouse and bra with rib, shoulder, and back bones. The blouse had held those upper-body bones in roughly the "proper position," while other smaller bones had cascaded into the crevices of the tire pile below.

Just up the slope from the television, Dr. Hanzlick found fragments of Julie Love's skull. Smaller shards of it had trickled down through the tires. Altogether, he recovered twenty-two pieces of Love's skull, including one with dark "Caucasian head hair" attached to it. Nearby he found a glass eye with a brown iris. Love had brown hair, and she'd had a glass eye since she was a little girl. When Dr. Hanzlick glued the fragments of her skull together he saw a beveled semicircle-shaped hole, nearly an inch in diameter, in what had been Julie Love's head. Beneath the skull fragments, he found a pinkish disk of shotgun wadding with a diameter similar to the hole in the skull. Combining all of his findings, Dr. Hanzlick concluded that Love had died from a "gunshot wound to the head" that was "consistent with a closeup blast by a 12-gauge sawed-off shotgun."

"Demon" had told Porter and Weldon that he "blew the side of [Love's] face off" and had boasted that they should have seen how he did it. In a sense Dr. Hanzlick did see that. He never found the bones that made up the right side of Julie Love's face.

I.

After a trial in February and March 1990, a Fulton County jury convicted Hammond of murder, kidnapping, and armed robbery. A two-day sentencing phase followed. On March 9, 1990, the jury found three aggravating circumstances: the murder of Julie Love was outrageously and wantonly vile; it had been committed during another capital felony (armed robbery); and Hammond had a prior armed robbery conviction. Hammond was sentenced to die. He appealed his conviction and sentence to the Georgia Supreme Court. *Hammond v. State*, 260 Ga. 591, 398 S.E.2d 168, 169 (Ga. 1990) (*Hammond I*). That court rejected all of Hammond's challenges, but it

remanded the case to the trial court "to give [Hammond] an opportunity to litigate the issue of trial counsel's effectiveness." *Id.* at 175.

After conducting an extensive four-day hearing on Hammond's ineffective assistance claims, the trial court issued a sixty-seven page order explaining its decision not to vacate the convictions and sentences. *State v. Hammond*, Order Denying Mot. to Vacate Conviction and Sentence, Ga.Super. Ct. Fulton County, at 60, Mar. 4, 1994 (Hull, J.) ("Remand Order"). As the Georgia Supreme Court later summarized it, the trial court "concluded that Hammond's trial counsel rendered reasonably effective assistance throughout all phases of trial," and "that the evidence of Hammond's guilt was so 1305 overwhelming *1305 that any deficiencies in trial counsel's performance did not affect the jury's decision in either phase of trial." *Hammond v. State*, 264 Ga. 879, 452 S.E.2d 745, 754 (1995) (*Hammond II*). On return of the case from remand, the Georgia Supreme Court agreed with the trial court that Hammond's counsel had not rendered ineffective assistance either in the original trial or on direct appeal. *Id.* at 754. The court also concluded that the evidence supported Hammond's convictions and that the death sentence fit the crime. *Id.* It affirmed the trial court's judgment in its entirety. *Id.*

Hammond filed a petition for a writ of habeas corpus in the Superior Court of Butts County in December 1995. He filed an amended petition a little more than two years later and then a second amended petition in April 1999. The state trial court conducted an evidentiary hearing on that second amended petition in December 1999 and eventually denied it in November 2000. *Hammond v. Head*, Order Denying Second Amended Petition for Writ of Habeas Corpus, Ga.Super. Ct. Butts County, at 3, Nov. 8, 2000 (Brannen, C.J.) ("State Habeas Order"). Hammond asked the Georgia Supreme Court for a certificate of probable cause to appeal, but that court denied Hammond's application in May 2002. Hammond appealed to the United States Supreme Court, but his petition for a writ of certiorari was denied in January 2003.

Hammond then filed his petition for federal habeas corpus in the United States District Court for the Northern District of Georgia in June 2003. In January 2004 he filed an amended petition that raised fifteen claims. In January 2008 the district court denied habeas relief because it concluded that the state courts' resolution of the claims he had presented to those courts was "neither contrary to nor an unreasonable application of clearly established federal law." *Hammond v. Terry*, No. 1:03-cv-1646, at 5-57, 80 (N.D.Ga. Jan. 4, 2008) (District Court Order). The district court also decided that Hammond was not entitled to habeas relief on any of the claims he raised that had not been decided on their merits by the state courts. Finally, the district court denied Hammond's requests for discovery and his request for an evidentiary hearing, which related to one of his prosecutorial misconduct claims.

Hammond filed a motion to alter or amend the judgment of the district court, which was denied in February 2008. The court did issue an order granting in part Hammond's motion for a certificate of appealability. That order gave Hammond permission to appeal on some of his claims. We later granted Hammond's motion to expand the COA to cover issues relating to his request for discovery and an evidentiary hearing on one of his *Brady* claims.

II.

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." A *Brady* violation has three components: "[1] The 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, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). The prejudice or materiality requirement is satisfied if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been 1306different." *1306 *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (internal quotation marks omitted); *see also Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995). We determine materiality by asking whether "the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict." *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1334 (11th Cir. 2009) (citing *Kyles*, 514 U.S. at 434, 436-37 n. 10, 115 S.Ct. at 1566, 1567 n. 10).

Under AEDPA, if the state court had addressed Hammond's *Brady* claims on the merits, we could not grant him relief unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1259 (11th Cir. 2005).

Hammond raised his *Brady* claims in his state habeas petition in 2003. Those claims were based on evidence that Hammond asserted had previously been suppressed by the State, and so he argued that the claims were timely. The state habeas court did not disagree. It simply failed to address the claims as *Brady* claims, instead treating them as ineffective assistance claims. For that reason the district court reviewed the *Brady* claims *de novo*, without applying any deference under AEDPA. We do the same. *See, e.g., Toles v. Gibson*, 269 F.3d 1167, 1172 (10th Cir. 2001) ("Under the AEDPA, the appropriate standard of review for a particular claim hinges on the treatment of that claim by the state courts. If a claim was not decided on the merits by the state courts . . . we may exercise our independent judgment in deciding the claim."); *DiBenedetto v. Hall*, 272 F.3d 1, 7 (1st Cir. 2001) ("Faced with state court opinions that do not decide constitutional claims raised by the defendant . . . federal courts apply de novo review to the federal constitutional claims raised in habeas petitions."). Hammond brings twelve *Brady* claims to us.

III.

We begin with the six *Brady* claims that fail to reach the materiality stage of the analysis. *See Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1337-42 (11th Cir. 2009) (following the same approach).

A.

Hammond claims that the prosecution violated *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), by eliciting misleading testimony from Janice Weldon about her criminal background.[4] Weldon testified that she had never been arrested or spent a single day in jail. Hammond contends that Weldon's statements were misleading because the State possessed evidence, mostly in the form of statements by Weldon herself, implicating her in several violent crimes including the Love murder, the Gwendale Turner murder, and the kidnapping of another woman.

[4] Claims arising under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), are a type of *Brady* claim that have a different and more defense-friendly measure of materiality. *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995). That difference does not figure into this case because, as we will soon see, the only *Giglio* claims Hammond raises do not make it to the materiality stage.

A *Giglio* claim involves an aggravated type of *Brady* violation in which the suppression of
1307 evidence enabled the prosecutor *1307 to put before the jury what he knew was false or misleading testimony, *Ford v. Hall*, 546 F.3d 1326, 1332 (11th Cir. 2008), or allowed the prosecutor himself to make a false statement to the jury, *Alzate*, 47 F.3d at 1110. The testimony or statement elicited or made must have been a false one. *See Smith*, 572 F.3d at 1335 ("Accurate statements do not violate the *Giglio* rule."); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989) ("Simply put, there has been no violation of *Giglio* in this case since [the witness'] testimony that he voluntarily turned himself in was true.").

Hammond concedes that Weldon's testimony about her criminal history was literally accurate. He admits that she had never been arrested, nor had she been in jail even for a single day. Georgia Bureau of Investigation (GBI) Agent Nita Weston corroborated that fact by testifying that she had been "unable to find any criminal history on Weldon." Because there was no lie, there was no *Giglio* violation.

B.

Hammond claims that the State failed to disclose its suspicions that Weldon had been involved in crimes against a woman named Ellen. In May 1988, just two months before Love was murdered, Ellen was abducted, robbed, raped, stabbed repeatedly, and left for dead. *See supra* at 1299. Ellen testified at Hammond's trial in this case and identified him as her attacker. Her testimony was admitted as similar-act evidence because the incident was so similar to Porter's and Weldon's accounts of what they and Hammond had done to Julie Love. Hammond's counsel wanted to impeach Weldon's credibility by showing that she had been the female accomplice in the crimes against Ellen. He complains that the State, which suspected that Weldon had been that accomplice, failed to disclose its suspicion to the defense.

It is unclear, however, what actual evidence Hammond contends should have been disclosed. He asserts that the police believed that Weldon was probably the female accomplice. Yet Hammond has cited no tangible evidence that was withheld that tended to show the accomplice was Weldon. He points to no evidence at all beyond what came out at his trial.

Weldon's story was that she learned of Ellen's kidnapping the next day, when Hammond told her about it. It came out, however, that Weldon knew the details of the crime against Ellen, including the fact that her stolen and abandoned car had an unmailed Mother's Day card in it. (She said Hammond took her to the car and she looked inside it.) Ellen, who had every reason to know and none to lie, testified that there was a female accomplice. Weldon, who claimed to have been told about the crime by Hammond, did not mention one. Everyone, including the jury, knew that Weldon had been Hammond's girlfriend at the time. Finally, Weldon bore a striking physical resemblance to another woman whom Ellen had originally identified as Hammond's female accomplice.

The point is that of course the police suspected that Weldon had been Hammond's female accomplice in the crimes against Ellen. All of the reasons for their suspicions came out at trial. For those same reasons Hammond's trial counsel also suspected that Weldon had been the accomplice. He pursued that point before the jury. Counsel cross-examined Ellen about it, getting her to admit that she had mistakenly identified another woman as the accomplice. He then showed Ellen a picture of Weldon for comparison's sake. He thought about having Weldon brought into the courtroom so Ellen could look at her, but decided at the last
1308 minute not to do that. *1308

So far as Hammond has been able to show, all the evidence to support his position that Weldon was the accomplice in the crimes against Ellen came out at trial. He points to the testimony of a police

officer taken at a deposition eight years after the trial in which the officer stated that he had suspected Weldon. He also has a former prosecutor's affidavit of the same vintage indicating that prosecutor had strongly believed Weldon was involved in the crimes against Ellen and had considered prosecuting her for them. So far as we can tell, however, the officer's and former prosecutor's suspicions were based on the same evidence that underlay everyone else's suspicions, all of which came out at trial. That one officer or one prosecutor had suspicions is not admissible evidence any more than the fact that trial counsel himself had those same suspicions. Nor has Hammond explained how disclosure of those suspicions would have led to the discovery of admissible evidence. There was no suppression of evidence.

Although we rest our decision about this *Brady* claim on the lack of suppression, we note that any thought of materiality brings to mind the awkwardness of this claim for Hammond. Weldon was his girlfriend. She and Porter testified that she was his accomplice in the abduction and robbery of Julie Love. If, as Hammond insists, his girlfriend Weldon was an accomplice in the crimes committed against Ellen, that makes it more likely that Hammond was the man who committed those crimes. And anything that makes it more likely that Hammond committed the crimes against Ellen makes it more likely that he committed the strikingly similar crimes against Julie Love just two months later.

C.

Hammond claims that the State withheld evidence about the amount of money it paid Weldon for her testimony. He adds that Weldon lied when she acknowledged only around $650 in cash payments from the GBI and Fulton County, and when she testified that the money was given to her so that she could relocate. Hammond asserts that the truth is that Weldon got at least 22 separate payments, mostly in cash, that totaled around $2,600. Hammond says that because his counsel did not have that information, he could not impeach Weldon with it. Hammond's trial counsel swore in a later affidavit that "I was never provided with information accurately detailing the payments made to Janice Weldon."

Hammond's claim is not supported by the record. At trial, during his cross examination of Weldon, Hammond's counsel said: "They spent $1,260 on you for food, did they not?" He also asked whether the GBI paid "$74.51 to have you moved?", whether "they spent $315 for your household expenses?", and whether the GBI paid "for your lodging that totaled $429.70?". Weldon acknowledged that she had been paid about $650, but disclaimed any knowledge of the amount that the GBI had paid to have her moved or for her lodging. For those expenses, she stated that the GBI "didn't pay me. They paid the hotel fee." Hammond's counsel concluded his line of questions by asking:

> Q. So you got a total, did you not, Miss Weldon, of almost $2500 for your expenses while you were in the witness program, did you not?
>
> A. Just like I said, they didn't show me no papers about no 2,000 and whatever dollars you're talking about.
>
> Q. Well, you don't have any doubt that that's inaccurate, do you?
>
> A. Well, I'm sure they didn't pay that much, because my lawyer took over.

As the trial transcript shows, Hammond's counsel possessed detailed figures about how much money had been spent to support Weldon. He knew her 1309 hotel bill *1309 and moving expenses down to the pennies, and was aware of the rough total amount of $2,500. He used that information to cross-examine Weldon. The trial transcript shows there was disclosure; there was no suppression.

Because information about the payments to Weldon was not suppressed, Hammond's related *Giglio* claim based on Weldon's alleged lies about the amount of the payments to her also fails. *Ford*, 546 F.3d at 1331 (" *Giglio* error, a species of *Brady* error, occurs when the *undisclosed evidence* demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury.") (internal quotation marks omitted) (emphasis added).

D.

Hammond claims that the State suppressed evidence that it had bullied Phillip Williams into testifying against Hammond after Williams attempted to recant what he had said earlier. Williams testified at trial that he had been incarcerated in the Fulton County jail with Hammond. He told the jury that, after they had become friends, Hammond had offered him $20,000, a car, and assistance with getting a job on the outside if Williams, who was slated for release, would kill Weldon. Williams further testified that Hammond had shown him pictures of Weldon and had written down his address so that Williams could contact Hammond after they got out of jail. According to Williams, Hammond had said that Weldon needed to be killed "because she knowed too much." Williams explained that he had gone to the police with the information because he "just didn't want to see Janice [Weldon] get hurt, knowing she had kids and stuff" and added that he believed Hammond would carry out his plan to have her killed. Williams testified that he did not expect anything in return for his testimony against Hammond, although he conceded that he had failed to respond to his subpoena and so had been arrested and held as a material witness for the trial.

Eight years after the trial, however, Williams signed an affidavit telling a much different story. In the 1998 affidavit Williams swore that "I had agreed to testify that Emanuel Hammond had offered me money to kill Janice Weldon. It wasn't true but at the time I had a very bad heroin addiction and I thought that if I agreed to testify I would get out of jail faster. . . ." Williams also claimed that he changed his mind and decided not to testify against Hammond, but the prosecutor had told him that if he refused to testify he would be falsely charged with other crimes and sent to prison. And if he agreed to testify, charges pending against him would be reduced or dropped. Williams said that he had been in heroin withdrawal and just wanted to get the whole thing over with so he could return to the street. The affidavit does not state that Williams told the prosecutor that his statements incriminating Hammond were false, only that he had changed his mind about testifying and then that the prosecutor had pressured him back into doing it.

After comparing Williams' testimony to his affidavit, the district court found that the affidavit was an after-the-fact fabrication and so refused to give it any weight. District Court Order, at 68-69. The court observed that Williams' 1998 allegations against the prosecutor were vague. It also noted that the prosecutor could not have agreed to drop any pending charges against Williams, as the affidavit claimed, because none were pending at that time. Moreover, Williams' trial testimony against Hammond was corroborated by the handwritten note containing Hammond's address that had been given to Williams and admitted into evidence at trial. In view of all the facts and circumstances, the district court made a 1310 factfinding *1310 that the story contained in Williams' affidavit was a lie.

We review the district court's factfindings only for clear error. *United States v. Hogan*, 986 F.2d 1364, 1371 (11th Cir. 1993). Hammond has not argued that the district court's finding that the prosecutor did not bully him into testifying was clear error, and we do not believe it was. As a result, this *Brady* claim has no factual basis. A prosecutor cannot be required to disclose that he bullied and threatened a witness when he did not.

E.

Hammond claims that the State suppressed evidence that Phillip Williams also had an extensive criminal record and a history of drug abuse. He argues that information about Williams' drug habit and prior convictions could have been used to impeach Williams' testimony.

Again, the record contradicts Hammond's claim. During Williams' cross-examination, Hammond's trial counsel asked him:

> Q. But you were in [jail] for possession of cocaine, weren't you?
>
> A. Yes.
>
> Q. And how often do you use cocaine?
>
> * * *
>
> A. Once, twice a week.
>
> Q. And how long have you used it?
>
> A. About two or three years.

Trial counsel also put into evidence certified copies of Williams' five prior convictions — two convictions for theft, each with a 12-month sentence; a conviction for theft with a 9-month sentence; a conviction for robbery with a 5-year sentence; and a drug conviction with a 2-year sentence. Hammond's trial counsel obviously had a lot of evidence of Williams' drug use and prior convictions, and Hammond has not specified what else, if anything, was suppressed.

F.

Hammond claims that the State failed to disclose that it sent the sawed-off shotgun it alleged was the murder weapon for forensic comparison to the wadding found by Love's body. He offers an inventive conspiracy theory, which goes like this: the State surreptitiously removed the shotgun from the evidentiary exhibits after it had been marked as an exhibit; the State had the shotgun tested; the test revealed that it was not the same shotgun that had fired the wadding found by Love's body; the State then hid that result from the defense; and to make the cover-up complete, it secretly slipped the shotgun back into evidence. Thus, Hammond argues that the prosecutor lied when he told the jury that the shotgun was the murder weapon because the prosecutor allegedly knew about the alleged negative result of the alleged forensic test.

While this claim may be firmly moored in Hammond's imagination, it is unmoored from any evidence in the record. His *Giglio* claim that the prosecutor lied about the shotgun being the murder weapon requires him to demonstrate that the prosecutor knew the shotgun was not the murder weapon. Not only is there no evidence the prosecutor knew that fact, there is also no evidence it was a fact. And there is plenty of evidence the shotgun was in fact the murder weapon. Julie Love was killed by a blast to the head that was "suggestive of a shotgun wound," and a shotgun wadding was found in the decaying matter close to the fragments of Julie Love's
1311 skull.[5] That *1311 wadding came not just from a 12-gauge shotgun, but from a sawed-off 12-gauge shotgun, precisely the same type of shotgun admitted into evidence. Michael Dominick testified that he had bought that sawed-off 12-gauge shotgun from Hammond, and he identified it by its missing trigger guard and by a string he had attached. Dominick added that Hammond had brought him the gun "about three or four weeks" before an August 1988 police raid. (Love had been killed in July of that same year.) Porter also identified the shotgun as the one that Hammond had used to murder Love. Hammond himself even acknowledged that he had seen the shotgun before, although he told the jury that it had belonged to Weldon, and that she, not he, had sold it to Dominick.

[5] The medical examiner testified:

> Q. Dr. Hanzlick, in front of you I have placed state's exhibit number 68 and ask you if you can identify that.

* * *

A. State's exhibit 68 is a pink, somewhat distorted shotgun wadding identical to the one that I removed from the ground the day that I examined the area around Julie Love's remains.

Q. Have you seen shotgun wadding before?

A. Yes, I have.

Q. Have you ever seen shotgun wadding in that condition?

A. I haven't seen one this particular color with these particular defects, no, but I've seen ones that in general are similar.

Q. But the only time you've seen one identical to this was at the crime scene?

A. Yes.

Q. And where was that found?

A. This was found in the soil or humus or decaying matter adjacent to the area where the skull was, skull fragments were located.

* * *

A. It's just a piece of shotgun wadding I found that was in close proximity to the fragments of her skull that bore an injury suggestive of a shotgun wound.

In the hope of countering all of that evidence, Hammond theorizes that a forensic test ruled out the shotgun as the murder weapon by finding that it did not fire the wadding found by Love's body. But despite vigorous attempts during the state habeas proceedings, Hammond failed to produce any evidence at all that the shotgun had ever been forensically tested. Forensic investigator Kelly Fite testified, "I see there's a gun on my report, but I don't recall the gun, actually." Nor did Fite have any recollection of doing any tests, or of what later happened to shotgun. Hammond has not shown that the prosecutor's assertion that the sawed-off shotgun was the murder weapon was a lie. Plenty of evidence supported the assertion that it was the murder weapon and no evidence indicates otherwise.

So all that remains of Hammond's *Brady* and *Giglio* claims about the shotgun is the assertion that the prosecution failed to notify him that it had temporarily removed the shotgun from the court for possible forensic testing. But even that assertion has no factual basis. Just hours after first locating the gun, the prosecutor told the court: "[W]e found the gun yesterday afternoon, found this witness [Dominick] this morning at 10:30. It's not like we've been sitting on a murder weapon ever since the date of the crime, believe me. Your Honor, we also expect there will be evidence from the crime lab technician." The trial court refused to admit the shotgun into evidence at that time and ordered the prosecutor to put it away so the jury would not see it. Hammond's counsel was on notice that the shotgun had not been admitted into evidence and that the prosecutor planned to seek forensic testing to connect it to the wadding. The prosecutor did not, as Hammond asserts, "surreptitiously remov[e] the gun from the courtroom in the middle of the trial." Petitioner's

Brief at 52. The shotgun had not at that point been admitted into evidence. It was still a State's exhibit. The prosecutor simply had it sent to the crime lab, after stating in open court that was what he was going to do.

The next week, the shotgun returned to the courtroom without any test results being mentioned.[6] The failure to mention any test results is the peg on which Hammond has hung his hat. He argues that the test results must have shown that the shotgun did not fire the wadding found by Love's body because otherwise the State would have introduced those test results into evidence. There is not a speck of evidence to show that there was a test indicating whether that sawed-off 12-gauge shotgun was the one that fired the wadding found with Love's body. Hammond has had an opportunity to find any evidence that there was a test, and what it showed, but he has come up with nothing.

> 6 The court's concerns about admitting the shotgun into evidence were eventually resolved, perhaps by Hammond's own testimony admitting that he recognized the shotgun but that it belonged to Weldon. It was admitted into evidence.

Hammond argues that, if the shotgun was not in fact tested, the most likely explanation is that the ballistics expert, Kelly Fite, immediately saw that the wadding was not fired by the shotgun. Hammond could have, but did not, recall Fite to the stand at trial to explain why there were no test results.

Fite was asked about test results during the state habeas evidentiary hearing. He testified that although an intake form showed that the gun had come to his lab, there was no record that it had ever been tested. He said that one possible explanation is that a quick look showed the wadding could not have come from the shotgun. Another explanation, he said, is that no test was possible because the barrel was oxidized (rusted), a condition that prevents matching the striations in a barrel to a wadding. That explanation is by far the more likely one because just a few days before Fite received the gun, Dominick, who had bought it from Hammond, had testified that the barrel was in fact rusty:

> Q. I want you to look down the barrel of this weapon, sir, if you will. Is it rusty?
>
> A. Yes, sir.

There is a perfectly logical explanation in the record, which does not require us to assume a multi-agency conspiracy against Hammond, for the absence of any test results about the gun, negative or otherwise. It was too rusty to test. The record shows it was rusty.

There is no factual anchor for Hammond's *Brady* claim about the shotgun. His trial counsel knew that the shotgun would be sent for testing and knew that no test results came back. He actually argued that fact to the jury. In the 19 years since his conviction Hammond has not found a shred of evidence that any test was ever performed on the gun, nor has he offered any explanation for the lack of a test that is remotely as plausible as the rusted barrel preventing any useful test. There is no evidence at all that the prosecutor received exculpatory test results and hid them.

As a fallback request, Hammond seeks to have the shotgun tested now. He argues that the district court abused its discretion in refusing to order testing in view of the state habeas court's earlier refusal of his similar request. Hammond hopes that despite the poor condition of this sawed-off 12-gauge shotgun with its rusty barrel, there is some chance that a test could show that it is not the sawed-off 12-gauge shotgun that was used to murder Julie Love.

Hammond's request to have the shotgun tested comes years too late. Whatever testing he wants done now he should have asked for at the time of the trial. He could at least have asked Fite at trial if any testing had been performed. The reason he did not pursue testing is telling. Hammond's

primary strategy at trial was to portray Weldon and Porter as the murderers. Consistent with that strategy, he did not attempt to present any evidence that this shotgun was not the murder weapon. Instead, he took the position that it was the murder weapon but that it belonged to Weldon, who along with Porter had used it to kill Love. Hammond testified this shotgun was not his but he had seen it at Weldon's house before Love was murdered. He told the jury that the gun had belonged "to one of her ex-boyfriends or something; some dude she was going with had apparently left it there." Hammond also testified that at one time he had gone with Weldon to sell the shotgun and had not seen it since. To corroborate Hammond's story, his counsel called a man named Richard Cody, who testified that he had been present when Weldon, not Hammond, sold the shotgun to Dominick. Cody added that the five rocks of crack cocaine that were given for the gun went to Weldon, not to Hammond.

Hammond's counsel followed up on his strategy of pinning the murder weapon on Weldon in his closing argument, when he told the jury: "[Y]ou heard Mr. Porter take the stand and say well, I remember that [shotgun] handle. Well, if he remembers the handle it's because he used it. And then you heard Mr. Cody take the stand and said yes, I was there; Miss Weldon sold this weapon and she's the one that received the crack cocaine and not Mr. Hammond." Counsel argued to the jury, in line with his general defense theory, that Weldon and Porter had committed the crime and had framed Hammond. Though he also noted in passing the lack of forensic testing, the defense argument that Weldon had owned and used the shotgun highlights the weakness of Hammond's belated position that it was not the murder weapon after all.

In keeping with his new position, and to strengthen his argument for testing the shotgun, Hammond's brief concedes that it was, after all, his: "[T]he truth in this case — that Appellant possessed a saw-off [sic] shotgun that was not the murder weapon — was virtually valueless to the prosecution." Petitioner's Brief at 53 (emphasis and internal quotation marks omitted). At trial Hammond swore it was not his shotgun; now he insists it is. A defendant can change his positions, but he is not entitled to a post-trial fishing expedition to support his new position, which contradicts his own testimony at trial, especially when there is no reason to believe that what he belatedly seeks would be useful.

IV.

The remainder of Hammond's *Brady* claims do reach the cumulative materiality stage. "[T]he analytical process of gauging materiality begins with determining the force and effect of each individual item of favorable evidence not disclosed to the defense." *Smith*, 572 F.3d at 1346; *see also Kyles*, 514 U.S. at 437 n. 10, 115 S.Ct. at 1567 n. 10 ("We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect . . . separately."); *Maharaj v. Sec'y, Dep't of Corr.*, 432 F.3d 1292, 1310 (11th Cir. 2005) ("[T]he only way to evaluate the cumulative effect is to first examine each piece standing alone."). That means we size up each piece of evidence before aggregating it and considering the cumulative impact. We then weigh that cumulative impact against the inculpatory evidence presented at trial to decide whether our confidence in the guilty verdict is undermined. *Smith*, 572 F.3d at 1346-47; *see also Kyles*, 514 U.S. at 453, 115 S.Ct. at 1575 ("[T]he question is . . . whether we can be confident that the jury's verdict would have been the same."). *1314

A.

Hammond claims that the State suppressed the audiotape of the prosecutor's pretrial interview with Weldon and Porter. He argues that the tape would have been useful because during that interview Porter said that Weldon herself had removed Love's earrings, which contradicted

Weldon's statement that Hammond had given them to her later. Weldon's and Porter's statements remained inconsistent about the earrings.

In his 1998 affidavit, Hammond's trial counsel stated: "Nor was I provided with the audiotape . . . of the joint interview between Mr. Porter and Ms. Weldon conducted by [the prosecutor]. . . . When I reviewed the State's file, there were no audiotapes or videotapes in the file." The State has not responded to Hammond's allegation that the audiotape was not disclosed. The tape qualifies as impeachment evidence and apparently was suppressed. Accordingly, this claim reaches the materiality stage.

However, the "tendency and force," *see Kyles*, 514 U.S. at 437 n. 10, 115 S.Ct. at 1567 n. 10, of the statement about the earrings on the tape is not strong. Had the tape been disclosed, it would have revealed that Porter and Weldon disagreed at a pretrial meeting about who had removed Love's earrings.[7] But that discrepancy is a detail. It is unsurprising that two accomplices would not have the same recollection about all of the details of what happened during an hours-long crime involving kidnapping, rape, robbery, beatings, and murder. The "tendency and force" of the earring discrepancy by itself is not strong, but it still must be considered cumulatively.

[7] To the extent that the tape also would have shown that Weldon, Porter, and the prosecutor all met together before the trial, the jury was already aware of that. During her cross-examination, Weldon volunteered that she had met with Porter and the prosecutor:

> A. . . . [T]hey got me and Mr. Porter together and we would refresh our remembry.
>
> Q. You and Mr. Porter got together and you refreshed your memory? Is that what you are telling the jury?
>
> A. Yes.
>
> Q. When did you do all this?
>
> * * *
>
> Q. Was it since you have reported this murder of Julie Love?
>
> A. Yes.
>
> * * *
>
> Q. And you and Mr. Porter got together, didn't you?
>
> A. We didn't get together. We was in the same room.
>
> Q. And you all discussed it?
>
> A. Yes.

B.

Hammond claims that the State failed to disclose Christopher Fagin's account of what happened to Gwendale Turner, who was the man Weldon said in a tape-recorded interview Hammond had shot to death. In an interview with police, Fagin had said that Weldon and Hammond had robbed Turner and shot him to death. During Hammond's state habeas action, his trial counsel stated in an affidavit that "Christopher Fagin's videotaped interview with law enforcement agents regarding the College Park (Gwendale Turner) homicide was also not made available to me." Hammond claims that had his counsel been armed with Fagin's accusation, he could have impeached Weldon generally and

specifically about her efforts to minimize her criminal background. The State has not denied that the Fagin tape recording was suppressed.

The gist of Fagin's statements was that in August of 1988, he had been present when Weldon and Hammond hatched a plan to rob one of her Cobra
1315 Club customers *1315 (now believed to be Turner). Fagin had been at Weldon's house when Hammond and Turner arrived from the club. Hammond took Fagin into the next room and showed him a .38 pistol and a sawed-off shotgun. Then Hammond, Weldon, and Turner left in Hammond's car. Shortly thereafter, Fagin heard a gunshot and the car returned. Fagin then helped dump the body, get rid of Turner's car, and clean the blood out of Hammond's car.

Although Fagin's statements implicate Weldon, this is a weak *Brady* claim because Fagin's statements largely corroborate Weldon's own description of the Turner murder, which the jury heard. Weldon's tape-recorded statement about the incident, which the defense played to the jury at Hammond's trial, was quite similar to Fagin's version of what happened. Weldon stated that she met a man (now believed to be Turner) at the club, where he flashed money and tried to pick her up. She described returning to her house, where Fagin was, then leaving her house with Hammond and Turner but without Fagin. She said that she was driving when Hammond, riding in the back, suddenly shot Turner with a sawed-off shotgun. She said that she then returned to the house and cleaned up her clothes. She explained that Fagin and Hammond had returned to the body to remove Turner's shirt, which had his name on it, and to take his money.

Hammond claims that Fagin's statements show that Weldon lured Turner to his death and actively participated in his murder. In fact, that is also a fair characterization of Weldon's own statements: she lured Turner to his death at the hands of Hammond and participated in the murder as the driver. To the extent that Hammond's goal was to impeach Weldon by showing that she had been involved in violent crimes before, Fagin's statements hardly add anything to Weldon's own admissions. Further, Fagin's statements also would have provided strong inculpatory evidence against Hammond. If they had been introduced at trial, those statements would have corroborated Weldon's otherwise uncorroborated account of Hammond murdering Turner. Because the effect of Fagin's statements would have been as harmful as helpful to the defense, we have some question whether they can accurately be described as favorable. *See Johnson v. Alabama*, 256 F.3d 1156, 1189 (11th Cir. 2001) ("[T]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching . . .") (quoting *Strickler*, 527 U.S. at 281, 119 S.Ct. at 1948). Even assuming that they can be considered favorable to Hammond, the balance of the opposing effects of Fagin's statements is not much in Hammond's favor. The suppressed statements will have little "tendency and force" in undermining the State's case at the materiality stage. *See Kyles*, 514 U.S. at 437 n. 10, 115 S.Ct. at 1567 n. 10.

C.

Hammond claims that the State failed to disclose that Weldon had been given broad immunity against prosecution for her crimes. He concedes that his trial counsel knew that Weldon had received immunity in the Love case, but argues that he had not been told that Weldon would not be prosecuted for her alleged role in the crimes against Ellen or for her admitted role in the Turner murder.

In support of this claim, Hammond presents an affidavit from Weldon's attorney affirming that: "It was [his] further understanding that [Weldon] would not be prosecuted in either DeKalb County or Fulton County for any other potential criminal
1316 charges arising from incidents about which *1316 she provided information to the State."

Hammond's trial counsel stated that he was not aware "of the precise nature and scope of the immunity agreement" entered into by Weldon.

In response, the State asserts only that the suppressed immunity agreements covering the crimes against Ellen and Turner are not material. As to the "tendency and force" of Weldon's immunities, *Kyles*, 514 U.S. at 437 n. 10, 115 S.Ct. at 1567 n. 10, generally speaking if an important witness has received immunity, that is a significant fact. The Supreme Court has held that the government's failure to disclose that it had promised immunity to its most important witness is material and requires a new trial, at least where the case depends almost entirely on that witness' testimony. *Giglio*, 405 U.S. at 154-55, 92 S.Ct. at 766; *see also Moore v. Kemp*, 809 F.2d 702, 720 (11th Cir. 1987) (remanding the case to the district court for an evidentiary hearing to determine if the key government witness had been promised immunity).

However, it is not the case that every immunity agreement, or the scope of the immunity promised, is always material by itself. *See United States v. Burroughs*, 830 F.2d 1574, 1579 (11th Cir. 1987) ("Materiality is a function of the strength of the government's case. . . . In *Giglio*, the weakness of the government's case played an important role in the Supreme Court's decision."). Although Weldon was a key State witness, her testimony was supported by Porter's equally important testimony, along with that of Dominick and Williams, as well as physical evidence in the form of the body, the earrings, the bank cards, the shotgun, and the wadding. Further, the jury knew of Weldon's immunity *for the case at hand*, in which she played a significant accomplice's role in a multi-hour kidnapping, beating, robbery, rape, and murder. During his closing argument, the defense counsel stated:

> Now, [Weldon]'s gone in and said I want to tell you all this and the State says well, we're not going to prosecute you. Why? Wasn't she involved? Wasn't she there? By her own admission? Didn't she sell the earrings? Didn't she see Mr. Porter rape poor Julie Love[?] . . .

So, it was not just brought out to the jury, but also stressed, that Weldon had gained a great deal from her testimony against Hammond.

As for her immunity in the Turner and Ellen cases, Weldon's testimony about them was minimal. She testified only briefly about the crimes against Ellen. She did not testify at all about the Turner incident, which was brought up by the defense and never mentioned by the prosecution.[8] Finally, there is no evidence that Weldon's immunity in the Turner and Ellen cases stemmed from her agreement to testify against Hammond in the Love case; it is just as likely that any immunity she received for those cases was negotiated in return for her telling the police what she knew about
1317 those crimes. *1317

[8] The Turner murder was not a part of the prosecution's case against Hammond at all. Weldon had given an unsworn videotaped statement to police, which the defense later insisted on playing during the trial. After the tape was played, the judge said: "Well, the only information that the jury has about [the Turner murder] is what they've learned from the videotape that you insisted be played to the jury. Defense counsel: Yes, Your Honor. Court: So I don't recollect the State introducing any evidence of testimony concerning that matter or mentioning it in opening statement at all." The court then rejected defense counsel's request to offer further evidence related to the Turner murder; the court refused to allow the defense to deflect the focus of the trial onto a different, uncharged murder.

Central to this materiality question is the fact that the jury knew Weldon was receiving a get out of jail free card in exchange for testifying against Hammond in the Love case. The jury knew that she had a powerful incentive to do the State's bidding and testify against Hammond. *See Alderman v. Zant*, 22 F.3d 1541, 1554 (11th Cir. 1994) ("[T]he thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony."); *Haber v. Wainwright*, 756 F.2d 1520, 1524 n. 8 (11th Cir. 1985) (noting that promises of leniency for a State's witness may create "a greater incentive for the witness to try to make his testimony pleasing to the prosecutor") (citation omitted). Because of the strength of the case against Hammond, and because the jury already knew of Weldon's immunity for all the crimes against Julie Love, we cannot say that the fact she received immunity in the Turner case (about which she did not actually testify) and in Ellen's case (about which there are only suspicions, not direct evidence, that she was involved) weighs heavily in the materiality scale. It certainly is not material by itself. Of course, we will consider this evidence along with the other suppressed evidence at the cumulative materiality stage.

D.

Hammond claims that the State failed to disclose the results of the GBI's forensic tests. Before the trial the GBI had tested the interior of Hammond's Cutlass for blood. The test result stated: "Examination of the interior of the car (item 17) and piece of upholstery (item 32) fails to reveal the presence of blood." According to Hammond, that evidence suggests that Love was never in Hammond's car and that Turner was not murdered in the car as Weldon had claimed (on the tape that the defense played to the jury). The State does not dispute that the forensic report was suppressed and argues only that it is not material.

As to its "tendency and force," *Kyles*, 514 U.S. at 437 n. 10, 115 S.Ct. at 1567 n. 10, Porter testified that when Hammond threw Love into the back seat and beat her, he hit her only in the center of her back and used only the side of the barrel of his shotgun. Porter testified that there was no blood. Thus, a test result showing no blood on the upholstery of Hammond's car is consistent with Porter's testimony. The test result has little or no value as evidence for the defense.

As for Gwendale Turner, Weldon stated in her taped police interview that Hammond had taken the car to a carwash to get the blood out. And the car was not examined for a full year after the shooting. Beyond that, the Turner murder was not part of the State's evidence against Hammond. The only reason the Turner murder came up was that the defense chose to play the tape of Weldon's description of the killing. No one was on trial for killing Turner, and even if the forensic evidence tended to disprove Weldon's version of Turner's death, it was nothing more than impeachment evidence on a collateral matter. *See generally* Fed.R.Evid. 608 (forbidding impeachment by extrinsic evidence on collateral matters). Insofar as this evidence cast doubt on whether Hammond murdered Turner in the way Weldon described it in the tape recording, it would have done the defense little good in this case.

For these reasons, the suppressed evidence of the negative blood tests is not material by itself but will be considered at the cumulative materiality stage.

E.

Hammond claims that the State failed to disclose
1318 evidence that a serial *1318 killer, James Richard Conner, had confessed to killing Julie Love and passed a polygraph examination about it.

Conner told the police that he and another man had kidnapped and killed a woman he believed was Julie Love. He claimed that they had shot Love with a .38 caliber pistol and then dumped her body into a stream bed on a county line near Lake Hartwell. Conner told police all of this in April

1989, and a search and excavation of the area where Conner said he had left the body turned up nothing.

The State does not dispute that Conner's confession was suppressed but instead argues that because the statements were demonstrably false, failing to disclose them did not violate *Brady*. Assuming otherwise, we evaluate the statement for materiality.

As to the "tendency and force" of Conner's confession, *see Kyles*, 514 U.S. at 437 n. 10, 115 S.Ct. at 1567 n. 10, it is obvious that Conner was wrong about having participated in the murder of Julie Love. He was completely wrong about every important fact that he shared with police. Forensic analysis of Love's remains suggested that she was shot not with a .38 as Conner said, but instead with a shotgun, as Porter testified. Her body was dumped not in a stream bed on the county line near Lake Hartwell, as Conner said, but instead on a trash pile in a different part of Atlanta, where Porter led police. That Porter was able to take police to the body, and Conner was not, proves that Porter knew what he was talking about while Conner did not. As the district court properly found, "there is no credibility to Conner's story." District Court Order, at 73.

The bald assertion that someone else confessed to killing Love can be favorable to the defense. But a demonstrably false confession such as Conner's probably is not. Even assuming it is "favorable" for *Brady* purposes it is only barely so and is of negligible weight in the materiality scale. *Cf. Smith*, 572 F.3d at 1344 (finding that a police report "was favorable to [the petitioner], although barely . . . [and] evidence of it should be considered in the cumulative materiality analysis, even though it will not help [the petitioner] much"). We will consider it for what little weight it has at the cumulative materiality stage.

F.

Hammond claims that the State failed to disclose evidence casting suspicion on Julie Love's boyfriend, Mark Kaplan. Hammond alleges that police knew that Kaplan's alibi for the night of Love's disappearance was false, that he had been seen siphoning gas from Love's car, had been sexually involved with other women, had later discouraged investigative efforts, and had lied to police when he said that he and Love were engaged and that she often ran out of gas.

Although the State does not dispute that certain information along these lines was not disclosed, the district court correctly found that Hammond overstated it. District Court Order, at 74. The record, as cited by Hammond, does not support his allegation that Kaplan was not engaged to Love and that he was sexually involved with other women at the time. Nor does it show that he tried to subvert the police investigation into Love's disappearance. Nor does it show that he lied when he said that Love often ran out of gas; in fact, another friend of Love's told police that a neighbor had driven Love to the gas station twice before.

As for the gas siphoning, that allegation rests entirely on an anonymous tip phoned in to a television station a month after Love disappeared; 1319 it was evidently *1319 never substantiated by the police. For all the record shows, it could have been phoned in by one of Hammond's friends or family members. Anonymous tips are not admissible into evidence to prove the truth of the matter stated in the tip. *See, e.g., Miles v. Burris*, 54 F.3d 284, 288 (7th Cir. 1995) (holding that a witness' "testimony about the content of the anonymous tip was inadmissible hearsay"). As for Kaplan's alibi being "false," the truth is that the gym where Kaplan said he had been the night Julie Love disappeared simply did not have a record of his being there.

Assuming that all of these allegations of information about Kaplan are "favorable" to the defense in the *Brady* sense, they have little "tendency and force" to help the defense. *See*

Kyles, 514 U.S. at 437 n. 10, 115 S.Ct. at 1567 n. 10. Some of the alleged information is not supported by the record cites that Hammond provides for it, some of it, like the anonymous tip, is not trustworthy in the least, and the rest of it does not amount to much. Overwhelming evidence connects Weldon and Porter, and through them Hammond, to the crime. And there is no evidence suggesting that Kaplan has any connection to Weldon or Porter. The alleged information about Kaplan is not entitled to much weight when we get to the cumulative materiality stage. *See Smith*, 572 F.3d at 1344.

G.

