No. 11-783

In the Supreme Court of the United States

JAMES A. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an appellate court should conduct *de novo* or deferential review of a district court's conclusion that there was no reasonable probability that exculpatory evidence not disclosed to a defendant before trial would have affected the outcome of the case.

2. Whether the court of appeals correctly concluded that there was no *Brady* violation because the allegedly suppressed exculpatory evidence was not material.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 650 F.3d 581. The district court's order denying petitioner's motion for a new trial (Pet. App. 28-94) is unreported. Prior opinions of the court of appeals (Pet. App. 95-108, 113-172) are reported at 571 F.3d 492 and 459 F.3d 509.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. A petition for rehearing was denied on September 19, 2011 (Pet. App. 173-174). The petition for a writ of certiorari was filed on December 19, 2011 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to commit wire fraud and to falsify the books, records, or accounts of a public company, in violation of 18 U.S.C. 371, 1343, and 1346, 15 U.S.C. 78m(b)(2) and (5), and 78ff, and 17 C.F.R. 240.13b2-1; wire fraud, in violation of 18 U.S.C. 1343; false declarations before a grand jury, in violation of 18 U.S.C. 1623; and obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to 46 months of imprisonment, to be followed by one year of supervised release.

The court of appeals vacated petitioner's conspiracy and wire fraud convictions but affirmed his perjury and obstruction convictions. Pet. App. 158. On remand, petitioner moved for a new trial on the perjury and obstruction charges, contending that the government had suppressed material exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district court denied the new-trial motion. Pet. App. 28-94. The court of appeals affirmed. *Id.* at 1-27.

1. This case involves one episode in the events leading to the collapse of Enron Corporation. Enron and Merrill Lynch executives engaged in a purported sale of an Enron asset—an equity interest in power-generating barges moored off the coast of Nigeria. Pet. App. 2, 96-97, 113-114. Specifically, Merrill executives agreed to pay $7 million for an interest in the barges by the end of 1999, so Enron could report a $12 million sale; in return, Enron promised to pay Merrill a $250,000 "advisory fee" and a guaranteed 15% return on $7 million, and to buy back the interest in the barges within six months if another buyer could not be found. *Ibid.* The government contended that the "sale" was a sham for the "sole pur-

pose" of allowing Enron to artificially inflate its 1999 earnings. *Id.* at 2. Petitioner, a Merrill managing director and head of its Strategic Asset and Lease Finance group, was involved in the barge transaction, and when questioned about it before a grand jury, he made false statements, leading to the charges at issue. *Id.* at 2-12.

a. In 1999, Enron executives were under considerable pressure to book earnings by the end of the year in order to meet the company's earnings targets. Pet. App. 115. As part of that effort, the executives attempted to sell the primary asset of one of Enron's energy divisions—the three Nigerian barges. *Id.* at 2, 113, 115. With the end of the year approaching and no buyer coming forward, the executives discussed the need for an "emergency alternative." *Id.* at 115. They decided to approach Merrill to see if it would be willing to "help Enron out" by purchasing an interest in the barges. *Id.* at 115-116.

In late December 1999, Enron treasurer Jeff McMahon approached Robert Furst, Enron's liaison at Merrill, and asked if Merrill would be willing to purchase an interest in the barges as a "bridge" until a permanent buyer could be found. Pet. App. 116. Furst discussed the proposal with others at Merrill, including petitioner and Daniel Bayly, who was head of the Global Investment Banking division. *Id.* at 115-116. Furst advocated that Merrill participate in the transaction to help build its relationship with Enron, but petitioner initially expressed concerns that the deal might make it appear that Merrill was "aid[ing]/abet[ting] Enron income st[atement] manipulation." *Id.* at 5-6, 117; Gov't C.A. Br. 7.