Six *Brady* claims have reached the cumulative materiality stage. They are: (1) an inconsistency between Porter and Weldon's stories as to who removed Love's earrings; (2) Chris Fagin's statements implicating Weldon as a participant in the murder of Gwendale Turner, although Weldon already had implicated herself in it by her own taped statement, which the jury heard; (3) Weldon's receipt of immunity for the Ellen and Turner crimes, in addition to her immunity for the Love murder, which the jury knew about; (4) the forensic report that showed no blood in Hammond's car more than a year after the Love murder; (5) the demonstrably false confession of a serial killer; and (6) a collection of miscellaneous information that supposedly casts suspicion on Mark Kaplan.

Our task is to consider the aggregate effect of all of that undisclosed evidence and compare it to the inculpatory evidence presented at trial. *Smith*, 572 F.3d at 1347 (discussing balancing the weight of evidence favoring the prosecution with the new weight of evidence favoring the defense). In that manner we decide whether our confidence in the guilty verdict is undermined — whether there is a reasonable probability that, given the exculpatory or impeaching evidence, a jury would have acquitted Hammond. *Id.* (citing *Kyles*, 514 U.S. at 453, 115 S.Ct. at 1575). "Of course, the stronger the evidence of guilt to begin with, the more favorable to the defense the undisclosed evidence will have to be to create a reasonable probability that a jury would have acquitted had the evidence been disclosed." *Smith*, 572 F.3d at 1347.

The evidence against Hammond was powerful. At oral argument even Hammond's present counsel admitted that the evidence presented against him was "extraordinarily strong" and added that she did "not believe there is an attorney in Georgia who would say that that was a weak case of guilt." That is an understatement. We agree with the state trial court and the district court, both of which characterized the evidence against Hammond as "overwhelming." *Hammond II*, 452 S.E.2d at 748 (quoting the trial court); District Court Order at 76-77.

Weldon and Porter told appropriately congruent
1320 stories. Their stories checked *1320 out — the bank cards had been found where Porter said the bank machines swallowed them; Love's earrings were found through the pawn shop where Weldon said she had sold them. Both Weldon and Porter described Hammond as carrying a sawed-off shotgun that night, and Porter said it was the weapon Hammond used to kill Love; the wadding found by Love's body was fired from a sawed-off shotgun. Porter led police to the area where they found the body. They knew that Love had been shot in the head, execution style. It is undeniable that Porter and Weldon were involved in the crime, as they testified that they and Hammond were.

There was also plenty of additional, separate evidence that corroborated Porter's and Weldon's stories and pointed to Hammond as the ringleader. One surviving woman, Trinh, whose story was similar enough to Love's to be admissible against Hammond, told how he had kidnapped, assaulted, and robbed her. Hammond openly admitted that he had been involved in two different abductions of women and had gone to prison for one of them. Another woman, Ellen, testified that Hammond

had robbed, raped, stabbed, and left her for dead in the same area where Love's body was later found and just two months before Love disappeared.

Michael Dominick testified that Hammond sold him a sawed-off 12-gauge shotgun around the time of Love's disappearance; Porter identified that gun as the one Hammond had used to kill Love; and the wadding found with her body came from a 12-gauge, sawed-off shotgun. Phillip Williams also testified that Hammond, while in jail later for assaulting Weldon, tried to pay him to kill Weldon because she knew too much.

Against this mountain of inculpatory evidence, we weigh the cumulative impact of the undisclosed evidence favorable to the defense to decide whether our confidence in the guilty verdict is undermined. *Smith*, 572 F.3d at 1347. There are three basic categories of that suppressed evidence: evidence impeaching Weldon, evidence of other perpetrators, and forensic evidence. We will look at the impact of each category and then combine those impacts.

Weldon could have been impeached in some small measure by the inconsistency about how she came to have Julie Love's earrings, and the fact that she had received immunity beyond her serious crimes against Love, and possibly even by Fagin's statement about the Turner murder, which was not a part of the State's case against Hammond. But that is not much impeachment in light of all the evidence and given all the corroboration of Weldon's damning testimony against Hammond.

Fagin's statement, and perhaps the immunity she received for her participation in other crimes, does show that Weldon is a criminal. But that fact was glaringly apparent to anyone who sat through the trial. Hammond's counsel presented testimony that Weldon, who was a stripper, had sold a sawed-off shotgun to a drug dealer for five rocks of crack cocaine. Weldon herself admitted that she had known about the crimes against Ellen, which she and Hammond believed had been a murder, yet she had done nothing about it. In a taped statement she admitted a role in the robbery and murder of Gwendale Turner; she told of luring him into a robbery which led to his murder by Hammond. Weldon admitted that she had driven the car during the Love kidnapping, and for hours had served as one of Love's captors. She did nothing to help Love escape from what she knew was likely to be death at Hammond's hands. She admitted
1321 rifling through Love's purse, robbing *1321 her, and standing by while Porter raped her. She admitted that she sold Love's earrings. She admitted that she never would have turned in Hammond but for the realization that he was going to kill her too.

Everyone knew Weldon was bad. The jury knew she had participated in violent crimes before. The jury knew she had received immunity for the kidnapping, robbery, and murder of Julie Love. The jury knew she had been paid for her testimony. The additional details that would have been provided by the undisclosed evidence about the earrings, Fagin's statement concerning Weldon's role in the Turner murder, and the immunity she received for other crimes, for which no one had been charged, would have been raindrops in the waterfall of evil surrounding Weldon.

The second category of evidence — that which Hammond contends points to other people as Love's possible killers — consists of Conner's false confession and the miscellaneous information relating to Mark Kaplan. This evidence, if it can be called that, has little or no weight to contribute to the aggregate consideration for the reasons we have already discussed. *See supra* at 1320-21. Moreover, it is unconnected to any feasible defense theory. This case was a straightforward instance of two admitted accomplices in a heinous murder coming forward to confess their own involvement and turning State's evidence against the alleged principal murderer, all coupled with evidence corroborating their testimony. Given all that Weldon and Porter knew about the crime, including where Love's

body had been left and where her earrings had been sold, Hammond's only feasible defense was that Porter and Weldon had committed the crime without his knowledge and had decided to frame him. The false confession by Conner and the miscellaneous information relating to Kaplan do not connect to that defense and therefore would not have supported it.

The third category of suppressed evidence involves the lack of blood in Hammond's car when it was examined more than a year after the Love and Turner murders. Though this is exculpatory evidence and it does have some weight, its impact in this case is substantially undermined by the fact that Porter testified Love had not bled in the car and by the delay in the examination.

Against all of that evidence, we weigh the inculpatory evidence — the corroborated parts of Weldon's testimony, Porter's testimony, Williams' and Dominick's testimony, Hammond's previous similar acts, the sawed-off shotgun, and the sale of the earrings. Our confidence in the guilty verdict and the sentence of death against Hammond is intact. It has not been undermined. Therefore, the suppressed evidence is not cumulatively material. The district court correctly rejected Hammond's *Brady* claims.

V.

Next, Hammond claims that the prosecutor made five improper remarks during the closing argument at the sentencing phase of his trial.[9] The 1322 Supreme *1322 Court has held that a death sentence can be rendered unconstitutional if the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986); *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720 (1991) (stating that the same due process standard of fundamental fairness exists at the sentencing phase of a capital trial); *see also Romine v. Head*, 253 F.3d 1349, 1366 (11th Cir. 2001) ("[H]abeas relief is due to be granted for improper prosecutorial argument at sentencing only where there has been a violation of due process, and that occurs if, but only if, the improper argument rendered the sentencing stage trial fundamentally unfair.").

> 9 Specifically, Hammond now complains about the prosecutor telling the jury: that Hammond "didn't even have the guts to face you during this part of the trial"; that he had shown no signs of religious conversion or remorse and had "violated the law of God. Thou shalt not kill. . . . An eye for an eye, a tooth for a tooth, a life for a life"; that it would be unfair for Hammond "to be in prison for life and have the taxpayers house, feed, clothe him with the tax dollars of Julie Love's friends and family . . ."; that he had been a "predator [] out there on the streets roaming, looking for prey. Just like a vicious wild animal roams the jungle looking for a weaker specimen to pounce upon."; and that Love would rest easier in her grave if Hammond were executed.

That is what Hammond claims — his death sentence violated due process because some of the prosecutor's remarks during closing argument rendered the sentencing process fundamentally unfair. During the sentencing stage itself Hammond failed to object to all but one of those remarks;[10] his objection to that one remark was sustained and the court instructed the jury to disregard the remark, and it denied his motion for a mistrial. During his direct appeal Hammond did not raise an issue about that or any of the other prosecutorial remarks he now contends violated due process. The Georgia Supreme Court rejected all of the contentions that Hammond did raise on direct appeal. It did, however, remand the case for the trial court to address whether Hammond's counsel had rendered ineffective assistance, an issue raised by the Court itself. *Hammond I*, 398 S.E.2d at 175. One Justice dissented from the remand on the ground that it was a waste of time.

He explained: "The evidence of aggravation in this case was so strong, this appellant is so dangerous, his criminal history is so lengthy, and his crime was so monstrous that it is difficult to understand how the remote possibility of a defect in representation could have materially affected the outcome of the trial." *Id.* at 179 (Smith, J., dissenting).

[10] The one of these prosecutorial remarks Hammond did object to at trial is the one about his failure to testify during the sentencing stage.

On remand Hammond complained about a slew of the prosecutor's statements, but not as an independent due process claim. Instead, he raised those statements and his trial counsel's failure to object to them in the context of an ineffective assistance of counsel claim. As Hammond's new counsel understood, the remand was limited to whether trial counsel had rendered effective assistance. *See Hammond II*, 452 S.E.2d at 754 ("This case was remanded to the trial court solely to resolve the issue of ineffective assistance of counsel. Hammond correctly acknowledges that the additional issues he now wishes to raise may not be considered in this proceeding.") (internal citation omitted).

For that reason, when the trial court addressed the claim on remand, it decided it as an ineffective assistance of counsel claim. *See* Remand Order at 60 ("The Court finds that the brief 18 pages of closing argument by the prosecutor in this case did not render the sentencing proceeding fundamentally unfair. In conclusion, [defense trial counsel] was not ineffective in any manner during the sentencing phase."). Reviewing that judgment, the Georgia Supreme Court handled the claim the same way, stating that although certain parts of the 1323 prosecutor's *1323 statement were improper, "after reviewing the entire sentencing phase of [the] trial, we conclude that these remarks neither changed the result of the sentencing trial nor rendered it fundamentally unfair. Therefore, Hammond has failed to establish ineffective assistance of trial counsel with regard to this claim." *Hammond II*, 452 S.E.2d at 753 (internal citations omitted).

In this federal habeas proceeding Hammond continued his ineffective assistance of counsel approach to attacking the prosecutor's sentencing stage remarks. The district court, however, held that the state courts' rejection of that ineffective assistance claim was not contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1). In his appeal to us from the district court's judgment, however, Hammond has dropped his ineffective assistance claim about the failure to object to the remarks and instead claims that the prosecutor's remarks violated due process.

The problem for Hammond is that this due process claim is procedurally barred. *See* State Habeas Order at 4 ("Georgia law requires that errors or deficiencies in the trial be objected to at trial and pursued on appeal if possible or they will be deemed waived."). Hammond did not raise this claim as a due process claim at trial or on direct appeal. Ineffective assistance of counsel can be cause to excuse a procedural default. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986) ("Ineffective assistance of counsel, then, is cause for a procedural default."). But Hammond does not argue that to us. He does not argue that the Georgia courts unreasonably applied *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), when they held that his counsel did not render ineffective assistance by failing to object to the prosecutorial remarks, or by failing to raise the due process claim involving them on direct appeal. Hammond's straight-up due process claims are barred.

VI.

Hammond claims that his Sixth Amendment right to counsel was violated by his trial counsel's constitutionally ineffective performance as

measured under *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. He argues that his trial counsel was ineffective for: (1) failing to investigate mental health evidence and present it as mitigating circumstances; (2) introducing a videotape that suggested Hammond had committed a separate, uncharged murder; and (3) failing to move for a mistrial of the sentencing phase even though Hammond had a right to one under a Georgia statute because the prosecutor made an argument about parole eligibility.[11] *1324 1324

[11] Hammond also appears to argue that his trial counsel erroneously advised him not to accept a plea offer from the prosecution. But Hammond offers no citation to any part of the record that supports this assertion. *See* Fed.R.App.P. 28(a)(9)(A) (requiring "citations to the authorities and parts of the record on which the appellant relies").

Further, when Hammond made the plea offer argument to the Georgia Supreme Court in 1994, that court held that "[t]he record does not show that present counsel raised this issue below," and added that in any case, the claim was "based solely on conjecture," and counsel's behavior did not fall outside "the wide range of reasonable professional assistance." *Hammond II*, 452 S.E.2d at 751. Accordingly, this claim is procedurally barred because it was not raised in the trial court when that court was considering the ineffective assistance claims. *See Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994) ("[W]here a state court has ruled in the alternative, addressing both the independent state procedural ground and the merits of the federal claim, the federal court should apply the state procedural bar and decline to reach the merits of the claim." (citing *Harris v. Reed*, 489 U.S. 255, 264 n. 10, 109 S.Ct. 1038, 1044 n. 10, 103 L.Ed.2d 308 (1989))). Hammond has made no effort to explain to us why this procedural bar does not apply. Indeed, he has hardly made any argument at all about his counsel's advice to him concerning an alleged plea offer.

Under *Strickland* Hammond must make two showings. First, he must show that his counsel's performance was deficient, which means that it "fell below an objective standard of reasonableness" and was "outside the wide range of professionally competent assistance." *Id.* at 688, 690, 104 S.Ct. at 2064, 2066; *see also Smith*, 572 F.3d at 1349. In deciding whether trial counsel performed deficiently, courts are to review his actions in a "highly deferential" manner and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. To overcome *Strickland's* presumption of reasonableness, Hammond must show that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc); *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007) ("Based on this strong presumption of competent assistance, the petitioner's burden of persuasion is a heavy one: `petitioner must establish that no competent counsel would have taken the action that his counsel did take.'" (quoting *Chandler*)).[12]

[12] An industrious effort on behalf of his client on other fronts does not bar a claim that trial counsel rendered ineffective assistance in one or more specific ways. *Jefferson v. Hall*, 570 F.3d 1283, 1314 (11th Cir. 2009) (Carnes, J., dissenting) ("Adequate, or even stellar, performance in regard to one aspect of the trial does not bar a conclusion that counsel performed ineffectively in another regard."). Still, it is worth noting that even though the evidence was overwhelming that Hammond committed a horrific crime against an innocent young woman, this is not one of those cases where counsel failed to make much effort. He worked hard for

his client. *See* Remand Order at 7-31 (cataloging and discussing counsel's pretrial effort and actions).

Second, under *Strickland* Hammond must also show that, but for his counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different — that is, our confidence in the outcome must be undermined by counsel's deficient performance. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. At least, that is the standard where the deficient performance resulted in the impairment of some federal right. *See* Part VI.D.3, below.

Under AEDPA, however, Hammond must do more than satisfy the *Strickland* standard. *See* 28 U.S.C. § 2254(d). Because the Georgia courts have already rejected these ineffective assistance claims, Hammond must show that their decision to deny relief on these claims was an objectively unreasonable application of the *Strickland* standard. *See Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 1939, 167 L.Ed.2d 836 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold."); *Bell v. Cone*, 535 U.S. 685, 699, 122 S.Ct. 1843, 1852, 152 L.Ed.2d 914 (2002); *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (11th Cir. 2004) ("[T]he AEDPA adds another layer of deference. . . . [The petitioner] must also show that in rejecting his ineffective assistance of counsel claim the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner.") *1325 (internal quotation marks and citation omitted).

1325

A.

Hammond claims that his trial counsel was ineffective for failing to more diligently seek out mitigating evidence about his mental competency and intelligence. Although counsel hired a psychiatrist and psychologist to examine him, Hammond contends that was not enough. He argues that his counsel failed to have enough contact with those experts to get the best results from them. He insists that a more thorough mental health investigation would have resulted in findings that Hammond had a below-normal IQ, a history of drug use, and untreated ADHD. Another psychologist, retained by later counsel for Hammond, stated that Hammond's academic ability is at the third or fourth grade level and that at a young age he huffed gasoline and was "scarred" by a sexual experience with a prostitute. Hammond theorizes that if all of this information had been presented during his sentencing phase, it would have created a reasonable probability of a life sentence.

As *Strickland* made clear, whether counsel must seek out mental or emotional state mitigating evidence, and the lengths to which he must go in doing so, depends on the individual facts of each case. *See Strickland*, 466 U.S. at 673, 699, 104 S.Ct. at 2057, 2070 (finding it "well within the range of professionally reasonable judgments" for a defense counsel not to request a psychiatric evaluation after speaking with the defendant). In a case like this one, where trial counsel did investigate the defendant's mental state, the deficiency question is whether his decision not to investigate it further was reasonable. *See id.* at 690-91, 104 S.Ct. at 2066; *Jefferson v. Hall*, 570 F.3d 1283, 1309 (11th Cir. 2009) (holding that "Jefferson's counsel were required only to make a reasonable decision that further investigation into Jefferson's mental health was unnecessary") (internal quotation marks omitted).

The Georgia trial court decided that Hammond's counsel was not deficient for failing to order additional mental health evaluations or for failing to present as mitigating circumstance evidence what his experts had found. Remand Order at 26-31, 31 ("If anything, the record affirmatively shows that Mr. Wehunt was effective trial counsel [on this issue]."). That decision was supported by a number of findings, including the fact that: (1)

trial counsel "was successful in obtaining over $8,000 in court funds to retain not only a noted psychiatrist but also an accomplished forensic psychologist"; (2) Dr. Cheatham, the forensic psychologist, "interviewed defendant Hammond extensively, conducted a physical examination of [him], took blood and urine specimens . . . and had the specimens tested"; (3) Dr. Sutton, the psychologist, met with Hammond twice, reviewed his school and medical records, and conducted comprehensive intelligence and neuropsychological tests on him; (4) Dr. Sutton found that Hammond was "at, or slightly below, average range of intelligence" with an IQ of 83; (5) Dr. Cheatham, in his own words, failed to find "any significant signs of mental disease or impairment," and Dr. Sutton found that Hammond was not psychotic, though he did have "some personality problems." Remand Order at 26-31.

Hammond has not even argued that clear and convincing evidence contradicts any of those state court factfindings, so they stand. 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear
1326 and convincing evidence."); *1326 *Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001).

The Georgia Supreme Court affirmed the trial court's rejection of this ineffective assistance of counsel claim. It held both that the performance of Hammond's trial counsel in investigating mental health mitigating circumstances was not deficient and also that no prejudice resulted from his decisions. *Hammond II*, 452 S.E.2d at 751 ("[T]he prejudice prong of the *Strickland v. Washington* test has not been satisfied . . . [and] we cannot conclude that the investigation by and tactical judgment of Hammond's attorney was outside the wide range of reasonably effective assistance.") (internal brackets and citation omitted). We agree. Hammond's mental health was investigated. After examining him, two highly regarded experts, a psychiatrist and a psychologist, concluded that Hammond had an IQ of 83. They found no significant signs of mental disease or impairment but instead only amorphous personality problems like impulsiveness and resentfulness of authority. Hammond's counsel reasonably decided that those findings were not helpful and that it was not necessary to dig deeper. About the reasonableness of counsel's decision, the state trial court noted "[i]t is arguable that on balance, Dr. Sutton's findings would have done more harm than good for defendant Hammond." Remand Order at 29. The Georgia courts reasonably applied *Strickland* when they held that Hammond's trial counsel was not deficient in this area.

B.

Hammond also claims that his trial counsel was ineffective for showing the jury a video of Weldon's police interview in which she incriminated herself and Hammond in the Gwendale Turner murder. Hammond concedes that counsel made a strategic decision to show the video but contends that it was a foolish one. The state trial court viewed the decision as a reasonable strategic one, stating that "[t]he playing of the Weldon tape was trial strategy, not ineffective assistance of counsel." Remand Order at 41. The Georgia Supreme Court agreed, rejecting this claim with the explanation that it was "not the duty of the courts to second-guess trial counsel's choice of strategy." *Hammond II*, 452 S.E.2d at 750; *see also Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.

Hammond's counsel showed the video because he wanted to impeach Weldon. He wanted to show that she took the business of murder lightly and would happily make unsubstantiated accusations against Hammond. He wanted to show that Weldon would blame Hammond for anything. And counsel had done his legwork: he had investigated the Turner murder himself and had found photos of the victim contradicting Weldon's

account. Tr. at 428 ("[Counsel]: I want [the State] to introduce the photograph, Judge, because that photograph clearly indicates that the man was shot from the front. . . . Your Honor, I'm ready. I knew what was in the tape. I've seen the pictures. I've done all my homework and . . . I think this witness has pretty well impeached herself. . . .").[13] *1327

13 Hammond also argues that his trial counsel incompetently handled the video tape in part because he referred to the victim Turner as "Fanulanu or whatever his name was." In fact, "FNU-LNU" stands for "first name unknown, last name unknown." We do not see how that makes any difference. The remark was made when no one was using Turner's name because no one was sure who the victim was. It appears that counsel had researched possible murders and murder victims that Weldon may have been referring to on the tape and found no bodies that matched her description of that killing. The body that the prosecution believed was the right one — that of Turner, apparently — had been shot in the front, not in the back of the head, contrary to Weldon's story.

After playing the tape, counsel requested and received a limiting instruction from the judge, who charged the jury that the tape was to be considered for impeachment purposes only. Counsel repeatedly confirmed that he had conferred with Hammond about playing the tape.[14] The court asked Hammond if he "concur[red] with the strategy and tactics . . . of [his] attorney in playing the tape for the benefit of the jury," and Hammond answered that he did. Tr. at 432-33.

14 Tr. at 426 ("Court: Did you discuss with Mr. Hammond the utilization of this? [Counsel]: Yes, sir."); Tr. at 427 ("Court: Well, my question is, did you discuss with Mr. Hammond, your client, the playing of this? [Counsel]: I discussed it with him, Judge, but he had never seen the tape."); Tr. at 432 ("Court: All right. Did you discuss the contents of the tape with your client before playing the tape? [Counsel]: No, Your Honor. I gave him a summary of the contents. I told him that I intended to use it for the purposes of impeachment.").

Counsel's strategy was to show a lengthy tape of Weldon in which she discussed the Love murder somewhat inconsistently with her testimony, and at the end, glibly accused Hammond of a completely different, entirely unsubstantiated murder — one in which photos tended to contradict her account. Counsel had prepared for the State's inevitable attempt to corroborate Weldon's statements. Either way the trial court ruled, it would further his strategy.

If, on the one hand, the trial court allowed the State to corroborate Weldon's story, counsel could rebut that with photographs that proved Turner had been shot in the front — not in the back of the head as Weldon claimed. The ensuing dispute would draw the jury's attention away from the Love murder and toward this other case for which no one was on trial and for which the State had much weaker evidence against Hammond. If, on the other hand, the court refused to allow the State to corroborate Weldon's story, her statement would be left floating without any corroboration and with the jury instructed to consider it only for purposes of impeaching her testimony against Hammond. The court chose the "on the other hand" course, and for all the jury knew, there was nothing to support Weldon's story that there even was a dead victim in that other case.

The strategy was bold but Hammond's counsel had done his homework, he got his limiting instruction, and he had the support and permission of his client. Those factors bolster the Georgia Supreme Court's rejection of this ineffective assistance claim. *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ."); *see also Lobosco v. Thomas*, 928 F.2d 1054, 1057 (11th Cir. 1991) (holding that, largely because the defendant concurred in the strategy, it

was not ineffective assistance under *Strickland* for defense counsel to use his closing argument at the guilt stage of the trial to concede the defendant's guilt and begin building a case for mercy based *on* his contrition); *United States v. Weaver*, 882 F.2d 1128, 1140 (7th Cir. 1989) ("Where a defendant, fully informed of the reasonable options before him, agrees to follow a particular strategy at trial, that strategy cannot later form the basis of a claim of ineffective assistance of counsel [under *Strickland*]."); *United States v. Williams*, 631 F.2d 198, 204 (3d Cir. 1980) (no ineffective assistance 1328 existed because the defendant *1328 ultimately concurred in his trial counsel's tactical decision). Hammond has failed to convince us that the Georgia Supreme Court's decision on this ineffective assistance of counsel claim was unreasonable within the meaning of § 2254(d)(1).

C.

Finally, Hammond claims that his counsel rendered ineffective assistance by failing to move for a mistrial when, during his closing argument at the sentencing phase of the trial, the prosecutor said: "[The defense counsel is] going to tell you to give the defendant life in prison so that he may be rehabilitated. I urge you, ladies and gentlemen, to reject that. There is no life without parole in Georgia. So one day he will be a free man. One day —". Before the prosecutor could say anything more, defense counsel interrupted with an objection, stating that the prosecutor "has no evidence to that effect and it's improper and I move to instruct the jury that, to strike it." The court granted that relief, stating to the jury: "Well, I will instruct the jury that the comment made by the district attorney with respect to what may or may not happen upon the imposition of a sentence by the jury of life imprisonment is improper, incorrect. You will please disregard his comments in that regard."

Under Georgia law at the time, if he had not been sentenced to death Hammond would have been eligible for parole in either 5 or 20 years, and therefore could have been released at age 29 or 44, depending on whether the sentences imposed for his crimes were made to run concurrently or 1329 consecutively.[15] Even though *1329 Hammond would have been eligible for parole if the jury had not sentenced him to death, the action of the judge in sustaining the objection and giving a curative instruction was correct under state law.

15 Hammond was found guilty of murder, kidnapping, and armed robbery. He was convicted and sentenced to life imprisonment for the robbery and death for the murder. He was sentenced to 20 years on the kidnapping conviction. These crimes were committed on July 11, 1988, so the provisions of the Georgia Code in effect at that time control. *Hahn v. State*, 166 Ga.App. 71, 303 S.E.2d 299, 301 (1983) (holding that "the only statute under which appellants could be constitutionally sentenced . . . was that which was in effect at the time the crime was actually committed").

If Hammond had received two concurrent life sentences, instead of the death sentence, section 42-9-45 of the Georgia Code would have applied. Prior to its amendment in 1994, that section provided in relevant part:

> An inmate serving a felony sentence or felony sentences shall only be eligible for consideration for parole after the expiration of nine months of his sentence or one-third of the time of the sentences, whichever is greater. Inmates serving sentences aggregating 21 years or more shall become eligible for consideration for parole upon completion of the service of seven years.

Ga. Code Ann. § 42-9-45(b) (1988), *amended by* 1994 Ga. Laws 1959, § 15 (1994).

This provision purportedly requires defendants serving sentences of 21 years or more, which includes life sentences, to serve 7 years before becoming eligible for parole. *See id.* In *Charron v. State Board of Pardons Paroles*, 253 Ga. 274, 319 S.E.2d 453 (1984), however, the Georgia Supreme Court construed § 42-9-45(b) as precatory rather than mandatory, thus avoiding its invalidation on state constitutional grounds. *Id.* at 455. Thus, Hammond would not have been required *by statute* to serve any particular duration of two concurrent sentences (or one life sentence) before becoming eligible for parole. Indeed, we have noted that "between 1983 and 1991, the Board, to alleviate prison overcrowding, chose not to comply fully with § 42-9-45(b)." *Jones v. Ga. State Bd. of Pardons Paroles*, 59 F.3d 1145, 1147 (11th Cir. 1995). Under the Georgia Constitution, however, Hammond would have had to serve 5 years of his armed robbery sentence before becoming eligible for parole. *See* Ga. Const. art. IV, § II, ¶ II(b), *amended by* 1994 Ga. Laws 2015 (1994) ("When a person is convicted of armed robbery, the board shall not have the authority to consider such person for pardon or parole until such person has served at least five years in the penitentiary."). Thus, if Hammond had received concurrent life sentences for the armed robbery and murder, he would have been required to serve 5 years. Based on his age (24) at the time of the trial, he would have been 29 years old when he became eligible for parole. The same is true if he had just received one life sentence.

The result would have been different if Hammond had received two consecutive life sentences. In that scenario, section 42-9-39 of the Georgia Code would have applied. That section imposes restrictions on the parole eligibility of defendants receiving certain life sentences. Subsection (c) governs when a defendant receives consecutive life sentences and one of the life sentences is imposed for the crime of murder. In 1988, section 42-9-39(c) provided:

> When a person receives consecutive life sentences as the result of offenses occurring in the same series of acts and any one of the life sentences is imposed for the crime of murder, such person shall serve consecutive ten-year periods for each such sentence, up to a maximum of 30 years, before being eligible for parole consideration.

Ga. Code Ann. § 42-9-39(c) (1988), *amended by* 2006 Ga. Laws 379, § 27 (2006).

This provision did not face the same constitutional limitations as § 42-9-45(b) because the Georgia Constitution empowered the General Assembly to "prescribe the terms and conditions for the board's granting a pardon or parole to . . . [a]ny person who has received *consecutive life sentences* as the result of offenses occurring during the same series of acts." Ga. Const. art. IV, § II, ¶ 11(c) (emphasis added). Thus, if Hammond had received consecutive life sentences for the armed robbery and murder, he would have been required to serve 10 years for each life sentence, making him eligible for parole in 20 years — when he was 44 years old. *See also Davis v. State*, 255 Ga. 598, 340 S.E.2d 869, 884 (1986) (noting that defendant receiving consecutive life sentences for murder and armed robbery would have to serve 20 years before being eligible for parole under the preamendment version of § 42-9-39(c)).

Georgia law not only forbade any argument based on parole eligibility, it provided the defendant with the option of a mistrial if such an argument was made:

> (a) No attorney at law in a criminal case shall argue to . . . the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury because pardon, parole, or clemency of any nature may be granted. . . .
>
> (b) [If such argument is made] opposing counsel shall have the right immediately to request the court to declare a mistrial, in which case it shall be mandatory upon the court to declare a mistrial. Failure to declare a mistrial shall constitute reversible error.

O.C.G.A. § 17-8-76. When asked later why he did not ask for a mistrial Hammond's counsel stated that he was "afraid that [he] just let it slip by." He said that "I was not aware at that particular time of the code section that you have reference to." Remand Order at 57 (quoting counsel).

Counsel did, however, become aware of § 17-8-76 before the time for filing a motion for a new trial expired. He read the relevant case law, he talked to other attorneys about it, and he made a conscious strategic decision not to file a motion seeking a new trial of the sentencing stage. *See* Remand Order at 58-59 (quoting counsel: "So as a result of that and after hours and hours of deliberation over it, I finally took it up on direct appeal and did not file a motion for a new trial."). It is probably just as well that counsel did not file a motion for new trial because Georgia law appears to preclude granting a new trial on § 17-8-76 grounds after the sentencing phase is over. *See Greene v. State*, 266 Ga. 439, 469 S.E.2d 129, 139 (1996), *rev'd on other grounds*, 519 U.S. 145, 117 S.Ct. 578, 136 L.Ed.2d 507 (1996); *Phillips v. State*, 176 Ga.App. 834, 338 S.E.2d 57, 58-59 (1985). *1330

Counsel raised the prosecutor's parole eligibility argument on direct appeal. The Georgia Supreme Court agreed that the prosecutor's remark about parole eligibility was improper under O.C.G.A. § 17-8-76(a), but it held that the trial court was not required to grant a mistrial on its own motion and did not err in giving the curative instruction Hammond had requested instead. *Hammond I*, 398 S.E.2d at 175 ("Our Code does not require that a mistrial be declared even without a request, and the trial court did not err by granting only the relief [a curative instruction] sought by the defendant. . . .").

1.

What all of this boils down to is the question of whether it was ineffective assistance of counsel for Hammond's counsel not to assert his state statutory right to a mistrial of the sentence proceeding at the time of the prosecutor's parole comment, a time before the sentence verdict was known. Because the state trial court and the state supreme court rejected this ineffective assistance of counsel claim on different grounds, we must first decide whether we defer under § 2254(d)(1) to the state trial court decision, the state supreme court decision, or both.

The trial court on collateral review held that counsel's failure to move for a mistrial was not deficient performance and, given that, it decided not to address the prejudice element. *See Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

The Georgia Supreme Court resolved the issue by coming at it from the other direction. It held that Hammond had failed to show prejudice and, given that, it decided not to address the performance element. *Hammond II*, 452 S.E.2d at 749 ("We need not decide whether in failing to move for a mistrial trial counsel's performance was deficient, because we conclude that this error did not undermine the reliability of the result of the sentencing trial."); *see Strickland* 466 U.S. at 697, 104 S.Ct. at 2069 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the

defendant as a result of the alleged deficiencies."). In deciding the prejudice issue against Hammond, the Georgia Supreme Court acknowledged that a request for a mistrial would have led to a different jury determining his sentence, but it concluded that "Hammond has not met his burden of showing that had a motion for mistrial been made `the [sentencing] decision reached would reasonably likely have been different.'" *Hammond II*, 452 S.E.2d at 750 (quoting *Strickland*). In explaining that conclusion, the court pointed to the overwhelming evidence of guilt and of aggravating circumstances as well as the fact that "the trial court instructed the jury that the prosecutor's statement was incorrect, improper, and should be disregarded." *Id.* at 749-50.

Hammond takes the position that by skipping to the prejudice element, the Georgia Supreme Court rejected the trial court's holding that Hammond had failed to establish the performance deficiency element. If that were so, the only decision meriting any deference under § 2254(d)(1) would be the Georgia Supreme Court's decision on the prejudice issue and we would address the performance issue *de novo*. But it is not so.

The Georgia Supreme Court did not express any disapproval of the trial court's decision on the deficient performance element. Recognizing that, 1331 Hammond argues *1331 that a state appellate court decision on one element of the ineffective assistance issue automatically erases the trial court's decision on the other element. He cites no authority for that proposition, and there are decisions that guide us away from it.

In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the state trial court and state court of appeals both rejected a petitioner's *Strickland* claim on the deficiency element. Neither court discussed the prejudice element. The Supreme Court found that the state courts' decision on the deficiency element was an unreasonable application of *Strickland*. *Id.* at 527, 123 S.Ct. at 2538. The Court then turned to the prejudice element and stated: "In assessing prejudice . . . our review is not circumscribed by a state court conclusion with respect to prejudice, as *neither* of the state courts below reached this prong of the *Strickland* analysis." *Id.* at 534, 123 S.Ct. at 2542 (emphasis added). The implication from *Wiggins* is that had *either* of the state courts reached the other prong, its decision would have been entitled to deference under § 2254(d)(1). *See also Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769, 1784, 173 L.Ed.2d 701 (2009) (noting that the reason AEDPA deference was not due is that "the Tennessee courts" did not reach the merits of the claim); *cf. Hannon v. Sec'y, Dep't of Corrs.*, 562 F.3d 1146, 1150 (11th Cir. 2009) (noting that AEDPA's deference to the factfindings of state courts "applies to fact findings made by both state trial courts and state appellate courts").

There is also the fact the *Strickland* opinion itself actually urges courts to decide ineffective assistance claims on the prejudice element if that is easier. The Supreme Court said: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. The Supreme Court of Georgia quoted that directive from *Strickland* in its opinion. *See Hammond II*, 452 S.E.2d at 750 n. 1. Under the circumstances, all we can infer from the Georgia Supreme Court's decision to resolve this ineffective assistance claim on the prejudice element is that it believed that was the easier route. We cannot conclude that it disagreed with or meant to discredit the different route the trial court took to the same destination.

Section 2254(d) speaks of deference to the "decision" that resulted from "the adjudication of the claim." The adjudication of this claim in the Georgia courts resulted in a decision that Hammond had not been denied effective assistance of counsel. Two reasons were given by the Georgia courts, one at each level of review. In deciding to give deference to both decisions, the

critical fact to us is that the Georgia Supreme Court does not appear to have disagreed with the trial court's decision on the deficiency element. The court could have easily expressed its disagreement, if any, but it did not do so. Or it could have cautioned that its decision was not to be read as implicitly agreeing with the trial court, but it did not do so. *Cf. State v. Spence*, 179 Ga.App. 750, 347 S.E.2d 612, 615 (1986) ("Finally, our decision in the present case should not be interpreted as. . . ."); *Allied Products Co. v. Green*, 175 Ga.App. 802, 334 S.E.2d 389, 390 (1985) ("Our decision in these cases is in no way to be interpreted as. . . ."); *Berman v. Rubin*, 138 Ga.App. 849, 227 S.E.2d 802, 806 (1976) ("Our decision should not be read to state or imply that. . . ."). The Georgia courts, considered collectively, gave two consistent reasons for deciding against this claim. Each reason is due deference. *1332

This conclusion is consistent with, indeed required by, the implicit holding of our recent decision in *Windom v. Secretary, Department of Corrections*, 578 F.3d 1227 (11th Cir. 2009). In that case the Georgia trial court rejected an ineffective assistance of counsel claim for lack of prejudice. *Id.* at 1249-50. The Georgia Supreme Court affirmed, but it did so on performance grounds without reaching the prejudice issue. *Id.* at 1249 n. 12. In that mixed-ruling circumstance, we granted AEDPA deference to the state trial court's prejudice holding, even though the Georgia Supreme Court did not reach it. *Id.* at 1249-51. We now make explicit the implicit holding in *Windom:* where a state trial court rejects a claim on one prong of the ineffective assistance of counsel test and the state supreme court, without disapproving that holding, affirms on the other prong, both of those state court decisions are due AEDPA deference. Unless both reasons for rejecting the claim are "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), the ineffective assistance of counsel claim is due to be rejected.

2.

We turn now to the deficient performance element of this ineffective assistance claim. Hammond's trial counsel promptly objected to the prosecutor's parole remark. He persuaded the judge to tell the jury that it was improper and incorrect and to instruct the jury to disregard it. Counsel did not ask for an automatic mistrial, to which he would have been entitled under O.C.G.A. § 17-8-76. He did not know at the time that state law entitled him to a mistrial on request. Our issue is whether the Georgia trial court's determination that the failure of Hammond's counsel to request a mistrial of the sentencing phase was not "outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066, is contrary to or an unreasonable application of *Strickland.*

Because the ineffective assistance of counsel standard is an objective one, a petitioner must establish that "no competent counsel would have taken the action that his counsel did take." *Chandler*, 218 F.3d at 1315. Under the law of this circuit the question is not why Hammond's counsel failed to move for a mistrial because of the parole remark but whether a competent attorney reasonably could have decided not to move for one. *Id.* at 1314-16. If an attorney could have reasonably decided not to abort the sentencing phase at the point the prosecutor mentioned parole, it does not matter if the actual reason trial counsel did not move for a mistrial was inattention, misguided tactics, or unawareness of the code section. *See McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008) ("[I]t matters not whether the challenged actions of counsel were the product of a deliberate strategy or mere oversight. The relevant question is not what actually motivated counsel, but what reasonably could have motivated counsel.") (internal quotation marks omitted); *Chandler*, 218 F.3d at 1316 n. 16 (approving of *Harich v. Dugger*, 844 F.2d 1464, 1470-71 (11th Cir. 1988) (en banc), and citing it as "concluding — without evidentiary

hearing on whether counsel's strategy arose from his ignorance of law — that trial counsel's performance was competent because hypothetical competent counsel reasonably could have taken action at trial identical to actual trial counsel.").[16]

1333*1333

[16] Our analysis is not affected by the fact that trial counsel asked for a mistrial in response to two other remarks the prosecutor had made earlier in his closing argument at the sentencing stage. Hammond does not contend that asking for a mistrial on those two other occasions amounted to ineffective assistance, and we have no occasion to address that question. His claim is only that failing to request a mistrial because of the parole remark was ineffective assistance. To the extent that Hammond argues the two instances in which his counsel did seek a mistrial show that the failure to seek one in this instance was not strategic, that argument assumes that we should apply a subjective standard. Under the objective standard set out in our *Chandler* decision, the question is not why this counsel failed to ask for a mistrial after the parole remark, but whether an attorney could have reasonably decided not to ask for one then. To the extent Hammond argues that his counsel's request for a mistrial in those other two instances demonstrates it was deficient performance for him not to ask for one after the parole remark, we disagree. It might just as well be said that asking for the mistrial on those two other occasions was deficient performance, while not doing so after the parole remark was effective assistance. And, of course, it is not objectively unreasonable for an attorney to change his mind or tactics during the course of a trial, or during a closing argument for that matter.

It follows that, under our circuit law, if a fully informed attorney reasonably could have decided to object to the parole remark and ask for a curative instruction but not move for a mistrial, Hammond has failed to establish the deficient performance element. And that is so even without the deference we owe the Georgia courts' decision rejecting this claim. *See generally Schriro*, 550 U.S. at 473, 127 S.Ct. at 1939 ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold.").

Viewing the matter objectively, an attorney could have reasonably decided to object and get a curative instruction without invoking the drastic option of a mistrial. There are a number of reasons an attorney could have been leery of a mistrial. First, the racial composition of the jury was favorable to Hammond, a black man accused of murdering a white woman. After five days of extensive voir dire of hundreds of potential jurors about their feelings toward race and toward the death penalty, Hammond's counsel had managed to have a jury selected that consisted of eight blacks and four whites. An attorney reasonably could have considered the jury composition favorable and not wanted to risk losing it in a do-over.

Second, the chance of benefitting from residual doubt would be reduced with a new jury. *See Jefferson*, 570 F.3d at 1305 (discussing residual doubt as a strategy); *Hannon*, 562 F.3d at 1154 ("We have noted in our circuit that this lingering doubt or residual doubt theory is very effective in some cases."); *Parker v. Sec'y, Dep't of Corrs.*, 331 F.3d 764, 787-88 (11th Cir. 2003) ("Creating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but is perhaps the most effective strategy to employ at sentencing.") (internal marks and citation omitted). If a mistrial had been declared, the new jury would be instructed that Hammond had been found guilty and then would be immersed in the horrible details of the crimes he had committed.[17] A reasonable

1334*1334 attorney could consider reducing the prospects of benefitting from any residual doubt a significant negative.[18]

[17] A defendant in Georgia does have the opportunity to offer evidence relating to guilt or innocence at a retrial of the sentencing phase. *See Alderman v. State*, 254 Ga. 206, 327 S.E.2d 168, 173 (1985). That does not mean, however, that a new jury would be as sensitive to any lingering doubts about guilt as the jury that had the heavy responsibility for determining guilt in the first instance. The new jurors would be instructed that the defendant had already been found guilty by an earlier jury and that their own responsibility was to set the punishment. An attorney reasonably could believe that in those circumstances jurors would be less open to a residual doubt argument than the jurors that had actually gone through the process of deciding whether the defendant was guilty to begin with. In addition, an attorney reasonably could be concerned that any prosecution witnesses he recalled for cross-examination before the new jury at a sentencing retrial might do better the second time around, having been through what amounts to a dress rehearsal for responding to counsel's cross-examination.

[18] The state trial court pointed out that a criminal defense attorney specializing in death penalty cases, who was called as an expert by Hammond, testified that when it comes to mitigating circumstances evidence, "residual doubt is probably the biggest mitigation there is." Remand Order at 59 n. 5.