On December 22, 1999, Furst; petitioner; Bayly; Schuyler Tilney, a Merrill banker; and other Merrill

executives participated in a conference call about the proposal. Pet. App. 5, 117-118. Furst and Tilney explained that Enron wanted Merrill to invest in the barges by year's end so that Enron could meet its earnings targets. *Id.* at 117-118. Furst and Tilney then stated that "[s]omebody at Enron" had told Merrill "that they would help us find a third party to buy the barges from us and, if that didn't happen by June 30th of 2000, Enron Corporation would buy the barges back from us." Trial Transcript (Tr.) 1044; see Pet. App. 5, 118. When Bayly asked whether Merrill could get a "written guaranty to support that representation," one of the others responded that Enron could not put the guarantee in writing because it would preclude Enron from booking earnings on the transaction. Tr. 1045-1046; see Pet. App. 5, 118.[1]

The following morning, petitioner faxed an "Appropriation Request" to Merrill's accounting department. Gov't Trial Ex. 212, at 1. The document described the proposed transaction in detail, explaining that the transaction was a "bridge" and that Enron has "assured us that we will be taken out of our investment within six months." *Id.* at 2. The document noted that Bayly was planning to participate in a conference call in which Enron would "confirm[] this commitment to guaranty the [Merrill] takeout." *Ibid.* The conference call took place that same morning; on the call, Enron Chief Financial Officer Andrew Fastow confirmed the guarantee to buy out Merrill. Pet. App. 7-8, 118-119; see Tr. 1339-1340, 2525-2526, 3614.

[1] Numerous witnesses later testified that such a guarantee would render the transaction a risk-free loan, so that Enron could not report a gain "under the accounting rules." Tr. 4242; see Tr. 1733, 2578, 2876-2879, 3136-3138, 3604.

Petitioner did not participate in the call, but he later sent an email to a colleague in which he cited the barge transaction as "precedent" for obtaining an off-the-books guarantee in a transaction with another company. Pet. App. 10-11, 119. Petitioner explained that, in the barge transaction, Merrill "had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what." *Ibid.* Several emails distributed among high-level Enron executives reflected the same understanding. *Id.* at 8; see Gov't C.A. Br. 13-14.

The barge transaction was closed just before year-end 1999, and Enron reported over $12 million in resulting earnings. Pet. App. 120. Enron paid Merrill the promised "advisory fee." *Ibid.*

Over the next six months, Enron did not find an industry buyer for the barges. Pet. App. 120. In mid-June 2000, Merrill executives drafted a letter to Enron, demanding repayment for the barges from Enron; petitioner was copied on the draft. *Id.* at 11 n.6. Before Merrill could send the letter, Enron arranged for Merrill's interest in the barges to be purchased by LJM2, a partnership controlled by Fastow that Enron used to "warehouse" assets when it "needed * * * to make earnings for any given quarter." *Id.* at 9. LJM2 purchased Merrill's interest in the barges at the promised 15% rate of return. *Ibid.* An LJM2 employee documented that Enron had "promis[ed] that Merrill would be taken out by sale to another investor by June, 2000," so that "without LJM2's purchase," Enron would have had to "repurchase the assets [itself] and reverse earnings" on the barge deal. Gov't Trial Ex. 105.

After the deal closed, a Merrill subordinate emailed petitioner and Furst, "Enjoy the barges on the other side of this trade and good luck"—a reference to the fact

that petitioner and Furst had investments in LJM2. Pet. App. 10. In response, petitioner joked, "thanks bill . . . wanna buy a barge?" *Ibid.* The subordinate replied, "only if I can have a *guaranty* of make-whole at par + return." *Ibid.* (emphasis provided by court).

b. The perjury and obstruction charges at issue arise from petitioner's statements about the transaction to a grand jury, where he denied knowledge of any take-out promise from Enron to Merrill. In pertinent part, and as quoted in the indictment (with the italicized phrases representing the charged false statements), petitioner testified as follows:

> Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?
>
> A: *It's inconsistent with my understanding of what the transaction was.*
>
> * * *
>
> Q: . . . Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?
>
> A: *In—no, I don't—the short answer is no, I'm not aware of the promise.* I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, *and I did not think it was a promise though.*

> Q: So you don't have any understanding as to why there would be a reference [in a certain document] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?
>
> A: *No.*

Pet. App. 148 (quoting indictment); see *id.* at 3-5.