At sentencing Hammond's trial counsel did argue residual doubt to the jury, not exclusively but forcefully. *See, e.g.*, Sentencing Transcript Vol. V at 280 (closing argument at sentence stage) ("But [the prosecutor] wants you to think that he's sitting here with all this evidence. Where is it? Where is it? That's what he wants you to believe."); *id.* at 281 ("But [the prosecutor] wants you to convict this man and say how vicious he is, because he came into this court and said I am not guilty of murder. I did not kill anyone. And I haven't killed anyone."); *id.* at 285 ("And anything he's been involved with, there may have been some violent acts, but there was an absence of one thing, and that was a death. But there was not an absence of death with Maurice Porter, was there? Maurice Porter and Janet Weldon are the two that was behind this entire act, but they want this man to pay for it.").

Third, an attorney could have reasonably believed that a new sentence hearing some months in the future would open up to reconsideration some evidentiary rulings that had been made in Hammond's favor. Trial counsel succeeded in keeping out evidence of some crimes Hammond had committed as a juvenile in 1978, 1979, and 1983. He had also managed to prevent Christopher Fagin from being called to testify about Hammond's involvement in the Gwendale Turner murder. As the state trial court found in the remand proceeding, trial counsel had "limited significantly what prior crimes the State was allowed to introduce in the sentencing phase." An attorney reasonably could worry that given months to prepare for a second sentencing phase, the State might be able to persuade the trial court to admit more of the other crimes evidence, or might unearth witnesses to still more crimes Hammond had committed.

Finally, a reasonable attorney would take into account the promptness of the objection to the prosecutor's parole remark and the equally prompt and clear curative instruction. The Supreme Court and this Court have often held that we must presume that juries follow their instructions to disregard specific remarks. *E.g., CSX Transp., Inc. v. Hensley*, ___ U.S. ___, 129 S.Ct. 2139, 2141, 173 L.Ed.2d 1184 (2009) ("The jury system is premised on the idea that rationality and careful regard for the court's instructions will confine and exclude jurors' raw emotions. Jurors routinely

serve as impartial factfinders in cases that involve sensitive, even life-and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions."); *Greer v. Miller*, 483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8, 97 L.Ed.2d 618 (1987) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence. . . ."); *United States v. Stone*, 9 F.3d 934, 938 (11th Cir. 1993) (collecting cases). By the same token, attorneys reasonably can rely on that presumption. An attorney reasonably could proceed on the premise that the jury would disregard the prosecutor's parole remark, which it was told was "improper, incorrect" and was specifically instructed to
1335 disregard. *1335

In sum, regardless of the actual reason Hammond's trial counsel did not request a mistrial based on the parole remark, an attorney in his position reasonably could have decided not to ask for one for good and adequate reasons. Therefore, not asking for a mistrial was objectively within "the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066, because it could be justified by a reasonable strategy. *See Chandler*, 218 F.3d at 1315 ("[F]or a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take."); *McClain*, 552 F.3d at 1253 ("Even if [defendant's] counsel in fact had no strategic reason for not further investigating [defendant's] history of drug abuse, counsel could have reasonably concluded that further investigation would not yield valuable evidence. . . ."). Accordingly, the Georgia trial court reasonably applied *Strickland* in denying Hammond's ineffective assistance of counsel claim because he did not establish that the failure to request a mistrial was "outside the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Alternatively, even if no deference were due the state court decision on the performance element, we would still conclude that Hammond had failed to establish it.

3.

Having found that this ineffective assistance of counsel claim fails on the performance element, we could stop here. In the interest of completeness, however, we will address the State's alternative argument that the claim also fails on the prejudice element. As we have mentioned, the Georgia Supreme Court decided it did fail for that reason. *Hammond II*, 452 S.E.2d at 749.

This is not your ordinary prejudice issue. It is an ineffective assistance prejudice issue different in kind from those that the Supreme Court and this Court have decided in the quarter century since *Strickland* was decided. All of those decisions that we have been able to find involve asserted errors of counsel that the defendant claimed deprived him of some advantage or protection that the Constitution or constitutionally protected values entitled him to have. That is not what we have here. This is a case in which the asserted error involved a state statutory right that not only does not protect or advance constitutional values or
1336 interests but also is in tension with them.[19] *1336

19 We asked the attorneys to file supplemental briefs on whether any decision had addressed this peculiar prejudice issue. The only controlling authority Hammond's present counsel pointed to is *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). That decision is not, however, one in which the Court applied *Strickland* to the failure to assert a pure state law right that did not further any federal constitutional principles or interests. Instead, *Flores-Ortega* involved counsel's alleged failure to consult with the defendant about his right to appeal the conviction. The Court expressly held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal" when there is reason to believe the

defendant would want to appeal or the defendant has demonstrated an interest in appealing. *Id.* at 480, 120 S.Ct. at 1036. In those circumstances, a failure to consult deprives the defendant of his federal constitutional right to be consulted about whether he should file a direct appeal. In its discussion of prejudice, the *Flores-Ortega* Court analogized a direct appeal to a critical stage of the trial proceeding. *Id.* at 483, 120 S.Ct. at 1038. The Court did not suggest that a direct appeal, or consultation about whether to take one, does not serve to protect federal constitutional principles or values. We believe that it does.

Although Hammond's present counsel have not argued it to us, we have also considered *Glover v. United States*, 531 U.S. 198, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001), which held that attorney error resulting in a sentence that was between 6 and 21 months higher than it should have been under the (then) mandatory federal sentencing guidelines range constituted prejudice. *Glover* is distinguishable from the present case because it involved the failure to assert a federal right, a failure that implicated the constitutional right not to be subject to a higher sentence than the law allows. (The top of the guidelines range after adjustments and departures was the equivalent of a statutory maximum in the pre- *Booker* era.). *See Ivy v. State*, 731 So.2d 601, 603 (Miss. 1999) (sentence exceeding statutory maximum is error affecting fundamental constitutional rights); *Crotts v. State*, 795 So.2d 1020, 1021 (Fla. 2d DCA 2001) (sentencing error violates substantive due process). *See generally Bozza v. United States*, 330 U.S. 160, 166, 67 S.Ct. 645, 648-49, 91 L.Ed. 818 (1947) ("It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal, or in habeas corpus proceedings.") (citations omitted); *cf. United States v. Bownes*, 405 F.3d 634, 637 (7th Cir. 2005) (due process prohibits waiver of the right to appeal a sentence in excess of the statutory maximum); *United States v. Bushert*, 997 F.2d 1343, 1351 n. 18 (11th Cir. 1993) ("It is both axiomatic and jurisdictional that a court of the United States may not impose a penalty for a crime beyond that which is authorized by statute."). The *Glover* case did not involve the failure to enforce a state law right that was in some tension with federal constitutional rights and interests.

The Georgia statute, enacted in 1957, forbids any argument that a defendant might not serve his full sentence because he could be paroled (or pardoned). O.C.G.A. § 17-8-76(a); *see generally Davis v. State*, 255 Ga. 598, 340 S.E.2d 869, 884-85 (1986). It applies to capital as well as non-capital cases. *See* § 17-8-76(a). The Supreme Court has never suggested that making a parole eligibility argument to a capital sentencing jury is unconstitutional or impedes federal constitutional values. Instead, a trilogy of Supreme Court decisions makes clear that it is constitutionally permissible to inform a jury that unless it sentences a capital defendant to death he will be eligible for parole. The import of those decisions goes beyond that. The Court's reasoning in them indicates that the Georgia statute, while permissible, not only does nothing to further federal constitutional values in the capital sentencing area but also is in some tension with them.

Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), involved a death sentence imposed on a defendant who, because of prior convictions for violent crimes, would not have been eligible for parole if the jury had sentenced him to life imprisonment. *See id.* at 156, 114 S.Ct. at 2190; *see also Shafer v. South Carolina*, 532 U.S. 36, 48, 121 S.Ct. 1263, 1271, 149 L.Ed.2d 178 (2001). The Supreme Court held in *Simmons* that capital defendants have a federal due process right to have the sentencing jury informed of their ineligibility for parole, at least

where the prosecution argues future dangerousness as a basis for a death sentence. *Simmons*, 512 U.S. at 162-66, 171, 114 S.Ct. at 2193-95, 2198 (plurality opinion of Blackmun, J., joined by Stevens, Souter, and Ginsburg, JJ.); *id.* at 176-78, 114 S.Ct. 2187, (concurring opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J.).

By the time of the decision in *Shafer v. South Carolina*, that state had enacted a new capital sentencing scheme, 532 U.S. at 46 n. 3, 121 S.Ct. at 1270 n. 3. As revised, South Carolina law provided that the only sentencing options where the jury found a statutory aggravating circumstance were death or life imprisonment without parole. *Id.* at 41, 46 n. 3, 121 S.Ct. at 1267, 1270 n. 3. Even though the judge instructed the jury that "life imprisonment means until the death of the defendant," he refused to *1337 instruct the jury, or allow defense counsel to inform it, that the defendant could not be paroled from a life sentence. *Id.* at 45, 121 S.Ct. at 1269. Instead, the judge instructed the jury that "[p]arole eligibility or ineligibility is not for your consideration." *Id.* The Supreme Court held that *Simmons* applied so that "whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's new scheme, due process requires that the jury be informed that a life sentence carries no possibility of parole." *Id.* at 51, 121 S.Ct. at 1273. Because of the failure to provide the jury with accurate information about the impossibility of parole, the death sentence was reversed. *Id.* at 55, 121 S.Ct. at 1275. The final case in the trilogy is *Kelly v. South Carolina*, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002), which extended the *Simmons* rule to cases in which future dangerousness is implied by the evidence and accentuated by the prosecutor even if he does not explicitly argue it.

The Supreme Court did not run the rule in the *Simmons* trilogy in both directions, but it did allow the states to do so. The Court said that in a state where a life-sentenced capital defendant is eligible for parole, nothing in the Constitution requires that the jury be informed of that eligibility. At the same time, the Court noted, nothing in the Constitution prevents the prosecution or judge from informing the jury about parole eligibility either. *Simmons*, 512 U.S. at 168, 114 S.Ct. at 2196 (plurality opinion); *id.* at 176 (concurring opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J.) ("In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact.").

For present purposes, what is significant is the reasoning behind the *Simmons* rule that due process requires a capital sentencing jury be informed of parole ineligibility where there is evidence of future dangerousness. In reaching that conclusion the Supreme Court recognized that "a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system," *Simmons*, 512 U.S. at 162, 114 S.Ct. at 2193 (plurality opinion), and it has a special importance in capital sentencing decisions where it is "indisputably relevant." *Id.* at 163, 114 S.Ct. at 2194. Indeed, the Court reasoned that "it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not." *Id.* Viewed from the other direction, "there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he will never be released on parole." *Id.* at 163-64, 114 S.Ct. at 2194. That is why the Court was convinced that, for the jury, parole information is "so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury." *Id.* at 164, 114 S.Ct. at 2194.

The Court explained that unless informed by the attorneys or the court, jurors lack information about parole laws and "there is a reasonable likelihood of juror confusion about the meaning of the term `life imprisonment.'" *Id.* at 169-70 n. 9, 114 S.Ct. at 2197 n. 9; *id.* at 169, 114 S.Ct. at 2197 ("It can hardly be questioned that most juries

lack accurate information about the precise meaning of `life imprisonment' as defined by the States."); *id.* at 177-78, 114 S.Ct. at 2201 (concurring opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J.) ("[C]ommon sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole."). A jury that is given a life sentence option but not told about what it means will be left "to speculate *1338 whether `life imprisonment' means life without parole or something else." *Id.* at 166, 114 S.Ct. at 2195 (plurality opinion). Failing to inform the jury about whether the defendant will be eligible for parole could lead it to "a false choice" and a "grievous misperception." *Id.* at 161-62, 114 S.Ct. at 2193. That is why concealing information about whether a life-sentenced defendant will be eligible for parole can amount to misleading the jury. *Id.* at 166 n. 5, 114 S.Ct. at 2195 n. 5.

Two members of the Court went beyond the due process holding in *Simmons* to explain why the Eighth Amendment required the same result. *Id.* at 172-74, 114 S.Ct. at 2198-99 (concurring opinion of Souter, J., joined by Stevens, J.). They pointed out that a capital sentencing jury is called upon to make "a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed." *Id.* at 172, 114 S.Ct. at 2198. That "requires provision of accurate sentencing information as an indispensable prerequisite to a reasoned determination of whether a defendant should live or die." *Id.* (internal marks and brackets omitted). That same "need for heightened reliability" requires that the jury be instructed on the terms used to describe the sentences it must consider in making "the reasoned moral choice between sentencing alternatives." *Id.*

To similar effect is *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), which upheld an instruction informing the jury that the governor had the authority to commute a sentence of life without parole to one of parole eligibility. The Court reasoned that without such information the jury might be misled; the instruction "corrects a misconception and supplies the jury with accurate information for its deliberation in selecting an appropriate sentence." *Id.* at 1009, 103 S.Ct. at 3458.

The point of our discussion is not that the Georgia parole concealment statute, O.C.G.A. § 17-8-76, is unconstitutional. It most definitely is not. *See Simmons*, 512 U.S. at 168, 114 S.Ct. at 2196 (plurality opinion); *id.* at 176-77, 114 S.Ct. 2187 (concurring opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J.); *see also Ramos*, 463 U.S. at 1013-14 n. 30, 103 S.Ct. at 3460 n. 30. The point is that the statute does not further the federal constitutional interests identified in the *Simmons* trilogy, or any others for that matter. Instead, its purpose and effect to some extent run counter to those federal constitutional interests and impede them, albeit in a way and to an extent that is not constitutionally forbidden.

As the Georgia Supreme Court has explained, the purpose of the statute is to conceal from the sentencing jury the fact that if it sentences the defendant to life, he will be parole eligible. *Davis*, 340 S.E.2d at 884. It is intended to and does have that purpose and effect even in cases, like this one, where the evidence focuses on the defendant's future dangerousness and the prosecutor stresses that factor throughout his closing argument.[20] The statute operates to prevent the jury from even knowing about, much less taking into account, an "indisputably relevant" fact that is "crucial *1339 to its sentencing determination," *Simmons*, 512, U.S. at 163-64, 114 S.Ct. at 2194 (plurality opinion). Despite the fact that "it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not," *id.* at 163, 114 S.Ct. at 2194, the Georgia statute effectively mandates that the jury view them the same. Because most jurors do not know what "life imprisonment" means, the statute leaves them to speculate, it causes confusion, and it may lead to a "false choice" and a misperception tainting their

capital sentencing decision, *id.* at 161-66, 114 S.Ct. 2187. To be sure, the taint is in favor of the defendant but it is a taint nonetheless.

> [20] *See, e.g.*, Tr. at 261 ("[H]e is too big a risk to be let back out into society."); Tr. at 262-63 ("The death sentence . . . takes the life of a murderer to prevent other murders."); Tr. at 265 ("[B]ased upon everything you have seen and heard, the defendant is a threat to society."); Tr. at 268 ("[T]he death sentence uses evil to prevent a greater evil. It takes the life of the murderer to prevent further murders. He is a menace to society."); Tr. at 270 ("Just look at his crimes. What do you think will happen to him this time? Can we afford to take that risk?").

The Georgia statute hobbles a capital sentencing jury in its attempt to make "a reasoned moral judgment" between life and death. *Id.* at 172-74, 114 S.Ct. at 2198-99 (concurring opinion of Souter, J., joined by Stevens, J.). It works against the heightened reliability required for capital sentencing, and by virtually ensuring that there will be "a reasonable likelihood of juror confusion about the meaning of the term `life imprisonment,'" *Simmons*, 512 U.S. at 169-70 n. 9, 114 S.Ct. at 2197 n. 9 (plurality opinion), which is one of the most crucial facts relevant to the sentencing decision, the statute can lead to sentences that are "arbitrarily or discriminatorily and wantonly and freakishly imposed," *id.* at 173, 114 S.Ct. at 2198 (concurring opinion of Souter, J., joined by Stevens, J.) (internal marks, ellipsis, and citations omitted). We have come a long way since *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and the decisions that came in its immediate wake. But we have not come so far that we can forget that arbitrariness and caprice are to be avoided in capital sentencing. Ignorance of crucial facts that inform the sentencing decision promotes arbitrary and capricious sentencing. We must keep that principle in mind when deciding whether it was contrary to or an unreasonable application of Supreme Court law under § 2254(d)(1) for the Georgia Supreme Court to decide that the failure of Hammond's counsel to take every available step to enforce the Georgia parole concealment statute does not undermine confidence in the outcome of the sentence proceeding.

In affirming the denial of state collateral relief on this ineffective assistance claim, the Georgia Supreme Court decided that Hammond had not shown the requisite prejudice from his counsel's failure to demand a mistrial because of the prosecutor's parole remark. *Hammond II*, 452 S.E.2d at 749-50. The court reasoned that while a motion for a mistrial would have resulted in another jury deciding Hammond's sentence, there was no reason to believe that a new jury would have reached a different result. *Id.* It pointed out that "[t]he evidence against Hammond, offered both during the guilt/innocence phase and in aggravation during the sentencing phase, was overwhelming" and that the trial judge had instructed the jury to disregard the prosecutor's remark about parole. *Id.* at 749. The court concluded that "Hammond has not met his burden of showing that had a motion for mistrial been made `the decision reached would reasonably likely have been different.'" *Id.* at 750 (quoting *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069).

Hammond's primary argument on this point is that the Georgia Supreme Court's decision about the lack of prejudice is due no deference under § 2254(d)(1) because the court looked to whether the outcome of a new sentencing proceeding before a different jury would have reached a different sentencing verdict. He argues that it instead should have looked merely to whether
1340*1340 there would have been a different result in this very sentencing proceeding — a mistrial instead of a death sentence, as it turned out. Because it asked the wrong question, Hammond argues, the Georgia Supreme Court's decision was "contrary to, or involved an unreasonable

application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1).

The problem for Hammond is that he cannot point to any Supreme Court decision that establishes what the prejudice question is when the alleged attorney error is the failure to scuttle a proceeding based on a state law right that not only does not involve enforcement of federal constitutional rights or interests but that also is in some tension with them. Hammond cannot cite any decision in which the Supreme Court has held that if an attorney fails to claim a state law right that is not grounded in any federal constitutional right or interests, courts should not look to whether there is a reasonable probability that the do-over proceeding state law provides would reach a different result.

There is language in some Supreme Court decisions that might be construed in Hammond's favor, if taken out of context, but it is only language and not a holding. That distinction is crucial because the Supreme Court has instructed us that in applying § 2254(d)(1) we are to look only to its actual holdings and not to its dicta. *See Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000) ("That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision. . . . [I]t restricts the source of clearly established law to this Court's jurisprudence."); *accord Carey v. Musladin*, 549 U.S. 70, 74, 127 S.Ct. 649, 653, 166 L.Ed.2d 482 (2006); *Yarborough v. Alvarado*, 541 U.S. 652, 660-61, 124 S.Ct. 2140, 2147, 158 L.Ed.2d 938 (2004); *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 1172, 155 L.Ed.2d 144 (2003); *Tyler v. Cain*, 533 U.S. 656, 664, 121 S.Ct. 2478, 2483, 150 L.Ed.2d 632 (2001); *see also Newland v. Hall*, 527 F.3d 1162, 1183 (11th Cir. 2008); *Stewart*, 476 F.3d at 1208; *Osborne v. Terry*, 466 F.3d 1298, 1305 (11th Cir. 2006).[21]

[21] The Supreme Court has also instructed us not to look to lower court decisions when we are deciding what is clearly established federal law for § 2254(d)(1) purposes. *See Williams*, 529 U.S. at 365, 120 S.Ct. at 1499; *see also id.* at 381, 120 S.Ct. at 1507 (Stevens, J., concurring) ("If this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar."); *Musladin*, 549 U.S. at 74, 77, 127 S.Ct. at 652, 654 (vacating a decision in which the Court of Appeals "cited its own precedent in support of its conclusion" that two Supreme Court cases clearly established a particular rule of federal law because no holding of the Supreme Court required that interpretation). We have followed that instruction in examining this prejudice issue.

Two statements in the *Williams* opinion illustrate the kind of language we are talking about here. At one place the opinion explains that counsel's deficient performance in an earlier case "had not deprived him of any substantive or procedural right to which the law entitled him." *Williams*, 529 U.S. at 392, 120 S.Ct. at 1512-13. At another place the opinion discusses whether the ineffectiveness of counsel "deprive[d] the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 393 n. 17, 120 S.Ct. at 1513 n. 17. Those two references in *Williams* to "the law" might be broadly read to include state as well as federal law, but the context in which they appear indicates otherwise and shows that the holding of the decision does not reach the present *1341 situation. In *Williams* it was "undisputed that Williams had a right — indeed, a constitutionally protected right — to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Id.* at 393, 120 S.Ct. at 1513. It was that federal constitutional right, not some state law right, which had been lost through counsel's

inaction. The Supreme Court had no occasion to decide in *Williams* the issue before us because this issue was not presented by the facts of that case.

The point is that the Supreme Court has never decided whether the prejudice standard that applies when attorney error results in loss of, or interference with, a federal constitutional right or interest also applies when the loss is only of a state law right that is not congruent with federal constitutional rights or interests. Because the Supreme Court has never decided that issue, we cannot say that the Georgia Supreme Court's resolution of the issue is contrary to or an unreasonable application of clearly established federal law. *See Wright v. Van Patten*, 552 U.S. 120, 126-27, 128 S.Ct. 743, 747, 169 L.Ed.2d 583 (2008) ("Because our cases give no clear answer to the question presented, let alone one in [petitioner's] favor, it cannot be said that the state court `unreasonably applied clearly established Federal law.'") (internal brackets altered and citation omitted); *Musladin*, 549 U.S. at 76, 127 S.Ct. at 653-54 (holding that even though Supreme Court decisions clearly established the test for inherent prejudice in cases involving state-actor conduct in the courtroom, a state court decision applying a different prejudice test for private-actor conduct was not contrary to or an unreasonable application of those decisions).

The *Musladin* case seems particularly apt here. In it the clearly established prejudice rule developed in cases involving state-actor conduct could have been extrapolated or extended to private-actor conduct, but the Supreme Court recognized that § 2254(d)(1) does not permit extrapolation or extension. Instead, that provision looks only to what the Supreme Court has actually held. For that reason, the Court concluded that "[g]iven the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court `unreasonably applied clearly established Federal law.'" 549 U.S. at 77, 127 S.Ct. at 654 (internal brackets omitted). The same is true here. Given the lack of any holding from the Supreme Court regarding the prejudice test applicable to an attorney error that forfeits only a state law right with no federal constitutional underpinnings, we cannot say the Georgia Supreme Court unreasonably applied clearly established federal law in looking to whether there is any reasonable probability of a different sentence verdict if a mistrial had been demanded and the case presented to a new jury.

Alternatively, even if the issue were before us anew, we would decide that Hammond has not shown the required prejudice from his counsel's action in objecting and requesting a curative instruction instead of moving for a mistrial. The purpose of the prejudice component of an ineffective assistance of counsel claim is to ensure the reliability and fundamental fairness of the proceeding. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064 (stating that the prejudice component "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). The Georgia parole concealment statute does not promote or safeguard the fairness or reliability of a sentence proceeding. To the contrary, as we have explained, the statute 1342*1342 suppresses truthful information and keeps the jury ignorant of crucial facts that would inform its sentencing decision. It is one thing to recognize that a state may enact a statute that keeps information about parole from the jury even though doing so hobbles the jury's ability to make a reasoned moral choice at sentencing. It is quite another thing to say that failure to enforce the remedies the state statute provides renders the sentence proceeding unfair or unreliable.

4.

We affirm the district court's denial of relief on Hammond's ineffective assistance of counsel claim relating to the prosecutor's remark about parole eligibility, which violated O.C.G.A. § 17-8-76. We do so because we believe that the Georgia courts' adjudication of that claim is not contrary to or an unreasonable application of clearly

established federal law, within the meaning of 28 U.S.C. § 2254(d)(1), as to either the performance or prejudice components of that claim. Alternatively, even if no deference were owed under § 2254(d)(1), we would reach the same conclusion.

AFFIRMED.

No. 75-491
U.S.

United States v. Agurs

427 U.S. 97 (1976)
Decided Jun 24, 1976

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 75-491.

Argued April 28, 1976. Decided June 24, 1976.

Respondent was convicted of second-degree murder for killing one Sewell with a knife during a fight. Evidence at the trial disclosed, *inter alia*, that Sewell, just before the killing, had been carrying two knives, including the one with which respondent stabbed him, that he had been repeatedly stabbed, but that respondent herself was uninjured. Subsequently, respondent's counsel moved for a new trial, asserting that he had discovered that Sewell had a prior criminal record (including guilty pleas to charges of assault and carrying a deadly weapon, apparently a knife) that would have tended to support the argument that respondent acted in self-defense, and that the prosecutor had failed to disclose this information to the defense. The District Court denied the motion on the ground that the evidence of Sewell's criminal record was not material, because it shed no light on his character that was not already apparent from the uncontradicted evidence, particularly the fact that he had been carrying two knives, the court stressing the inconsistency between the self-defense claim and the fact that Sewell had been stabbed repeatedly while respondent was unscathed. The Court of Appeals reversed, holding that the evidence of Sewell's criminal record was material and that its non-disclosure required a new trial because the jury might have returned a different verdict had the evidence been received. *Held:* The prosecutor's failure to tender Sewell's criminal record to the defense did not deprive respondent of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment, where it appears that the record was not requested by defense counsel and gave rise to no inference of perjury, that the trial judge remained convinced of respondent's guilt beyond a reasonable doubt after considering the criminal record in the context of the entire record, and that the judge's firsthand appraisal of the entire record was thorough and entirely reasonable. *Mooney* v. *Holohan*, 294 U. S. 103; *Brady* v. *Maryland*, 373 U. S. 83, distinguished. Pp. 103-114.

(a) A prosecutor does not violate the constitutional duty of *98 disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial. Pp. 107-109.

(b) Whether or not procedural rules authorizing discovery of everything that might influence a jury might be desirable, the Constitution does not demand such broad discovery; and the mere possibility that an item of undisclosed information might have aided the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense. Pp. 109-110.

(c) Nor is the prosecutor's constitutional duty of disclosure measured by his moral culpability or willfulness; if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor. P. 110.

(d) The proper standard of materiality of undisclosed evidence, and the standard applied by the trial judge in this case, is that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed. Pp. 112-114.

167 U. S. App. D. C. 28, 510 F. 2d 1249, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 114.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Thornburgh, John F. Cooney, Jerome M. Feit*, and *Robert H. Plaxico*.

Edwin J. Bradley argued the cause for respondent. With him on the brief were *Michael E. Geltner, William Greenhalgh*, and *Sherman L. Cohn.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

After a brief interlude in an inexpensive motel room, respondent repeatedly stabbed James Sewell, causing his death. She was convicted of second-degree murder. The question before us is
99 whether the prosecutor's failure *99 to provide defense counsel with certain background information about Sewell, which would have tended to support the argument that respondent acted in self-defense, deprived her of a fair trial under the rule of *Brady* v. *Maryland*, 373 U. S. 83. The answer to the question depends on (1) a review of the facts, (2) the significance of the failure of defense counsel to request the material, and (3) the standard by which the prosecution's failure to volunteer exculpatory material should be judged.

I

At about 4:30 p. m. on September 24, 1971, respondent, who had been there before, and Sewell, registered in a motel as man and wife. They were assigned a room without a bath. Sewell was wearing a bowie knife in a sheath, and carried another knife in his pocket. Less than two hours earlier, according to the testimony of his estranged wife, he had had $360 in cash on his person.

About 15 minutes later three motel employees heard respondent screaming for help. A forced entry into their room disclosed Sewell on top of respondent struggling for possession of the bowie knife. She was holding the knife; his bleeding hand grasped the blade; according to one witness he was trying to jam the blade into her chest. The employees separated the two and summoned the authorities. Respondent departed without comment before they arrived. Sewell was dead on arrival at the hospital.

Circumstantial evidence indicated that the parties had completed an act of intercourse, that Sewell had then gone to the bathroom down the hall, and that the struggle occurred upon his return. The contents of his pockets were in disarray on the dresser and no money was found; the jury may have inferred that respondent took Sewell's money and that the fight started when Sewell re-entered
100 the room and saw what she was doing. *100

On the following morning respondent surrendered to the police. She was given a physical examination which revealed no cuts or bruises of any kind, except needle marks on her upper arm. An autopsy of Sewell disclosed that he had several deep stab wounds in his chest and abdomen, and a

number of slashes on his arms and hands, characterized by the pathologist as "defensive wounds."[1]

[1] The alcohol level in Sewell's blood was slightly below the legal definition of intoxication.

Respondent offered no evidence. Her sole defense was the argument made by her attorney that Sewell had initially attacked her with the knife, and that her actions had all been directed toward saving her own life. The support for this self-defense theory was based on the fact that she had screamed for help. Sewell was on top of her when help arrived, and his possession of two knives indicated that he was a violence-prone person.[2] It took the jury about 25 minutes to elect a foreman and return a verdict.

[2] Moreover, the motel clerk testified that Sewell's wife had said he "would use a knife"; however, Mrs. Sewell denied making this statement. There was no dispute about the fact that Sewell carried the bowie knife when he registered.

Three months later defense counsel filed a motion for a new trial asserting that he had discovered (1) that Sewell had a prior criminal record that would have further evidenced his violent character; (2) that the prosecutor had failed to disclose this information to the defense; and (3) that a recent opinion of the United States Court of Appeals for the District of Columbia Circuit made it clear that such evidence was admissible even if not known to the defendant.[3] Sewell's prior record included a plea of guilty to a charge of assault and carrying
101 *101 a deadly weapon in 1963, and another guilty plea to a charge of carrying a deadly weapon in 1971. Apparently both weapons were knives.

[3] See *United States* v. *Burks*, 152 U. S. App. D. C. 284, 286, 470 F. 2d 432, 434 (1972).

The Government opposed the motion, arguing that there was no duty to tender Sewell's prior record to the defense in the absence of an appropriate request; that the evidence was readily discoverable in advance of trial and hence was not the kind of "newly discovered" evidence justifying a new trial; and that, in all events, it was not material.

The District Court denied the motion. It rejected the Government's argument that there was no duty to disclose material evidence unless requested to
102 do so,[4] *102 assumed that the evidence was admissible, but held that it was not sufficiently material. The District Court expressed the opinion that the prior conviction shed no light on Sewell's character that was not already apparent from the uncontradicted evidence, particularly the fact that he carried two knives; the court stressed the inconsistency between the claim of self-defense and the fact that Sewell had been stabbed repeatedly while respondent was unscathed.

[4] "THE COURT: What are you saying? How can you request that which you don't know exists. That is the very essence of Brady.

"THE COURT: Are you arguing to the Court that the status of the law is that if you have a report indicating that fingerprints were taken and that the fingerprints on the item . . . which the defendant is alleged to have assaulted somebody turn out not to be the defendant's, that absent a specfic request for that information, you do not have any obligation to defense counsel?

"MR. CLARKE: No, Your Honor. There is another aspect which comes to this, and that is whether or not the Government knowingly puts on perjured testimony. It has an obligation to correct that perjured testimony.

"THE COURT: I am not talking about perjured testimony. You don't do anything about it. You say nothing about it. You have got the report there. You know that possibly it could be exculpatory. Defense counsel doesn't know about it. He has been misinformed about it. Suppose he doesn't know about it. And because he has made no specific request for that information,

you say that the status of the law under Brady is that you have no obligation as a prosecutor to open your mouth?

"MR. CLARKE: No. Your Honor. . . .

"But as the materiality of the items becomes less to the point where it is not material, there has to be a request, or else the Government, just like the defense, is not on notice." App. 147-149.

The Court of Appeals reversed.[5] The court found no lack of diligence on the part of the defense and no misconduct by the prosecutor in this case. It held, however, that the evidence was material, and that its non-disclosure required a new trial because the jury might have returned a different verdict if the evidence had been received.[6]

5 167 U. S. App. D. C. 28, 510 F. 2d 1249 (1975). The opinion of the Court of Appeals disposed of the direct appeal filed after respondent was sentenced as well as the two additional appeals taken from the two orders denying motions for new trial. After the denial of the first motion, respondent's counsel requested leave to withdraw in order to enable substitute counsel to file a new motion for a new trial on the ground that trial counsel's representation had been ineffective because he did not request Sewell's criminal record for the reason that he incorrectly believed that it was inadmissible. The District Court denied that motion. Although that action was challenged on appeal, the Court of Appeals did not find it necessary to pass on the validity of that ground. We think it clear, however, that counsel's failure to obtain Sewell's prior criminal record does not demonstrate ineffectiveness.

6 Although a majority of the active judges of the Circuit, as well as one of the members of the panel, expressed doubt about the validity of the panel's decision, the court refused to rehear the case en banc.

The decision of the Court of Appeals represents a significant departure from this Court's prior holding; because we believe that that court has incorrectly interpreted the constitutional
103 requirement of due process, we reverse. *103

II

The rule of *Brady* v. *Maryland*, 373 U. S. 83, arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.

In the first situation, typified by *Mooney* v. *Holohan*, 294 U. S. 103, the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury.[7] In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair,[8] and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[9] It is this line of
104 cases on which the *104 Court of Appeals placed primary reliance. In those cases the Court has applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. Since this case involves no misconduct, and since there is no reason to question the veracity of any of the prosecution witnesses, the test of materiality followed in the *Mooney* line of cases is not necessarily applicable to this case.

7 In *Mooney* it was alleged that the petitioner's conviction was based on perjured testimony "which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him." 294 U. S., at 110.

The Court held that such allegations, if

true, would establish such fundamental unfairness as to justify a collateral attack on petitioner's conviction.

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Id.*, at 112.

8 *Pyle* v. *Kansas*, 317 U. S. 213; *Alcorta* v. *Texas*, 355 U. S. 28; *Napue* v. *Illinois*, 360 U. S. 264; *Miller* v. *Pate*, 386 U. S. 1; *Giglio* v. *United States*, 405 U. S. 150; *Donnelly* v. *DeChristoforo*, 416 U. S. 637.

9 See *Giglio*, *supra*, at 154, quoting from *Napue*, *supra*, at 271.

The second situation, illustrated by the *Brady* case itself, is characterized by a pretrial request for specific evidence. In that case defense counsel had requested the extrajudicial statements made by Brady's accomplice, one Boblit. This Court held that the suppression of one of Boblit's statements deprived Brady of due process, noting specifically that the statement had been requested and that it was "material."[10] A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.

10 "We now hold that 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." 373 U. S., at 87. Although in *Mooney* the Court had been primarily concerned with the willful misbehavior of the prosecutor, in *Brady* the Court focused on the harm to the defendant resulting from non-disclosure. See discussions of this development in Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L. J. 136 (1964); and Comment, *Brady v. Maryland* and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112 (1972).

Brady was found guilty of murder in the first degree. Since the jury did not add the words "without capital punishment" to the verdict, he was sentenced to death. At his trial Brady did not deny his involvement in the deliberate killing, but
105 testified that it was his accomplice, *105 Boblit, rather than he, who had actually strangled the decedent. This version of the event was corroborated by one of several confessions made by Boblit but not given to Brady's counsel despite an admittedly adequate request.

After his conviction and sentence had been affirmed on appeal,[11] Brady filed a motion to set aside the judgment, and later a post-conviction proceeding, in which he alleged that the State had violated his constitutional rights by suppressing the Boblit confession. The trial judge denied relief largely because he felt that Boblit's confession would have been inadmissible at Brady's trial. The Maryland Court of Appeals disagreed;[12] it ordered a new trial on the issue of punishment. It held that the withholding of material evidence, even "without guile," was a denial of due process and that there were valid theories on which the confession might have been admissible in Brady's defense.

11 220 Md. 454, 154 A. 2d 434 (1959).

12 226 Md. 422, 174 A. 2d. 167 (1961).

This Court granted certiorari to consider Brady's contention that the violation of his constitutional right to a fair trial vitiated the entire proceeding.[13] The holding that the suppression of exculpatory evidence violated Brady's right to due process was

affirmed, as was the separate holding that he should receive a new trial on the issue of punishment but not on the issue of guilt or innocence. The Court interpreted the Maryland
106 Court *106 of Appeals opinion as ruling that the confession was inadmissible on that issue. For that reason, the confession could not have affected the outcome on the issue of guilt but could have affected Brady's punishment. It was material on the latter issue but not the former. And since it was not material on the issue of guilt, the entire trial was not lacking in due process.

13 "The petitioner was denied due process of law by the State's suppression of evidence before his trial began. The proceeding must commence again from the stage at which the petitioner was overreached. The denial of due process of law vitiated the verdict and the sentence. *Rogers* v. *Richmond*, 365 U. S. 534, 545. The verdict is not saved because other competent evidence would support it. *Culombe* v. *Connecticut*, 367 U. S. 568, 621." Brief for Petitioner in *Brady* v. *Maryland*, No. 490, O. T. 1962, p. 6.

The test of materiality in a case like *Brady* in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made.[14] Indeed, this Court has not yet decided whether the prosecutor has any obligation to provide defense counsel with exculpatory information when no request has been made. Before addressing that question, a brief comment on the function of the request is appropriate.

14 See Comment, 40 U. Chi. L. Rev., *supra*, n. 10, at 115-117.

In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all *Brady* material" or for "anything exculpatory." Such a request really gives the prosecutor no
107 better notice than if no request is *107 made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. Whether we focus on the desirability of a precise definition of the prosecutor's duty or on the potential harm to the defendant, we conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all. The third situation in which the *Brady* rule arguably applies, typified by this case, therefore embraces the case in which only a general request for " *Brady* material" has been made.

We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty.

III

We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant's discovery rights. We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution. Our

construction of that Clause will apply equally to the comparable clause in the Fourteenth Amendment applicable to trials in state courts.

The problem arises in two principal contexts. First, in advance of trial, and perhaps during the course of a trial as well, the prosecutor must decide what, if anything, he should voluntarily
108 submit to defense counsel. *108 Second, after trial a judge may be required to decide whether a non-disclosure deprived the defendant of his right to due process. Logically the same standard must apply at both times. For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.

Nevertheless, there is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.

The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the Court expressly
109 rejected in *Brady*.[15] For a jury's *109 appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.

15 "In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession 'could have reduced the appellant Brady's offense below murder in the first degree.' We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a bifurcated trial (cf. *Williams* v. *New York*, 337 U. S. 241) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment." 373 U. S., at 90-91 (footnote omitted).

Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much. While expressing the opinion that representatives of the State may not "suppress substantial material evidence," former Chief Justice Traynor of the California Supreme Court has pointed out that "they are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses." *In re Imbler*, 60 Cal. 2d 554, 569, 387 P. 2d 6, 14 (1963). And this Court recently noted that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore* v. *Illinois*, 408 U. S. 786, 795.[16] The mere possibility that an
110 item of undisclosed information *110 might have

helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

16 In his opinion concurring in the judgment in *Giles* v. *Maryland*, 386 U. S. 66, 98, Mr. Justice Fortas stated:

"This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel. It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information."

Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor.[17] If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. Cf. *Giglio* v. *United States*, 405 U. S. 150, 154. Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

17 In *Brady* this Court, as had the Maryland Court of Appeals, expressly rejected the good faith or the bad faith of the prosecutor as the controlling consideration: "We now hold that 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*. The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U. S., at 87. (Emphasis added.) If the nature of the prosecutor's conduct is not controlling in a case like *Brady*, surely it should not be controlling when the prosecutor has not received a specific request for information.

As the District Court recognized in this case, there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.[18] For though the attorney for the sovereign must prosecute the
111 accused with earnestness and vigor, he *111 must always be faithful to his client's overriding interest that "justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger* v. *United States*, 295 U. S. 78, 88. This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.

18 The hypothetical example given by the District Judge in this case was fingerprint evidence demonstrating that the defendant could not have fired the fatal shot.

On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.[19] If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

19 This is the standard generally applied by lower courts in evaluating motions for new trial under Fed. Rule Crim. Proc. 33 based on newly discovered evidence. See, *e. g.*,

Ashe v. *United States*, 288 F. 2d 725, 733 (CA6 1961); *United States* v. *Thompson*, 493 F. 2d 305, 310 (CA9 1974), cert. denied, 419 U. S. 834; *United States* v. *Houle*, 490 F. 2d 167, 171 (CA2 1973), cert. denied, 417 U. S. 970; *United States* v. *Meyers*, 484 F. 2d 113, 116 (CA3 1973); *Heald* v. *United States*, 175 F. 2d 878, 883 (CA10 1949). See also 2 C. Wright, Federal Practice and Procedure § 557 (1969).

On the other hand, since we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel, we cannot consistently treat every non-disclosure as though it were error. It necessarily follows that the judge should not order a new trial
112 every time he is unable to *112 characterize a non-disclosure as harmless under the customary harmless-error standard. Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his "conviction is sure that the error did not influence the jury, or had but very slight effect." *Kotteakos* v. *United States*, 328 U. S. 750, 764. Unless every non-disclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt.[20] 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. This means that the omission must be evaluated in the context of the entire
113 record.[21] If there is no reasonable doubt about *113 guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

20 It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense, 74 Yale L. J. 136 (1964). Such a standard would be unacceptable for determining the materiality of what has been generally recognized as " *Brady* material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

21 "If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only had a brief glimpse, the result might well be different." Comment, 40 U. Chi. L. Rev., *supra*, n. 10, at 125.

This statement of the standard of materiality describes the test which courts appear to have applied in actual cases although the standard has been phrased in different language.[22] It is also the standard which the trial judge applied in this case.

He evaluated the significance of Sewell's prior criminal record in the context of the full trial which he recalled in detail. Stressing in particular the incongruity of a claim that Sewell was the aggressor with the evidence of his multiple wounds and respondent's unscathed condition, the trial judge indicated his unqualified opinion that
114 respondent was guilty. He *114 noted that Sewell's prior record did not contradict any evidence offered by the prosecutor, and was largely cumulative of the evidence that Sewell was wearing a bowie knife in a sheath and carrying a second knife in his pocket when he registered at the motel.

22 See, *e. g.*, *Stout* v. *Cupp*, 426 F. 2d 881, 882-883 (CA9 1970); *Peterson* v. *United States*, 411 F. 2d 1074, 1079 (CA8 1969); *Lessard* v. *Dickson*, 394 F. 2d 88, 90-92 (CA9 1968), cert. denied, 393 U. S. 1004; *United States* v. *Tomaiolo*, 378 F. 2d 26, 28 (CA2 1967). One commentator has identified three different standards this way:

"As discussed previously, in earlier cases the following standards for determining materiality for disclosure purposes were enunciated: (1) evidence which may be merely helpful to the defense; (2) evidence which raised a reasonable doubt as to defendant's guilt; (3) evidence which is of such a character as to create a substantial likelihood of reversal." Comment, Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure, 59 Iowa L. Rev. 433, 445 (1973).

See also Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 Col. L. Rev. 858 (1960).

Since the arrest record was not requested and did not even arguably give rise to any inference of perjury, since after considering it in the context of the entire record the trial judge remained convinced of respondent's guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender Sewell's record to the defense did not deprive respondent of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment. Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today holds that the prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence. But once having recognized the existence of a duty to volunteer exculpatory evidence, the Court so narrowly defines the category of "material" evidence embraced by the duty as to deprive it of all meaningful content.

In considering the appropriate standard of materiality governing the prosecutor's obligation to volunteer exculpatory evidence, the Court observes:

"[T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply
115 been *115 discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal [the standard generally applied to a motion under Fed. Rule Crim. Proc. 33 based on newly discovered evidence[1]]. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Ante*, at 111 (footnote omitted).

[1] The burden generally imposed upon such a motion has also been described as a burden of demonstrating that the newly discovered evidence would probably produce a different verdict in the event of a retrial. See, *e. g.*, *United States* v. *Kahn*, 472 F. 2d 272, 287 (CA2 1973); *United States* v. *Rodriguez*, 437 F. 2d 940, 942 CA5 1971); *United States* v. *Curran*, 465 F. 2d 260, 264 (CA7 1972).

I agree completely.

The Court, however, seemingly forgets these precautionary words when it comes time to state the proper standard of materiality to be applied in cases involving neither the knowing use of perjury nor a specific defense request for an item of information. In such cases, the prosecutor commits constitutional error, the Court holds, "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Ante*, at 112. As the Court's subsequent discussion makes clear, the defendant challenging the prosecutor's failure to disclose evidence is entitled to relief, in the Court's view, only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. The burden thus imposed on the defendant is at least as "severe" as, if not more
116 *116 "severe" than,[2] the burden he generally faces on a Rule 33 motion. Surely if a judge is able to say that evidence actually creates a reasonable doubt as to guilt in his mind (the Court's standard), he would also conclude that the evidence "probably would have resulted in acquittal" (the general Rule 33 standard). In short, in spite of its own salutary precaution, the Court treats the case in which the prosecutor withholds evidence no differently from the case in which evidence is newly discovered from a neutral source. The "prosecutor's obligation to serve the cause of justice" is reduced to a status, to borrow the Court's words, of "no special significance." *Ante*, at 111.

[2] See *United States* v. *Keogh*, 391 F. 2d 138, 148 (CA2 1968), in which Judge Friendly implies that the standard the Court adopts is more severe than the standard the Court rejects.

Our overriding concern in cases such as the one before us is the defendant's right to a fair trial. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might exonerate him. See *Moore* v. *Illinois*, 408 U. S. 786, 810 (1972) (opinion of MARSHALL, J.). This fundamental notion of fairness does not pose any irreconcilable conflict for the prosecutor, for as the Court reminds us, the prosecutor "must always be faithful to his client's overriding interest that 'justice shall be done.'" *Ante*, at 111. No interest of the State is served, and no duty of the prosecutor advanced, by the suppression of evidence favorable to the defendant. On the contrary, the

prosecutor fulfills his most basic responsibility when he fully airs all the relevant evidence at his command.

I recognize, of course, that the exculpatory value to the defense of an item of information will often not be apparent to the prosecutor in advance of
117 trial. And *117 while the general obligation to disclose exculpatory information no doubt continues during the trial, giving rise to a duty to disclose information whose significance becomes apparent as the case progresses, even a conscientious prosecutor will fail to appreciate the significance of some items of information. See *United States* v. *Keogh*, 391 F. 2d 138, 147 (CA2 1968). I agree with the Court that these considerations, as well as the general interest in finality of judgments, preclude the granting of a new trial in every case in which the prosecutor has failed to disclose evidence of some value to the defense. But surely these considerations do not require the rigid rule the Court intends to be applied to all but a relatively small number of such cases.

Under today's ruling, if the prosecution has not made knowing use of perjury, and if the defense has not made a specific request for an item of information, the defendant is entitled to a new trial only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. With all respect, this rule is completely at odds with the overriding interest in assuring that evidence tending to show innocence is brought to the jury's attention. The rule creates little, if any, incentive for the prosecutor conscientiously to determine whether his files contain evidence helpful to the defense. Indeed, the rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment.

More fundamentally, the Court's rule usurps the function of the jury as the trier of fact in a criminal case. The Court's rule explicitly establishes the judge as the trier of fact with respect to evidence withheld by the prosecution. The defendant's fate is sealed so long as the evidence does not create a reasonable doubt as to guilt in the judge's mind,
118 regardless of whether the *118 evidence is such that reasonable men could disagree as to its import — regardless, in other words, of how "close" the case may be.[3]

> [3] To emphasize the harshness of the Court's rule, the defendant's fate is determined finally by the judge only if the judge does not entertain a reasonable doubt as to guilt. If evidence withheld by the prosecution does create a reasonable doubt as to guilt in the judge's mind, that does not end the case — rather, the defendant (one might more accurately say the prosecution) is "entitled" to have the case decided by a jury.

The Court asserts that this harsh standard of materiality is the standard that "courts appear to have applied in actual cases although the standard has been phrased in different language." *Ante*, at 113 (footnote omitted). There is no basis for this assertion. None of the cases cited by the Court in support of its statement suggests that a judgment of conviction should be sustained so long as the judge remains convinced beyond a reasonable
119 doubt of the defendant's guilt.[4] The prevailing *119 view in the federal courts of the standard of materiality for cases involving neither a specific request for information nor other indications of deliberate misconduct — a standard with which the cases cited by the Court are fully consistent — is quite different. It is essentially the following: If there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of conviction must be set aside.[5] This standard, unlike the Court's, reflects a recognition that the determination must be in terms of the impact of an item of evidence on the jury, and that this determination cannot always be made with
120 certainty.[6] *120

[4] In *Stout* v. *Cupp*, 426 F. 2d 881 (CA9 1970), a habeas proceeding, the court simply quoted the District Court's finding that if the suppressed evidence had been introduced, "the jury would not have reached a different result." *Id.*, at 883. There is no indication that the quoted language was intended as anything more than a finding of fact, which would, quite obviously, dispose of the defendant's claim under any standard that might be suggested. In *Peterson* v. *United States*, 411 F. 2d. 1074 (CA8 1969), the court appeared to require a showing that the withheld evidence "was 'material' and would have aided the defense." *Id.*, at 1079. The court in *Lessard* v. *Dickson*, 394 F. 2d 88 (CA9 1968), found it determinative that the withheld evidence "could hardly be regarded as being able to have much force against the inexorable array of incriminating circumstances with which [the defendant] was surrounded." *Id.*, at 91. The jury, the court noted, would not have been "likely to have had any [difficulty]" with the argument defense counsel would have made with the withheld evidence. *Id.*, at 92. Finally, *United States* v. *Tomaiolo*, 378 F. 2d 26 (CA2 1967), required the defendant to show that the evidence was "material and of some substantial use to the defendant." *Id.*, at 28.

[5] See, *e. g.*, *United States* v. *Morell*, 524 F. 2d 550, 553 (CA2 1975); *Ogden* v. *Wolff*, 522 F. 2d 816, 822 (CA8 1975); *Woodcock* v. *Amaral*, 511 F. 2d 985, 991 (CA1 1974); *United States* v. *Miller*, 499 F. 2d 736, 744 (CA10 1974); *Shuler* v. *Wainwright*, 491 F. 2d 1213, 1223 (CA5 1974); *United States* v. *Kahn*, 472 F. 2d, at 287; *Clarke* v. *Burke*, 440 F. 2d 853, 855 (CA7 1971); *Hamric* v. *Bailey*, 386 F. 2d 390, 393 (CA4 1967).

[6] That there is a significant difference between the Court's standards and what has been described as the prevailing view is made clear by Judge Friendly, writing for the court in *United States* v. *Miller*, 411 F. 2d 825 (CA2 1969). After stating the court's conclusion that a new trial was required because of the Government's failure to disclose to the defense the pretrial hypnosis of its principal witness, Judge Friendly observed:

> "We have reached this conclusion with some reluctance, particularly in light of the considered belief of the able and conscientious district judge, who has lived with this case for years, that review of the record in light of all the defense new trial motions left him 'convinced of the correctness of the jury's verdict.' We, who also have had no small exposure to the facts, are by no means convinced otherwise. The test, however, is not how the newly discovered evidence concerning the hypnosis would affect the trial judge or ourselves but whether, with the Government's case against [the defendant] already subject to serious attack, there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. We cannot conscientiously say there was not." *Id.*, at 832 (footnote omitted).

The Court approves — but only for a limited category of cases — a standard virtually identical to the one I have described as reflecting the prevailing view. In cases in which "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," *ante*, at 103, the judgment of conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Ibid.* This lesser burden on the defendant is appropriate, the Court states, primarily because the withholding of evidence contradicting testimony offered by witnesses called by the prosecution "involve[s] a corruption of the truth-seeking

function of the trial process." *Ante*, at 104. But surely the truth-seeking process is corrupted by the withholding of evidence favorable to the defense, regardless of whether the evidence is directly contradictory to evidence offered by the prosecution. An example offered by Mr. Justice Fortas serves to illustrate the point. "[L]et us assume that the State possesses information that blood was found on the victim, and that this blood is of a type which does not match that of the accused or of the victim. Let us assume that no related testimony was offered by the State." *Giles* v. *Maryland*, 386 U. S. 66, 100 (1967) (concurring in judgment). The suppression of the information unquestionably corrupts the truth-seeking process, and the burden on the defendant in establishing his entitlement to a new trial ought be no different from the burden he would face if related testimony had been elicited by the prosecution. See *id.*, at 99-101.

The Court derives its "reasonable likelihood" standard for cases involving perjury from cases
121 such as *Napue* v. *Illinois*, 360 U. S. 264 *121 (1959), and *Giglio* v. *United States*, 405 U. S. 150 (1972). But surely the results in those cases, and the standards applied, would have been no different if perjury had not been involved. In *Napue* and *Giglio*, co-conspirators testifying against the defendants testified falsely, in response to questioning by defense counsel, that they had not received promises from the prosecution. The prosecution failed to disclose that promises had in fact been made. The corruption of the truth-seeking process stemmed from the suppression of evidence affecting the overall credibility of the witnesses, see *Napue*, *supra*, at 269; *Giglio*, *supra*, at 154, and that corruption would have been present whether or not defense counsel had elicited statements from the witnesses denying that promises had been made.

It may be that, contrary to the Court's insistence, its treatment of perjury cases reflects simply a desire to deter deliberate prosecutorial misconduct. But if that were the case, we might reasonably expect a rule imposing a lower threshold of materiality than the Court imposes — perhaps a harmless-error standard. And we would certainly expect the rule to apply to a broader category of misconduct than the failure to disclose evidence that contradicts testimony offered by witnesses called by the prosecution. For the prosecutor is guilty of misconduct when he deliberately suppresses evidence that is clearly relevant and favorable to the defense, regardless, once again, of whether the evidence relates directly to testimony given in the course of the Government's case.

This case, however, does not involve deliberate prosecutorial misconduct. Leaving open the question whether a different rule might appropriately be applied in cases involving
122 deliberate misconduct,[7] I would hold that the *122 defendant in this case had the burden of demonstrating that there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. This is essentially the standard applied by the Court of Appeals, and I would affirm its judgment.

[7] It is the presence of deliberate prosecutorial misconduct and a desire to deter such misconduct, presumably, that leads the Court to recognize a rule more readily permitting new trials in cases involving a specific defense request for information. The significance of the defense request, the Court states, is simply that it gives the prosecutor notice of what is important to the defense; once such notice is received, the failure to disclose is "seldom, if ever, excusable." *Ante*, at 106. It would seem to follow that if an item of information is of such obvious importance to the defense that it could not have escaped the prosecutor's attention, its suppression should be treated in the same manner as if there had been a specific request. This is precisely the approach taken by some courts. See, *e. g., United*

States v. *Morell*, 524 F. 2d, at 553; *United States* v. *Miller*, 499 F. 2d, at 744; *United States* v. *Kahn*, 472 F. 2d, at 287; *United States* v. *Keogh*, 391 F. 2d, at 146-147.

123 *123

No. 84-48
U.S.

United States v. Bagley

473 U.S. 667 (1985)
Decided Jul 2, 1985

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-48.

Argued March 20, 1985 Decided July 2, 1985

Respondent was indicted on charges of violating federal narcotics and firearms statutes. Before trial, he filed a discovery motion requesting, *inter alia*, "any deals, promises or inducements made to [Government] witnesses in exchange for their testimony." The Government's response did not disclose that any "deals, promises or inducements" had been made to its two principal witnesses, who had assisted the Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent. But the Government did produce signed affidavits by these witnesses recounting their undercover dealing with respondent and concluding with the statement that the affidavits were made without any threats or rewards or promises of reward. Respondent waived his right to a jury trial and was tried before the District Court. The two principal Government witnesses testified about both the firearms and narcotics charges, and the court found respondent guilty on the narcotics charges but not guilty on the firearms charges. Subsequently, in response to requests made pursuant to the Freedom of Information Act and the Privacy Act, respondent received copies of ATF contracts signed by the principal Government witnesses during the undercover investigation and stating that the Government would pay money to the witnesses commensurate with the information furnished. Respondent then moved to vacate his sentence, alleging that the Government's failure in response to the discovery motion to disclose these contracts, which he could have used to impeach the witnesses, violated his right to due process under *Brady* v. *Maryland*, 373 U.S. 83, which held that the prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment. The District Court denied the motion, finding beyond a reasonable doubt that had the existence of the ATF contracts been disclosed to it during trial, the disclosure would not have affected the outcome, because the principal Government witnesses' testimony was primarily devoted to the firearms charges on which respondent was acquitted, and was exculpatory on the narcotics charges. The Court of Appeals reversed, holding that the Government's failure to disclose the requested impeachment evidence that respondent could have used to conduct an effective cross-examination of the
668 Government's principal *668 witnesses required automatic reversal. The Court of Appeals also stated that it "disagree[d]" with the District Court's conclusion that the nondisclosure was harmless beyond a reasonable doubt, noting that the witnesses' testimony was in fact inculpatory on the narcotics charges.

Held: The judgment is reversed, and the case is remanded.

719 F.2d 1462, reversed and remanded.

JUSTICE BLACKMUN delivered the opinion of the Court with respect to Parts I and II, concluding that the Court of Appeals erred in holding that the prosecutor's failure to disclose evidence that could have been used effectively to impeach important Government witnesses requires automatic reversal. Such nondisclosure constitutes constitutional error and requires reversal of the conviction only if the evidence is material in the sense that its suppression might have affected the outcome of the trial. Pp. 674-678.

JUSTICE BLACKMUN, joined by JUSTICE O'CONNOR, delivered an opinion with respect to Part III, concluding that the nondisclosed evidence at issue 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. This standard of materiality is sufficiently flexible to cover cases of prosecutorial failure to disclose evidence favorable to the defense regardless of whether the defense makes no request, a general request, or a specific request. Although the prosecutor's failure to respond fully to a specific request may impair the adversary process by having the effect of representing to the defense that certain evidence does not exist, this possibility of impairment does not necessitate a different standard of materiality. Under the standard stated above, the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. Pp. 678-684.

JUSTICE WHITE, joined by THE CHIEF JUSTICE and JUSTICE REHNQUIST, being of the view that there is no reason to elaborate on the relevance of the specificity of the defense's request for disclosure, either generally or with respect to this case, concluded that reversal was mandated simply because the Court of Appeals failed to apply the "reasonable probability" standard of materiality to the nondisclosed evidence in question. P. 685.

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined, and an opinion with respect to Part III, in which O'CONNOR, J., joined. WHITE, J., filed
669 *669 an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 685. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 685. STEVENS, J., filed a dissenting opinion, *post*, p. 709. POWELL, J., took no part in the decision of the case.

David A. Strauss argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Trott*, and *Deputy Solicitor General Frey*.

Thomas W. Hillier II argued the cause and filed a brief for respondent.–

– *John K. Van de Kamp*, Attorney General, and *Karl S. Mayer, Thomas A. Brady*, and *Charles R. B. Kirk*, Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging reversal.

JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion of the Court except as to Part III.

In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), this Court held that "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 punishment." The issue in the present case concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses.

I

In October 1977, respondent Hughes Anderson Bagley was indicted in the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes. On November 18, 24 days before trial, respondent filed a discovery motion. The sixth paragraph of that motion requested:

> "The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, and any deals, promises or
670 inducements *670 made to witnesses in exchange for their testimony." App. 18.[1]

[1] In addition, ¶ 10(b) of the motion requested "[p]romises or representations made to any persons the government intends to call as witnesses at trial, including but not limited to promises of no prosecution, immunity, lesser sentence, etc.," and ¶ 11 requested "[a]ll information which would establish the reliability of the Milwaukee Railroad Employees in this case, whose testimony formed the basis for the search warrant." App. 18-19.

The Government's two principal witnesses at the trial were James F. O'Connor and Donald E. Mitchell. O'Connor and Mitchell were state law enforcement officers employed by the Milwaukee Railroad as private security guards. Between April and June 1977, they assisted the federal Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent.

The Government's response to the discovery motion did not disclose that any "deals, promises or inducements" had been made to O'Connor or Mitchell. In apparent reply to a request in the motion's ninth paragraph for "[c]opies of all Jencks Act material,"[2] the Government produced a series of affidavits that O'Connor and Mitchell had signed between April 12 and May 4, 1977, while the undercover investigation was in progress. These affidavits recounted in detail the undercover dealings that O'Connor and Mitchell were having at the time with respondent. Each affidavit concluded with the statement, "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it."[3]

[2] The Jencks Act, 18 U.S.C. § 3500, requires the prosecutor to disclose, after direct examination of a Government witness and on the defendant's motion, any statement of the witness in the Government's possession that relates to the subject matter of the witness' testimony.

[3] Brief for United States 3, quoting Memorandum of Points and Authorities in Support of Pet. for Habeas Corpus, CV80-3592-RJK(M) (CD Cal.) Exhibits 1-9.

Respondent waived his right to a jury trial and was tried before the court in December 1977. At the
671 trial, O'Connor *671 and Mitchell testified about both the firearms and the narcotics charges. On December 23, the court found respondent guilty on the narcotics charges, but not guilty on the firearms charges.

In mid-1980, respondent filed requests for information pursuant to the Freedom of Information Act and to the Privacy Act of 1974, 5 U.S.C. § 552 and 552a. He received in response copies of ATF form contracts that O'Connor and Mitchell had signed on May 3, 1977. Each form

was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor." The printed portion of the form stated that the vendor "will provide" information to ATF and that "upon receipt of such information by the Regional Director, Bureau of Alcohol, Tobacco and Firearms, or his representative, and upon the accomplishment of the objective sought to be obtained by the use of such information to the satisfaction of said Regional Director, the United States will pay to said vendor a sum commensurate with services and information rendered." App. 22 and 23. Each form contained the following typewritten description of services:

> "That he will provide information regarding T-I and other violations committed by Hughes A. Bagley, Jr.; that he will purchase evidence for ATF; that he will cut *[sic]* in an undercover capacity for ATF; that he will assist ATF in gathering of evidence and testify against the violator in federal court." *Ibid*.

The figure "$300.00" was handwritten in each form on a line entitled "Sum to Be Paid to Vendor."

Because these contracts had not been disclosed to respondent in response to his pretrial discovery motion,[4] respondent moved under 28 U.S.C. § 672 2255 to vacate his sentence. He *672 alleged that the Government's failure to disclose the contracts, which he could have used to impeach O'Connor and Mitchell, violated his right to due process under *Brady* v. *Maryland, supra*.

> [4] The Assistant United States Attorney who prosecuted respondent stated in stipulated testimony that he had not known that the contracts existed and that he would have furnished them to respondent had he known of them. See App. to Pet. for Cert. 13a.

The motion came before the same District Judge who had presided at respondent's bench trial. An evidentiary hearing was held before a Magistrate. The Magistrate found that the printed form contracts were blank when O'Connor and Mitchell signed them and were not signed by an ATF representative until after the trial. He also found that on January 4, 1978, following the trial and decision in respondent's case, ATF made payments of $300 to both O'Connor and Mitchell pursuant to the contracts.[5] Although the ATF case agent who dealt with O'Connor and Mitchell testified that these payments were compensation for expenses, the Magistrate found that this characterization was not borne out by the record. There was no documentation for expenses in these amounts; Mitchell testified that his payment was not for expenses, and the ATF forms authorizing the payments treated them as rewards.

> [5] The Magistrate found, too, that ATF paid O'Connor and Mitchell, respectively, $90 and $80 in April and May 1977 before trial, but concluded that these payments were intended to reimburse O'Connor and Mitchell for expenses, and would not have provided a basis for impeaching O'Connor's and Mitchell's trial testimony. The District Court adopted this finding and conclusion. *Id.*, at 7a, 13a.

The District Court adopted each of the Magistrate's findings except for the last one to the effect that "[n]either O'Connor nor Mitchell expected to receive the payment of $300 or any payment from the United States for their testimony." App. to Pet. for Cert. 7a, 12a, 14a. Instead, the court found that it was "probable" that O'Connor and Mitchell expected to receive compensation, in addition to their expenses, for their assistance, "though perhaps not for their testimony." *Id.*, at 7a. The District Court also expressly rejected, *ibid.*, the Magistrate's 673 conclusion, *id.*, at 14a, that: *673

> "Because neither witness was promised or expected payment for his testimony, the United States did not withhold, during pretrial discovery, information as to any `deals, promises or inducements' to these witnesses. Nor did the United States suppress evidence favorable to the defendant, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963)."

The District Court found beyond a reasonable doubt, however, that had the existence of the agreements been disclosed to it during trial, the disclosure would have had no effect upon its finding that the Government had proved beyond a reasonable doubt that respondent was guilty of the offenses for which he had been convicted. *Id.*, at 8a. The District Court reasoned: Almost all of the testimony of both witnesses was devoted to the firearms charges in the indictment. Respondent, however, was acquitted on those charges. The testimony of O'Connor and Mitchell concerning the narcotics charges was relatively very brief. On cross-examination, respondent's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies that had been prescribed for respondent's personal use. The answers of O'Connor and Mitchell to this line of cross-examination tended to be favorable to respondent. Thus, the claimed impeachment evidence would not have been helpful to respondent and would not have affected the outcome of the trial. Accordingly, the District Court denied respondent's motion to vacate his sentence.

The United States Court of Appeals for the Ninth Circuit reversed. *Bagley* v. *Lumpkin*, 719 F.2d 1462 (1983). The Court of Appeals began by noting that, according to precedent in the Circuit, prosecutorial failure to respond to a specific *Brady* request is properly analyzed as error, and a resulting conviction must be reversed unless the error is harmless beyond a reasonable doubt. The court noted that the District Judge who had 674 presided over the bench trial *674 concluded beyond a reasonable doubt that disclosure of the ATF agreement would not have affected the outcome. The Court of Appeals, however, stated that it "disagree[d]" with this conclusion. *Id.*, at 1464. In particular, it disagreed with the Government's — and the District Court's — premise that the testimony of O'Connor and Mitchell was exculpatory on the narcotics charges, and that respondent therefore would not have sought to impeach "his own witness." *Id.*, at 1464, n. 1.

The Court of Appeals apparently based its reversal, however, on the theory that the Government's failure to disclose the requested *Brady* information that respondent could have used to conduct an effective cross-examination impaired respondent's right to confront adverse witnesses. The court noted: "In *Davis* v. *Alaska*, . . . the Supreme Court held that the denial of the `right of *effective* cross-examination' was `"constitutional error of the first magnitude"' requiring automatic reversal." 719 F.2d, at 1464 (quoting *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974)) (emphasis added by Court of Appeals). In the last sentence of its opinion, the Court of Appeals concluded: "we hold that the government's failure to provide requested *Brady* information to Bagley so that he could effectively cross-examine two important government witnesses requires an automatic reversal." 719 F.2d, at 1464.

We granted certiorari, 469 U.S. 1016 (1984), and we now reverse.

II

The holding in *Brady* v. *Maryland* requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S., at 87. See also *Moore* v. *Illinois*, 408 U.S. 786, 794-795 (1972). The Court explained in *United States* v. *Agurs*, 427 U.S. 97, 104 (1976): "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of

materiality is a concern that the suppressed
675 evidence might have affected the outcome of *675 the trial." The evidence suppressed in *Brady* would have been admissible only on the issue of punishment and not on the issue of guilt, and therefore could have affected only Brady's sentence and not his conviction. Accordingly, the Court affirmed the lower court's restriction of Brady's new trial to the issue of punishment.

The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.[6] Thus, the prosecutor is not required to deliver his entire file to defense counsel,[7] but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial:

> "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict 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
676 constitutional duty of disclosure *676 unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 U.S., at 108.

In *Brady* and *Agurs*, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. See *Giglio* v. *United States*, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S., at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue* v. *Illinois*, 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").

The Court of Appeals treated impeachment evidence as constitutionally different from exculpatory evidence. According to that court, failure to disclose impeachment evidence is "even more egregious" than failure to disclose exculpatory evidence "because it threatens the defendant's right to confront adverse witnesses."

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[6] By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but 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). See *Brady* v. *Maryland*, 373 U.S., at 87-88.

[7] See *United States* v. *Agurs*, 427 U.S. 97, 106, 111 (1976); *Moore* v. *Illinois*, 408 U.S. 786, 795 (1972). See also *California* v. *Trombetta*, 467 U.S. 479, 488, n. 8 (1984). An interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." *Giles* v. *Maryland*, 386 U.S. 66, 117 (1967) (dissenting opinion). Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.

719 F.2d, at 1464. Relying on *Davis* v. *Alaska*, 415 U.S. 308 (1974), the Court of Appeals held that the Government's failure to disclose requested impeachment evidence that the defense could use to conduct an effective cross-examination of important prosecution witnesses constitutes "`constitutional error of the first magnitude'" requiring automatic reversal. 719 F.2d, at 1464 (quoting *Davis* v. *Alaska, supra*, at 318).

This Court has rejected any such distinction between impeachment evidence and exculpatory evidence. In *Giglio* v. *United States, supra*, the Government failed to disclose impeachment evidence similar to the evidence at issue in the present case, that is, a promise made to the key
677 Government *677 witness that he would not be prosecuted if he testified for the Government. This Court said:

> "When the `reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*]. We do not, however, automatically require a new trial whenever `a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .' A finding of materiality of the evidence is required under *Brady*. . . . A new trial is required if `the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .'" 405 U.S., at 154 (citations omitted).

Thus, the Court of Appeals' holding is inconsistent with our precedents.

Moreover, the court's reliance on *Davis* v. *Alaska* for its "automatic reversal" rule is misplaced. In *Davis*, the defense sought to cross-examine a crucial prosecution witness concerning his probationary status as a juvenile delinquent. The defense intended by this cross-examination to show that the witness might have made a faulty identification of the defendant in order to shift suspicion away from himself or because he feared that his probationary status would be jeopardized if he did not satisfactorily assist the police and prosecutor in obtaining a conviction. Pursuant to a state rule of procedure and a state statute making juvenile adjudications inadmissible, the trial judge prohibited the defense from conducting the cross-examination. This Court reversed the defendant's conviction, ruling that the direct restriction on the scope of cross-examination denied the defendant "the right of effective cross-examination which `"would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart* v. *Janis*, 384
678 U.S. 1, 3.'" 415 U.S., at 318 (quoting *Smith* *678 v. *Illinois*, 390 U.S. 129, 131 (1968)). See also *United States* v. *Cronic*, 466 U.S. 648, 659 (1984).

The present case, in contrast, does not involve any direct restriction on the scope of cross-examination. The defense was free to cross-examine the witnesses on any relevant subject, including possible bias or interest resulting from inducements made by the Government. The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. As discussed above, such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of the finding of guilt." *United States* v. *Agurs*, 427 U.S., at 112, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.

III A

It remains to determine the standard of materiality applicable to the nondisclosed evidence at issue in this case. Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States* v. *Agurs*. The Court in *Agurs* distinguished three situations involving the

discovery, after trial, of information favorable to the accused that had been known to the prosecution but unknown to the defense. The first situation was the prosecutor's knowing use of perjured testimony or, equivalently, the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false. The Court noted the well-established rule that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have
679 affected the judgment of the jury." *679 427 U.S., at 103 (footnote omitted).[8] Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-
680 error review,[9] it may as *680 easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt. The Court in *Agurs* justified this standard of materiality on the ground that the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves "a corruption of the truth-seeking function of the trial process." *Id.*, at 104.

[8] In fact, the *Brady* rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony. In *Mooney* v. *Holohan*, 294 U.S. 103 (1935), the Court established the rule that the knowing use by a state prosecutor of perjured testimony to obtain a conviction and the deliberate suppression of evidence that would have impeached and refuted the testimony constitutes a denial of due process. The Court reasoned that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice." *Id.*, at 112. The Court reaffirmed this principle in broader terms in *Pyle* v. *Kansas*, 317 U.S. 213 (1942), where it held that allegations that the prosecutor had deliberately suppressed evidence favorable to the accused and had knowingly used perjured testimony were sufficient to charge a due process violation. The Court again reaffirmed this principle in *Napue* v. *Illinois*, 360 U.S. 264 (1959). In *Napue*, the principal witness for the prosecution falsely testified that he had been promised no consideration for his testimony. The Court held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. The Court explained that the principle that a State may not knowingly use false testimony to obtain a conviction — even false testimony that goes only to the credibility of the witness — is "implicit in any concept of ordered liberty." *Id.*, at 269. Finally, the Court held that it was not bound by the state court's determination that the false testimony "could not in any reasonable likelihood have affected the judgment of the jury." *Id.*, at 271. The Court conducted its own independent examination of the record and concluded that the false testimony "may have had an effect on the outcome of the trial." *Id.*, at 272. Accordingly, the Court reversed the judgment of conviction.

[9] The rule that a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict derives from *Napue* v. *Illinois*, 360 U.S., at 271. See n. 8, *supra*. See also *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S., at 271). *Napue* antedated *Chapman* v. *California*, 386 U.S. 18 (1967), where the "harmless beyond a reasonable doubt" standard was established. The Court in *Chapman* noted that there was little, if any, difference between Page 680 a rule formulated, as in *Napue*, in terms of "`whether there is a reasonable possibility that the evidence complained of might have contributed to

the conviction,'" and a rule "`requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 386 U.S., at 24 (quoting *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963)). It is therefore clear, as indeed the Government concedes, see Brief for United States 20, and 36-38, that this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless-error standard.

At the other extreme is the situation in *Agurs* itself, where the defendant does not make a *Brady* request and the prosecutor fails to disclose certain evidence favorable to the accused. The Court rejected a harmless-error rule in that situation, because under that rule every nondisclosure is treated as error, thus imposing on the prosecutor a constitutional duty to deliver his entire file to defense counsel.[10] 427 U.S., at 111-112. At the same time, the Court rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal. *Id.*, at 111. The Court reasoned: "If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve
681 the cause of justice." *Ibid*. The *681 standard of materiality applicable in the absence of a specific *Brady* request is therefore stricter than the harmless-error standard but more lenient to the defense than the newly-discovered-evidence standard.

10 This is true only if the nondisclosure is treated as error subject to harmless-error review, and not if the nondisclosure is treated as error only if the evidence is material under a not "harmless beyond a reasonable doubt" standard.

The third situation identified by the Court in *Agurs* is where the defense makes a specific request and the prosecutor fails to disclose responsive evidence.[11] The Court did not define the standard of materiality applicable in this situation,[12] but suggested that the standard might be more lenient to the defense than in the situation in which the defense makes no request or only a general request. 427 U.S., at 106. The Court also noted: "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Ibid*.

11 The Court in *Agurs* identified *Brady* as a case in which specific information was requested by the defense. 427 U.S., at 106. The request in *Brady* was for the extrajudicial statements of Brady's accomplice. See 373 U.S., at 84.

12 The Court in *Agurs* noted: "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." 427 U.S., at 104. Since the *Agurs* Court identified *Brady* as a "specific request" case, see n. 11, *supra*, this language might be taken as indicating the standard of materiality applicable in such a case. It is clear, however, that the language merely explains the meaning of the term "materiality." It does not establish a standard of materiality because it does not indicate what quantum of likelihood there must be that the undisclosed evidence would have affected the outcome.

The Court has relied on and reformulated the *Agurs* standard for the materiality of undisclosed evidence in two subsequent cases arising outside the *Brady* context. In neither case did the Court's discussion of the *Agurs* standard distinguish among the three situations described in *Agurs*. In *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 874 (1982), the Court held that due process is violated when testimony is made unavailable to the defense by Government deportation of

witnesses "only if there is a reasonable likelihood that the testimony could have affected the
682 judgment of the *682 trier of fact." And in *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694.[13] The *Strickland* Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ibid*.

[13] In particular, the Court explained in *Strickland:* "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S., at 695.

We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

The Government suggests that a materiality standard more favorable to the defendant reasonably might be adopted in specific request cases. See Brief for United States 31. The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued. *Ibid*.

We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the 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
683 *683 nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality, however, for under the *Strickland* formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

B

In the present case, we think that there is a significant likelihood that the prosecutor's response to respondent's discovery motion misleadingly induced defense counsel to believe that O'Connor and Mitchell could not be impeached on the basis of bias or interest arising from inducements offered by the Government. Defense counsel asked the prosecutor to disclose any inducements that had been made to witnesses, and the prosecutor failed to disclose that the possibility of a reward had been held out to O'Connor and Mitchell if the information they supplied led to "the accomplishment of the objective sought to be obtained . . . to the satisfaction of [the Government]." App. 22 and 23. This possibility of a reward gave O'Connor and Mitchell a direct, personal stake in respondent's conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's

satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction. Moreover, the prosecutor disclosed affidavits that stated that O'Connor and Mitchell received no promises of reward in return for providing information in the affidavits
684 implicating respondent in *684 criminal activity. In fact, O'Connor and Mitchell signed the last of these affidavits the very day after they signed the ATF contracts. While the Government is technically correct that the blank contracts did not constitute a "promise of reward," the natural effect of these affidavits would be misleadingly to induce defense counsel to believe that O'Connor and Mitchell provided the information in the affidavits, and ultimately their testimony at trial recounting the same information, without any "inducements."

The District Court, nonetheless, found beyond a reasonable doubt that, had the information that the Government held out the possibility of reward to its witnesses been disclosed, the result of the criminal prosecution would not have been different. If this finding were sustained by the Court of Appeals, the information would be immaterial even under the standard of materiality applicable to the prosecutor's knowing use of perjured testimony. Although the express holding of the Court of Appeals was that the nondisclosure in this case required automatic reversal, the Court of Appeals also stated that it "disagreed" with the District Court's finding of harmless error. In particular, the Court of Appeals appears to have disagreed with the factual premise on which this finding expressly was based. The District Court reasoned that O'Connor's and Mitchell's testimony was exculpatory on the narcotics charges. The Court of Appeals, however, concluded, after reviewing the record, that O'Connor's and Mitchell's testimony was in fact inculpatory on those charges. 719 F.2d, at 1464, n. 1. Accordingly, we reverse the judgment of the Court of Appeals and remand the case to that court for a determination whether there is a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

685 *685

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

I agree with the Court that respondent is not entitled to have his conviction overturned unless he can show that the evidence withheld by the Government was "material," and I therefore join Parts I and II of the Court's opinion. I also agree with JUSTICE BLACKMUN that for purposes of this inquiry, "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." *Ante*, at 682. As the Justice correctly observes, this standard is "sufficiently flexible" to cover all instances of prosecutorial failure to disclose evidence favorable to the accused. *Ibid*. Given the flexibility of the standard and the inherently fact-bound nature of the cases to which it will be applied, however, I see no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense's request for disclosure, either generally or with respect to this case. I would hold simply that the proper standard is one of reasonable probability and that the Court of Appeals' failure to apply this standard necessitates reversal. I therefore concur in the judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

When the Government withholds from a defendant evidence that might impeach the prosecution's *only witnesses*, that failure to disclose cannot be

deemed harmless error. Because that is precisely the nature of the undisclosed evidence in this case, I would affirm the judgment of the Court of Appeals and would not remand for further proceedings.

I

The federal grand jury indicted the respondent, Hughes Anderson Bagley, on charges involving
686 possession of firearms *686 and controlled substances with intent to distribute. Following a bench trial, Bagley was found not guilty of the firearms charges, guilty of two counts of knowingly and intentionally distributing Valium, and guilty of several counts of a lesser included offense of possession of controlled substances. He was sentenced to six months' imprisonment and a special parole term of five years on the first count of distribution, and to three years of imprisonment, which were suspended, and five years' probation, on the second distribution count. He received a suspended sentence and five years' probation for the possession convictions.

The record plainly demonstrates that on the two counts for which Bagley received sentences of imprisonment, the Government's entire case hinged on the testimony of two private security guards who aided the Bureau of Alcohol, Tobacco and Firearms (ATF) in its investigation of Bagley. In 1977 the two guards, O'Connor and Mitchell, worked for the Milwaukee Railroad; for about three years, they had been social acquaintances of Bagley, with whom they often shared coffee breaks. 7 Tr. 2-3; 8 Tr. 2a-3a. At trial, they testified that on two separate occasions they had visited Bagley at his home, where Bagley had responded to O'Connor's complaint that he was extremely anxious by giving him Valium pills. In total, Bagley received $8 from O'Connor, representing the cost of the pills. At trial, Bagley testified that he had a prescription for the Valium because he suffered from a bad back, 14 Tr. 963-964. No testimony to the contrary was introduced. O'Connor and Mitchell each testified that they had worn concealed transmitters and body recorders at these meetings, but the tape recordings were insufficiently clear to be admitted at trial and corroborate their testimony.

Before trial, counsel for Bagley had filed a detailed discovery motion requesting, among other things, "any deals, promises or inducements made to witnesses in exchange for their testimony." App. 17-19. In response to the discovery request, the Government had provided affidavits sworn by
687 *687 O'Connor and Mitchell that had been prepared during their investigation of Bagley. Each affidavit recounted in detail the dealings the witnesses had had with Bagley and closed with the declaration, "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." Brief for United States 3, quoting Memorandum of Points and Authorities in Support of Pet. for Habeas Corpus, CV80-3592-RJK(M) (CD Cal.) Exhibits 1-9. Both of these agents testified at trial thereafter, and the Government did not disclose the existence of any deals, promises, or inducements. Counsel for Bagley asked O'Connor on cross-examination whether he was testifying in response to pressure or threats from the Government about his job, and O'Connor said he was not. 7 Tr. 89-90. In light of the affidavits, as well as the prosecutor's silence as to the existence of any promises, deals, or inducements, counsel did not pursue the issue of bias of either guard.

As it turns out, however, in May 1977, seven months prior to trial, O'Connor and Mitchell each had signed an agreement providing that ATF would pay them for information they provided. The form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor," and provided that the Bureau would, "upon the accomplishment of the objective sought to be obtained . . . pay to said vendor a sum commensurate with services and information rendered." App. 22-23. It further invited the Bureau's special agent in charge of the investigation, Agent Prins, to recommend an

amount to be paid after the information received had proved "worthy of compensation." Agent Prins had personally presented these forms to O'Connor and Mitchell for their signatures. The two witnesses signed the last of their affidavits, which declared the absence of any promise of reward, *the day after they signed the ATF forms*. After trial, Agent Prins requested that O'Connor and Mitchell each be paid $500, but the Bureau reduced these "rewards" to $300 each. App. to
688 *688 Pet. for Cert. 14a. The District Court Judge concluded that "it appears probable to the Court that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony." *Id.*, at 7a.

Upon discovering these ATF forms through a Freedom of Information Act request, Bagley sought relief from his conviction. The District Court Judge denied Bagley's motion to vacate his sentence stating that because he was the same judge who had been the original trier of fact, he was able to determine the effect the contracts would have had on his decision, more than four
689 years earlier, to convict Bagley. The judge stated that beyond a reasonable doubt the contracts, if disclosed, would have had no effect upon the convictions:

> "The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial . . . . Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The Court found the defendant not guilty of those charges. With respect to the charges against the defendant of distributing controlled substances and possessing controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant." *Id.*, at 8a.

*689

The foregoing statement, as to which the Court remands for further consideration, is seriously flawed on its face. First, the testimony that the court describes was in fact the *only inculpatory testimony in the case* as to the two counts for which Bagley received a sentence of imprisonment. If, as the judge claimed, the testimony of the two information "vendors" was "very brief" and in part favorable to the defendant, that fact shows the weakness of the prosecutor's case, not the harmlessness of the error. If the testimony that might have been impeached is weak and also cumulative, corroborative, or tangential, the failure to disclose the impeachment evidence could conceivably be held harmless. But when the testimony is the start and finish of the prosecution's case, and is weak nonetheless, quite a different conclusion must necessarily be drawn.

Second, the court's statement that Bagley did not attempt to discredit the witnesses' testimony, as if to suggest that impeachment evidence would not have been used by the defense, ignores the realities of trial preparation and strategy, and is factually erroneous as well. Initially, the Government's failure to disclose the existence of any inducements to its witnesses, coupled with its disclosure of affidavits stating that no promises had been made, would lead all but the most careless lawyer to step wide and clear of questions about promises or inducements. The combination of nondisclosure and disclosure would simply lead any reasonable attorney to believe that the witness could not be impeached on that basis. Thus, a firm avowal that no payment is being received in return for assistance and testimony, if offered at trial by a witness who is not even a Government employee, could be devastating to the defense. A wise attorney would, of necessity, seek an alternative defense strategy.

Moreover, counsel for Bagley in fact did attempt to discredit O'Connor, by asking him whether two ATF agents had pressured him or had threatened
690 that his job might be in *690 jeopardy, in order to get him to cooperate. 7 Tr. 89-90. But when O'Connor answered in the negative, *ibid.*, counsel stopped this line of questioning. In addition, counsel for Bagley attempted to argue to the District Court, in his closing argument, that O'Connor and Mitchell had "fabricated" their accounts, 14 Tr. 1117, but the court rejected the proposition:

> "Let me say this to you. I would find it hard to believe really that their testimony was fabricated. I think they might have been mistaken. You know, it is possible that they were mistaken. *I really did not get the impression at all that either one or both of those men were trying at least in court here to make a case against the defendant*." *Id.*, at 1117-1118. (Emphasis added.)

The District Court, in so saying, of course had seen no evidence to suggest that the two witnesses might have any motive for "mak[ing] a case" against Bagley. Yet, as JUSTICE BLACKMUN points out, the possibility of a reward, the size of which is directly related to the Government's success at trial, gave the two witnesses a "personal stake" in the conviction and an "incentive to testify falsely in order to secure a conviction." *Ante*, at 683.

Nor is this case unique. Whenever the Government fails, in response to a request, to disclose impeachment evidence relating to the credibility of its key witnesses, the truth-finding process of trial is necessarily thrown askew. The failure to disclose evidence affecting the overall credibility of witnesses corrupts the process to some degree in all instances, see *Giglio* v. *United States*, 405 U.S. 150 (1972); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *United States* v. *Agurs*, 427 U.S. 97, 121 (1976) (MARSHALL, J., dissenting), but when "the `reliability of a given witness may well be determinative of guilt or innocence,'" *Giglio, supra*, at 154 (quoting *Napue, supra*, at 269), and when "the Government's case depend[s] almost entirely on" the testimony of a certain witness, 405 U.S., at 154, evidence of that witness' possible
691 *691 bias simply may not be said to be irrelevant, or its omission harmless. As THE CHIEF JUSTICE said in *Giglio* v. *United States*, in which the Court ordered a new trial in a case in which a promise to a key witness was not disclosed to the jury:

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

> "For these reasons, the due process requirements enunciated in *Napue* and other cases cited earlier require a new trial." *Id.*, at 154-155.