2. a. A grand jury in the Southern District of Texas indicted petitioner on one count of conspiracy to commit wire fraud and to falsify the books, records, or accounts of a public company, in violation of 18 U.S.C. 371, 1343, and 1346, 15 U.S.C. 78m(b)(2) and (5), and 78ff, and 17 C.F.R. 240.13b2-1; two counts of wire fraud, in violation of 18 U.S.C. 1343; one count of false declarations before a grand jury, in violation of 18 U.S.C. 1623; and one count of obstruction of justice, in violation of 18 U.S.C. 1503.

b. Before trial, the government searched its paper documents and electronic Enron databases—comprising millions of pages of records—for materials related to the barge transaction. Gov't C.A. Br. 22-23. By March 2004, about six months before the September 2004 trial, the government had provided petitioner and his co-defendants with hundreds of thousands of pages of discovery, including indexed and searchable emails and other documents from Enron, Merrill, and LJM2. *Ibid.*

In April 2004, the government provided the defense with a list of potential witnesses who might have exculpatory information, including McMahon, who was Enron's treasurer, and Katherine Zrike, who was chief counsel in Merrill's Global Investment Banking division. Docket entry No. 205 Ex. 1. At the defense's request, the district court reviewed *in camera* the "materials that led the Government to identify" these persons as

"hav[ing] exculpatory testimony"—including Senate investigators' notes of interviews with McMahon and transcripts of Zrike's testimony before the grand jury and the Securities and Exchange Commission (SEC)—and then ordered the government to provide summaries of those materials to the defense. Pet. App. 58-59 n.51; see 7/14/2004 D. Ct. Order 9 (Docket entry No. 290).

The government provided the summaries to the defense about two weeks later. Pet. App. 13; see *id.* at 183-186 (letter from government to defense counsel). As relevant here, the government disclosed that, according to McMahon, "Merrill wanted Enron/Fastow's assurance that Enron would use best efforts to * * * find a buyer" for the barges and that he (McMahon) "does not recall any guaranteed take out at the end of the 6 month remarketing period." *Id.* at 184. The government disclosed that Zrike "did not feel that there was a commitment by Enron to guarantee Merrill's takeout within 6 months"; she "believed that there was a business understanding between Enron and Merrill that Enron would remarket the barges" but also that "[t]here was no legally binding commitment to do so"; and she believed "there was no obligation for Enron to buy [the barges] back," so that "Merrill's investment * * * was at risk." *Id.* at 185.

c. At trial, the government sought to prove the existence of Enron's guarantee, and petitioner's knowledge of it, by presenting the above-described documentary evidence along with testimony from Enron executives and a Merrill employee. The government's witnesses included Tina Trinkle, a Merrill credit analyst; Eric Boyt, an in-house Enron accountant; Sean Long, head of the Enron energy group with oversight over the barges; and Michael Kopper and Ben Glisan, high-level Enron

finance executives who worked closely with Fastow and McMahon.

Trinkle testified about the December 22 Merrill conference call during which the participants, including petitioner, learned that "[s]omebody at Enron" had promised that "Enron Corporation would buy the barges back from us" if no industry buyer could be found. Tr. 1044; see Pet. App. 5, 117-118. Boyt testified that one of the participants in the December 23 call told him that, on the call, Fastow had "guarantee[d]" Merrill a "buy-back" if no other buyer could be found. Tr. 2525-2536; see Pet. App. 7, 118-119. Long testified that he learned in January 2000 that Enron had "assur[ed]" Merrill that it would "not get hurt by" the barge deal because Enron would "buy Merrill Lynch's interest back" if no other buyer could be found. Tr. 2102-2103; see Pet. App. 9. Kopper testified that Fastow told him in 2000 that Fastow and McMahon had "promise[d]" Merrill that it would be "out of the * * * transaction" "within six months." Tr. 1339-1340; see Pet. App. 7-8. And Glisan testified that both Fastow and McMahon told him they had made such a "guarantee." Tr. 3601-3603, 3613-3614; see Pet. App. 7-8, 117.

In an effort to show there was no guarantee, the defense called Zrike as a witness. She testified that, based on what petitioner, Furst, and others at Merrill had told her, she believed Enron had agreed "only" "to find a third-party buyer," so that Merrill was at "risk of loss" and the barge deal was a "true sale." Tr. 4100-4106; see Pet. App. 6, 25-26; Gov't C.A. Br. 49. Also during the defense case, the parties stipulated that McMahon was unavailable to testify because he would assert his Fifth Amendment privilege against compelled self-incrimination. Tr. 5260-5261; see Pet. App. 23.

After a six-week trial, the jury found petitioner guilty on all counts. Pet. App. 114. The district court sentenced him to concurrent sentences of 46 months of imprisonment on each count, to be followed by one year of supervised release. *Id.* at 122-123; see Judgment 1-4.