Here, too, witnesses O'Connor and Mitchell were crucial to the Government's case. Here, too, their personal credibility was potentially dispositive, particularly since the allegedly corroborating tape recordings were not audible. It simply cannot be denied that the existence of a contract signed by those witnesses, promising a reward whose size would depend "on the Government's satisfaction with the end result," *ante*, at 683, might sway the trier of fact, or cast doubt on the truth of all that the witnesses allege. In such a case, the trier of fact is absolutely entitled to know of the contract, and the defense counsel is absolutely entitled to develop his case with an awareness of it. Whatever the applicable standard of materiality, see *infra*, in this instance it undoubtedly is well met.

Indeed, *Giglio* essentially compels this result. The similarities between this case and that one are evident. In both cases, the triers of fact were left unaware of Government inducements to key witnesses. In both cases, the individual trial prosecutors acted in good faith when they failed to disclose the exculpatory evidence. See *Giglio, supra*, at 151-153; App. to Pet. for Cert. 13a
692 (Magistrate's finding that *692 Bagley prosecutor would have disclosed information had he known of it). The sole difference between the two cases lies in the fact that in *Giglio*, the prosecutor affirmatively stated *to the trier of fact* that no promises had been made. Here, silence in response to a defense request took the place of an affirmative error at trial — although the prosecutor did make an affirmative misrepresentation to the defense in the affidavits. Thus, in each case, the trier of fact was left unaware of powerful reasons to question the credibility of the witnesses. "[T]he truth-seeking process is corrupted by the withholding of evidence favorable to the defense, regardless of whether the evidence is directly contradictory to evidence offered by the prosecution." *Agurs, supra*, at 120 (MARSHALL, J., dissenting). In this case, as in *Giglio*, a new trial is in order, and the Court of Appeals correctly reversed the District Court's denial of such relief.

II

Instead of affirming, the Court today chooses to reverse and remand the case for application of its newly stated standard to the facts of this case. While I believe that the evidence at issue here, which remained undisclosed despite a particular request, undoubtedly was material under the Court's standard, I also have serious doubts whether the Court's definition of the constitutional right at issue adequately takes account of the interests this Court sought to protect in its decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963).

A

I begin from the fundamental premise, which hardly bears repeating, that "[t]he purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one." *Application of Kapatos*, 208 F. Supp. 883, 888 (SDNY 1962); see *Giles* v. *Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in judgment) ("The State's obligation is not to convict, but to see that, so far as possible, truth emerges"). When evidence
693 favorable to the defendant is known to exist, *693 disclosure only enhances the quest for truth; it takes no direct toll on that inquiry. Moreover, the existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty. The private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference.

When the state does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and

thereby undermines the reliability of the verdict. Unlike a situation in which exculpatory evidence exists but neither the defense nor the prosecutor has uncovered it, in this situation the state already has, resting in its files, material that would be of assistance to the defendant. With a minimum of effort, the state could improve the real and apparent fairness of the trial enormously, by assuring that the defendant may place before the trier of fact favorable evidence known to the government. This proposition is not new. We have long recognized that, within the limit of the state's ability to identify so-called exculpatory information, the state's concern for a fair verdict precludes it from withholding from the defense evidence favorable to the defendant's case in the prosecutor's files. See, *e.g., Pyle* v. *Kansas*, 317 U.S. 213, 215-216 (1942) (allegation that imprisonment resulted from perjured testimony and deliberate suppression by authorities of evidence favorable to him "charge a deprivation of rights guaranteed by the Federal Constitution").[1]

694 *694

[1] As early as 1807, this Court made clear that prior to trial a defendant must have access to impeachment evidence in the Government's possession. Addressing defendant Aaron Burr's claim that he should have access to the letter of General Wilkinson, a key witness against Burr in his trial for treason, Chief Justice Marshall wrote: "The application of that letter to the case is shown by the terms in which the communication was made. It is a statement of the conduct of the Page 694 accused made by the person who is declared to be the essential witness against him. The order for producing this letter is opposed: "First, because it is not material to the defense. It is a principle, universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say; for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at the trial." *United States* v. *Burr*, 25 F. Cas. 30, 36 (No. 14,692d) (CC Va. 1807).

This recognition no doubt stems in part from the frequently considerable imbalance in resources between most criminal defendants and most prosecutors' offices. Many, perhaps most, criminal defendants in the United States are represented by appointed counsel, who often are paid minimal wages and operate on shoestring budgets. In addition, unlike police, defense counsel generally is not present at the scene of the crime, or at the time of arrest, but instead comes into the case late. Moreover, unlike the government, defense counsel is not in the position to make deals with witnesses to gain evidence. Thus, an inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense. When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision. This grim reality, of course, poses a direct challenge to the traditional model of the adversary criminal process,[2] and

695 perhaps *695 because this reality so directly questions the fairness of our longstanding processes, change has been cautions and halting. Thus, the Court has not gone the full road and expressly required that the state provide to the defendant access to the prosecutor's complete files, or investigators who will assure that the defendant has an opportunity to discover every existing piece of helpful evidence. But cf. *Ake* v. *Oklahoma*, 470 U.S. 68 (1985) (access to

assistance of psychiatrist constitutionally required on proper showing of need). Instead, in acknowledgment of the fact that important interests are served when potentially favorable evidence is disclosed, the Court has fashioned a compromise, requiring that the prosecution identify and disclose to the defendant favorable material that it possesses. This requirement is but a small, albeit important, step toward equality of justice.[3]

[2] See Fortas, The Fifth Amendment: Nemo Tenetur Prodere Seipsum, 25 Clev. B. A. J. 91, 98 (1954) ("The state and [the defendant] could meet, as the law contemplates, in adversary trial, as equals — strength against strength, resource against resource, argument against argument"); see also Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133, 1142-1145 (1982) (discussing challenge *Brady* poses to traditional adversary model).

[3] Indeed, this Court's recent decision stating a stringent standard for demonstrating ineffective assistance of counsel makes an effective *Brady* right even more crucial. Without a real guarantee of effective counsel, the relative abilities of the state and the defendant become even more skewed, and the need for a minimal guarantee of access to potentially favorable information becomes significantly greater. See *Strickland* v. *Washington*, 466 U.S. 668 (1984); *id.*, at 712-715 (MARSHALL, J., dissenting); Babcock, *supra*, at 1163-1174 (discussing the interplay between the right to *Brady* material and the right to effective assistance of counsel).

B

Brady v. *Maryland*, 373 U.S. 83 (1963), of course, established this requirement of disclosure as a fundamental element of a fair trial by holding that a defendant was denied due process if he was not given access to favorable evidence that is material either to guilt or punishment. Since *Brady* was decided, this Court has struggled, in a series of decisions, to define how best to effectuate the right recognized. To my mind, the *Brady* decision, the reasoning that underlay it, and the fundamental interest in a fair trial, combine to give the criminal defendant the right to receive from the prosecutor, and the prosecutor the affirmative duty to turn
696 *696 over to the defendant, *all* information known to the government that might reasonably be considered favorable to the defendant's case. Formulation of this right, and imposition of this duty, are "the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair." *Moore* v. *Illinois*, 408 U.S. 786, 809-810 (1972) (MARSHALL, J., concurring in part and dissenting in part). If that right is denied, or if that duty is shirked, however, I believe a reviewing court should not automatically reverse but instead should apply the harmless-error test the Court has developed for instances of error affecting constitutional rights. See *Chapman* v. *California*, 386 U.S. 18 (1967).

My view is based in significant part on the reality of criminal practice and on the consequently inadequate protection to the defendant that a different rule would offer. To implement *Brady*, courts must of course work within the confines of the criminal process. Our system of criminal justice is animated by two seemingly incompatible notions: the adversary model, and the state's primary concern with justice, not convictions. *Brady*, of course, reflects the latter goal of justice, and is in some ways at odds with the competing model of a sporting event. Our goal, then, must be to integrate the *Brady* right into the harsh, daily reality of this apparently discordant criminal process.

At the trial level, the duty of the state to effectuate *Brady* devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must

aggressively seek convictions in court on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to
697 identify the *697 material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith. Indeed, one need only think of the Fourth Amendment's requirement of a neutral intermediary, who tests the strength of the policeman-advocate's facts, to recognize the curious status *Brady* imposes on a prosecutor. One telling example, offered by Judge Newman when
698 he was a United States Attorney, suffices:

> "I recently had occasion to discuss *[Brady]* at a PLI Conference in New York City before a large group of State prosecutors. . . . I put to them this case: You are prosecuting a bank robbery. You have talked to two or three of the tellers and one or two of the customers at the time of the robbery. They have all taken a look at your defendant in a line-up, and they have said, `This is the man.' In the course of your investigation you also have found another customer who was in the bank that day, who viewed the suspect, and came back and said, `This is *not* the man.'
>
> "The question I put to these prosecutors was, do you believe you should disclose to the defense the name of the witness who, when he viewed the suspect, said `that is not the man'? In a room of prosecutors not quite as large as this group but almost as large, only two hands went up. There were only two prosecutors in that group who felt they should disclose or would disclose that information. Yet I was putting to them what I thought was the easiest case — the clearest case for disclosure of exculpatory information!" J. Newman, A Panel Discussion before the Judicial Conference of the Second Judicial Circuit (Sept. 8, 1967), reprinted in Discovery in Criminal Cases, 44 F.R.D. 481, 500-501 (1968) (hereafter Newman).

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While familiarity with *Brady* no doubt has increased since 1967, the dual role that the prosecutor must play, and the very real pressures that role creates, have not changed.

The prosecutor surely greets the moment at which he must turn over *Brady* material with little enthusiasm. In perusing his files, he must make the often difficult decision as to whether evidence is favorable, and must decide on which side to err when faced with doubt. In his role as advocate, the answers are clear. In his role as representative of the state, the answers should be equally clear, and often to the contrary. Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense, and might make the difference to the trier of fact.

Once the prosecutor suspects that certain information might have favorable implications for the defense, either because it is potentially exculpatory or relevant to credibility, I see no reason why he should not be required to disclose it. After all, favorable evidence indisputably enhances the truth-seeking process at trial. And it is the job of the defense, not the prosecution, to

decide whether and in what way to use arguably favorable evidence. In addition, to require disclosure of all evidence that might reasonably be considered favorable to the defendant would have the precautionary effect of assuring that no information of potential consequence is mistakenly overlooked. By requiring full disclosure of favorable evidence in this way, courts could begin to assure that a possibly dispositive piece of information is not withheld from the trier of fact by a prosecutor who is torn between the two roles he must play. A clear rule of this kind, coupled with a presumption in favor of disclosure, also would facilitate the prosecutor's admittedly difficult task by removing a substantial amount of unguided discretion.

If a trial will thereby be more just, due process would seem to require such a rule absent a countervailing interest. I see little reason for the
699 government to keep such information *699 from the defendant. Its interest in nondisclosure at the trial stage is at best slight: the government apparently seeks to avoid the administrative hassle of disclosure, and to prevent disclosure of inculpatory evidence that might result in witness intimidation and manufactured rebuttal evidence.[4] Neither of these concerns, however, counsels in favor of a rule of nondisclosure in close or ambiguous cases. To the contrary, a rule simplifying the disclosure decision by definition does not make that decision more complex. Nor does disclosure of favorable evidence inevitably lead to disclosure of inculpatory evidence, as might an open file policy, or to the anticipated wrongdoings of defendants and their lawyers, if indeed such fears are warranted. We have other mechanisms for disciplining unscrupulous defense counsel; hamstringing their clients need not be one of them. I simply do not find any state interest that warrants withholding from a presumptively innocent defendant, whose liberty is at stake in the proceeding, information that bears on his case and that might enable him to defend himself.

4 See Newman, 44 F. R. D., at 499 (describing the "serious" problem of witness intimidation that arises from prosecutor's disclosure of witnesses). But see Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wn. U. L. Q. 279, 289-290 (disputing a similar argument).

Under the foregoing analysis, the prosecutor's duty is quite straightforward: he must divulge all evidence that reasonably appears favorable to the defendant, erring on the side of disclosure.

C

The Court, however, offers a complex alternative. It defines the right not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively, by reference to the likely effect the evidence will have on the outcome of the trial. Thus, the Court holds that due process does not require the prosecutor to turn over evidence unless the
700 evidence is "material," and the *700 Court states that 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." *Ante*, at 682. Although this looks like a post-trial standard of review, see, *e.g., Strickland* v. *Washington*, 466 U.S. 668 (1984) (adopting this standard of review), it is not. Instead, the Court relies on this review standard to define the contours of the defendant's constitutional right to certain material prior to trial. By adhering to the view articulated in *United States* v. *Agurs*, 427 U.S. 97 (1976) — that there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial — the Court permits prosecutors to withhold with impunity large amounts of undeniably favorable evidence, and it imposes on prosecutors the burden to identify and disclose evidence pursuant to a pretrial standard that virtually defies definition.

The standard for disclosure that the Court articulates today enables prosecutors to avoid disclosing obviously exculpatory evidence while acting well within the bounds of their constitutional obligation. Numerous lower court cases provide examples of evidence that is undoubtedly favorable but not necessarily "material" under the Court's definition, and that consequently would not have to be disclosed to the defendant under the Court's view. See, *e.g., United States* v. *Sperling*, 726 F.2d 69, 71-72 (CA2 1984) (prior statement disclosing motive of key Government witness to testify), cert. denied, 467 U.S. 1243 (1984); *King* v. *Ponte*, 717 F.2d 635 (CA1 1983) (prior inconsistent statements of Government witness); see also *United States* v. *Oxman*, 740 F.2d 1298, 1311 (CA3 1984) (addressing "disturbing" prosecutorial tendency to withhold information because of later opportunity to argue, with the benefit of hindsight, that information was not "material"), cert. pending *sub nom. United States* v. *Pflaumer*, No. 84-1033. The result is to veer sharply away from the basic
701 notion that the fairness of a trial increases *701 with the amount of existing favorable evidence to which the defendant has access, and to disavow the ideal of full disclosure.

The Court's definition poses other, serious problems. Besides legitimizing the nondisclosure of clearly favorable evidence, the standard set out by the Court also asks the prosecutor to predict what effect various pieces of evidence will have on the trial. He must evaluate his case and the case of the defendant — of which he presumably knows very little — and perform the impossible task of deciding whether a certain piece of information will have a significant impact on the trial, bearing in mind that a defendant will later shoulder the heavy burden of proving how it would have affected the outcome. At best, this standard places on the prosecutor a responsibility to speculate, at times without foundation, since the prosecutor will not normally know what strategy the defense will pursue or what evidence the defense will find useful. At worst, the standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive. One Court of Appeals has recently vented its frustration at these unfortunate consequences:

> "It seems clear that those tests [for materiality] have a tendency to encourage unilateral decision-making by prosecutors with respect to disclosure. . . . [T]he root of the problem is the prosecutor's tendency to adopt a retrospective view of materiality. Before trial, the prosecutor cannot know whether, after trial, particular evidence will prove to have been material. . . . Following their adversarial instincts, some prosecutors have determined unilaterally that evidence will not be material and, often in good faith, have disclosed it neither to defense counsel nor to the court. If and when the evidence emerges after trial, the prosecutor can
> 702 always argue, *702 with the benefit of hindsight, that it was not material." *United States* v. *Oxman, supra*, at 1310.

The Court's standard also encourages the prosecutor to assume the role of the jury, and to decide whether certain evidence will make a difference. In our system of justice, that decision properly and wholly belongs to the jury. The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question. Accordingly he will decide the evidence need not be disclosed. But the ideally neutral trier of fact, who approaches the case from a wholly different perspective, is by the prosecutor's decision denied the opportunity to consider the evidence. The reviewing court, faced with a verdict of guilty, evidence to support that verdict,

and pressures, again understandable, to finalize criminal judgments, is in little better position to review the withheld evidence than the prosecutor.

I simply cannot agree with the Court that the due process right to favorable evidence recognized in *Brady* was intended to become entangled in prosecutorial determinations of the likelihood that particular information would affect the outcome of trial. Almost a decade of lower court practice with *Agurs* convinces me that courts and prosecutors have come to pay "too much deference to the federal common law policy of discouraging discovery in criminal cases, and too little regard to due process of law for defendants." *United States* v. *Oxman, supra*, at 1310-1311. Apparently anxious to assure that reversals are handed out sparingly, the Court has defined a rigorous test of materiality. Eager to apply the "materiality" standard at the pretrial stage, as the Court permits them to do, prosecutors lose sight of the basic principles underlying the doctrine. I would return to the original theory and promise of *Brady* and reassert the duty of the prosecutor to disclose all evidence in his files that might reasonably be considered favorable to the defendant's case. No 703 *703 prosecutor can know prior to trial whether such evidence *will* be of consequence at trial; the mere fact that it might be, however, suffices to 704 mandate disclosure.[5] *704

[5] *Brady* not only stated the rule that suppression by the prosecution of evidence favorable to the defendant "violates due process where the evidence is material either to guilt or to punishment," 373 U.S., at 87, but also observed that two decisions of the Court of Appeals for the Third Circuit "state the correct constitutional rule." *Id.*, at 86. Neither of those decisions limited the right only to evidence that is "material" within the meaning that the Court today articulates. Instead, they provide strong evidence that *Brady* might have used the word in its evidentiary sense, to mean, essentially, germane to the points at issue. In *United States ex rel. Almeida* v. *Baldi*, 195 F.2d 815 (CA3 1952), cert. denied, 345 U.S. 904 (1953), the appeals court granted a petition for habeas corpus in a case in which the State had withheld from the defendant evidence that might have mitigated his punishment. After describing the withheld evidence as "relevant" and "pertinent," 195 F.2d, at 819, the court concluded: "We think that the conduct of the Commonwealth as outlined in the instant case is in conflict with our fundamental principles of liberty and justice. The suppression of evidence favorable to Almeida was a denial of due process." *Id.*, at 820. Similarly, in *United States ex rel. Thompson* v. *Dye*, 221 F.2d 763, 765 (CA3), cert. denied, 350 U.S. 875 (1955), the District Court had denied a petition for habeas corpus after finding that certain evidence of defendant's drunkenness at the time of the offense in question was not "vital" to the defense and did not require disclosure. 123 F. Supp. 759, 762 (WD Pa. 1954). The Court of Appeals reversed, observing that whether or not the jury ultimately would credit the evidence at issue, the evidence was substantial and the State's failure to disclose it cannot "be held as a matter of law to be unimportant to the defense here." 221 F.2d, at 767. It is clear that the term "material" has an evidentiary meaning quite distinct from that which the Court attributes to it. Judge Weinstein, for example, defines as synonymous the words "ultimate fact," "operative fact," "material fact," and "consequential fact," each of which, he states, means "a `fact that is of consequence to the determination of the action.'" 1 J. Weinstein M. Berger, Weinstein's Evidence ¶ 401[03], n. 1 (1982) (quoting Fed. Rule Evid. 401). Similarly, another treatise on evidence explains that there are two components to relevance — materiality and probative value. "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the

case. If the evidence is offered to help prove a proposition which is not a matter in issue, Page 704 the evidence is immaterial." E. Cleary, McCormick on Evidence § 185 (3d ed. 1984). "Probative value" addresses the tendency of the evidence to establish a "material" proposition. *Ibid*. See also 1 J. Wigmore, Evidence § 2 (P. Tillers rev. 1982). There is nothing in *Brady* to suggest that the Court intended anything other than a rule that favorable evidence need only relate to a proposition at issue in the case in order to merit disclosure. Even if the Court did not use the term "material" simply to refer to favorable evidence that might be relevant, however, I still believe that due process requires that prosecutors have the duty to disclose all such evidence. The inherent difficulty in applying, prior to trial, a definition that relates to the outcome of the trial, and that is based on speculation and not knowledge, means that a considerable amount of potentially consequential material might slip through the Court's standard. Given the experience of the past decade with *Agurs*, and the practical problem that inevitably exists because the evidence must be disclosed prior to trial to be of any use, I can only conclude that all potentially favorable evidence must be disclosed. Of course, I agree with courts that have allowed exceptions to this rule on a showing of exigent circumstances based on security and law enforcement needs.

D

In so saying, I recognize that a failure to divulge favorable information should not result in reversal in all cases. It may be that a conviction should be affirmed on appeal despite the prosecutor's failure to disclose evidence that reasonably might have been deemed potentially favorable prior to trial. The state's interest in nondisclosure at trial is minimal, and should therefore yield to the readily apparent benefit that full disclosure would convey to the search for truth. After trial, however, the benefits of disclosure may at times be tempered by the state's legitimate desire to avoid retrial when error has been harmless. However, in making the determination of harmlessness, I would apply our normal constitutional error test and reverse unless it is clear beyond a reasonable doubt that the withheld evidence would not have affected the outcome of the trial. See *Chapman* v. *California*, 386 U.S. 18 (1967); see also *Agurs*, 427 U.S., at 705 119-120 (MARSHALL, J., dissenting).[6] *705

[6] In a case of deliberate prosecutorial misconduct, automatic reversal might well be proper. Certain kinds of constitutional error so infect the Page 705 system of justice as to require reversal in all cases, such as discrimination in jury selection. See, *e.g., Peters* v. *Kiff*, 407 U.S. 493 (1972). A deliberate effort of the prosecutor to undermine the search for truth clearly is in the category of offenses antithetical to our most basic vision of the role of the state in the criminal process.

Any rule other than automatic reversal, of course, dilutes the *Brady* right to some extent and offers the prosecutor an incentive not to turn over all information. In practical effect, it might be argued, there is little difference between the rule I propose — that a prosecutor must disclose all favorable evidence in his files, subject to harmless-error review — and the rule the Court adopts — that the prosecutor must disclose only the favorable information that might affect the outcome of the trial. According to this argument, if a constitutional right to all favorable evidence leads to reversal only when the withheld evidence might have affected the outcome of the trial, the result will be the same as with a constitutional right only to evidence that will affect the trial outcome. See Capra, Access to Exculpatory Evidence: Avoiding the *Agurs* Problems of Prosecutorial Discretion and Retrospective Review, 53 Ford. L. Rev. 391, 409-410, n. 117 (1984). For several reasons, however, I disagree. First, I have faith that a prosecutor would treat a rule requiring disclosure of all information of a certain kind differently

from a rule requiring disclosure only of some of that information. Second, persistent or egregious failure to comply with the constitutional duty could lead to disciplinary actions by the courts. Third, the standard of harmlessness I adopt is more protective of the defendant than that chosen by the Court, placing the burden on the prosecutor, rather than the defendant, to prove the harmlessness of his actions. It would be a foolish prosecutor who gambled too glibly with that standard of review. And finally, it is unrealistic to ignore the fact that at the appellate stage the state has an interest in avoiding retrial where the error is harmless beyond a reasonable doubt. That interest counsels against requiring a new trial in every case. *706

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Thus, while I believe that some review for harmlessness is in order, I disagree with the Court's standard, even were it merely a standard for review and not a definition of "materiality." First, I see no significant difference for truth-seeking purposes between the *Giglio* situation and this one; for the same reasons I believe the result must therefore be the same here as in *Giglio*, see *supra*, at 691-692, I also believe the standard for reversal should be the same. The defendant's entitlement to a new trial ought to be no different in the two cases, and the burden he faces on appeal should also be the same. *Giglio* remains the law for a class of cases, and I reaffirm my belief that the same standard applies to this case as well. See *Agurs, supra*, at 119-120 (MARSHALL, J., dissenting).

Second, only a strict appellate standard, which places on the prosecutor a burden to defend his decisions, will remove the incentive to gamble on a finding of harmlessness. Any lesser standard, and especially one in which the defendant bears the burden of proof, provides the prosecutor with ample room to withhold favorable evidence, and provides a reviewing court with a simple means to affirm whenever in its view the correct result was reached. This is especially true given the speculative nature of retrospective review:

> "The appellate court's review of `what might have been' is extremely difficult in the context of an adversarial system. Evidence is not introduced in a vacuum; rather, it is built upon. The absence of certain evidence may thus affect the usefulness, and hence the use, of other evidence to which defense counsel does have access. Indeed, the absence of a piece of evidence may affect the entire trial strategy of defense counsel." Capra, *supra*, at 412.

As a consequence, the appellate court no less than the prosecutor must substitute its judgment for that of the trier of fact under an inherently slippery test. Given such factors as a reviewing court's natural inclination to affirm a judgment *707 that appears "correct" and that court's obvious inability to know what a jury ever will do, only a strict and narrow test that places the burden of proof on the prosecutor will begin to prevent affirmances in cases in which the withheld evidence might have had an impact.

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Even under the most protective standard of review, however, courts must be careful to focus on the nature of the evidence that was not made available to the defendant and not simply on the quantity of the evidence against the defendant separate from the withheld evidence. Otherwise, as the Court today acknowledges, the reviewing court risks overlooking the fact that a failure to disclose has a direct effect on the entire course of trial.

Without doubt, defense counsel develops his trial strategy based on the available evidence. A missing piece of information may well preclude the attorney from pursuing a strategy that potentially would be effective. His client might consequently be convicted even though nondisclosed information might have offered an additional or alternative defense, if not pure exculpation. Under such circumstances, a reviewing court must be sure not to focus on the amount of evidence supporting the verdict to

determine whether the trier of fact reasonably would reach the same conclusion. Instead, the court must decide whether the prosecution has shown beyond a reasonable doubt that the new evidence, if disclosed and developed by reasonably competent counsel, would not have
708 affected the outcome of trial.[7] *708

[7] For example, in *United States ex rel. Butler* v. *Maroney*, 319 F.2d 622 (CA3 1963), the defendant was convicted of first-degree murder. Trial counsel based his defense on temporary insanity at the time of the murder. During trial, testimony suggested that the shooting might have been the accidental result of a struggle, but defense counsel did not develop that defense. It later turned out that an eyewitness to the shooting had given police a statement that the victim and Butler had struggled prior to the murder. If defense counsel had known before trial what the eyewitness had seen, he might have relied on an additional defense, and he might have emphasized the struggle. See Note, The Prosecutor's Constitutional Page 708 Duty to Reveal Evidence to the Defendant, 74 Yale L. J. 136, 145 (1964). Unless the same information already was known to counsel before trial, the failure to disclose evidence of that kind simply cannot be harmless because reasonably competent counsel might have utilized it to yield a different outcome. No matter how overwhelming the evidence that Butler committed the murder, he had a right to go before a trier of fact and present his best available defense. Similarly, in *Ashley* v. *Texas*, 319 F.2d 80 (CA5), cert. denied, 375 U.S. 931 (1963), the defendant was sentenced to death for murder. The prosecutor disclosed to the defense a psychiatrist's report indicating that the defendant was sane, but he failed to disclose the reports of a psychiatrist and a psychologist indicating that the defendant was insane. The non-disclosed information did not relate to the trial defense of self-defense. But the failure to disclose the evidence clearly prevented defense counsel from developing the possibly dispositive defense that he might have developed through further psychiatric examinations and presentation at trial. The nondisclosed evidence obviously threw off the entire course of trial preparation, and a new trial was in order. In such a case, there simply is no need to consider — in light of the evidence that actually was presented and the quantity of evidence to support the verdict returned — the possible effect of the information on the particular jury that heard the case. Indeed, to make such an evaluation would be to substitute the reviewing court's judgment of the facts, including the previously undisclosed evidence, for that of the jury, and to do so without the benefit of competent counsel's development of the information. See also Field, Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15 (1976) (discussing application of harmless-error test).

In this case, it is readily apparent that the undisclosed information would have had an impact on the defense presented at trial, and perhaps on the judgment. Counsel for Bagley argued to the trial judge that the Government's two key witnesses had fabricated their accounts of the drug distributions, but the trial judge rejected the argument for lack of any evidence of motive. See *supra*, at 690. These key witnesses, it turned out, were each to receive monetary rewards whose size was contingent on the usefulness of their assistance. These rewards "served only to strengthen any incentive to testify falsely in order to secure a conviction." *Ante*, at 683. To my mind,
709 no more need be said; this non-disclosure *709 could not have been harmless. I would affirm the judgment of the Court of Appeals.

JUSTICE STEVENS, dissenting.

This case involves a straightforward application of the rule announced in *Brady* v. *Maryland*, 373 U.S. 83 (1963), a case involving nondisclosure of material evidence by the prosecution in response to a specific request from the defense. I agree that the Court of Appeals misdescribed that rule, see *ante*, at 674-678, but I respectfully dissent from the Court's unwarranted decision to rewrite the rule itself.

As the Court correctly notes at the outset of its opinion, *ante*, at 669, the holding in *Brady* was that "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." 373 U.S., at 87. We noted in *United States* v. *Agurs*, 427 U.S. 97, 103 (1976), that the rule of *Brady* arguably might apply in three different situations involving the discovery, after trial, of evidence that had been known prior to trial to the prosecution but not to the defense. Our holding in *Agurs* was that the *Brady* rule applies in two of the situations, but not in the third.

The two situations in which the rule applies are those demonstrating the prosecution's knowing use of perjured testimony, exemplified by *Mooney* v. *Holohan*, 294 U.S. 103 (1935), and the prosecution's suppression of favorable evidence specifically requested by the defendant, exemplified by *Brady* itself. In both situations, the prosecution's deliberate nondisclosure constitutes constitutional error — the conviction must be set aside if the suppressed or perjured evidence was "material" and there was "any reasonable likelihood" that it "could have affected" the outcome of the trial. 427 U.S., at 103.[1] See *Brady, supra*, at 88 ("would tend to exculpate"); *710 accord, *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 874 (1982) ("reasonable likelihood"); *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) ("reasonable likelihood"); *Napue* v. *Illinois*, 360 U.S. 264, 272 (1959) ("may have had an effect on the outcome"). The combination of willful prosecutorial suppression of evidence and, "more importantly," the potential "corruption of the truth-seeking function of the trial process" requires that result. 427 U.S., at 104, 106.[2]

[1] I do not agree with the Court's reference to the "constitutional error, *if any*, in this case," see *ante*, at 678 (emphasis added), because I believe a violation of the *Brady* rule is by definition constitutional error. Cf. *United* Page 710 *States* v. *Agurs*, 427 U.S., at 112 (rejecting rule making "every nondisclosure . . . automatic error" outside the *Brady* specific request or perjury contexts). As written, the *Brady* rule states that the Due Process Clause is violated when favorable evidence is not turned over "upon request" and "the evidence is material either to guilt or punishment." *Brady* v. *Maryland*, 373 U.S., at 87. As JUSTICE MARSHALL's explication of the record in this case demonstrates, *ante*, at 685-692, the suppressed evidence here was not only favorable to Bagley, but also unquestionably material to the issue of his guilt or innocence. The two witnesses who had signed the undisclosed "Contract[s] for Purchase of Information" were the only trial witnesses as to the two distribution counts on which Bagley was convicted. On cross-examination defense counsel attempted to undercut the witnesses' credibility, obviously a central issue, but had little factual basis for so doing. When defense counsel suggested a lack of credibility during final argument in the bench trial, the trial judge demurred, because "I really did not get the impression at all that either one or both of these men were trying at least in court here to make a case against the defendant." A finding that evidence showing that the witnesses in fact had a "direct, personal stake in respondent's conviction," *ante*, at 683, was nevertheless not "material" would be egregiously erroneous under any standard.

[2] "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or

> reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . ." *Brady, supra*, at 87-88.

In *Brady*, the suppressed confession was *inadmissible* as to guilt and "could not have affected the outcome" on that issue. 427 U.S., at 106. However, the evidence "could have affected Brady's punishment," and was, therefore, "material on the latter issue but not on the former." *Ibid.* 711 Materiality *711 was thus used to describe admissible evidence that "could have affected" a dispositive issue in the trial.

The question in *Agurs* was whether the *Brady* rule should be *extended*, to cover a case in which there had been neither perjury nor a specific request — that is, whether the prosecution has some constitutional duty to search its files and disclose automatically, or in response to a general request, all evidence that "might have helped the defense, or might have affected the outcome." 427 U.S., at 110.[3] Such evidence would, of course, be covered by the *Brady* formulation if it were specifically requested. We noted in *Agurs*, however, that because there had been no specific defense request for the later-discovered evidence, there was no notice to the prosecution that the defense did not already have that evidence or that it considered the evidence to be of particular value. 427 U.S., at 106-107. Consequently, we stated that in the absence of a request the prosecution has a constitutional duty to volunteer only "obviously exculpatory . . . evidence." *Id.*, at 107. Because this constitutional duty to disclose is *different* from the duty described in *Brady*, it is not surprising that we developed a different standard of materiality in the *Agurs* context. Necessarily describing the "inevitably imprecise" standard in terms appropriate to post-trial review, we held that no constitutional violation occurs in the absence of a specific request unless "the omitted evidence creates a reasonable doubt that did not otherwise 712 exist." *Id.*, at 108, 112.[4] *712

[3] "[W]e conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all . . . . "We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty." 427 U.S., at 107.

[4] "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only Page 712 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." *Id.*, at 112 (footnote omitted). We also held in *Agurs* that when no request for particular information is made, post-trial determination of whether a failure voluntarily to disclose exculpatory evidence amounts to constitutional error depends on the "character of the evidence, not the character of the prosecutor." *Id.*, at 110. Nevertheless, implicitly acknowledging the broad discretion that trial and appellate courts must have to ensure fairness in this area, we noted that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.*, at 108. Finally, we noted that the post-trial determination of reasonable doubt will vary even in the no-request context, depending on all the circumstances of each case. For example, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.*, at 113.

What the Court ignores with regard to *Agurs* is that its analysis was restricted entirely to the general or no-request context.[5] The "standard of materiality" we fashioned for the purpose of determining whether a prosecutor's failure to *volunteer* exculpatory evidence amounted to constitutional error was and is unnecessary with regard to the two categories of prosecutorial suppression already covered by the *Brady* rule. The specific situation in *Agurs*, as well as the circumstances of *United States* v. *Valenzuela-Bernal*, 458 U.S. 858 (1982) and *Strickland* v. *Washington*, 466 U.S. 668 (1984), simply falls "outside the *Brady* context." *Ante*, at 681.

> [5] See *ante*, at 678 ("Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States* v. *Agurs*"); *ante*, at 681 (referring generally to "the *Agurs* standard for the materiality of undisclosed evidence"); *ante*, at 700 (MARSHALL, J., dissenting) (describing *Agurs* as stating a general rule that "there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial"). But see Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133, 1148 (1982) (*Agurs* "distinguished" between no-request situations and the other two *Brady* contexts "where a pro-defense standard . . . would continue").

But the *Brady* rule itself unquestionably applies to this case, because the Government failed to disclose favorable evidence that was clearly
713 responsive to the defendant's specific *713 request. Bagley's conviction therefore must be set aside if the suppressed evidence was "material" — and it obviously was, see n. 1, *supra* — and if there is "any reasonable likelihood" that it could have affected the judgment of the trier of fact. Our choice, therefore, should be merely whether to affirm for the reasons stated in Part I of JUSTICE MARSHALL's dissent, or to remand to the Court of Appeals for further review under the standard stated in *Brady*. I would follow the latter course, not because I disagree with JUSTICE MARSHALL's analysis of the record, but because I do not believe this Court should perform the task of reviewing trial transcripts in the first instance. See *United States* v. *Hasting*, 461 U.S. 499, 516-517 (1983) (STEVENS, J., concurring in judgment). I am confident that the Court of Appeals would reach the appropriate result if it applied the proper standard.

The Court, however, today sets out a reformulation of the *Brady* rule in which I have no such confidence. Even though the prosecution suppressed evidence that was specifically requested, apparently the Court of Appeals may now reverse only if there is a "reasonable probability" that the suppressed evidence "would" have altered "the result of the [trial]." *Ante*, at 682, 684. According to the Court this single rule is "sufficiently flexible" to cover specific as well as general or no-request instances of nondisclosure, *ante*, at 682, because, at least in the view of JUSTICE BLACKMUN and JUSTICE O'CONNOR, a reviewing court can "consider directly" under this standard the more threatening effect that nondisclosure in response to a specific defense request will generally have on the truth-seeking function of the adversary process. *Ante*, at
714 683 (opinion of BLACKMUN, J.).[6] *714

> [6] I of course agree with JUSTICE BLACKMUN, *ante*, at 679-680, n. 9, and 684, and JUSTICE MARSHALL, *ante*, at 706, that our long line of precedents establishing the "reasonable likelihood" standard for use of perjured testimony remains intact. I also note that the Court plainly envisions that reversal of Bagley's conviction would be possible on remand even under the new standard formulated today for specific-request cases. See *ante*, at 684.

I cannot agree. The Court's approach stretches the concept of "materiality" beyond any recognizable scope, transforming it from merely an evidentiary

concept as used in *Brady* and *Agurs*, which required that material evidence be admissible and probative of guilt or innocence in the context of a specific request, into a result-focused standard that seems to include an independent weight in favor of affirming convictions despite evidentiary suppression. Evidence favorable to an accused and relevant to the dispositive issue of guilt apparently may still be found not "material," and hence suppressible by prosecutors prior to trial, unless there is a reasonable probability that its use would result in an acquittal. JUSTICE MARSHALL rightly criticizes the incentives such a standard creates for prosecutors "to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive." *Ante*, at 701.

Moreover, the Court's analysis reduces the significance of deliberate prosecutorial suppression of potentially exculpatory evidence to that merely of one of numerous factors that "may" be considered by a reviewing court. *Ante*, at 683 (opinion of BLACKMUN, J.). This is not faithful to our statement in *Agurs* that "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U.S., at 106. Such suppression is far more serious than mere nondisclosure of evidence in which the defense has expressed no particular interest. A reviewing court should attach great significance to silence in the face of a specific request, when responsive evidence is later shown to have been in the Government's possession. Such silence actively misleads in the same way as would an affirmative representation that exculpatory evidence does not exist when, in fact, it does (*i. e.*, perjury) — indeed, the two situations are aptly described as "sides of a single coin." Babcock, Fair Play: Evidence Favorable to
715 *715 an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133, 1151 (1982).

Accordingly, although the judgment of the Court of Appeals should be vacated and the case should be remanded for further proceedings, I disagree with the Court's statement of the correct standard to be applied. I therefore respectfully dissent from the judgment that the case be remanded for determination under the Court's new standard.

716 *716

No. 98-1022
United States Court of Appeals, Tenth Circuit

United States v. Gonzalez-Montoya

161 F.3d 643 (10th Cir. 1998)
Decided Nov 24, 1998

No. 98-1022.

Filed November 24, 1998.

Appeal from the United States District Court for the District of Colorado (D.C. No. 97-CR-208-N).

644 *644

Stephen M. Wheeler, Stephen M. Wheeler, P.C., appearing for the Appellant.

John M. Hutchins, Assistant United States Attorney (Henry L. Solano, United States Attorney, and James R. Boma, Assistant United States Attorney, with him on the brief), District of Colorado, Denver, Colorado, appearing for the Appellee.

Before TACHA, BRORBY, and KELLY, Circuit Judges.

646 *646

KELLY, Circuit Judge.

Defendant-Appellant Victor Hugo Gonzalez-Montoya appeals from his sentence for conspiracy to distribute and distribution of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 846. He contends that (1) insufficient evidence supported the admission of hearsay statements by an alleged co-conspirator; (2) the district court improperly denied his motion for mistrial after it was discovered that the government had withheld material impeachment evidence in violation of the disclosure requirements of Giglio v. United States, 405 U.S. 150 (1972); (3) the government's misstatement of the deliberate ignorance jury instruction during its closing argument and the court's decision not to give a curative instruction constituted reversible error; and (4) the district court should have granted him a sentence reduction under the "safety valve" provision of the sentencing guidelines, 18 U.S.C. § 3553(f). Our jurisdiction arises under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(c), and we affirm.

Background

Mr. Gonzalez-Montoya and co-defendant Roberto Bonillo-Esqueda were indicted for participation in
647 a conspiracy to distribute *647 more than 100 grams of methamphetamine on or about May 29, 1997. Mr. Bonillo-Esqueda negotiated a plea agreement, in which he agreed to testify against Mr. Gonzalez-Montoya. The grand jury then returned a three-count superseding indictment against Mr. Gonzalez-Montoya. In the superseding indictment, Mr. Gonzalez-Montoya was first charged conspiracy to possess, with intent to distribute, methamphetamine (count one); and two substantive counts of possession, with intent to distribute, methamphetamine (counts two and three). The jury convicted him counts one and three and acquitted him of count two. This appeal followed.

Mr. Gonzalez-Montoya's appeal arises from four distinct incidents during trial and sentencing. The first incident involves the court's admission of hearsay testimony by Mr. Bonillo-Esqueda. At trial, Mr. Bonillo-Esqueda named Mr. Gonzalez-Montoya as the source of methamphetamine for a transaction between Mr. Bonillo-Esqueda and "Jose," a government informant, on May 27, 1997.

Mr. Bonillo-Esqueda testified to conversations with both Jose and the Defendant and stated that he gave the "buy money" from the May 27 sale to Mr. Gonzalez-Montoya. He further testified that he called Mr. Gonzalez-Montoya after Jose requested more methamphetamine and that Mr. Gonzalez-Montoya agreed to provide four pounds at $8,000 per pound.

Defense counsel objected that the testimony about Mr. Gonzalez-Montoya's statements was inadmissible hearsay. However, the trial judge overruled the objection and stated that he would make "make some findings at an appropriate point." See 2 R. at 57. Mr. Bonillo-Esqueda continued to testify to conversations with Mr. Gonzalez-Montoya regarding the price of the methamphetamine. He also provided details of a rendezvous between himself, Jose, and Mr. Gonzalez-Montoya at a Denver restaurant on May 29, 1997. According to Mr. Bonillo-Esqueda, Mr. Gonzalez-Montoya showed Jose a bag of methamphetamine at the restaurant, and, after two police officers entered the restaurant, Mr. Gonzalez-Montoya went into an adjoining alley with the bag. There, he gave the bag to Jose and was arrested by an FBI agent.

After hearing this and other evidence, the court found that a conspiracy existed between Mr. Gonzalez-Montoya and Mr. Bonillo-Esqueda and that the statements were made in furtherance of the conspiracy. See 2 R. at 115-116. However, the record reveals that the judge was confused about whether the testimony to which defense counsel objected was offered by Mr. Bonillo-Esqueda or by the DEA agent, Thomas Bartusiak. See id. at 114-15. Moreover, the court was not directed to particular statement's in Mr. Bonillo-Esqueda's testimony challenged as inadmissible hearsay. See id. at 115-16.

The second ground for appeal involves the government's failure to disclose impeachment evidence to defense counsel in a timely manner. During cross-examination, Mr. Bonillo-Esqueda testified that he had not sold drugs to Jose prior to May 27, 1997. This testimony contradicted information that the government possessed regarding a sale by Mr. Bonillo-Esqueda to Jose on May 22, 1997. On redirect, the prosecutor attempted to impeach Mr. Bonillo-Esqueda on this issue, but the judge cut him short. When defense counsel objected that the government had failed to disclose impeachment evidence regarding the May 22 sale, the court instructed the government to fax the relevant documents to defense counsel. After reviewing the newly-provided material, defense counsel moved for a mistrial. The court denied this motion on the grounds that giving the defense lawyer access to the impeachment material and an opportunity to question Mr. Bonillo-Esqueda at trial regarding the May 22 transaction put the defense lawyer in "in the same position [he] would have occupied if [he] had gotten the report on a timely basis." 3 R. at 138. Defense counsel elected not to conduct further cross-examination of Mr. Bonillo-Esqueda. Yet, Mr. Gonzalez-Montoya contends on appeal that his case was prejudiced by the untimely production of the Giglio material.

Mr. Gonzalez-Montoya's third claim arises from the government's erroneous explanation of a jury instruction on deliberate ignorance. During his rebuttal closing argument, the *648 prosecutor told the jury to pay close attention to the court's deliberate ignorance instruction. When the prosecutor started to read the instruction, defense counsel objected. The judge sustained the objection and stated that the court would read the jury instructions, but the prosecutor nevertheless proceeded to advise the jury on the meaning of deliberate ignorance until the court halted him.

As a result of this incident, the court elected not to give the deliberate ignorance instruction. It also declined to give a curative instruction that the government requested on the grounds that further discussion of deliberate ignorance would confuse the jury. Defense counsel did not request a curative instruction.

Finally, Mr. Gonzalez-Montoya appeals the denial of his request for a two-level sentence reduction under the safety valve provision of the sentencing guidelines, 18 U.S.C. § 3553(f). On January 2, 1998, he was sentenced to a term of 108 months in prison, followed by four years of supervised release. The court declined to reduce his sentence under the safety valve provision because he continued to maintain that he delivered the bag of methamphetamine from Mr. Bonillo-Esqueda to Jose without knowledge of its contents. Because the court considered this assertion to be false, it found that Mr. Gonzalez-Montoya failed to satisfy the fifth requirement of the safety valve provision: that the defendant truthfully provide the government with all information concerning the offense.

Discussion A. Admissibility of Co-conspirator Statements

Mr. Gonzalez-Montoya argues that the district court erred in admitting Mr. Bonillo-Esqueda's testimony about statements that Mr. Gonzalez-Montoya made. According to Mr. Gonzalez-Montoya, the trial judge improperly found that such testimony contained co-conspirator statements, which are non-hearsay under Fed.R.Evid. 801(d)(2)(E). Mr. Gonzalez-Montoya contends that the court erred in not holding a pretrial James hearing to make the three factual determinations necessary to admit co-conspirator statements: (1) that a conspiracy existed, (2) that both the declarant and the defendant were members of the conspiracy, and (3) that the statements were made in the course of the conspiracy. See United States v. Owens, 70 F.3d 1118, 1123 (10th Cir. 1995); United States v. James, 590 F.2d 575, 582 (5th Cir. 1979).

The record shows that Mr. Bonillo-Esqueda testified to out-of-court conversations between himself, Jose, and Mr. Gonzalez-Montoya. See 2 R. at 56-58. His testimony encompassed out-of-court declarations by Mr. Gonzalez-Montoya admissible as non-hearsay under two distinct sub-sections of Fed.R.Evid. 801(d). Although the district court admitted all of these statements under Fed.R.Evid. 801(d)(2)(E), see 2 R. at 115, Mr. Gonzalez-Montoya's out-of-court statements were also party admissions under Fed.R.Evid. 801(d)(2)(A). See United States v. Mayes, 917 F.2d 457, 463 and n. 8 (10th Cir. 1990) (holding that statements by defendants in tape-recorded conversations with co-conspirators were party admissions). Mr. Bonillo-Esqueda recounted a conversation in which the defendant admitted critical elements of the offense with which he was charged: possession of methamphetamine, intent to sell it to Jose, the price, and the date and time that he hoped to close the deal. See 2 R. at 56-58. Such statements fall squarely within the parameters of Fed.R.Evid. 801(d)(2)(A). See Mayes, 917 F.2d at 463; see also United States v. Cass, 127 F.3d 1218, 1222 n. 2 (10th Cir. 1997), cert. denied, 118 S. Ct. 1101 (1998). Hence, we need not reach the James issue with regard to them.

However, because the district court admitted remarks attributed to both the defendant and Mr. Bonillo-Esqueda under the co-conspirator rule, and because of the apparent confusion about which statements defense counsel alleged to be inadmissible hearsay, see 2 R. at 114-15, we take this opportunity to reiterate our strong preference for James proceedings where the government relies on co-conspirator statements. See United States v. Lopez-Gutierrez, 83 F.3d 1235, 1242 649 (10th Cir. 1996); Owens, 70 F.3d at 1123. *649

Under Tenth Circuit law, the district court may satisfy the prerequisites for admission of a co-conspirator statement through either of two means: by holding a James hearing or by provisionally admitting the statement "with the caveat that . . . the party offering [it] must prove the existence of the predicate conspiracy through trial testimony or other evidence." Owens, 70 F.3d at 1123. In either case, the court may consider the hearsay statement itself, as well as independent factors, in determining whether the government has

established a conspiracy by a preponderance of the evidence. See Fed.R.Evid. 801(d)(2); see also United States v. Bourjaily, 483 U.S. 171, 181(1987).

Here, the presence of Mr. Gonzalez-Montoya at the restaurant and in the alley with methamphetamine in his hands, the transfer of marked "buy money" between himself and Mr. Bonillo-Esqueda, combined with the provisionally-admitted hearsay testimony, support the court's determination that a conspiracy existed. We reject Mr. Gonzalez-Montoya's argument that he had no more than a buyer-seller relationship with Mr. Bonillo-Esqueda. As we noted in United States v. Flores, 149 F.3d 1272, 1277 (10th Cir. 1998), "the purpose of the buyer-seller rule is to separate consumers, who do not plan to redistribute drugs for profit, from street-level, mid-level, and other distributors." Id.; see also United States v. Ivy, 83 F.3d 1266, 1285 (10th Cir. 1996). Neither Mr. Gonzalez-Montoya, nor Mr. Bonillo-Esqueda, qualified as a mere consumer.

Because Mr. Bonillo-Esqueda's testimony contained both non-hearsay party admissions and statements that the government proved were made in furtherance of the conspiracy, we hold that it was properly admitted. However, this case underscores our preference for the use of pretrial hearings to determine the existence of the predicate conspiracy. B. Untimely Disclosure of Giglio Evidence

Mr. Gonzalez-Montoya unsuccessfully sought a mistrial on the grounds that the government's violation of the disclosure rules of Giglio v. United States, 405 U.S. 150, 153-54 (1972), deprived him of a fair trial. We review questions regarding the disclosure of exculpatory or impeachment evidence de novo. See Smith v. Sec. of New Mexico Dep't. of Corrections, 50 F.3d 801, 827 (10th Cir. 1995). Impeachment, as well as exculpatory evidence falls within the rule, articulated in Brady v. Maryland, 373 U.S. 83, 87 (1963), that suppression of material information favorable to the accused violates due process. See Giglio, 405 U.S. at 154; Smith, 50 F.3d at 822, 825. In order to establish a Brady or Giglio violation, "the defendant bears the burden of establishing (1) that the prosecution suppressed the evidence, (2) that the evidence was favorable to the accused, and (3) that the evidence was material." Smith, 50 F.3d at 824. According to the Supreme Court, the criterion of materiality is met only if there is a "reasonable probability" that the outcome of the trial would have been different had the evidence been disclosed to the defense. United States v. Bagley, 473 U.S. 667, 682 (1985); see also Smith, 50 F.3d at 827.

The documents relating to Mr. Bonillo-Esqueda's involvement in an earlier drug transaction constituted impeachment evidence that the prosecution should have disclosed in a timely manner. See 3 R. at 137. Mr. Bonillo-Esqueda was an alleged co-conspirator. He was thus a material witness whose credibility, or lack thereof, played a critical role in the determination of Mr. Gonzalez-Montoya's guilt or innocence. See Giglio, 405 U.S. at 15; United States v. Buchanan, 891 F.2d 1436, 1443 (10th Cir. 1989).

In denying a mistrial, the district court incorrectly stated that bad faith is a prerequisite for a mistrial on Giglio grounds. See 3 R. at 134. Constitutional error arises from "the character of the evidence, not character of the prosecutor." United States v. Agurs, 427 U.S. 97, 107 (1976); Brady, 373 U.S. at 8. Although we held in United States v. Dennison, 891 F.2d 255, 260 (10th Cir. 1989), that
650 dismissal of a case in midtrial *650 for failure to fully comply with a discovery order is too extreme a sanction where the prosecutor did not act in bad faith and no prejudice occurred, our precedent establishes that "the term `suppression,' in the Brady context, does not require a finding of . . . [a] culpable state of mind. . . ." Smith, 50 F.3d at 824; see also, e.g., United States v. Sullivan, 919 F.2d 1403, 1426 (10th Cir. 1990). Distinctions between late disclosure and non-disclosure, good faith and bad faith, have no relevance if the government's conduct prejudices the outcome of the case.

Here, no prejudice resulted. The trial judge found that untimely disclosure did not affect the results of the proceeding because defense counsel had an opportunity to review the new evidence and question Mr. Bonillo-Esqueda about it. See id. at 138. When assessing the materiality of Giglio information, we must consider the significance of the suppressed evidence in relation to the entire record. See Smith, 50 F.3d at 827. We will not automatically order a new trial "whenever a combing of the prosecutor's files . . . has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." Giglio, 405 U.S. at 154; United States v. Washita Construction Co., 789 F.2d 809, 824 (10th Cir. 1986).

On appeal, Mr. Gonzalez-Montoya has failed to demonstrate a reasonable probability that timely revelation of the impeachment evidence would have altered the outcome of his case. See Bagley, 473 U.S. at 682. After obtaining and reviewing the new evidence during trial, defense counsel declined to interview Mr. Bonillo-Esqueda or to examine him in front of the jury about the prior drug deal. See 3 R. at 136. The record suggests, and defense counsel conceded at oral argument, that the decision not to probe the issue further stemmed from concern about opening the door to evidence of the Defendant's involvement in the earlier transaction. See 2 R. at 95-96, 133. Defense counsel stated at oral argument that, if he had obtained the impeachment evidence earlier, he would have used a private investigator to show that Mr. Bonillo-Esqueda was the leader and organizer of the illegal activity. However, the defense lawyer's reluctance to question Mr. Bonillo-Esqueda about the May 22 transaction, for fear of implicating Mr. Gonzalez-Montoya, would not have abated with additional time to prepare. Thus, the district court properly denied Mr. Gonzalez-Montoya's motion for a mistrial.

C. Deliberate Ignorance Instruction

Mr. Gonzalez-Montoya contends that the prosecutor committed misconduct when he discussed the "deliberate ignorance" standard in his rebuttal closing argument and that the court abused its discretion in failing to give a curative jury instruction.

Defense counsel objected when the prosecutor began to read the deliberate ignorance instruction, but he did not challenge the prosecutor's subsequent misstatement of the law. Because defense counsel did not specifically object to the prosecutor's remarks about the reasonable person standard, we review them for plain error. See United States v. Olano, 507 U.S. 725, 731 (1993); United States v. Oberle, 136 F.3d 1414, 1421 (10th Cir. 1998), cert. denied, 1998 WL 396485 (1998). A court of appeals has the authority, but is not required, to order correction of plain errors that were not brought to the attention of the district court, if they affect substantial rights. See Olano, 507 U.S. at 735. We employ a two-step process in evaluating claims of prosecutorial misconduct: First, we determine whether the prosecutor's behavior was improper; if so, we decide whether it mandates reversal. See id. In evaluating such incidents for plain error, we will reverse "only if, after reviewing the entire record, we conclude that

the error is obvious and one that would undermine the fairness of the trial and result in a miscarriage of justice." Id.

Here, the prosecutor's definition of deliberate ignorance as failure to learn what a reasonable person would know represented an incorrect statement of the law. Deliberate ignorance is found where the defendant had subjective, rather than objective knowledge of his criminal behavior. See
651 *651 United States v. Lee, 54 F.3d 1534, 1538 (10th Cir. 1995). However, the fact that the prosecutor misstated the standard does not mean that Mr. Gonzalez-Montoya was deprived of a fair trial. See Oberle, 136 F.3d at 1421. We generally do not reverse a conviction "if the conduct [that the defendant challenges] was merely `singular and isolated.'" United States v. Ivy, 83 F.3d 1266,1288 (10th Cir. 1996) (quoting United States v. Pena, 930 F.2d 1486, 1491 (10th Cir. 1991). Here, the inappropriate remarks constituted one incident that the trial court cut short sua sponte by censuring the prosecutor before the jury.

Mr. Gonzalez-Montoya also contends that the district court's failure to give a deliberate ignorance instruction "left the jury without anything to guide them but the prosecutor's misstatement of the law." See Aplt. Br. at 17. Even if defense counsel had made a timely objection at trial, curative actions by the district court constitute only one factor in our determination of whether prejudice resulted. See United States v. Lonedog, 929 F.2d 568, 572 (10th Cir. 1991). Although the trial judge decided not to revisit the deliberate ignorance issue, he reminded the jury that, where the court and the lawyers disagreed, the jury was to be governed by the court's version of the instruction and the law. See 3 R. at 293; see also Ivy, 83 F.3d at 1288 (prosecutorial misconduct not usually prejudicial where the court tells the jury what weight to give the closing argument). Viewing the prosecutor's misconduct in light of the entire record, we conclude that the inappropriate remarks did not "influence the jury to convict on grounds other than the evidence presented" and that the fairness of Mr. Gonzalez-Montoya's trial was not undermined. United States v. Ramirez, 63 F.3d 937, 944 (10th Cir. 1995) (quoting United States v. Lowder, 5 F.3d 467, 473 (10th Cir. 1993)).

Nor did the court abuse its discretion in deciding not to give the deliberate ignorance instruction. We review refusal to give a particular jury instruction for abuse of discretion. See United States v. Pacheco, 154 F.3d 1236, 1238 (10th Cir. 1998); United States v. McIntosh, 124 F.3d 1330, 1337 (10th Cir. 1997). While "[a] defendant is entitled to an instruction on his theory of the case if the instruction is a correct statement of the law and if he has offered sufficient evidence for the jury to find in his favor," McIntosh, 124 F.3d at 1337, Mr. Gonzalez-Montoya did not request a deliberate ignorance instruction. In fact, before closing arguments, defense counsel argued that such an instruction should not be given. See 3 R. at 229. In omitting the deliberate ignorance instruction, the trial court essentially complied with defense counsel's wishes and punished the government for its inappropriate remarks.

Mr. Gonzalez-Montoya also maintains that, in a broader sense, the jury was improperly instructed on the controlling principles of law. We consider jury instructions de novo to determine whether, as a whole, they correctly stated the governing law and provided the jury with a sufficient understanding of the relevant standards and issues. See Pacheco, 154 F.3d at 1238. Viewed in their entirety, the instructions informed the jury in the instant case that the government must prove knowledge and intent.

We decline to order a new trial because of either the prosecutor's misstatement of the deliberate ignorance standard or the court's refusal to give a curative instruction.

D. Safety Valve Provision

Finally, Mr. Gonzalez-Montoya contends that he was improperly denied a two-level downward adjustment under the safety valve provision of the

sentencing guidelines, 18 U.S.C. § 3553(f). We review the district court's determination of a particular defendant's eligibility for relief under § 3553(f) for clear error. See United States v. Roman-Zarate, 115 F.3d 778, 784 (10th Cir. 1997); United States v. Acosta-Olivas, 71 F.3d 375, 377 n. 3 (10th Cir. 1995). To the extent that district court interpreted the "scope and meaning" of 3553(f)(5), we review its legal interpretation de novo. See Acosta-Olivas, 71 F.3d at 377 n. 3.

To override a mandatory minimum sentence, a defendant must prove that he meets all five requirements of the safety valve provision: (1) that
652 he does not have *652 more than one criminal history point under the sentencing guidelines; (2) that he did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (3) that the offense did not result in death or serious bodily injury; (4) that the defendant was not a leader or organizer of the offense and that he was not engaged in a continuing criminal enterprise; and (5) that, not later than the time of sentencing, he "truthfully provided to the Government all information and evidence concerning the offense or offenses that were part of the same course of conduct or a common scheme or plan." 18 U.S.C. § 3553(f). The burden of proving all five requirements by a preponderance of the evidence lies with the defendant. See United States v. Verners, 103 F.3d 108, 110 (10th Cir. 1996); see also United States v. Ortiz, 136 F.3d 882, 883 (2d Cir. 1997), cert. denied, 118 S. Ct. 1104 (1998).

The district court's ruling that Mr. Gonzalez-Montoya did not qualify for a downward adjustment under § 3553(f) hinged on his failure to satisfy the fifth requirement. Mr. Gonzalez-Montoya continued to maintain at sentencing that he was too drunk on May 29 to knowingly participate in a drug deal or to be aware of the contents of the bag. See 4 R. at 7. His written statement that he had consumed 10 to 12 beers in several hours conflicted with his subsequent trial testimony that he drank as many as 25 beers; both of these claims belied the lucidity he displayed at the time of arrest. Moreover, he denied knowing Mr. Bonillo-Esqueda's name or conversing with him prior to May 29, 1997. On this basis, the trial judge found that Mr. Gonzalez-Montoya had not conveyed to the government "all information or evidence" about the May 29 offense, as required by § 3553(f)(5). See 3 R. at 18.

Mr. Gonzalez-Montoya argues that the "tell all" requirement of 3553(f)(5) does not mandate a confession of guilt on the part of the defendant. While we agree that the safety valve provision and acceptance of responsibility under U.S.S.G. 3E1.1(a) are not coterminous, we conclude that 3553(f)(5) goes beyond merely barring the defendant from denying the offense of conviction. See United States v. Sabir, 117 F.3d 750, 753 (3d Cir. 1997). Under § 3353(f)(5), a defendant must affirmatively volunteer all he knows, including facts beyond the basic elements of the crime. See United States v. Myers, 106 F.3d 936, 941 (10th Cir. 1997, cert. denied, ___ U.S. ___, 117 S. Ct. 2446 (1997) (stating that "section 5 is very broad"); Sabir, 117 F.3d at 752. Because both the trial court and the jury found that Mr. Gonzalez-Montoya untruthfully minimized his role in the May 29 drug transaction, we cannot say that the trial court's findings were clearly erroneous. See Sabir, 117 F.3d at 753 (holding that defendant's false efforts to minimize his role disqualified him from a safety valve adjustment).

Conviction by a jury does not foreclose relief under the safety valve provision. See United States v. Sherpa, 110 F.3d 656, 660 (9th Cir. 1996) (holding that defendant who claimed ignorance of the contents of a suitcase satisfied § 3553(f)(5), even though the jury found that he knowingly possessed heroin). However, a trial judge, like a jury, is free to find a defendant's contentions untruthful. Given such a finding, we hold that Mr. Gonzalez-Montoya did not meet his burden of establishing all five requirements for a downward adjustment under safety valve provision.

AFFIRMED. *1231 1231

No. 08-30170
United States Court of Appeals, Ninth Circuit

U.S. v. Kohring

637 F.3d 895 (9th Cir. 2011)
Decided Mar 11, 2011

No. 08-30170.

Argued October 6, 2010.

896 Submitted and Filed March 11, 2011. *896

Michael Filipovic; Assistant Federal Public Defender; Seattle, WA, for the appellant.

Kevin R. Gingras; United States Department of Justice; Washington, D.C., for the appellee.

Appeal from the United States District Court for the District of Alaska, John W. Sedwick, District Judge, Presiding. D.C. No. 3:07-cr-00055-JWS-1.

Before: BETTY B. FLETCHER, A. WALLACE TASHIMA and SIDNEY R. THOMAS, Circuit Judges.

Opinion by Judge THOMAS; Partial Concurrence and Partial Dissent by Judge B. FLETCHER.

898 *898

OPINION

THOMAS, Circuit Judge:

Victor Kohring filed this appeal after being convicted of three public corruption charges. While the case was pending on appeal, we remanded it to the district court for the limited purpose of determining whether the government had breached its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and, if so, the remedy to which Kohring is entitled. The district court determined the prosecution had failed to disclose favorable evidence to Kohring, but it concluded the government did not violate *Brady/Giglio* because the newly-disclosed information is not material. We agree with the district court that the prosecution suppressed favorable material, but we respectfully disagree with its conclusion as to materiality. We conclude that the newly-disclosed information, when viewed collectively, is material and that the prosecution violated *Brady/Giglio*. We vacate Kohring's conviction and remand to the district court for a new trial.

I

Victor Kohring, a former member of the Alaska State House of Representatives, was convicted in federal district court on three counts of public corruption felonies: conspiracy to commit extortion and attempted extortion under color of official right and bribery under 18 U.S.C. § 371 (Count 1), attempted interference with commerce by extortion induced under color of official right in violation of 18 U.S.C. § 1951(a) (Count 3), and bribery concerning programs receiving federal funds in violation of 18 U.S.C. § 666(a)(1)(B) (Count 4). Kohring was acquitted of Count 2 — interference with commerce by extortion induced under color of official right in violation of 18 U.S.C. § 1951(a).

Kohring was charged after a federal investigation suggested he had accepted several cash payments and other benefits from Bill Allen in exchange for various legislative acts benefitting VECO Corporation, Allen's oil field services company

899 that *899 had interests in the construction of a natural gas pipeline in Alaska. The evidence tended to show a lengthy, ongoing relationship between Allen and Kohring, but most of the evidence presented at trial related to transactions in 2006, during or near in time to Alaska's state legislative session in Juneau. Many of these transactions were documented in surreptitious audio and video recordings.

A

The government's case against Kohring consisted primarily of (1) recorded conversations between Kohring, Allen, and Rick Smith, another VECO executive; (2) testimony of Allen and Smith, who both reached plea agreements in exchange for their cooperation; and (3) the testimony of an FBI agent concerning statements Kohring made when his office was searched.

In a February 21, 2006, recorded telephone conversation between Smith and Kohring, the two discussed how the recently introduced Petroleum Production Tax bill would further VECO's interest in the development of a natural gas pipeline. The bill, while helpful to VECO, was contrary to Kohring's anti-tax philosophy. The two agreed to meet with Allen over dinner at the Island Pub restaurant on February 23, 2006, presumably to discuss matters further. A recorded conversation from March 4, 2006, between Allen and Smith, suggested that Allen had paid Kohring $1,000 at the Island Pub dinner.

A surreptitious video recording from March 30, 2006, captured a meeting between Kohring, Allen, and Smith in "Suite 604," a room in a local hotel that VECO rented during legislative sessions. The video recording captured three transactions — (1) Kohring asking Allen for help with a $17,000 credit card debt, (2) Allen giving Kohring money to "put in Easter eggs for his daughter," and (3) Allen paying Kohring money "for his daughter's Girl Scout uniform."

Kohring began that meeting by asking Allen "how [Kohring] could deal with" his $17,000 credit card debt. Kohring explained that he accumulated the debt on account of medical bills and had been unable to pay it off with only his legislative salary. He told Allen and Smith he had "a situation . . . it's a financial matter" that he thought "potentially, could hurt [him] politically" and "[would] be a public record." He asked Allen and Smith if they "would . . . consider helping [him] and suggest some options to [him] as to what could be done." Allen did not give Kohring money at that time, but he assured Kohring that he would see what he could do. Kohring responded, "I wanna do everything . . . completely above board, of course." Indeed, he told Allen and Smith that he would pose "hypothetical questions" regarding any assistance to the ethics committee advisor for the Legislature. Allen responded, "I don't know if that's real smart. . . . I wouldn't even say to anybody that you're in a bind." Kohring demurred. At the end of their meeting, Kohring asked, "What can I do at this point to help you guys? Any — anything? . . . Just keep lobbying my colleagues for a governor's, ah, plan, right?"

At the same Suite 604 meeting, Allen gave Kohring money ostensibly (1) to put in his daughter's Easter eggs and (2) for his daughter's Girl Scout uniform. The video recording shows Allen asking Kohring when he was taking off for the Easter holiday and then telling Kohring how he used to put money in Easter eggs for children to find. Allen then reached into his wallet for cash to give to Kohring and asked Smith, "Have you got any hundreds? . . . [G]ive me a hundred." Kohring then told Allen the $50 he sent his daughter for her
900 Girl Scout uniform "was a little short" *900 and that "[s]he'll need about a hundred." Allen handed Kohring more cash. The video recording did not capture the amount of money transacted. Kohring stated that he received only "around $100" at the meeting. Allen, though, testified he paid Kohring between $700-$1,100 at the meeting. Smith said

Kohring received as much as $1,000, but he could only approximate because he did not know for sure how much was given.

The government also introduced evidence that on June 8, 2006 — the final day of the special legislative session for passing the Petroleum Production Tax — Allen called Kohring to arrange a meeting at a local McDonald's restaurant. Allen testified at trial that he met Kohring at the restaurant, they walked back to Suite 604, and, while they were outside the hotel, Allen gave Kohring $600-$700. The government tied this testimony to another Suite 604 recording where Kohring told Allen he would have left town to prevent a vote on the Pipeline Production Tax if Allen had wanted him to do so.

B

At trial, the district court instructed the jury on the elements of each count and the time frames alleged in the government's Superceding Indictment. But neither the instructions nor the general verdict forms made specific reference to any of the acts alleged or connected specific acts to the individual counts. Kohring was convicted on conspiracy to commit extortion (Counts 1), attempted extortion (Count 3), and bribery (Count 4) but acquitted of extortion (Count 2). No special interrogatories were provided to the jury as part of the verdict form, and the trial court denied Kohring's request to interview the jury.

Kohring initially appealed his convictions on grounds not relevant here. Meanwhile, essentially the same prosecution team that was prosecuting Kohring was also prosecuting Senator Ted Stevens in Washington, D.C., on public corruption charges. *See United States v. Stevens*, Criminal Case No. 08-231 (D.D.C.). The government prosecuted Senator Stevens because he failed to disclose gifts he had received from Allen, as required by the Ethics in Government Act, *see* 5 U.S.C. App'x 4 §§ 101-505. Senator Stevens was convicted on several counts. After his conviction, though, it became apparent that the prosecution team had failed to provide Senator Stevens' with favorable discovery pertaining to a key witness — Bill Allen. A new group of government lawyers reviewed the matter, and they moved to dismiss all charges against Senator Stevens with prejudice, based on the undisclosed *Brady/Giglio* material.

After Senator Stevens' charges were dismissed, Kohring moved us to order the government to disclose, under *Brady/Giglio*, all evidence "favorable to the accused." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. The government then moved us to remand the matter to the district court for further proceedings under *Brady/Giglio*. We ordered Kohring released pending appeal and remanded the matter to the district court for the limited purpose of determining whether the government had breached its obligation of full disclosure under *Brady/Giglio* and, if so, whether Kohring was prejudiced and entitled to a remedy.

C

On remand, the government disclosed, for the first time, several thousand pages of documents, including "FBI 302 reports," undated and dated handwritten notes from interviews with Allen and Smith, e-mails, various memoranda, and police reports.

After receiving the material, Kohring moved the district court to dismiss the Superceding Indictment or, alternatively, order a new trial. 901 Kohring alleged *Brady/Giglio* *901 violations, based on the prosecution's failure to disclose the information, and violations of *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), based on the prosecution's purported solicitation of false testimony from Allen and Smith. Specifically, Kohring claimed the newly-disclosed information included: (1) evidence that Allen had been or was still being investigated for sexual misconduct with minors, (2) evidence that cast doubt on Allen's memory and the amount of money paid to Kohring, (3) evidence that the payments were made out of friendship and pity rather than a corrupt *quid-pro-quo* relationship, (4)

evidence of inconsistent statements made by Smith, as well as a questionable relationship he had with an investigating FBI agent, and (5) evidence that a government witness thought Kohring was not corrupt.

The district court denied Kohring's motion for dismissal or a new trial, but it observed the material was favorable to Kohring and, indeed, had been suppressed. The district court nonetheless concluded the suppression did not amount to a *Brady/Giglio* violation because the suppression did not prejudice Kohring. The court reached this conclusion by reasoning that the newly-disclosed information did not cast any doubt on the evidence of Kohring's alleged $17,000 solicitation in the hotel room, which the court assumed supported the convictions on conspiracy to commit extortion (Counts 1), attempted extortion (Count 3), and bribery (Count 4). Thus, the withheld evidence, which tended to cast doubt on the remaining payments was immaterial. The district court noted in passing, though, that if Kohring had been convicted of extortion (Count 2) — which was charged on the basis of payments other than the $17,000 solicitation — then the newly-disclosed information would have undermined confidence in the guilty verdict.

Kohring also moved the district court for an evidentiary hearing on the newly-disclosed information, but the district court denied that motion, as well.

On appeal, Kohring challenges the district court's denial of his motion to dismiss the Superceding Indictment or, alternatively, for a new trial or evidentiary hearing. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's *Brady/Giglio* determinations and all other questions of law. *United States v. Stever*, 603 F.3d 747, 752 (9th Cir. 2010); *Jackson v. Brown*, 513 F.3d 1057, 1069 (9th Cir. 2008).

II

There is no doubt, as the district court properly held, that the prosecution withheld and suppressed information that was favorable to the defense. Because Kohring was prejudiced by the suppression, we must vacate Kohring's conviction and remand the case for a new trial.

In *Brady*, the Supreme Court held "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 punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. 1194. In *Giglio*, the Supreme Court extended this principle to include evidence that impeaches a witness's credibility. 405 U.S. at 154, 92 S.Ct. 763.

There are three elements of a *Brady/Giglio* violation: "(1) the 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." *United States v. Williams*, 547 F.3d 1187, 1202 (9th Cir. 2008) (quoting *Strickler* 902 *v. Greene*, *902 527 U.S. 263, 281-32, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (internal quotation marks omitted)).

Evidence is prejudicial or material[1] "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." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). There is a "reasonable probability" of prejudice when suppression of evidence "undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (citing *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375). But a "reasonable probability" may be found "even where the remaining evidence would have been sufficient to convict the defendant." *Jackson*, 513 F.3d at 1071 (citing *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936).

1 For the purpose of *BradyiGiglio*, "material" and "prejudicial" have the same meaning. *Benn v. Lambert*, 283 F.3d 1040, 1053 (9th Cir. 2002).

Suppressed evidence is considered "collectively, not item by item." *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555. If a reviewing court finds a material *Brady/Giglio* violation, "there is no need for further harmless-error review." *Id.* at 435, 115 S.Ct. 1555. But if suppressed evidence is "merely cumulative," then the failure to disclose is not a violation. *Morris v. Ylst*, 447 F.3d 735, 741 (9th Cir. 2006).

We disagree with the government's argument that the newly-disclosed information is irrelevant. The government maintains the newly-disclosed information casts no doubt on the video-recorded evidence of the alleged $17,000 solicitation and that the alleged solicitation alone was sufficient to support convictions on all three counts. Contrary to the government's argument, there is no way to determine whether the jury based all three convictions on the alleged $17,000 solicitation. The jury was given only a general verdict form.[2] The jury was not instructed as to the specific alleged acts that supported each count. Nor was it provided with a copy of the Superceding Indictment, which connected specific allegations to each count. The jury was instructed as to the time frame for each count, [3] but the government alleged that multiple acts occurred during those time frames, not just the alleged $17,000 solicitation. And, while the prosecutor referenced the alleged solicitation during closing arguments in connection with the attempted extortion count (Count 3) that alone does not imply the jury necessarily based its convictions on the alleged solicitation. In short, the newly-disclosed information is not irrelevant because it speaks to the acts that the jury might have relied on in
903 reaching its verdicts *903 (including the alleged $17,000 solicitation).

2 We have encountered similar problems with general verdicts. *See United States v. Manarite*, 44 F.3d 1407, 1413-14 (9th Cir. 1995). There, we reversed a conspiracy conviction after reversing a conviction on mail and wire fraud, which, along with other substantive charges, were alleged objects of the conspiracy. *Id.* Because the jury used only a general verdict, we could not determine what object the conspiracy conviction was based on. *Id.* We reversed the conspiracy conviction because it was possible that the conviction was based solely on the mail and wire fraud, which we had reversed. *Id.* We reasoned, "[I]f the judge instructs the jury that it need find only one of the multiple objects, and the reviewing court holds any of the supporting counts legally insufficient, the conspiracy count also fails." *Id.* at 1413 (citing *United States v. DeLuca*, 692 F.2d 1277, 1281 (9th Cir. 1982)). Otherwise, the defendant might have been convicted of conspiring to commit an act that was not a crime.

3 The time frames for the counts were: conspiracy to commit extortion (Count 1) — January 2002 to August 2006; extortion (Count 2) — January 2006 to August 2006; attempted extortion — March 2006 to August 2006; and bribery — January 2006 to August 2006.

Beyond being merely relevant to the acts, Kohring alleges the newly-disclosed information is either exculpatory or could have been used to impeach government witnesses. Specifically, he claims the newly-disclosed information includes: (1) evidence that Allen had been or was still being investigated for sexual misconduct with minors, (2) evidence that casts doubt on Allen's memory and the amount of money paid to Kohring, (3) evidence that the payments were made out of friendship and pity rather than a corrupt *quid-pro-guo* relationship, (4) evidence of inconsistent statements made by Smith, as well as a questionable relationship he had with an

investigating FBI agent, and (5) evidence that a government witness thought Kohring was not corrupt.

A

Brady/Giglio claims are evaluated collectively, but we "must first evaluate the tendency and force of each item of suppressed evidence and then evaluate its cumulative effect at the end of the discussion." *Barker v. Fleming*, 423 F.3d 1085, 1094 (9th Cir. 2005) (quoting *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555).

1

The newly-disclosed information contains Anchorage Police Department ("ADP") files alleging that Allen sexually exploited minors and attempted to conceal that behavior by soliciting perjury from the minors and arranging for one of the minors to make herself unavailable to testify against Allen.

These documents confirm the existence of an extensive investigation (dating back to at least 2004) into Allen's alleged sexual misconduct. The documents further establish that the prosecution was aware of the ADP investigation before Kohring's trial. In fact, one of the Assistant U.S. Attorneys prosecuting this case and a FBI agent were present at interviews of one of the victims by the Anchorage Police Department. But Kohring was not made aware of the investigation or any of the allegations until he received the newly-disclosed information on remand.

The district court addressed this information by referencing its discussion of the same evidence in *United States v. Kott*, 2010 WL 148447 (D.Alaska Jan. 13, 2010), a similar political-corruption case where Allen was also a key witness. There (and, by implication, here), the district court concluded the evidence was favorable and suppressed by the government, satisfying the first two *Brady/Giglio* elements. *See id.* at *9. The district court concluded the evidence was not material, though, because it would have been excluded under 403 of the Federal Rules of Evidence, and Kohring could not have otherwise employed it to attack Allen's "character for truthfulness" under Rule 608, since it was extrinsic evidence. *See id.*

To be material under *Brady/Giglio*, "undisclosed information or evidence acquired through that information must be admissible," *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989), or capable of being used "to impeach a government witness," *United States v. Price*, 566 F.3d 900, 911-12 (9th Cir. 2009). We review for abuse of discretion a district court's determination that information would be inadmissible or could not be used for impeachment. *Id.* at 912 (citing *United States v. Scott*, 74 F.3d 175, 177 (9th Cir. 1996)).

The district court abused its discretion when it concluded the newly-disclosed information concerning Allen's alleged sexual misconduct would be inadmissible or could not be used for
904 impeachment. First, *904 Rule 403 does not foreclose Kohring's use of the information. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed.R.Evid. 403 (emphasis added).

The district court concluded the material would have been inadmissible under Rule 403 because it would have been unfairly prejudicial, would have confused the issues, and would have been needlessly cumulative, because the jury was already aware that Allen was cooperating with the government to avoid corruption charges stemming from his relationship with Kohring, Kott, and others. We disagree.

The evidence was certainly prejudicial, but not unfairly so. Even if there is some danger of unfair prejudice or confusion of the issues, that danger

does not "substantially outweigh" the probative value of the information. Evidence that Allen attempted to suborn perjurious testimony from one of the minors and attempted to make another unavailable for a trial would have been highly probative of his "character for truthfulness." *See* Rule 608(b) (permitting cross-examination on specific instances of misconduct "if probative of truthfulness or untruthfulness"). And the district court could have contained the prejudicial effect of the material, as well as any possible confusion of the issues, by limiting its introduction to the essential facts necessary to reveal Allen's character for truthfulness.

Moreover, the material would not have been needlessly cumulative. The fact that Allen might have had a motive to testify against Kohring in order to gain leniency as to his corruption charges does not mean that evidence of a different bias or motive would be cumulative. *See, e.g., Horton v. Mayle*, 408 F.3d 570, 579 (9th Cir. 2005) (citing *Napue*, 360 U.S. at 270, 79 S.Ct. 1173 (holding that some evidence of bias does not diminish the value of other evidence describing a different source of bias)); *Banks v. Dretke*, 540 U.S. 668, 702-03,124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (holding impeachment evidence was not "merely cumulative" where the withheld evidence was of a different character than evidence already known to the defense). Indeed, evidence of Allen's sexual misconduct with a minor would have shed light on the magnitude of Allen's incentive to cooperate with authorities and would have revealed that he had much more at stake than was already known to the jury. Beyond facing serious criminal charges, the newly-disclosed information shows Allen was very distressed at the prospect of his alleged sexual misconduct becoming public. In an FBI interview, Allen said he would "become unglued" if the allegations were published in the media).

Even though the information does not run afoul of Rule 403, the question remains as to whether it would have been admissible or whether Kohring could have used it to impeach Allen. We conclude that, at a minimum, Kohring could have used the information on cross-examination to impeach Allen. *See, e.g., Lindh v. Murphy*, 124 F.3d 899 (7th Cir. 1997) (holding that a defendant was denied his Sixth Amendment right to cross-examination when he was barred from questioning an expert witness about potential bias stemming from accusations of sexual impropriety with several patients that resulted in criminal charges and the loss of his medical license and faculty position).

The Confrontation Clause of the Sixth Amendment "guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him." *United States v. Larson*, 495 F.3d 1094, 1102 (9th Cir. 2007) (en banc) (citing *905 *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (internal quotations omitted)). That right includes "the right of effective cross-examination." *Id.* (citing *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). We have recognized that "[effective cross-examination is critical to a fair trial because '[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.'" *Id.* (quoting *Davis*, 415 U.S. at 316, 94 S.Ct. 1105). And we, like the Supreme Court, have "emphasized the policy favoring expansive witness cross-examination in criminal trials." *Id.* (citing *United States v. Lo*, 231 F.3d 471, 482 (9th Cir. 2000); *Van Arsdall*, 475 U.S. at 678-79, 106 S.Ct. 1431; *Davis*, 415 U.S. at 316, 94 S.Ct. 1105).

We observed in *Larson* that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* (quoting *Davis*, 415 U.S. at 316-17, 94 S.Ct. 1105). Thus, "jurors [are] entitled to have the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to

place on [the Government witness'] testimony." *Id.* (quoting *Davis*, 415 U.S. at 317, 94 S.Ct. 1105). We explained in *United States v. Schoneberg*:

> The constitutional right to cross-examine is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation," but that limitation cannot preclude a defendant from asking, not only "whether [the witness] was biased" but also "to make a record from which to argue why [the witness] might have been biased."

396 F.3d 1036, 1042 (9th Cir. 2005) (quoting *Davis*, 415 U.S. at 318, 94 S.Ct. 1105) (footnotes omitted) (alterations in original).

We consider three factors "in determining whether a defendant's Confrontation Clause right to cross-examine is violated: (1) [whether] the excluded evidence was relevant; (2) [whether] there were other legitimate interests outweighing the defendant's interest in presenting the evidence; and (3) [whether] the exclusion of the evidence left the jury with sufficient information to assess the credibility of the witness." *Id.* at 1103 (alterations in original) (citing *United States v. Beardslee*, 197 F.3d 378, 383 (9th Cir. 1999)).

Here, the information related to Allen's alleged sexual misconduct was relevant, particularly with respect to his character for truthfulness. Rule 608 would have expressly permitted Kohring to cross-examine Allen about this specific conduct.[4] And, as discussed above, there were no interests outweighing Kohring's interest in presenting the evidence. Finally, if the district court would have prevented Kohring from cross-examining Allen on the alleged sexual misconduct, the jury would not have had sufficient information to assess Allen's credibility. The alleged misconduct would have added an entirely new dimension to the jury's assessment of Allen. Allen was "the prosecution's star witness." *Price*, 566 F.3d at 914 (quoting *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997)). As we have previously held, "Impeachment evidence is especially likely to be material when it impugns the testimony *906 of a witness who is critical to the prosecution's case." *Id.* (quoting *Silva v. Brown*, 416 F.3d 980, 987 (9th Cir. 2005)). Indeed, had the evidence of Allen's past conduct been disclosed, "there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment" regarding Allen's testimony against Kohring. *See Price*, 566 F.3d at 914 (quoting *Cone v. Bell*, ___U.S.___, 129 S.Ct. 1769, 1771, 173 L.Ed.2d 701 (2009)).

[4] Even if Kohring would not have been permitted to introduce extrinsic evidence in the course of cross-examination under Rule 608(b), Kohring would have still been permitted to ask Allen about the alleged misconduct. And even if Allen would have denied the allegations, the jury would have been able to observe his demeanor when he answered the questions, which might have been telling. *See, e.g., Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); *California v. Green*, 399 U.S. 149, 157-58, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

2

The newly-disclosed information also illustrates Allen's difficulty with remembering key facts, as well as Allen's and Smith's differing (and sometimes changing) recollections as to how much money they paid Kohring. Setting aside for a moment the question of the information's admissibility, the information is exculpatory and has impeachment value.

For instance, a government attorney's handwritten notes from September 1, 2006, read, "Island Pub meeting: bad recall of mtg." When Allen was apparently asked about the alleged McDonald's payment, handwritten notes from Allen's attorney state Allen had a "vague memory" and "didn't remember how this fit in." When asked about the Island Pub payment, Allen's attorney's notes read, "Bill DNR why he gave VK the $1,000." Undated notes written by an unknown author read, "Bill . . .

meds affecting cognitive memory." These are only a few examples of hand-written notes, both dated and undated, that tend to show Allen had difficulty remembering the details of key events.

The newly-disclosed information also illustrates inconsistent views on how much money was actually paid to Kohring. At trial, Allen testified he paid Kohring $1,000 at the Island Pub dinner, between $700-$1,100 in Suite 604 (the "Easter Egg" "Girl Scout Uniform" payments), and $600-$700 outside of McDonald's. A series of reports and e-mails reveals uncertainty, though, as to these amounts.