3. The court of appeals vacated petitioner's conspiracy and wire fraud convictions, holding that the honest-services theory on which they rested was legally flawed. Pet. App. 123-138. But the court affirmed his perjury and obstruction convictions, rejecting (*inter alia*) his contention that the evidence was insufficient to prove that he had knowingly lied to the grand jury. *Id.* at 144-154.[2] This Court denied petitioner's petition for a writ

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[2] Although the court vacated petitioner's conspiracy and wire fraud convictions, the court's opinion "affirmed" petitioner's "conviction[s] and sentences," Pet. App. 158, and its mandate likewise reflected "affirm[ance]" of petitioner's sentences, see Docket entry No. 895. The affirmance of petitioner's 46-month sentence appeared to be a mistake, because that sentence was based on all five counts of conviction, and the court of appeals vacated three of the counts. The government therefore asked the court of appeals to recall and correct the mandate to permit the district court to resentence petitioner solely in view of his perjury and obstruction convictions. The court of appeals granted that motion. See 2/14/2012 C.A. Order.

Petitioner is wrong to contend (Pet. 9 n.2) that the government "asserted that [petitioner] should be resentenced now under a higher Guidelines range." The original Guidelines range was 97 to 121 months of imprisonment, and the court departed downward seven levels to a range of 46 to 57 months. Mot. to Recall & Reform Mandate 3 & Ex. A, at 30-31. The government's motion to recall and correct the mandate stated that the government had tentatively calculated a pre-departure offense level of 22 and a criminal history category of I, and that "if the district court were to grant the same seven-level departure that it granted at the initial sentencing * * * to avoid unwarranted disparity among co-defendants," petitioner's "advisory imprisonment range would be 18 to 24 months." *Id.* at 16 & n.3.

of certiorari. *Brown* v. *United States*, 550 U.S. 933 (2007) (No. 06–975).

The court of appeals later held that the government could retry petitioner on the conspiracy and wire fraud charges consistent with double jeopardy principles. Pet. App. 95-108. Petitioner again filed a petition for a writ of certiorari, which this Court denied. *Brown* v. *United States*, 130 S. Ct. 767 (2009) (No. 09-496). The government ultimately dismissed the conspiracy and wire fraud charges rather than retry petitioner on them. Pet. App. 3 n.1.

4. In a series of pleadings filed in the district court from 2007 to 2010, petitioner sought a new trial on the affirmed perjury and obstruction counts, contending that the government, before trial, violated *Brady* v. *Maryland*, *supra*, by suppressing material exculpatory evidence he only learned about in the years after the trial. See Pet. App. 32 n.3. As relevant here, petitioner argued that the government's pretrial disclosures regarding McMahon (Enron's treasurer) and Zrike (Merrill's chief counsel on the barge transaction) failed to mention that (a) McMahon had told the Senate's Permanent Subcommittee on Investigations that Enron had agreed only to use "best efforts" to find a buyer for Merrill's interest in the Nigerian barges and did not "promise" to get Merrill out of the deal (*id.* at 23); (b) Zrike had testified to the grand jury and SEC that she and her fellow Merrill lawyers had tried and failed to add "a best-efforts clause" to the barge deal documents (*id.* at 25); and (c) Zrike had further stated that she did not think it was "nefarious [or] problematic" that Enron "would not put in writing an obligation to buy [the barges] back" (*ibid.* (brackets supplied by court)).

The district court denied petitioner's motion. Pet. App. 28-94. The court explained that a new trial is appropriate based on *Brady* when evidence was suppressed, the suppressed evidence was favorable to the defense, and the suppressed evidence was material to guilt or punishment. *Id.* at 32-33. After comprehensively reviewing petitioner's submissions and the evidence at trial, the district court found no *Brady* violations.

The district court held that the government's disclosures about McMahon and Zrike conveyed "the substance" of their statements to the Senate, grand jury, and SEC to the defense and that this information therefore "was not suppressed." Pet. App. 59; see *id.* at 62. The court also held that any differences between the disclosures and the underlying statements were not material. The court determined that petitioner had sufficient information about the substance of McMahon's statements to the Senate to cross-examine the government's witnesses effectively and concluded that petitioner "ha[d] not shown how having access to the actual interview notes, as opposed to a summary of their substance, would have enabled him to take any greater material advantage of the information." *Id.* at 59-60 n.53.