For example, with respect to the Island Pub payment, the government withheld FBI Form FD-302 interview reports ("FBI 302 reports") showing that Allen failed to mention the Island Pub payment at his first debriefing with the FBI on August 31, 2006. Allen was interviewed two days later with his attorney present and initially said he thought "he gave Kohring $500 cash on about four occasions to help him out, and gave him $1,000 once when Kohring's credit cards were maxed out." At the same interview, though, Allen "confirmed" he gave Kohring $1,000 at the Island Pub. Handwritten notes by the prosecutor and Allen's attorney show Allen was also confused as to who was present at the Island Pub meeting.

With respect to the Girl Scout uniform and Easter Egg payments in Suite 604, a newly-disclosed FBI 302 report from September 1, 2006, reads:

> ALLEN thinks during that particular meeting, SMITH probably gave KOHRING $300-$400 in cash, and ALLEN probably gave KOHRING $500, ostensibly to apply towards the purchase of KOHRING's daughter's Girl Scout uniforms.

A newly-disclosed IRS memorandum of an interview with Allen on December 11-12, 2006, reads:

> BILL ALLEN recalled giving VIC KOHRING about $1,000 which BILL ALLEN said was for Vic Kohring's daughter's Girl Scout uniform. BILL ALLEN also recalled that he had given Vic Kohring $1,000 at the Island Pub in Juneau a month before the meeting in Suite 604.

But an October 3, 2007, e-mail exchanged among the prosecution team reveals a stark inconsistency between Allen's and *907 Smith's recollection of how much money was allegedly transacted:

> Smith and Allen have different recollections re how much they provided to VK in Ste 604. BA thinks he was trying to give VK $1,000 and he asked RS if he had any hundreds, b/c he may not have enough with him at the time. BA generally recalls giving two amounts to VK totaling anywhere b/w $600-$l,000. He believes he counted out $500 from his wallet and gave it to VK for the second payment.
>
> RS has somewhat better recall on the issue. *He believes that when BA asked him for money, he only gave BA $100.* Although he's speculating to a certain degree, he believes BA may have asked him for money b/c BA didn't have any hundreds on him and the Easter Egg story (which RS had heard BA tell in the past) involves stuffing $100 in an egg
>
> As for the second payment, RS recalls BA counting out 5 bills. RS assumes these were only $20 bills if BA did not have any hundreds with him. *If RS's assumptions are right, then VK only received $200 total.*

(emphasis added).

Finally, in terms of the alleged McDonald's payment, two newly-disclosed FBI 302 reports show that, during his first two debriefings, Allen failed to mention any payment made to Kohring at McDonald's. In particular, during one of the debriefings, "Allen did not recall giving Kohring

cash gifts any other times during the most recent [2006] legislative session" other than the Island Pub payment in February 2006. Allen's first mention of the McDonald's payment came in a March 16, 2007, interview (memorialized in a newly-disclosed FBI 302 report), but Allen did not connect that payment to any specific date, he only said that it took place sometime during the 2006 legislative session.

This newly-disclosed information is favorable to Kohring, thus satisfying the first element of *Brady/Giglio*. *See* 373 U.S. at 87, 83 S.Ct. 1194; *Williams*, 547 F.3d 1187. The information tends to cast some doubt on the amounts that were allegedly paid to Kohring, as well as whether the payments were made at all. It also shows that Allen had difficulty remembering details of key events. The second element of *Brady/Giglio* is also satisfied because the information was suppressed. *Id.; Williams*, 547 F.3d at 1202.

We also conclude that some of the information was material, satisfying the third element of *Brady/Giglio*. *Id.; Williams*, 547 F.3d at 1202. As discussed above, in order for the newly-disclosed information to be material under *Brady/Giglio*, the information must be either admissible, lead to information that will be admissible, or capable of being used for impeachment. *Kennedy*, 890 F.2d at 1059; *Price*, 566 F.3d at 911-12. Nevertheless, a prosecutor does not have a duty to disclose "his or her strategies, legal theories or impressions of the evidence." *Morris*, 447 F.3d at 742. In other words, the prosecutor does not have a duty under *Brady/Giglio* to disclose all opinion work product. "[I]n general, a prosecutor's opinions and mental impressions of the case are not discoverable under *Brady [/Giglio] unless* they contain underlying exculpatory facts." *Id.* (emphasis original).

Here, some of the newly-disclosed information is opinion work product, otherwise inadmissible, or not capable of being used for impeachment (e.g., some of the undated, unidentified handwritten notes). Other information, such as the FBI 302 reports would, on the other hand, likely be either admissible or capable of being used for impeachment. And even some of the facts
908 contained in the opinion work product *908 should have been disclosed. Consider, for instance, the October 3, 2007, e-mail. Certain statements in the e-mail reveal the prosecutor's "impressions of the evidence." *Morris*, 447 F.3d at 742. With regard to Smith's recollection of how much money Allen gave Kohring in Suite 604, the e-mail reads "RS has somewhat better recall on the issue." This is, arguably, the prosecutor's impression of Smith's memory (admittedly, it could also be a fact). However, the statement that "[Smith] believes that when BA asked him for money, he only gave BA $100" is clearly an "underlying exculpatory fact" that should have been disclosed to Kohring if it was not merely cumulative. *See id.* Thus, while the prosecution did not have a duty to disclose the e-mail itself or the opinion work product in the e-mail, it did have a duty to disclose the non-cumulative "underlying exculpatory facts" in the e-mail. *See id.* The same can be said with respect to other newly-disclosed information that is arguably opinion work product (e.g., the attorneys' handwritten notes).

The newly-disclosed information also has to be more than "merely cumulative" to be material under *Brady/Giglio*. *Id.* (citing *United States v. Marashi*, 913 F.2d 724, 732 (9th cir.1990)). Here, the newly-disclosed information regarding Allen's memory problems would have been merely cumulative if presented at trial. At trial, Kohring's attorney exploited Allen's poor memory before the jury in both cross-examination and closing argument. In cross-examination, Kohring's attorney asked about the Island Pub payment, the Easter egg and Girl Scout uniform payments, and the McDonald's payment. Allen's testimony displayed his difficulty with remembering the specific payments, who witnessed the payments, and the purpose of the payments. Kohring's attorney then took full advantage of Allen's poor memory and confusion in his closing argument:

> Mr. Allen's demeanor on the stand was rather pathetic. Now, he has — and I don't mean to make fun of it — but he has memory problems, he has a brain injury. He obviously drinks too much. His demeanor on the stand — and remember his brain injury predated any of this that we're talking about here — but his demeanor on the stand was completely self-serving and pathetic.

We have previously held that when defense counsel sufficiently impeaches a government witness in cross-examination and closing argument, the defendant cannot later claim a *Brady/Giglio* violation on account of additional undisclosed evidence supporting the impeachment. *See Hovey v. Ayers*, 458 F.3d 892, 921 (9th Cir. 2006). In such circumstances, the evidence is cumulative because the grounds for impeachment are "no secret" to the jury. *Id.* Here, Allen's own testimony on cross-examination, along with counsel's closing argument, put Allen's poor memory and confusion directly before the jury. Further evidence of Allen's poor memory and confusion would have only been cumulative and would probably not have impacted the jury's verdict.

The same is not true, though, with respect to some of the information regarding the amount of money allegedly paid to Kohring. At trial, for instance, Smith confirmed that the "agreed facts" in his plea agreement stated he and Allen paid Kohring up to $1,000 in Suite 604 on March 30, 2006. But he also testified that he could only approximate that amount because he did not know for sure how much Kohring was paid. Indeed, the October 3, 2007, e-mail indicates Smith was not sure as to the precise amount Kohring received. But the same e-mail also contains what would have inevitably been valuable impeachment evidence — Smith's belief that Allen gave Kohring only $200 or less. 909 This difference *909 could have potentially been important to the jury, because Kohring stated that he only received "around $100" in Suite 604 that day and that the payment was a gift to a friend rather than a bribe. Similarly, the inconsistent payment amounts described in the FBI 302 reports and the IRS memo could have also been used as impeachment material.

3

The newly-disclosed information also tends to show that Allen gave Kohring money partly out of pity and friendship. At trial, Allen testified he paid Kohring partly out of pity and friendship and partly to secure Kohring's loyalty and encourage him to perform certain legislative acts on Allen's behalf. A newly-disclosed FBI 302 report shows that Allen said he paid Kohring, at least partly, because he "felt sorry" for him and wanted to help him with his "financial problems." Handwritten notes from an interview with Allen also show that Allen said he "gave stuff to VK because[he] is a friend." Other notes indicate that Allen said he "NEVER ASKED VIC TO DO ANYTHING IN EXCH. for cash or [unintelligible] or some benefit."

This newly-disclosed information is favorable to Kohring, and it was suppressed, thus satisfying the first two elements of *Brady/Giglio*. *Brady*, 373 U.S. at 87, 83 S.Ct. 1194; *Williams*, 547 F.3d at 1202. The information is also material and not "merely cumulative." *See Morris*, 447 F.3d at 741. Prior to trial the prosecution did, in fact, provide Kohring with a letter stating that Allen had said the payments were partly motivated by pity:

> Mr. Allen has advised the government that his motivation in providing these financial benefits to Mr. Kohring was partly because he felt sorry for Mr. Kohring regarding his personal financial situation and partly so that Mr. Kohring would take official acts on the part of VECO corporation.

Thus, for the purposes of *Brady/Giglio*, the prosecution met its obligation of alerting Kohring to Allen's statement that he paid Kohring partly out of pity. But the prosecution still had an obligation to disclose Allen's admission that he

"NEVER ASKED VIC TO DO ANYTHING IN EXCH. for cash or [unintelligible] or some benefit." This statement is not necessarily inconsistent with Allen's testimony that he paid Kohring, at least in part, to encourage Kohring to undertake certain legislative acts. Many lobbyists and other individuals contribute to political campaigns with the same hope. But what the statement tends to show is that Allen himself never told or otherwise expressed to Kohring that the payments were *quid-pro-quo*. The statement adds an entirely different dimension to what Kohring knew before trial. It makes clear that, while Allen might have given Kohring money, he never told Kohring he was paying him to curry legislative favors. Had Kohring known that Allen made this and similar statements, he could have undoubtedly used it at trial.

4

The newly-disclosed information contains what Kohring characterizes as two classes of exculpatory or impeachment information regarding Smith. The first includes undated handwritten notes, which show that Smith believed Kohring was be-holden to Allen on account of campaign contributions — not payments. The same notes also state that Smith " [d]oesn't know what VK thought the cash payments represented — whether he viewed them as bribes or gifts." At trial, Smith testified that Allen's payments were intended to keep "Vic on board on political issues."

This newly-disclosed information is arguably favorable and was suppressed. But it is not material. Smith testified at trial that — from his and Allen's perspective — the payments were politically motivated. *910 The thrust of the newly-disclosed information is that Smith had no knowledge of what Kohring thought of the payments — whether he thought they were gifts or politically motivated. The undated notes are not likely admissible, and Kohring has not adequately shown how they could have been used to impeach Smith.

910

The second class of information related to Smith concerns his relationship with a FBI special agent working on the case. According to material that Kohring viewed after trial (but did not obtain), Smith invited the agent and her husband to a golf tournament and then paid their tournament fees. The agent and her husband attended the tournament but did not reimburse Smith for the $500 entry fee. The agent said she "went golfing with Smith because she was extremely concerned about his mental condition. . . . Smith was having significant psychological troubles because of the pending federal criminal case against him [and she] was concerned Smith was possibly even suicidal. . . ."

Kohring argues he could have used this information in two ways at trial. First, he claims he could have "turned the free golf tournament . . . against the government by arguing that it showed bias and Smith's effort to curry favor with the lead case agent. . . ." Second, he argues that evidence of Smith's alleged mental instability demonstrated his susceptibility to coaching by Allen and others, and it "explained] Smith's willingness to bend his story to fit the government's theory."

This newly-disclosed information is not material under *Brady/Giglio*. With respect to Kohring's claim that it shows bias on the part of the government, the jury was well-aware that Smith was working closely with the government on the case, and evidence of the golf outing would have probably been "merely cumulative." *See Morris*, 447 F.3d at 742.

The government is generally under an obligation to disclose impeachment evidence that bears on the credibility of a witness, including evidence of poor mental and emotional health that may be provable on cross-examination. *United States v. Pryce*, 938 F.2d 1343, 1345-46 (D.C. Cir. 1991); *accord United States v. Smith*, 77 F.3d 511, 516 (D.C. Cir. 1996) ("Mental records can be material as impeachment evidence because they can cast doubt on the accuracy of a witness' testimony.").

Pryce and *Smith*, though, are distinguishable from the facts here in an important way. In each of those cases, the withheld evidence was psychiatric reports and medical records, respectively. *Pryce*, 938 F.2d at 1345-46; *Smith*, 77 F.3d at 516. Here, the information concerning Smith's alleged mental instability comes from the FBI special agent's informal assessment. Her assessment is a far cry from the professional psychiatric reports and medical records in *Pryce* and *Smith.*

Second, Kohring has not alleged that Smith suffered from mental instability at the time of the alleged payments. The First Circuit addressed this issue and concluded: "[W]e are aware of no court to have found relevant an *informally diagnosed* depression or personality defect. Rather, federal courts appear to have found mental instability relevant to credibility only where, *during the time-frame of the events testified to*, the witness exhibited a pronounced disposition to lie or hallucinate, or suffered from a severe illness . . . that dramatically impaired her ability to perceive and tell the truth." *United States v. Butt*, 955 F.2d 77, 82-83 (1st Cir. 1992) (emphasis added); *accord United States v. Antone*, 981 F.2d 1059, 1061 (9th Cir. 1992); *see also United States v. Sasso*, 59 F.3d 341, 347-48 (2d Cir. 1995) ("Evidence of a witness's psychological history may be admissible when it goes to her credibility. 911 In assessing the probative value *911 of such evidence, the court should consider such factors as the nature of the psychological problem, . . . the temporal recency or remoteness of the history . . . and whether the witness suffered from the problem at the time of the events to which she is to testify, so that it may have affected her ability to perceive or to recall events or to testify accurately.")

5

Finally, the newly-disclosed information includes a letter from one prosecutor to another, dated June 19, 2009, stating that "while it has not been memorialized in any interview reports or notes, it appears that at some point and on at least one occasion, [a former employee of the Alaska Attorney General's office] said that he did not think Mr. Kohring was dirty or corrupt, and [he] had the overall impression that if Mr. Kohring were corrupt, he may not realize it." The former employee, "was the source that developed investigative evidence related to Smith, Allen, and Tom Anderson." But the newly-disclosed information suggests the former employee made this statement on February 15, 2005, more than a year before most of the payments at issue here.

Kohring claims the statement would have been admissible exculpatory evidence under Fed.R.Evid. 404(a)(1) and 405(a). Presumably, Kohring's attorney could have asked the former employee on cross-examination whether he thought Kohring was corrupt. Rule 404(a)(1) and 405(a) allow the defendant to present character evidence, in the form of opinion testimony, "for the purpose of proving action in conformity therewith on a particular occasion."

The government, though, argues the statement would have been inadmissible under Rule 704(b) because it speaks to the "ultimate issue" — i.e., whether Kohring was corrupt. The government's reading of the rule, though, is misplaced. Rule 704(b) applies only to *expert* witnesses. *See, e.g., United States v. Hofus*, 598 F.3d 1171, 1179-80 (9th Cir. 2010). The former employee did not testify as an expert. And Rule 704(a) clearly states that "[e]xcept as provided in subdivision (b), testimony in the form of an opinion or inference other wise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." In other words, the Federal Rules of Evidence specifically permit the type of opinion testimony that the former employee might have offered. *See, e.g., United States v. Yarbrough*, 527 F.3d 1092, 1101-02 (10th Cir. 2008) (permitting opinion testimony relevant to intent "where the sole issue before the jury is whether a defendant undertook his undisputed acts with a prohibited state of mind.").

That the evidence is likely admissible does not necessarily imply it is material. The newly-disclosed information tends to show the statement was made on February 15, 2005 — more than a year before the alleged payments and solicitation discussed here. As a result, the former employee's opinion in 2005 probably would have had little relevance to how the jury perceived Kohring's mental state at the time of the misconduct.

B

After "first evaluating] the tendency and force of each item of suppressed evidence," we must "then evaluate its cumulative effect at the end of the discussion." *Barker*, 423 F.3d at 1094 (quoting *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555). Having reviewed the specific undisclosed evidence, we turn to a collective analysis of the *Brady/Giglio* claims. *Jackson*, 513 F.3d at 1076. In doing so, we are mindful that a jury's verdict should be
912 overturned as a result of the prosecution's *912 suppression of favorable evidence only if that evidence is material. *Id.* at 1076. Suppressed 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, 105 S.Ct. 3375. There is a "reasonable probability" of prejudice when suppression of evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555 (citing *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375). A "reasonable probability" may be found "even where the remaining evidence would have been sufficient to convict the defendant." *Jackson*, 513 F.3d at 1071 (citing *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936).

The prosecution's suppression of evidence in this case "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. The newly-disclosed information includes several thousand pages of relevant material. We are cognizant of the prosecution's explanation that it disclosed the voluminous material out of an abundance of caution. And we recognize that the prosecution might not have had a duty to disclose all the information it did. However, a substantial amount of the material is either admissible on its face, could have been used as impeachment material, or is likely inadmissible but memorializes exculpatory facts or impeachment information that should have been disclosed.

The newly-disclosed information contains several different classes of information that, collectively, give rise to "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, 105 S.Ct. 3375. Had the information been disclosed to Kohring, for instance, Kohring would have been able to impeach Allen with evidence of his alleged sexual misconduct. Contrary to the government's claim, this evidence would not have been cumulative in light of the jury's awareness of the plea agreement Allen had with the government. Evidence of the sexual misconduct would have added an entirely new dimension to Allen's possible motives for cooperating with the government. And, specifically, evidence that Allen attempted to suborn perjury from one of the alleged victims and attempted to make another unavailable to testify would have probably had a substantial impact on the jury's assessment of Allen's character for truthfulness.

In terms of the payments made to Kohring, the information shows stark inconsistencies in how much Allen and Smith believed they paid Kohring. The October 3, 2007, e-mail shows that Smith believed Allen only paid up to $200 to Kohring in Suite 604 on March 30, 2006. This is a far cry from the $700-$1,100 Allen testified to and is more consistent with Kohring's testimony that he received "around $100." Even if Kohring was not being paid out of friendship or pity, the fact that his account of the amount paid to him was potentially consistent with Smith's account might have made Kohring more credible in the eyes of the jury. But, because of the prosecution's

suppression, Kohring did not have the opportunity to cross-examine or impeach Smith as to that account.

Taken together, the newly-disclosed information is material and, as a result, the prosecution violated *Brady/Giglio.*

III

We are left to decide the appropriate remedy. The government clearly should have disclosed a substantial amount of the information in question. However, we do not have sufficient evidence to conclude the prosecution "acted flagrantly, willfully, and in bad faith." *See United States v. Chapman*, 524 F.3d 1073, 1085 (9th Cir. 2008). 913 As a result, we do not *913 exercise our supervisory authority by dismissing the Superceding Indictment. *See id.* (citing *United States v. Kearns*, 5 F.3d 1251, 1255 (9th Cir. 1993) (holding that even though the government's conduct "may have been negligent, or even grossly negligent," it did not rise to the level of flagrant misconduct)). Nor are we able to conclude that the violations were a result of "outrageous government conduct" that amounted "to a due process violation," which would also warrant dismissal of the Superceding Indictment. *Id.* at 1084. We have previously observed that "the appropriate remedy" for a *Brady/Giglio* violation "will usually be a new trial." *Id.* at 1086. That is the case here.[5]

[5] Another reason advanced by the partial dissent for the exercise of our supervisory authority to dismiss this indictment is "the prosecution's unrepentant attitude." In fairness, we note that the government took corrective action at the Public Integrity Section, which was primarily responsible for this prosecution, and installed a completely new prosecution team. It was the government, through this new team, that first suggested to us that the case should be remanded to the district court for it to examine whether there were any *Brady/Giglio* violations. It then produced the voluminous record that is subject of this appeal. The team also withdrew its opposition to Kohring's request to be released on bail pending resolution of the remand. The partial dissent also suggests that dismissal is justified "to release Kohring from further anguish and uncertainty." This rationale has yet to be recognized as an independent basis on which to exercise our supervisory power to dismiss an indictment, and we decline to do so here. In addition, we are also cognizant of the detailed and careful analysis by a highly respected presiding trial judge that there was more than sufficient evidence to support the verdict, and that he was unpersuaded that the result would be different even with introduction of the new information. We are also mindful that Kohring was acting in a position of public trust when the alleged acts were committed. Under the circumstances, despite the powerful views of our friend and esteemed colleague, we conclude that the exercise of supervisory power to dismiss the indictment would be inappropriate in this case. Rather, the proper course is to place the case, once again, in the hands of a jury, fully apprised of all the relevant information.

Kohring's conviction is vacated, and this matter is remanded to the district court for a new trial. We need not, and do not, reach any other issue urged by the parties on appeal.

VACATED and REMANDED.

B. FLETCHER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I and II of the majority's opinion, which unequivocally establish that the prosecution withheld and suppressed material that was favorable to the defense, in violation of *Brady* and *Giglio*, and that these suppressions undeniably prejudiced Kohring. I respectfully dissent, however, from Part III. Because this case

exemplifies "flagrant prosecutorial misconduct," *United States v. Chapman*, 524 F.3d 1073, 1085 (9th Cir. 2008), I would have this court exercise its supervisory authority to dismiss the Superceding Indictment with prejudice.

"A court may dismiss an indictment under its supervisory powers only when the defendant suffers 'substantial prejudice' and where 'no lesser remedial action is available.'" *Id.* at 1087 (internal citations omitted). Both conditions are satisfied here. The majority opinion clearly establishes the substantial prejudice Kohring has suffered as a result of the prosecution's misconduct in this case. And, as discussed below, the prosecution's unrepentant attitude indicates that no lesser remedial action will be effective.

A court may exercise its supervisory power "to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal
914 conduct." *914 *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991), *abrogated on other grounds as recognized by United States v. W.R. Grace*, 526 F.3d 499, 511 n. 9 (9th Cir. 2008). Each of these considerations is relevant in this case.

First, as detailed in the majority's opinion, the prosecution's *Brady/Giglio* offenses violated Kohring's due process right to a fair trial. *See Chapman, 524* F.3d at 1086 (observing that *Brady* violations "are just like other constitutional violations" and may justify the dismissal of an indictment "when the prosecution's actions rise . . . to the level of flagrant prosecutorial misconduct"). Furthermore, the prosecution's misconduct is an affront to the integrity of our system of justice. The prosecution failed to disclose *thousands* of pages of material documents — including FBI reports, memoranda, and police reports — until *after* Kohring's conviction. Even then, the prosecution failed to fulfill its disclosure obligations, turning over the previously undisclosed documents only *after* the defense filed a *Brady* motion.

I disagree with the majority's conclusion that the prosecution's conduct does not amount to flagrant, willful bad-faith misbehavior. *See* Maj. Op. at 912. Our court has "never suggested . . . that 'flagrant misbehavior' does not embrace reckless disregard for the prosecution's constitutional obligations." *Chapman*, 524 F.3d at 1085. Here, the record is replete with such reckless disregard. To cite just two examples: The late-disclosed information establishes that the prosecution was aware of the Anchorage Police Department's investigation into Allen's sexual misconduct, long before Kohring's trial began. It also indicates that Allen and Smith had wildly differing recollections as to how much money they allegedly gave to Kohring. This information undermines the prosecution's star witness and goes to the heart of the charges brought against Kohring. The prosecution's failure to timely disclose this information amounts to a reckless disregard for its constitutional obligations under *Brady/Giglio.*

Despite these egregious violations of basic prosecutorial responsibilities, the prosecution insists that Kohring's trial was justly conducted and his conviction fairly obtained. The prosecution's refusal to accept responsibility for its misconduct is deeply troubling and indicates that a stronger remedy is necessary to impress upon it the reprehensible nature of its acts and omissions. *See Chapman*, 524 F.3d at 1087 ("[W]e [have] made clear that in determining the proper remedy for prosecutorial misconduct, we must consider the government's willfulness in committing the misconduct and its willingness to own up to it." (quoting *United States v. Kojayan*, 8 F.3d 1315, 1318 (9th Cir. 1993) (punctuation omitted))). In this case, dismissal of the Superceding Indictment is justified not only as a deterrent but to release Kohring from further anguish and uncertainty.

I understand, as noted by the majority, that the government undertook certain after-the-fact amends, such as corrective action within the Public Integrity Section, installing a new prosecution team, and withdrawing its opposition to Kohring's request to be released on bail pending resolution of our remand to the district court. None of these actions, however, cure what happened to Kohring during his trial. I feel strongly that, if one looks closely at what is actually at stake in this case — ensuring a fair trial for Victor Kohring — the government has failed to make proper amends. For these reasons, I would exercise our supervisory authority to dismiss the
915 Superceding Indictment with prejudice. *915

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

Primary tabs

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1932; Apr. 26, 2011, eff. Dec. 1, 2011.)

Notes of Advisory Committee on Proposed Rules

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 12–15 (1956); Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Van. L. Rev. 385, 392 (1952); McCormick §152, pp. 319–321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore §1849. Cf. McCormick §152, p. 320, n. 29, listing unfair surprise as a ground for

exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure §60–445, surprise is not included in California Evidence Code §352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 [now 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

Committee Notes on Rules—2011 Amendment

The language of Rule 403 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 404. Character Evidence; Other Crimes, Wrongs, or Acts

Primary tabs

(a) Character Evidence.

(1) ***Prohibited Uses*****.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions for a Defendant or Victim in a Criminal Case*****.** The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.

(1) ***Prohibited Uses*****.** Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses*****.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) ***Notice in a Criminal Case.*** In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1932; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011.)

Notes of Advisory Committee on Proposed Rules

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or

evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§155–161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic as underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutger, L.Rev. 574, 584 (1956); McCormick §157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in accordance with the prevailing view. McCormick §158, p. 334. A similar provision in Rule 608, to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 581–583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657–658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the

California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *Id*., 615:

"Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion.

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956).

Notes of Committee on the Judiciary, House Report No. 93–650

The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the

ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

Notes of Committee on the Judiciary, Senate Report No. 93–1277

This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

Notes of Advisory Committee on Rules—1987 Amendment

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on Rules—1991 Amendment

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, *see, e.g., United States v. McClure*, 546 F.2nd 670 (5th Cir. 1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. *See, e.g*., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely

fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. *Compare* Fla. Stat. Ann §90.404 (2)(b) (notice must be given at least 10 days before trial) *with* Tex.R.Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. *Cf*. Fla. Stat. Ann §90.404 (2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. §3500, et seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule *in limine* on 404(b) evidence before it is offered or even mentioned during trial. When ruling *in limine*, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, *see United States v. Williams*, 900 F.2d 823 (5th Cir. 1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not

intend through the amendment to affect the role of the court and the jury in considering such evidence. *See United States v. Huddleston*, 485 U.S. 681, 108 S.Ct 1496 (1988).

Committee Notes on Rules—2000 Amendment

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985) (when the accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness, but it does not permit proof of the accused's character trait for violence).

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412–415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove

the alleged victim's propensity to act in a certain way. *See United States v. Burks*, 470 F.2d 432, 434–5 (D.C.Cir. 1972) (evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm"). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

The term "alleged" is inserted before each reference to "victim" in the Rule, in order to provide consistency with Evidence Rule 412.

GAP Report—Proposed Amendment to Rule 404(a). The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 404(a):

1. The term "a pertinent trait of character" was changed to "the same trait of character," in order to limit the scope of the government's rebuttal. The Committee Note was revised to accord with this change in the text.

2. The word "alleged" was added before each reference in the Rule to a "victim" in order to provide consistency with Evidence Rule 412. The Committee Note was amended to accord with this change in the text.

3. The Committee Note was amended to clarify that rebuttal is not permitted under this Rule if the accused proffers evidence of the alleged victim's character for a purpose other than to prove the alleged victim's propensity to act in a certain manner.

Committee Notes on Rules—2006 Amendment

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial

use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629–30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States*, 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264–5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

Nothing in the amendment is intended to affect the scope of Rule 404(b). While Rule 404(b) refers to the "accused," the "prosecution," and a "criminal case," it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment as released for public comment. A

paragraph was added to the Committee Note to state that the amendment does not affect the use of Rule 404(b) in civil cases.

Committee Notes on Rules—2011 Amendment

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Committee Notes on Rules—2020 Amendment

Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

The notice provision has been changed in a number of respects:

- The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.
- The pretrial notice must be in writing—which requirement is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.
- Notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. See Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied—even in cases in which a final determination as to the admissibility of the

evidence must await trial. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. See, e.g., United States v. Lopez-Gutierrez, 83 F.3d 1235 (10th Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); United States v. Perez-Tosta, 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

- The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.
- Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided when the government moves in limine for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word "other" is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs, and acts "other" than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

https://www.law.cornell.edu/rules/fre/rule_404

Rule 16. Discovery and Inspection

Primary tabs

(a) Government's Disclosure.

(1) *Information Subject to Disclosure.*

(A) *Defendant's Oral Statement*. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) *Defendant's Written or Recorded Statement*. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- statement is within the government's possession, custody, or control; and

- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) *Organizational Defendant*. Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) *Defendant's Prior Record*. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) *Documents and Objects*. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) *Reports of Examinations and Tests*. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) *Expert Witnesses*. At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government

requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) *Information Not Subject to Disclosure*. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. §3500.

(3) *Grand Jury Transcripts*. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

(b) Defendant's Disclosure.

(1) *Information Subject to Disclosure.*

(A) *Documents and Objects*. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) *Reports of Examinations and Tests*. If a defendant requests disclosure under Rule Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect

and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) *Expert Witnesses*. The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if—

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications[.]

(2) *Information Not Subject to Disclosure*. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) *Protective and Modifying Orders*. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) *Failure to Comply*. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

Notes

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94–64, §3(20)–(28), July 31, 1975, 89 Stat. 374, 375; Pub. L. 94–149, §5, Dec. 12, 1975, 89 Stat. 806; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 29, 2002, eff. Dec. 1, 2002; Pub. L. 107–273, div. C, title I, §11019(b), Nov. 2, 2002, 117 Stat. 1825; Apr. 16, 2013, eff. Dec. 1, 2013.)

Notes of Advisory Committee on Rules—1944

Whether under existing law discovery may be permitted in criminal cases is doubtful, *United States v. Rosenfeld*, 57 F.2d 74 (C.C.A. 2d)—cert. den., 286 U.S. 556. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, *United States v. B. Goedde and Co*., 40 F.Supp. 523, 534 (E.D.Ill.). The

rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court.

Notes of Advisory Committee on Rules—1966 Amendment

The extent to which pretrial discovery should be permitted in criminal cases is a complex and controversial issue. The problems have been explored in detail in recent legal literature, most of which has been in favor of increasing the range of permissible discovery. See, e.g. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash.U.L.Q. 279; Everett, Discovery in Criminal Cases—In Search of a Standard, 1964 Duke L.J. 477; Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan.L.Rev. 293 (1960); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1172–1198 (1960); Krantz, Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb.L.Rev. 127 (1962); Louisell, Criminal Discovery: Dilemma Real or Apparent, 49 Calif.L.Rev. 56 (1961); Louisell, The Theory of Criminal Discovery and the Practice of Criminal Law, 14 Vand.L.Rev. 921 (1961); Moran, Federal Criminal Rules Changes: Aid or Illusion for the Indigent Defendant? 51 A.B.A.J. 64 (1965); Symposium, Discovery in Federal Criminal Cases, 33 F.R.D. 47–128 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228 (1964); Developments in the Law—Discovery, 74 Harv.L.Rev. 940, 1051–1063. Full judicial exploration of the conflicting policy considerations will be found in *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953) and *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958); cf. *State v. Murphy*, 36 N.J. 172, 175 A.2d 622 (1961); *State v. Moffa*, 36 N.J. 219, 176 A.2d 1 (1961). The rule has been revised to expand the scope of pretrial discovery. At the same time provisions are made to guard against possible abuses.

Subdivision (a).—The court is authorized to order the attorney for the government to permit the defendant to inspect and copy or photograph three different types of material:

(1) Relevant written or recorded statements or confessions made by the defendant, or copies thereof. The defendant is not required to designate

because he may not always be aware that his statements or confessions are being recorded. The government's obligation is limited to production of such statements as are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (*Cicenia v. LaGay*, 357 U.S. 504, 511 (1958)), and with the law in a number of states. See e.g., Del. Rules Crim. Proc., Rule 16; Ill.Stat. Ch. 38, §729; Md. Rules Proc., Rule 728; *State v. McGee*, 91 Ariz. 101, 370 P.2d 261 (1962); *Cash v. Superior Court*, 53 Cal.2d 72, 346 P.2d 407 (1959); *State v. Bickham*, 239 La. 1094, 121 So.2d 207, cert. den. 364 U.S. 874 (1960); *People v. Johnson*, 356 Mich. 619, 97 N.W.2d 739 (1959); *State v. Johnson*, supra; *People v. Stokes*, 24 Miss.2d 755, 204 N.Y.Supp.2d 827 (Ct.Gen.Sess. 1960). The amendment also makes it clear that discovery extends to recorded as well as written statements. For state cases upholding the discovery of recordings, see, e.g., *People v. Cartier*, 51 Cal.2d 590, 335 P.2d 114 (1959); *State v. Minor*, 177 A.2d 215 (Del.Super.Ct. 1962).

(2) Relevant results or reports of physical or mental examinations, and of scientific tests or experiments (including fingerprint and handwriting comparisons) made in connection with the particular case, or copies thereof. Again the defendant is not required to designate but the government's obligation is limited to production of items within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. With respect to results or reports of scientific tests or experiments the range of materials which must be produced by the government is further limited to those made in connection with the particular case. Cf. Fla.Stats. §909.18; *State v. Superior Court*, 90 Ariz. 133, 367 P.2d 6 (1961); *People v. Cooper*, 53 Cal.2d 755, 770, 3 Cal.Rptr. 148, 157, 349 P.2d 1964, 973 (1960); *People v. Stokes*, supra, at 762, 204 N.Y.Supp.2d at 835.

(3) Relevant recorded testimony of a defendant before a grand jury. The policy which favors pretrial disclosure to a defendant of his statements to government agents also supports, pretrial disclosure of his testimony before a grand jury. Courts, however, have tended to require a showing of special circumstances before ordering such disclosure. See, e.g., *United States v.*

Johnson, 215 F.Supp. 300 (D.Md. 1963). Disclosure is required only where the statement has been recorded and hence can be transcribed.

Subdivision (b).—This subdivision authorizes the court to order the attorney for the government to permit the defendant to inspect the copy or photograph all other books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government. Because of the necessarily broad and general terms in which the items to be discovered are described, several limitations are imposed:

(1) While specific designation is not required of the defendant, the burden is placed on him to make a showing of materiality to the preparation of his defense and that his request is reasonable. The requirement of reasonableness will permit the court to define and limit the scope of the government's obligation to search its files while meeting the legitimate needs of the defendant. The court is also authorized to limit discovery to portions of items sought.

(2) Reports, memoranda, and other internal government documents made by government agents in connection with the investigation or prosecution of the case are exempt from discovery. Cf. *Palermo v. United States*, 360 U.S. 343 (1959); *Ogden v. United States*, 303 F.2d 724 (9th Cir. 1962).

(3) Except as provided for reports of examinations and tests in subdivision (a)(2), statements made by government witnesses or prospective government witnesses to agents of the government are also exempt from discovery except as provided by 18 U.S.C. §3500.

Subdivision (c).—This subdivision permits the court to condition a discovery order under subdivision (a)(2) and subdivision (b) by requiring the defendant to permit the government to discover similar items which the defendant intends to produce at the trial and which are within his possession, custody or control under restrictions similar to those placed in subdivision (b) upon discovery by the defendant. While the government normally has resources adequate to secure the information necessary for trial, there are some situations in which mutual disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage. For example, in cases where both prosecution and defense have employed experts to make psychiatric examinations, it seems as important for the government to study the opinions of the experts to be called by the

defendant in order to prepare for trial as it does for the defendant to study those of the government's witnesses. Or in cases (such as antitrust cases) in which the defendant is well represented and well financed, mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases. State cases have indicated that a requirement that the defendant disclose in advance of trial materials which he intends to use on his own behalf at the trial is not a violation of the privilege against self-incrimination. See *Jones v. Superior Court*, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); *People v. Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963); Traynor, Ground Lost and Found in Criminal Discovery. 39 N.Y.U.L.Rev. 228, 246 (1964); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery, 51 Calif.L.Rev. 135 (1963); Note, 76 Harv.L.Rev. 828 (1963).

Subdivision (d).—This subdivision is substantially the same as the last sentence of the existing rule.

Subdivision (e).—This subdivision gives the court authority to deny, restrict or defer discovery upon a sufficient showing. Control of the abuses of discovery is necessary if it is to be expanded in the fashion proposed in subdivisions (a) and (b). Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, the protection of information vital to the national security, and the protection of business enterprises from economic reprisals.

For an example of a use of a protective order in state practice, see *People v. Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963). See also Brennan, Remarks on Discovery, 33 F.R.D. 56, 65 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228, 244, 250.

In some cases it would defeat the purpose of the protective order if the government were required to make its showing in open court. The problem arises in its most extreme form where matters of national security are involved. Hence a procedure is set out where upon motion by the government the court may permit the government to make its showing, in whole or in part, in a written statement to be inspected by the court in camera. If the court grants relief based on such showing, the government's statement is to be sealed and preserved in the records of the court to be

made available to the appellate court in the event of an appeal by the defendant, Cf. 18 U.S.C. §3500.

Subdivision (f).—This subdivision is designed to encourage promptness in making discovery motions and to give the court sufficient control to prevent unnecessary delay and court time consequent upon a multiplication of discovery motions. Normally one motion should encompass all relief sought and a subsequent motion permitted only upon a showing of cause. Where pretrial hearings are used pursuant to Rule 17.1, discovery issues may be resolved at such hearings.

Subdivision (g).—The first sentence establishes a continuing obligation on a party subject to a discovery order with respect to material discovered after initial compliance. The duty provided is to notify the other party, his attorney or the court of the existence of the material. A motion can then be made by the other party for additional discovery and, where the existence of the material is disclosed shortly before or during the trial, for any necessary continuance.

The second sentence gives wide discretion to the court in dealing with the failure of either party to comply with a discovery order. Such discretion will permit the court to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances.

Notes of Advisory Committee on Rules—1974 Amendment

Rule 16 is revised to give greater discovery to both the prosecution and the defense. Subdivision (a) deals with disclosure of evidence by the government. Subdivision (b) deals with disclosure of evidence by the defendant. The majority of the Advisory Committee is of the view that the two—prosecution and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution.

The draft provides for a right of prosecution discovery independent of any prior request for discovery by the defendant. The Advisory Committee is of the view that this is the most desirable approach to prosecution discovery. See American Bar Association, Standards Relating to Discovery and Procedure Before Trial, pp. 7, 43–46 (Approved Draft, 1970).

The language of the rule is recast from "the court may order" or "the court shall order" to "the government shall permit" or "the defendant shall permit." This is to make clear that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is dispute as to whether the matter is discoverable or a request for a protective order under subdivision (d)(1). The court, however, has the inherent right to enter an order under this rule.

The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases. For example, subdivision (a)(3) is not intended to deny a judge's discretion to order disclosure of grand jury minutes where circumstances make it appropriate to do so.

Subdivision (a)(1)(A) amends the old rule to provide, upon request of the defendant, the government shall permit discovery if the conditions specified in subdivision (a)(1)(A) exist. Some courts have construed the current language as giving the court discretion as to whether to grant discovery of defendant's statements. See *United States v. Kaminsky*, 275 F.Supp. 365 (S.D.N.Y. 1967), denying discovery because the defendant did not demonstrate that his request for discovery was warranted; *United States v. Diliberto*, 264 F.Supp. 181 (S.D.N.Y. 1967), holding that there must be a showing of actual need before discovery would be granted; *United States v. Louis Carreau*, Inc., 42 F.R.D. 408 (S.D.N.Y. 1967), holding that in the absence of a showing of good cause the government cannot be required to disclose defendant's prior statements in advance of trial. In *United States v. Louis Carreau*, Inc., at p. 412, the court stated that if rule 16 meant that production of the statements was mandatory, the word "shall" would have been used instead of "may." See also *United States v. Wallace*, 272 F.Supp. 838 (S.D.N.Y. 1967); *United States v. Wood*, 270 F.Supp. 963 (S.D.N.Y. 1967); *United States v. Leighton*, 265 F.Supp. 27 (S.D.N.Y. 1967); *United States v. Longarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); *Loux v. United States*, 389 F.2d 911 (9th Cir. 1968); and the discussion of discovery in Discovery in Criminal Cases, 44 F.R.D. 481 (1968). Other courts have held that even though the current rules make discovery discretionary, the defendant need not show cause when he seeks to discover his own statements. See *United States v. Aadal*, 280 F.Supp. 859 (S.D.N.Y. 1967); *United States v.*

Federmann, 41 F.R.D. 339 (S.D.N.Y. 1967); and *United States v. Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968).

The amendment making disclosure mandatory under the circumstances prescribed in subdivision (a)(1)(A) resolves such ambiguity as may currently exist, in the direction of more liberal discovery. See C. Wright, Federal Practice and Procedure: Criminal §253 (1969, Supp. 1971), Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo.L.J. 1276 (1966); Fla.Stat.Ann. §925.05 (Supp. 1971–1972); N.J.Crim.Prac.Rule 35–11(a) (1967). This is done in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence. This is the ground upon which the American Bar Association Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) has unanimously recommended broader discovery. The United States Supreme Court has said that the pretrial disclosure of a defendant's statements "may be the 'better practice.' " *Cicenia v. La Gay*, 357 U.S. 504, 511, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958). See also *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952); *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958).

The requirement that the statement be disclosed prior to trial, rather than waiting until the trial, also contributes to efficiency of administration. It is during the pretrial stage that the defendant usually decides whether to plead guilty. See *United States v. Projansky*, supra. The pretrial stage is also the time during which many objections to the admissibility of types of evidence ought to be made. Pretrial disclosure ought, therefore, to contribute both to an informed guilty plea practice and to a pretrial resolution of admissibility questions. See ABA, Standards Relating to Discovery and Procedure Before Trial §1.2 and Commentary pp. 40–43 (Approved Draft, 1970).

The American Bar Association Standards mandate the prosecutor to make the required disclosure even though not requested to do so by the defendant. The proposed draft requires the defendant to request discovery, although obviously the attorney for the government may disclose without waiting for a request, and there are situations in which due process will require the prosecution, on its own, to disclose evidence "helpful" to the defense. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215

(1963); *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967).

The requirement in subdivision (a)(1)(A) is that the government produce "statements" without further discussion of what "statement" includes. There has been some recent controversy over what "statements" are subject to discovery under the current rule. See Discovery in Criminal Cases, 44 F.R.D. 481 (1968); C. Wright, Federal Practice and Procedure: Criminal §253, pp. 505–506 (1969, Supp. 1971). The kinds of "statements" which have been held to be within the rule include "substantially verbatim and contemporaneous" statements, *United States v. Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967); statements which reproduce the defendant's "exact words," *United States v. Armantrout*, 278 F.Supp. 517 (S.D.N.Y. 1968); a memorandum which was not verbatim but included the substance of the defendant's testimony, *United States v. Scharf*, 267 F.Supp. 19 (S.D.N.Y. 1967); Summaries of the defendant's statements, *United States v. Morrison*, 43 F.R.D. 516 (N.D.Ill. 1967); and statements discovered by means of electronic surveillance, *United States v. Black*, 282 F.Supp. 35 (D.D.C. 1968). The court in *United States v. Iovinelli*, 276 F.Supp. 629, 631 (N.D.Ill. 1967), declared that "statements" as used in old rule 16 is not restricted to the "substantially verbatim recital of an oral statement" or to statements which are a "recital of past occurrences."

The Jencks Act, 18 U.S.C. §3500, defines "statements" of government witnesses discoverable for purposes of cross-examination as: (1) a "written statement" signed or otherwise approved by a witness, (2) "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. §3500(e). The language of the Jencks Act has most often led to a restrictive definition of "statements," confining "statements" to the defendant's "own words." See *Hanks v. United States*, 388 F.2d 171 (10th Cir. 1968), and *Augenblick v. United States*, 377 F.2d 586, 180 Ct.Cl. 131 (1967).

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) do not attempt to define "statements" because of a disagreement among members of the committee as to what the definition should be. The majority rejected the restrictive definition of "statements" contained in the Jencks Act, 18 U.S.C. §3500(e),

in the view that the defendant ought to be able to see his statement in whatever form it may have been preserved in fairness to the defendant and to discourage the practice, where it exists, of destroying original notes, after transforming them into secondary transcriptions, in order to avoid cross-examination based upon the original notes. See *Campbell v. United States*, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963). The minority favored a restrictive definition of "statements" in the view that the use of other than "verbatim" statements would subject witnesses to unfair cross-examination. See American Bar Association's Standards Relating to Discovery and Procedure Before Trial pp. 61–64 (Approved Draft, 1970). The draft of subdivision (a)(1)(A) leaves the matter of the meaning of the term unresolved and thus left for development on a case-by-case basis.

Subdivision (a)(1)(A) also provides for mandatory disclosure of a summary of any oral statement made by defendant to a government agent which the attorney for the government intends to use in evidence. The reasons for permitting the defendant to discover his own statements seem obviously to apply to the substance of any oral statement which the government intends to use in evidence at the trial. See American Bar Association Standards Relating to Discovery and Procedure Before Trial §2.1(a)(ii) (Approved Draft, 1970). Certainly disclosure will facilitate the raising of objections to admissibility prior to trial. There have been several conflicting decisions under the current rules as to whether the government must disclose the substance of oral statements of the defendant which it has in its possession. Cf. *United States v. Baker*, 262 F.Supp. 657 (D.C.D.C. 1966); *United States v. Curry*, 278 F.Supp. 508 (N.D.Ill. 1967); *United States v. Morrison*, 43 F.R.D. 516 (ND.Ill. 1967); *United States v. Reid*, 43 F.R.D. 520 (ND.Ill. 1967); *United States v. Armantrout*, 278 F.Supp. 517 (S.D.N.Y. 1968); and *United States v. Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967). There is, however, considerable support for the policy of disclosing the substance of the defendant's oral statement. Many courts have indicated that this is a "better practice" than denying such disclosure. E.g., *United States v. Curry*, supra; *Loux v. United States*, 389 F.2d 911 (9th Cir. 1968); and *United States v. Baker*, supra.

Subdivision (a)(1)(A) also provides for mandatory disclosure of any "recorded testimony" which defendant gives before a grand jury if the testimony "relates to the offense charged." The present rule is discretionary

and is applicable only to those of defendant's statements which are "relevant."

The traditional rationale behind grand jury secrecy—protection of witnesses—does not apply when the accused seeks discovery of his own testimony. Cf. *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966); and *Allen v. United States*, 129 U.S.App.D.C. 61, 390 F.2d 476 (1968). In interpreting the rule many judges have granted defendant discovery without a showing of need or relevance. *United States v. Gleason*, 259 F.Supp. 282 (S.D.N.Y. 1966); *United States v. Longarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); and *United States v. United Concrete Pipe Corp*., 41 F.R.D. 538 (N.D.Tex. 1966). Making disclosure mandatory without a showing of relevance conforms to the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial §2.1(a)(iii) and Commentary pp. 64–66 (Approved Draft, 1970). Also see Note, Discovery by a Criminal Defendant of His Own Grand-Jury Testimony, 68 Columbia L.Rev. 311 (1968).

In a situation involving a corporate defendant, statements made by present and former officers and employees relating to their employment have been held discoverable as statements of the defendant. *United States v. Hughes*, 413 F.2d 1244 (5th Cir. 1969). The rule makes clear that such statements are discoverable if the officer or employee was "able legally to bind the defendant in respect to the activities involved in the charges."

Subdivision (a)(1)(B) allows discovery of the defendant's prior criminal record. A defendant may be uncertain of the precise nature of his prior record and it seems therefore in the interest of efficient and fair administration to make it possible to resolve prior to trial any disputes as to the correctness of the relevant criminal record of the defendant.

Subdivision (a)(1)(C) gives a right of discovery of certain tangible objects under the specified circumstances. Courts have construed the old rule as making disclosure discretionary with the judge. Cf. *United States v. Kaminsky*, 275 F.Supp. 365 (S.D.N.Y. 1967); *Gevinson v. United States*, 358 F.2d 761 (5th Cir. 1966), cert. denied, 385 U.S. 823, 87 S.Ct. 51, 17 L.Ed.2d 60 (1966); and *United States v. Tanner*, 279 F.Supp. 457 (N.D.Ill. 1967). The old rule requires a "showing of materiality to the preparation of his defense and that the request is reasonable." The new rule requires disclosure if any one of three situations exists: (a) the defendant shows that disclosure

of the document or tangible object is material to the defense, (b) the government intends to use the document or tangible object in its presentation of its case in chief, or (c) the document or tangible object was obtained from or belongs to the defendant.

Disclosure of documents and tangible objects which are "material" to the preparation of the defense may be required under the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), without an additional showing that the request is "reasonable." In *Brady* the court held that "due process" requires that the prosecution disclose evidence favorable to the accused. Although the Advisory Committee decided not to codify the Brady Rule, the requirement that the government disclose documents and tangible objects "material to the preparation of his defense" underscores the importance of disclosure of evidence favorable to the defendant.

Limiting the rule to situations in which the defendant can show that the evidence is material seems unwise. It may be difficult for a defendant to make this showing if he does not know what the evidence is. For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant. See ABA Standards Relating to Discovery and Procedure Before Trial §2.1(a)(v) and Commentary pp. 68–69 (Approved Draft, 1970). This is probably the result under old rule 16 since the fact that the government intends to use the physical evidence at the trial is probably sufficient proof of "materiality." C. Wright, Federal Practice and Procedure: Criminal §254 especially n. 70 at p. 513 (1969, Supp. 1971). But it seems desirable to make this explicit in the rule itself.

Requiring disclosure of documents and tangible objects which "were obtained from or belong to the defendant" probably is also making explicit in the rule what would otherwise be the interpretation of "materiality." See C. Wright, Federal Practice and Procedure: Criminal §254 at p. 510 especially n. 58 (1969, Supp. 1971).

Subdivision (a)(1)(C) is also amended to add the word "photographs" to the objects previously listed. See ABA Standards Relating to Discovery and Procedure Before Trial §2.1(a)(v) (Approved Draft, 1970).

Subdivision (a)(1)(D) makes disclosure of the reports of examinations and tests mandatory. This is the recommendation of the ABA Standards Relating to Discovery and Procedure Before Trial §2.1(a)(iv) and Commentary pp.

66–68 (Approved Draft, 1970). The obligation of disclosure applies only to scientific tests or experiments "made in connection with the particular case." So limited, mandatory disclosure seems justified because: (1) it is difficult to test expert testimony at trial without advance notice and preparation; (2) it is not likely that such evidence will be distorted or misused if disclosed prior to trial; and (3) to the extent that a test may be favorable to the defense, its disclosure is mandated under the rule of *Brady v. Maryland*, supra.

Subdivision (a)(1)(E) is new. It provides for discovery of the names of witnesses to be called by the government and of the prior criminal record of these witnesses. Many states have statutes or rules which require that the accused be notified prior to trial of the witnesses to be called against him. See, e.g., Alaska R.Crim.Proc. 7(c); Ariz.R.Crim.Proc. 153, 17 A.R.S. (1956); Ark.Stat.Ann. §43–1001 (1947); Cal.Pen.Code §995n (West 1957); Colo.Rev.Stat.Ann. §§39–3–6, 39–4–2 (1963); Fla.Stat.Ann. §906.29 (1944); Idaho Code Ann. §19–1404 (1948); Ill.Rev.Stat. ch. 38, §114–9 (1970); Ind.Ann.Stat. §9–903 (1856), IC 1971, 35–1–16–3; Iowa Code Ann. §772.3 (1950); Kan.Stat.Ann. §62–931 (1964); Ky.R.Crim. Proc. 6.08 (1962); Mich.Stat.Ann. §28.980, M.C.L.A. §767.40 (Supp.1971); Minn.Stat.Ann. §628.08 (1947); Mo.Ann.Stat. §545.070 (1953); Mont.Rev. Codes Ann. §95–1503 (Supp. 1969); Neb.Rev.Stat. §29–1602 (1964); Nev.Rev.Stat. §173.045 (1967); Okl.Stat. tet. 22, §384 (1951); Ore.Rev.Stat. §132.580 (1969); Tenn. Code Ann. §40–1708 (1955); Utah Code Ann. §77–20–3 (1953). For examples of the ways in which these requirements are implemented, see *State v. Mitchell*, 181 Kan. 193, 310 P.2d 1063 (1957); *State v. Parr*, 129 Mont. 175, 283 P.2d 1086 (1955); *Phillips v. State*, 157 Neb. 419, 59 N.W. 598 (1953).

Witnesses' prior statements must be made available to defense counsel after the witness testifies on direct examination for possible impeachment purposes during trial: 18 U.S.C. §3500.

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial §2.1(a)(i) (Approved Draft, 1970) require disclosure of both the names and the statements of prosecution witnesses. Subdivision (a)(1)(E) requires only disclosure, prior to trial, of names, addresses, and prior criminal record. It does not require disclosure of the witnesses' statements although the rule does not preclude the parties from agreeing to disclose statements prior to trial. This is done, for example, in courts using the so-called "omnibus hearing."

Disclosure of the prior criminal record of witnesses places the defense in the same position as the government, which normally has knowledge of the defendant's record and the record of anticipated defense witnesses. In addition, the defendant often lacks means of procuring this information on his own. See American Bar Association Standards Relating to Discovery and Procedure Before Trial §2.1(a)(vi) (Approved Draft, 1970).

A principal argument against disclosure of the identity of witnesses prior to trial has been the danger to the witness, his being subjected either to physical harm or to threats designed to make the witness unavailable or to influence him to change his testimony. Discovery in Criminal cases, 44 F.R.D. 481, 499–500 (1968); Ratnoff, The New Criminal Deposition Statute in Ohio—Help or Hindrance to Justice?, 19 Case Western Reserve L.Rev. 279, 284 (1968). See, e.g., *United States v. Estep*, 151 F.Supp. 668, 672–673 (N.D. Tex. 1957):

> Ninety percent of the convictions had in the trial court for sale and dissemination of narcotic drugs are linked to the work and the evidence obtained by an informer. If that informer is not to have his life protected there won't be many informers hereafter.

See also the dissenting opinion of Mr. Justice Clark in *Roviaro v. United States*, 353 U.S. 53, 66 –67, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). Threats of market retaliation against witnesses in criminal antitrust cases are another illustration. *Bergen Drug Co. v. Parke, Davis & Company*, 307 F.2d 725 (3d Cir. 1962); and *House of Materials, Inc. v. Simplicity Pattern Co*., 298 F.2d 867 (2d Cir. 1962). The government has two alternatives when it believes disclosure will create an undue risk of harm to the witness: It can ask for a protective order under subdivision (d)(1). See ABA Standards Relating to Discovery and Procedure Before Trial §2.5(b) (Approved Draft, 1970). It can also move the court to allow the perpetuation of a particular witness's testimony for use at trial if the witness is unavailable or later changes his testimony. The purpose of the latter alternative is to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury. See rule 15.

Subdivision (a)(2) is substantially unchanged. It limits the discovery otherwise allowed by providing that the government need not disclose "reports, memoranda, or other internal government documents made by the

attorney for the government or other government agents in connection with the investigation or prosecution of the case" or "statements made by government witnesses or prospective government witnesses." The only proposed change is that the "reports, memoranda, or other internal government documents made by the attorney for the government" are included to make clear that the work product of the government attorney is protected. See C. Wright, Federal Practice and Procedure: Criminal §254 n. 92 (1969, Supp. 1971); *United States v. Rothman*, 179 F.Supp. 935 (W.D.Pa. 1959); Note, "Work Product" in Criminal Discovery, 1966 Wash.U.L.Q. 321; American Bar Association, Standards Relating to Discovery and Procedure Before Trial §2.6(a) (Approved Draft, 1970); cf. *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed2d 215 (1963), requires the disclosure of evidence favorable to the defendant. This is, of course, not changed by this rule.

Subdivision (a)(3) is included to make clear that recorded proceedings of a grand jury are explicitly dealt with in rule 6 and subdivision (a)(1)(A) of rule 16 and thus are not covered by other provisions such as subdivision (a)(1)(C) which deals generally with discovery of documents in the possession, custody, or control of the government.

Subdivision (a)(4) is designed to insure that the government will not be penalized if it makes a full disclosure of all potential witnesses and then decides not to call one or more of the witnesses listed. This is not, however, intended to abrogate the defendant's right to comment generally upon the government's failure to call witnesses in an appropriate case.

Subdivision (b) deals with the government's right to discovery of defense evidence or, put in other terms, with the extent to which a defendant is required to disclose its evidence to the prosecution prior to trial. Subdivision (b) replaces old subdivision (c).

Subdivision (b) enlarges the right of government discovery in several ways: (1) it gives the government the right to discovery of lists of defense witnesses as well as physical evidence and the results of examinations and tests; (2) it requires disclosure if the defendant has the evidence under his control and intends to use it at trial in his case in chief, without the additional burden, required by the old rule, of having to show, in behalf of the government, that the evidence is material and the request reasonable;

and (3) it gives the government the right to discovery without conditioning that right upon the existence of a prior request for discovery by the defendant.

Although the government normally has resources adequate to secure much of the evidence for trial, there are situations in which pretrial disclosure of evidence to the government is in the interest of effective and fair criminal justice administration. For example, the experimental "omnibus hearing" procedure (see discussion in Advisory Committee Note to rule 12) is based upon an assumption that the defendant, as well as the government, will be willing to disclose evidence prior to trial.

Having reached the conclusion that it is desirable to require broader disclosure by the defendant under certain circumstances, the Advisory Committee has taken the view that it is preferable to give the right of discovery to the government independently of a prior request for discovery by the defendant. This is the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial, Commentary, pp. 43–46 (Approved Draft, 1970). It is sometimes asserted that making the government's right to discovery conditional will minimize the risk that government discovery will be viewed as an infringement of the defendant's constitutional rights. See discussion in C. Wright, Federal Practice and Procedure: Criminal §256 (1969, Supp.1971); Moore, Criminal Discovery, 19 Hastings L.J. 865 (1968); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am.Cr.L.Q. 3 (1967). There are assertions that prosecution discovery, even if conditioned upon the defendants being granted discovery, is a violation of the privilege. See statements of Mr. Justice Black and Mr. Justice Douglas, 39 F.R.D. 69, 272, 277–278 19 (1966); C. Wright, Federal Practice and Procedure: Criminal §256 (1969, Supp. 1971). Several states require defense disclosure of an intended defense of alibi and, in some cases, a list of witnesses in support of an alibi defense, without making the requirement conditional upon prior discovery being given to the defense. E.g., Ariz.R.Crim.P. 162(B), 17 A.R.S. (1956); Ind.Ann.Stat. §9–1631 to 9–1633 (1956), IC 1971, 35–5–1–1 to 35–5–1–3; Mich.Comp. Laws Ann. §§768.20, 768.21 (1968); N.Y. CPL §250.20 (McKinney's Consol.Laws, c. 11–A, 1971); and Ohio Rev.Code Ann. §2945.58 (1954). State courts have refused to hold these statutes violative of the privilege against self-incrimination. See *State v. Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931), and *People v. Rakiec*, 260 App.Div. 452, 23 N.Y.S.2d

607, aff'd, 289 N.Y. 306, 45 N.E.2d 812 (1942). See also rule 12.1 and Advisory Committee Note thereto.

Some state courts have held that a defendant may be required to disclose, in advance of trial, evidence which he intends to use on his own behalf at trial without violating the privilege against self-incrimination. See *Jones v. Superior Court of Nevada County*, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); *People v. Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery?, 51 Calif.L.Rev. 135 (1963); Note, 76 Harv.L.Rev. 838 (1963). The courts in Jones v. Superior Court of Nevada County, supra, suggests that if mandatory disclosure applies only to those items which the accused intends to introduce in evidence at trial, neither the incriminatory nor the involuntary aspects of the privilege against self-incrimination are present.

On balance the Advisory Committee is of the view that an independent right of discovery for both the defendant and the government is likely to contribute to both effective and fair administration. See Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif.L.Rev. 89 (1965), for an analysis of the difficulty of weighing the value of broad discovery against the value which inheres in not requiring the defendant to disclose anything which might work to his disadvantage.

Subdivision (b)(1)(A) provides that the defendant shall disclose any documents and tangible objects which he has in his possession, custody, or control and which he intends to introduce in evidence in his case in chief.

Subdivision (b)(1)(B) provides that the defendant shall disclose the results of physical or mental examinations and scientific tests or experiments if (a) they were made in connection with a particular case; (b) the defendant has them under his control; and (c) he intends to offer them in evidence in his case in chief or which were prepared by a defense witness and the results or reports relate to the witness's testimony. In cases where both prosecution and defense have employed experts to conduct tests such as psychiatric examinations, it seems as important for the government to be able to study the results reached by defense experts which are to be called by the defendant as it does for the defendant to study those of government experts. See Schultz, Criminal Discovery by the Prosecution: Frontier Developments and Some Proposals for the Future, 22 N.Y.U.Intra.L.Rev. 268

(1967); American Bar Association, Standards Relating to Discovery and Procedure Before Trial §3.2 (Supp., Approved Draft, 1970).

Subdivision (b)(1)(C) provides for discovery of a list of witnesses the defendant intends to call in his case in chief. State cases have indicated that disclosure of a list of defense witnesses does not violate the defendant's privilege against self-incrimination. See *Jones v. Superior Court of Nevada County*, supra, and *People v. Lopez*, supra. The defendant has the same option as does the government if it is believed that disclosure of the identity of a witness may subject that witness to harm or a threat of harm. The defendant can ask for a protective order under subdivision (d)(1) or can take a deposition in accordance with the terms of rule 15.

Subdivision (b)(2) is unchanged, appearing as the last sentence of subdivision (c) of old rule 16.

Subdivision (b)(3) provides that the defendant's failure to introduce evidence or call witnesses shall not be admissible in evidence against him. In states which require pretrial disclosure of witnesses' identity, the prosecution is not allowed to comment upon the defendant's failure to call a listed witness. See *O'Connor v. State*, 31 Wis.2d 684, 143 N.W.2d 489 (1966); *People v. Mancini*, 6 N.Y.2d 853, 188 N.Y.S.2d 559, 160 N.E.2d 91 (1959); and *State v. Cocco*, 73 Ohio App. 182, 55 N.E.2d 430 (1943). This is not, however, intended to abrogate the government's right to comment generally upon the defendant's failure to call witnesses in an appropriate case, other than the defendant's failure to testify.

Subdivision (c) is a restatement of part of old rule 16(g).

Subdivision (d)(1) deals with the protective order. Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed. See *Will v. United States*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967). The language "by the judge alone" is not meant to be inconsistent with *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). In *Alderman* the court points out that there may be appropriate occasions for the trial judge to decide questions relating to pretrial disclosure. See *Alderman v. United States*, 394 U.S. at 182 n. 14, 89 S.Ct. 961.

Subdivision (d)(2) is a restatement of part of old rule 16(g) and (d).

Old subdivision (f) of rule 16 dealing with time of motions is dropped because rule 12(c) provides the judge with authority to set the time for the making of pretrial motions including requests for discovery. Rule 12 also prescribes the consequences which follow from a failure to make a pretrial motion at the time fixed by the court. See rule 12(f).

Notes of Committee on the Judiciary, House Report No. 94–247; 1975 Amendment

A. Amendments Proposed by the Supreme Court. Rule 16 of the Federal Rules of Criminal Procedure regulates discovery by the defendant of evidence in possession of the prosecution, and discovery by the prosecution of evidence in possession of the defendant. The present rule permits the defendant to move the court to discover certain material. The prosecutor's discovery is limited and is reciprocal—that is, if the defendant is granted discovery of certain items, then the prosecution may move for discovery of similar items under the defendant's control.

As proposed to be amended, the rule provides that the parties themselves will accomplish discovery—no motion need be filed and no court order is necessary. The court will intervene only to resolve a dispute as to whether something is discoverable or to issue a protective order.

The proposed rule enlarges the scope of the defendant's discovery to include a copy of his prior criminal record and a list of the names and addresses, plus record of prior felony convictions, of all witnesses the prosecution intends to call during its case-in-chief. It also permits the defendant to discover the substance of any oral statement of his which the prosecution intends to offer at trial, if the statement was given in response to interrogation by any person known by defendant to be a government agent.

Proposed subdivision (a)(2) provides that Rule 16 does not authorize the defendant to discover "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. . . ."

The proposed rule also enlarges the scope of the government's discovery of materials in the custody of the defendant. The government is entitled to a list of the names and addresses of the witnesses the defendant intends to

call during his case-in-chief. Proposed subdivision (b)(2) protects the defendant from having to disclose "reports, memoranda, or other internal defense documents . . . made in connection with the investigation or defense of the case. . . ."

Subdivision (d)(1) of the proposed rule permits the court to deny, restrict, or defer discovery by either party, or to make such other order as is appropriate. Upon request, a party may make a showing that such an order is necessary. This showing shall be made to the judge alone if the party so requests. If the court enters an order after such a showing, it must seal the record of the showing and preserve it in the event there is an appeal.

B. Committee Action. The Committee agrees that the parties should, to the maximum possible extent, accomplish discovery themselves. The court should become involved only when it is necessary to resolve a dispute or to issue an order pursuant to subdivision (d).

Perhaps the most controversial amendments to this rule were those dealing with witness lists. Under present law, the government must turn over a witness list *only* in capital cases. [Section 3432 of title 18 of the United States Code provides: A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.] The defendant never needs to turn over a list of his witnesses. The proposed rule requires both the government and the defendant to turn over witness lists in every case, capital or noncapital. Moreover, the lists must be furnished to the adversary party upon that party's request.

The proposed rule was sharply criticized by both prosecutors and defenders. The prosecutors feared that pretrial disclosure of prosecution witnesses would result in harm to witnesses. The defenders argued that a defendant cannot constitutionally be compelled to disclose his witnesses.

The Committee believes that it is desirable to promote greater pretrial discovery. As stated in the Advisory Committee Note,

broader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial,

and by otherwise contributing to an accurate determination of the issue of guilt or innocence. . . .

The Committee, therefore, endorses the principle that witness lists are discoverable. However, the Committee has attempted to strike a balance between the narrow provisions of existing law and the broad provisions of the proposed rule.

The Committee rule makes the procedures defendant-triggered. If the defendant asks for and receives a list of prosecution witnesses, then the prosecution may request a list of defense witnesses. The witness lists need not be turned over until 3 days before trial. The court can modify the terms of discovery upon a sufficient showing. Thus, the court can require disclosure of the witness lists earlier than 3 days before trial, or can permit a party not to disclose the identity of a witness before trial.

The Committee provision promotes broader discovery and its attendant values—informed disposition of cases without trial, minimizing the undesirable effect of surprise, and helping insure that the issue of guilt or innocence is accurately determined. At the same time, it avoids the problems suggested by both the prosecutors and the defenders.

The major argument advanced by prosecutors is the risk of danger to their witnesses if their identities are disclosed prior to trial. The Committee recognizes that there may be a risk but believes that the risk is not as great as some fear that it is. Numerous states require the prosecutor to provide the defendant with a list of prosecution witnesses prior to trial. [These States include Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, Oklahoma, Oregon, Tennessee, and Utah. See Advisory Committee Note, House Document 93–292, at 60.] The evidence before the Committee indicates that these states have not experienced unusual problems of witness intimidation. [See the comments of the Standing Committee on Criminal Law and Procedure of the State Bar of California in Hearings II, at 302.]

Some federal jurisdictions have adopted an omnibus pretrial discovery procedure that calls upon the prosecutor to give the defendant its witness lists. One such jurisdiction is the Southern District of California. The evidence before the Committee indicates that there has been no unusual problems with witness intimidation in that district. Charles Sevilla, Chief Trial

Attorney for the Federal Defenders of San Diego, Inc., which operates in the Southern District of California, testified as follows:

> The Government in one of its statements to this committee indicated that providing the defense with witness lists will cause coerced witness perjury. This does not happen. We receive Government witness lists as a matter of course in the Southern District, and it's a rare occasion when there is any overture by a defense witness or by a defendant to a Government witness. It simply doesn't happen except on the rarest of occasion. When the Government has that fear it can resort to the protective order. [Hearings II, at 42.]

Mr. Sevilla's observations are corroborated by the views of the U.S. Attorney for the Southern District of California:

> Concerning the modifications to Rule 16, we have followed these procedures informally in this district for a number of years. We were one of the districts selected for the pilot projects of the Omnibus Hearing in 1967 or 1968. We have found that the courts in our district will not require us to disclose names of proposed witnesses when in our judgment to do so would not be advisable. Otherwise we routinely provide defense counsel with full discovery, including names and addresses of witnesses. We have not had any untoward results by following this program, having in mind that the courts will, and have, excused us from discovery where the circumstances warrant. [Hearings I, at 109.]

Much of the prosecutorial criticism of requiring the prosecution to give a list of its witnesses to the defendant reflects an unwillingness to trust judges to exercise sound judgment in the public interest. Prosecutors have stated that they frequently will open their files to defendants in order to induce pleas. [See testimony of Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, in Hearings I, at 150.]

Prosecutors are willing to determine on their own when they can do this without jeopardizing the safety of witnesses. There is no reason why a judicial officer cannot exercise the same discretion in the public interest.

The Committee is convinced that in the usual case there is no serious risk of danger to prosecution witnesses from pretrial disclosure of their identities. In exceptional instances, there may be a risk of danger. The Committee rule,

however, is capable of dealing with those exceptional instances while still providing for disclosure of witnesses in the usual case.

The Committee recognizes the force of the constitutional arguments advanced by defenders. Requiring a defendant, upon request, to give to the prosecution material which may be incriminating, certainly raises very serious constitutional problems. The Committee deals with these problems by having the defendant trigger the discovery procedures. Since the defendant has no constitutional right to discover any of the prosecution's evidence (unless it is exculpatory within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963)), it is permissible to condition his access to nonexculpatory evidence upon his turning over a list of defense witnesses. Rule 16 currently operates in this manner.

The Committee also changed subdivisions (a)(2) and (b)(2), which set forth "work product" exceptions to the general discovery requirements. The subsections proposed by the Supreme Court are cast in terms of the type of document involved (e. g., report), rather than in terms of the content (e. g., legal theory). The Committee recast these provisions by adopting language from Rule 26(b)(3) of the Federal Rules of Civil Procedure.

The Committee notes that subdivision (a)(1)(C) permits the defendant to discover certain items that "were obtained from or belong to the defendant." The Committee believes that, as indicated in the Advisory Committee Note [House Document 93–292, at 59], items that "were obtained from or belong to the defendant" are items that are material to the preparation of his defense.

The Committee added language to subdivision (a)(1)(B) to conform it to provisions in subdivision (a)(1)(A). The rule as changed by the Committee requires the prosecutor to give the defendant such copy of the defendant's prior criminal record as is within the prosecutor's "possession, custody, or control, the existence of which is known, or by the exercise of due diligence may become known" to the prosecutor. The Committee also made a similar conforming change in subdivision (a)(1)(E), dealing with the criminal records of government witnesses. The prosecutor can ordinarily discharge his obligation under these two subdivisions, (a)(1)(B) and (E), by obtaining a copy of the F.B.I. "rap sheet."

The Committee made an additional change in subdivision (a)(1)(E). The proposed rule required the prosecutor to provide the defendant with a record

of the felony convictions of government witnesses. The major purpose for letting the defendant discover information about the record of government witnesses, is to provide him with information concerning the credibility of those witnesses. Rule 609(a) of the Federal Rules of Evidence permits a party to attack the credibility of a witness with convictions other than just felony convictions. The Committee, therefore, changed subdivision (a)(1)(E) to require the prosecutor to turn over a record of all criminal convictions, not just felony convictions.

The Committee changed subdivision (d)(1), which deals with protective orders. Proposed (d)(1) required the court to conduct an ex parte proceeding whenever a party so requested. The Committee changed the mandatory language to permissive language. A Court may, not must, conduct an ex parte proceeding if a party so requests. Thus, if a party requests a protective or modifying order and asks to make its showing ex parte, the court has two separate determinations to make. First, it must determine whether an ex parte proceeding is appropriate, bearing in mind that ex parte proceedings are disfavored and not to be encouraged. [An ex parte proceeding would seem to be appropriate if any adversary proceeding would defeat the purpose of the protective or modifying order. For example, the identity of a witness would be disclosed and the purpose of the protective order is to conceal that witness' identity.] Second, it must determine whether a protective or modifying order shall issue.

Conference Committee Notes, House Report No. 94–414; 1975 Amendment

Rule 16 deals with pretrial discovery by the defendant and the government. The House and Senate versions of the bill differ on Rule 16 in several respects.

A. Reciprocal vs. Independent Discovery for the Government.—The House version of the bill provides that the government's discovery is reciprocal. If the defendant requires and receives certain items from the government, then the government is entitled to get similar items from the defendant. The Senate version of the bill gives the government an independent right to discover material in the possession of the defendant.

The Conference adopts the House provisions.

B. Rule 16(a)(1)(A).—The House version permits an organization to discover relevant recorded grand jury testimony of any witness who was, at the time of the acts charged or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind it in respect to the activities involved in the charges. The Senate version limits discovery of this material to testimony of a witness who was, at the time of the grand jury proceeding, so situated as an officer or employee as to have been legally to bind the defendant in respect to the activities involved in the charges.

The Conferees share a concern that during investigations, ex-employees and ex-officers of potential corporate defendants are a critical source of information regarding activities of their former corporate employers. It is not unusual that, at the time of their testimony or interview, these persons may have interests which are substantially adverse to or divergent from the putative corporate defendant. It is also not unusual that such individuals, though no longer sharing a community of interest with the corporation, may nevertheless be subject to pressure from their former employers. Such pressure may derive from the fact that the ex-employees or ex-officers have remained in the same industry or related industry, are employed by competitors, suppliers, or customers of their former employers, or have pension or other deferred compensation arrangements with former employers.

The Conferees also recognize that considerations of fairness require that a defendant corporation or other legal entity be entitled to the grand jury testimony of a former officer or employee if that person was personally involved in the conduct constituting the offense and was able legally to bind the defendant in respect to the conduct in which he was involved.

The Conferees decided that, on balance, a defendant organization should not be entitled to the relevant grand jury testimony of a former officer or employee in every instance. However, a defendant organization should be entitled to it if the former officer or employee was personally involved in the alleged conduct constituting the offense and was so situated as to have been able legally to bind the defendant in respect to the alleged conduct. The Conferees note that, even in those situations where the rule provides for disclosure of the testimony, the Government may, upon a sufficient showing, obtain a protective or modifying order pursuant to Rule 16(d)(1).

The Conference adopts a provision that permits a defendant organization to discover relevant grant jury testimony of a witness who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

C. Rules 16(a)(1)(E) and (b)(1)(C) (witness lists).—The House version of the bill provides that each party, the government and the defendant, may discover the names and addresses of the other party's witnesses 3 days before trial. The Senate version of the bill eliminates these provisions, thereby making the names and addresses of a party's witnesses nondiscoverable. The Senate version also makes a conforming change in Rule 16(d)(1). The Conference adopts the Senate version.

A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

D. Rules 16(a)(2) and (b)(2).—Rules 16(a)(2) and (b)(2) define certain types of materials ("work product") not to be discoverable. The House version defines work product to be "the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents." This is parallel to the definition in the Federal Rules of Civil Procedure. The Senate version returns to the Supreme Court's language and defines work product to be "reports, memoranda, or other internal government documents." This is the language of the present rule.

The Conference adopts the Senate provision.

The Conferees note that a party may not avoid a legitimate discovery request merely because something is labelled "report", "memorandum", or "internal document". For example if a document qualifies as a statement of the defendant within the meaning of the Rule 16(a)(1)(A), then the labelling of that document as "report", "memorandum", or "internal government document" will not shield that statement from discovery. Likewise, if the

results of an experiment qualify as the results of a scientific test within the meaning of Rule 16(b)(1)(B), then the results of that experiment are not shielded from discovery even if they are labelled "report", "memorandum", or "internal defense document".

Notes of Advisory Committee on Rules—1983 Amendment

Note to Subdivision (a)(3). The added language is made necessary by the addition of Rule 26.2 and new subdivision (i) of Rule 12, which contemplate the production of statements, including those made to a grand jury, under specified circumstances.

Notes of Advisory Committee on Rules—1987 Amendment

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on Rules—1991 Amendment

The amendment to Rule 16(a)(1)(A) expands slightly government disclosure to the defense of statements made by the defendant. The rule now requires the prosecution, upon request, to disclose any written record which contains reference to a relevant oral statement by the defendant which was in response to interrogation, without regard to whether the prosecution intends to use the statement at trial. The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecution's intent to make any use of the statements.

The written record need not be a transcription or summary of the defendant's statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement. Otherwise, the prosecution would have the difficult task of locating and disclosing the myriad oral statements made by a defendant, even if it had no intention of using the statements at trial. In a lengthy and complicated investigation with multiple interrogations by different government agents, that task could become unduly burdensome.

The existing requirement to disclose oral statements which the prosecution intends to introduce at trial has also been changed slightly. Under the amendment, the prosecution must also disclose any relevant oral statement which it intends to use at trial, without regard to whether it intends to

introduce the statement. Thus, an oral statement by the defendant which would only be used for impeachment purposes would be covered by the rule.

The introductory language to the rule has been modified to clarify that without regard to whether the defendant's statement is oral or written, it must at a minimum be disclosed. Although the rule does not specify the means for disclosing the defendant's statements, if they are in written or recorded form, the defendant is entitled to inspect, copy, or photograph them.

Notes of Advisory Committee on Rules—1993 Amendment

New subdivisions (a)(1)(E) and (b)(1)(C) expand federal criminal discovery by requiring disclosure of the intent to rely on expert opinion testimony, what the testimony will consist of, and the bases of the testimony. The amendment is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination. *See* Eads, *Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery*, 67 *N. C. L. Rev*. 577, 622 (1989).

Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose information regarding its expert witnesses if the defendant first requests the information. Once the requested information is provided, the government is entitled, under (b)(1)(C) to reciprocal discovery of the same information from the defendant. The disclosure is in the form of a written summary and only applies to expert witnesses that each side intends to call. Although no specific timing requirements are included, it is expected that the parties will make their requests and disclosures in a timely fashion.

With increased use of both scientific and nonscientific expert testimony, one of counsel's most basic discovery needs is to learn that an expert is expected to testify. *See* Gianelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 *Vand. L. Rev*. 793 (1991); *Symposium on Science and the Rules of Legal Procedure*, 101 F.R.D. 599 (1983). This is particularly important if the expert is expected to testify on matters which touch on new or controversial techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's qualifications which in turn will permit the requesting party to determine whether in fact the witness is an expert

within the definition of Federal Rule of Evidence 702. Like Rule 702, which generally provides a broad definition of who qualifies as an "expert," the amendment is broad in that it includes both scientific and nonscientific experts. It does not distinguish between those cases where the expert will be presenting testimony on novel scientific evidence. The rule does not extend, however, to witnesses who may offer only lay opinion testimony under Federal Rule of Evidence 701. Nor does the amendment extend to summary witnesses who may testify under Federal Rule of Evidence 1006 unless the witness is called to offer expert opinions apart from, or in addition to, the summary evidence.

Second, the requesting party is entitled to a summary of the expected testimony. This provision is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion. In some instances, a generic description of the likely witness and that witness's qualifications may be sufficient, e.g., where a DEA laboratory chemist will testify, but it is not clear which particular chemist will be available.

Third, and perhaps most important, the requesting party is to be provided with a summary of the bases of the expert's opinion. Rule 16(a)(1)(D) covers disclosure and access to any results or reports of mental or physical examinations and scientific testing. But the fact that no formal written reports have been made does not necessarily mean that an expert will not testify at trial. At least one federal court has concluded that that provision did not otherwise require the government to disclose the identify of its expert witnesses where no reports had been prepared. *See, e.g., United States v. Johnson*, 713 F.2d 654 (11th Cir. 1983, *cert. denied*, 484 U.S. 956 (1984) (there is no right to witness list and Rule 16 was not implicated because no reports were made in the case). The amendment should remedy that problem. Without regard to whether a party would be entitled to the underlying bases for expert testimony under other provisions of Rule 16, the amendment requires a summary of the bases relied upon by the expert. That should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts.

The amendments are not intended to create unreasonable procedural hurdles. As with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).

Notes of Advisory Committee on Rules—1994 Amendment

The amendment is intended to clarify that the discovery and disclosure requirements of the rule apply equally to individual and organizational defendants. *See In re United States*, 918 F.2d 138 (11th Cir. 1990) (rejecting distinction between individual and organizational defendants). Because an organizational defendant may not know what its officers or agents have said or done in regard to a charged offense, it is important that it have access to statements made by persons whose statements or actions could be binding on the defendant. *See also United States v. Hughes*, 413 F.2d 1244, 1251–52 (5th Cir. 1969), *vacated as moot*, 397 U.S. 93 (1970) (prosecution of corporations "often resembles the most complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth").

The amendment defines defendant in a broad, nonexclusive fashion. *See also* 18 U.S.C. §18 (the term "organization" includes a person other than an individual). And the amendment recognizes that an organizational defendant could be bound by an agent's statement, *see, e.g*., Federal Rule of Evidence 801 (d)(2), or be vicariously liable for an agent's actions. The amendment contemplates that, upon request of the defendant, the Government will disclose any statements within the purview of the rule and made by persons whom the government contends to be among the classes of persons described in the rule. There is no requirement that the defense stipulate or admit that such persons were in a position to bind the defendant.

Notes of Advisory Committee on Rules—1997 Amendment

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial. And if the government provides that information, it is entitled to reciprocal discovery under (b)(1)(C). This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra.*

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra.*

Committee Notes on Rules—2002 Amendment

The language of Rule 16 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 16(a)(1)(A) is now located in Rule 16(a)(1)(A), (B), and (C). Current Rule 16(a)(1)(B), (C), (D), and (E) have been relettered.

Amended Rule 16(b)(1)(B) includes a change that may be substantive in nature. Rule 16(a)(1)(E) and 16(a)(1)(F) require production of specified information if the government intends to "use" the information "in its case-in-chief at trial." The Committee believed that the language in revised Rule 16(b)(1)(B), which deals with a defendant's disclosure of information to the government, should track the similar language in revised Rule 16(a)(1). In Rule 16(b)(1)(B)(ii), the Committee changed the current provision which reads: "the defendant intends to *introduce* as evidence" to the "defendant intends to *use* the item . . ." The Committee recognized that this might constitute a substantive change in the rule but believed that it was a

necessary conforming change with the provisions in Rule 16(a)(1)(E) and (F), noted *supra*, regarding use of evidence by the government.

In amended Rule 16(d)(1), the last phrase in the current subdivision—which refers to a possible appeal of the court's discovery order—has been deleted. In the Committee's view, no substantive change results from that deletion. The language is unnecessary because the court, regardless of whether there is an appeal, will have maintained the record.

Finally, current Rule 16(e), which addresses the topic of notice of alibi witnesses, has been deleted as being unnecessarily duplicative of Rule 12.1.

Committee Notes on Rules-2013 Amendment

Subdivision (a). Paragraph (a)(2) is amended to clarify that the 2002 restyling of Rule 16 did not change the protection afforded to government work product.

Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy "books, papers, [and] documents" material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated paragraphs-not including Rule 16(a)(1)(C)-Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that "a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product." *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

With one exception not relevant here, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesigned as subparagraph (a)(1)(E)), some courts have been urged to construe the restyled rule as eliminating protection for government work product.

Court have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product by that rule. Correctly recognizing that restyling was intended to effect no substantive change,

courts have invoked the doctrine of the scrivener's error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules. *See, e.g. United States v. Rudolph*, 224 F.R.D. 503, 504-11 (N.D. Ala. 2004), and *United States v. Fort*, 472 F.3d 1106, 1110 n.2 (9th Cir. 2007) (adopting the *Rudolph* court's analysis).

By restoring the enumerated subparagraphs, the amendment makes it clear that a defendant's pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

Changes Made After Publication and Comment. No changes were made after publication and comment.

References in Text

The Federal Rules of Evidence, referred to in subds. (a)(1)(G) and (b)(1)(C), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Amendment by Public Law

2002 —Subd. (a)(1)(G). Pub. L. 107–273, §11019(b)(1), amended subpar. (G) generally.

Subd. (b)(1)(C). Pub. L. 107–273, §11019(b)(2), amended subpar. (C) generally.

1975 —Subd. (a)(1). Pub. L. 94–64 amended subpars. (A), (B), and (D) generally, and struck out subpar. (E).

Subd. (a)(4). Pub. L. 94–149 struck out par. (4) "Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness."

Subd. (b)(1). Pub. L. 94–64 amended subpars. (A) and (B) generally, and struck out subpar. (C).

Subd. (b)(3). Pub. L. 94–149 struck out par. (3) "Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for a comment upon a failure to call a witness."

Subd. (c). Pub. L. 94–64 amended subd. (c) generally.

Subd. (d)(1). Pub. L. 94–64 amended par. (1) generally.

Effective Date of 2002 Amendment

Pub. L. 107–273, div. C, title I, §11019(c), Nov. 2, 2002, 116 Stat. 1826, provided that: "The amendments made by subsection (b) [amending this rule] shall take effect on December 1, 2002."

Effective Date of Amendments Proposed April 22, 1974; Effective Date of 1975 Amendments

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

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