Similarly, the court explained that Zrike's allegedly suppressed statements were cumulative to the testimony she gave at trial, namely, that "her impression of the deal" was that it had been "a re-marketing agreement" only with no guarantee. Pet. App. 63 n.59; see *id.* at 62-63. The court further explained that the evidence that Zrike had tried and failed to add a "best efforts" clause to the barge agreement was not *Brady* material because it was "quite clear that Enron would not agree in writing to *any* obligation to re-market the barges." *Id.* at 63.

And with Zrike, as with McMahon, the court concluded that petitioner failed to show that he exercised due diligence: petitioner and the other defendants "knew that Zrike was Merrill Lynch's senior-most attorney on the barge transaction"; "they knew her impression of the deal"; she "testified as a friendly witness" at petitioner's trial; and petitioner "had every opportunity to ask her about her participation in drafting the deal documents." *Id.* at 63-64 & n.60.

In addition to finding that none of the alleged suppressions violated *Brady*, the court also "view[ed] all of these items in the aggregate," "[took] into account their cumulative effect in light of the other evidence," and reached the "same result." Pet. App. 78. The court concluded that "there is no reasonable probability that the outcome of [petitioner's] trial would have been different if the government had disclosed" "the fragments of evidence" petitioner had claimed were wrongfully suppressed, especially given the "mass" of "documentary evidence" and "witness testimony" showing that Enron had in fact made a guarantee. *Id.* at 79.

5. The court of appeals affirmed. Pet. App. 1-27. Like the district court, the court explained that "[t]o establish a *Brady* violation," petitioner had to "prove that (1) the prosecution suppressed evidence, (2) it was favorable to [him], and (3) it was material." *Id.* at 13-14. The court also stated that it "assess[es] the materiality of the suppressed evidence cumulatively, not item by item." *Id.* at 15-16. And it observed that it "generally review[s] whether the government violated *Brady de novo*," but also applies "an exception to [the] general rule of *de novo* review" when the "district court has reviewed potential *Brady* material *in camera* and ruled that the material was not discoverable." *Id.* at 16 (quot-

ing *United States* v. *Skilling*, 554 F.3d 529, 578 (5th Cir. 2009), vacated in part on other grounds, 130 S. Ct. 2896 (2010)). Because the district court here "review[ed] the McMahon notes and Zrike testimony pretrial," the court of appeals stated it would "review [the] decision as to those items for clear error." *Id.* at 17.

As to McMahon, the court of appeals determined that petitioner had shown suppression of favorable evidence because McMahon "unequivocally" told Senate investigators that Enron had not given Merrill a guarantee, "whereas the government's disclosure letter says only that McMahon 'does not recall' a guaranteed buyback." Pet. App. 23. As to Zrike, the court "assume[d] *arguendo*" that the government's disclosure did not adequately convey the statements she made to the grand jury and SEC about how the barge deal had been documented. *Id.* at 22.

But the court determined that any suppressed exculpatory evidence was not material. Pet. App. 22-27. The court observed that "[e]vidence 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.'" *Id.* at 14 (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). Under this standard, the court explained, "'[t]he 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.'" *Ibid.* (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995)). The court concluded that neither McMahon's nor Zrike's statements met the materiality standard.

The court explained that petitioner "could have made only very little use of" interview notes recounting McMahon's statements to Senate investigators, because McMahon did not testify as a live witness, so petitioner "[a]t most" could have used the statements to attempt to "impeach Glisan's and Kopper's testimony that McMahon told them there was a buyback 'promise.'" Pet. App. 23-24 & n.22; see *id.* at 24 (apart from their potential use as impeachment evidence, "the McMahon notes * * * were otherwise inadmissible hearsay"). The court further explained that such impeachment "would have had essentially no impact on the government's case" because the declaration was "cumulative" of a host of other evidence about the guarantee: namely, the "unimpeached," independent testimony of Trinkle, Boyt, Long, Kopper, and Glisan, as well as substantial documentary proof of the guarantee, including an email in which petitioner himself said Fastow had "*promise[d] to pay [Merrill] back no matter what*." *Id.* at 10-11, 24.

The court likewise held that Zrike's statements to the grand jury and the SEC about how the deal was documented "would have been of little marginal benefit to [petitioner]" because Zrike "already took the stand as a witness" for the defense and stated that "she believed the agreement was nothing more than a 'best-efforts' agreement." Pet. App. 25-26. The court added that the government had "neutralized" Zrike's testimony by showing that her Merrill colleagues "kept her and the other lawyers out of the loop" about Enron's guarantee and determined that "[n]othing in [Zrike's] allegedly suppressed testimony would have weakened the prosecution's successful argument on that point." *Id.* at 26.

The court therefore concluded that "the favorable evidence [petitioner] points to is not, even cumulatively,

sufficient to" show a "substantial probability of a different outcome," particularly in light of the "considerable evidence of [petitioner's] guilt" introduced at trial. Pet. App. 26.

6. The court of appeals denied petitioner's petition for rehearing and rehearing en banc, with no judge in regular active service calling for a poll. Pet. App. 173-174.

ARGUMENT

Petitioner renews his claim (Pet. 14-38) that a new trial is warranted because the government failed to disclose material exculpatory evidence regarding McMahon and Zrike, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The court of appeals correctly rejected that claim, and its fact-specific conclusion does not implicate any conflict of authority among the courts of appeals. Further review is therefore unwarranted.

1. Petitioner contends (Pet. 14-24) that the courts of appeals disagree about the appropriate standard of review for *Brady* claims. That contention does not warrant further review. This Court repeatedly has denied certiorari on the standard-of-review question, see, *e.g.*, *O'Keefe* v. *United States*, 544 U.S. 1034 (2005) (No. 04-1378); *Higgs* v. *United States*, 543 U.S. 1004 (2004) (No. 04-5226); *Ryan* v. *United States*, 526 U.S. 1064 (1999) (No. 98-993), and the same result is warranted here.

a. In *Brady*, the 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, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In subsequent cases, the Court has held that undisclosed evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been dis-

closed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part and concurring in the judgment); see *Kyles* v. *Whitley*, 514 U.S. 419, 433-434 (1995). A "reasonable probability" of a different result exists "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

b. The court of appeals recognized, Pet. App. 16, and the government agrees, that a district court's conclusion about the materiality of undisclosed exculpatory evidence generally should be reviewed *de novo*.[3] To determine whether a *Brady* violation has occurred, a court must assess the undisclosed evidence in light of the evidence actually presented at trial to determine whether there is a "reasonable probability" that disclosure would have caused a different result. Although highly fact-specific, that inquiry requires courts to apply a legal standard to the circumstances of a particular case. Accordingly, the materiality inquiry is a mixed question of fact and law. See, *e.g.*, *Thompson* v. *Keohane*, 516 U.S. 99, 109-110 (1995).

Although this Court has not expressly decided the question, its cases suggest that materiality rulings are

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[3] The government argued below that "the question whether the government violated *Brady* is, at bottom, a legal one subject to *de novo* review" but also noted Fifth Circuit precedent recognizing that "the ultimate legal question inevitably involves contextual factual subcomponents as to which the district court's vantage is superior," so that the court of appeals could give weight to the district court's "opportunity to hear the testimony at trial firsthand, view the demeanor of the witnesses, observe the ebb and flow of the evidence at trial, and evaluate the strengths and weaknesses of the government's case." Gov't C.A. Br. 26-27 (internal quotation marks omitted).

generally to be reviewed *de novo*. The Court has not afforded deference to lower-court determinations about the materiality of undisclosed evidence. For example, in *Kyles*, which involved a habeas corpus challenge to a state conviction, the Court appeared to review the defendant's *Brady* claim *de novo* and did not suggest that the materiality of the undisclosed information was a factual issue subject to deference. See 514 U.S. at 441-454. Similarly, when the Court in *Bagley* remanded the case to the court of appeals to determine whether the undisclosed evidence was material, it did so without suggesting that the appellate court should defer to the district court's own determination of the issue. See 473 U.S. at 683-684 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in the judgment); see also *Smith* v. *Cain*, 132 S. Ct. 627, 630-631 (2012) (Court decided materiality of undisclosed evidence without affording deference to district court's determination of the issue); *Wood* v. *Bartholomew*, 516 U.S. 1, 5-8 (1995) (per curiam) (same).

c. Petitioner is correct that the circuits have provided varying articulations about the appropriate standard of review of a district court's materiality determination. But the inconsistency is likely more apparent than real. With the exception of the Seventh Circuit, every federal court of appeals with jurisdiction over criminal cases—including the court below—has held that *Brady* claims generally are to be reviewed *de novo*. *Conley* v. *United States*, 415 F.3d 183, 188 (1st Cir. 2005); *United States* v. *Madori*, 419 F.3d 159, 169 (2d Cir. 2005), cert. denied, 546 U.S. 1115 (2006); *United States* v. *Thornton*, 1 F.3d 149, 158 (3d Cir.), cert. denied, 510 U.S. 982 (1993); *United States* v. *King*, 628 F.3d 693, 702 (4th Cir. 2011); *United States* v. *Fernandez*, 559 F.3d 303, 319 (5th Cir.), cert. denied, 129 S. Ct.

2783, and 130 S. Ct. 139 (2009); *United States* v. *Phillip*, 948 F.2d 241, 250 (6th Cir. 1991), cert. denied, 504 U.S. 930 (1992); *Mandacina* v. *United States*, 328 F.3d 995, 1001 (8th Cir.), cert. denied, 540 U.S. 1018 (2003); *United States* v. *Price*, 566 F.3d 900, 907 & n.6 (9th Cir. 2009); *United States* v. *Hughes*, 33 F.3d 1248, 1251 (10th Cir. 1994); *United States* v. *Beasley*, 72 F.3d 1518, 1525 (11th Cir.) (per curiam), cert. denied, 518 U.S. 1027, and 519 U.S. 866 (1996); *United States* v. *Oruche*, 484 F.3d 590, 595-596 (D.C. Cir. 2007); see Pet. App. 15-16. Petitioner acknowledges (Pet. 23) that "[a]ll the Circuits have recognized in at least some cases that the question of materiality is a legal judgment."[4]

The Seventh Circuit has held that "the judgment whether some piece (or pieces) of evidence wrongfully withheld by the government might if disclosed have changed the outcome of the trial [is] to be reviewed deferentially" because a trial judge can be expected to "have developed a feel for the impact of the witnesses on the jury" and "how that impact might have been different" in the event of disclosure. *United States* v. *Boyd*, 55 F.3d 239, 242 (1995); see, *e.g.*, *United States* v. *Wil-*

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[4] It is not necessarily the case, as petitioner suggests (Pet. 18), that general application of an abuse-of-discretion standard of review to a ruling on a new-trial motion is inconsistent with the conclusion that materiality determinations under *Brady* are subject to *de novo* review, because a trial court's erroneous ruling on a legal issue amounts to an abuse of discretion. See *Koon* v. *United States*, 518 U.S. 81, 100 (1996) ("Little turns * * * on whether we label review of this particular question abuse of discretion or *de novo*" because "[a] district court by definition abuses its discretion when it makes an error of law.") (citation omitted); see also *Oruche*, 484 F.3d at 595 (acknowledging that "[g]enerally, this court reviews the district court's grant of a new trial for abuse of discretion" but also that "assessment of the materiality of this evidence under *Brady* is a question of law").

liams, 81 F.3d 1434, 1440-1441 (7th Cir. 1996); *United States* v. *Maloney*, 71 F.3d 645, 652-653 (7th Cir. 1995), cert. denied, 519 U.S. 927 (1996).

But it is far from clear that the Seventh Circuit's approach, in practice, leads to measurably different results than the *de novo* standard applied by the other circuits. As cases from the other circuits recognize, *de novo* review leaves room for acknowledgment of the trial court's unique perspective. A leading case in the Fifth Circuit, for example, recognized that although *Brady* claims are to be "examine[d] * * * anew," they may be "intimately intertwined with * * * trial proceedings" as to which a district court will have firsthand insights that an appellate court, reviewing a "cold record," would otherwise lack. *United States* v. *Sipe*, 388 F.3d 471, 479 (2004); see note 3, *supra*. Several courts of appeals that apply *de novo* review have cited this institutional advantage of the district court as a basis for giving some weight to its materiality determination. See, *e.g.*, *Conley*, 415 F.3d at 188 n.3 (giving "[s]ome deference to the district court's resolution of fact-dominated questions in the *Brady* context"); *United States* v. *Ryan*, 153 F.3d 708, 711 (8th Cir. 1998) (agreeing with Seventh Circuit that "the district judge was in a better position than we to weigh the imponderables involved in a judgment of prejudice") (internal quotation marks omitted), cert. denied, 526 U.S. 1064 (1999); *Thornton*, 1 F.3d at 158 (district court's "weighing of the evidence merits deference from the Court of Appeals, especially given the difficulty inherent in measuring the effect of a nondisclosure on the course of a lengthy trial covering many witnesses and exhibits") (internal quotation marks omitted); *United States* v. *Sanchez*, 917 F.2d 607, 618 (1st Cir. 1990) (materiality determinations are "ordinarily

accorded deference" because they are "'inherently fact-bound'") (quoting *Bagley*, 473 U.S. at 685 (White, J., concurring)), cert. denied, 499 U.S. 977 (1991); *United States* v. *Provenzano*, 615 F.2d 37, 49 (2d Cir.) (trial judge was in "best position to appraise the possible effect of the *Brady* material"), cert. denied, 446 U.S. 953 (1980).

A *de novo* standard is consistent with giving due weight to the district court's firsthand observations on a fact-intensive issue. In an analogous context, this Court held in *Ornelas* v. *United States*, 517 U.S. 690 (1996), that a court of appeals should review *de novo* a district court's rulings on probable cause and reasonable suspicion while "giv[ing] due weight" to a district court's conclusion that a police officer's inferences were reasonable. *Id.* at 699-700.

d. The court of appeals stated that it ordinarily "review[s] a *Brady* claim *de novo*," but also applies an "exception" to that "general rule" where, as here, "a district court has reviewed potential *Brady* material *in camera* and ruled that the material was not discoverable." Pet. App. 16 (internal quotation marks omitted). No conflict in the lower courts exists as to that holding. As petitioner points out (Pet. 17-18 & nn.8-9), other courts of appeals have likewise adopted deferential standards in cases of *in camera* review by a district court. See, *e.g.*, *United States* v. *Willis*, 89 F.3d 1371, 1380-1381 & n.6 (8th Cir.) (applying abuse-of-discretion standard), cert. denied, 519 U.S. 909 (1996); *United States* v. *Trevino*, 89 F.3d 187, 190 (4th Cir. 1996) (applying clear-error standard); *United States* v. *Phillips*, 854 F.2d 273, 277 (7th Cir. 1988) (applying abuse-of-discretion standard under which reversal would be unwarranted "if reasonable men could differ as to the pro-

priety of the [district] court's action") (internal quotation marks omitted); *United States* v. *Monroe*, 943 F.2d 1007, 1012 (9th Cir. 1991) (applying clear-error standard), cert. denied, 503 U.S. 971 (1992).

Petitioner contends (Pet. 21-24 & n.12) that *de novo* review is appropriate even though the district court conducted an *in camera* review. But petitioner cites no case from this Court or another court of appeals in which "a district court * * * reviewed potential *Brady* material *in camera* and ruled that the material was not discoverable," Pet. App. 16 (internal quotation marks omitted), and the reviewing court nevertheless held that a *de novo* standard applied. He suggests (Pet. 17) that *United States* v. *King*, *supra*, was such a case, but he is mistaken. The district court in *King* did not conduct an *in camera* review; rather, the court of appeals vacated and remanded because the district court had failed to inspect grand jury testimony *in camera* even though the defendant had made a sufficient *prima facie* showing that the testimony "could contain materially favorable evidence." 628 F.3d at 703-704 (emphasis omitted); see *id.* at 698 ("At no point did the court examine the grand jury transcript or rule on the materiality of the information contained in it."). In the absence of a conflict on the exception to *de novo* review applied by the court of appeals on the facts of this case, further review is not warranted.

That is particularly true because the result would be the same here under *de novo* review. Indeed, although the court of appeals recited the clear-error standard and stated that "the district court did not clearly err" (Pet. App. 16-17, 22-23), its analysis of materiality did not depend on that deferential standard of review. The court conducted its own review of the allegedly sup-

pressed evidence and the trial record and concluded that the evidence "would have had essentially no impact on the government's case." *Id.* at 24. As to "the suppressed portions of the McMahon notes," the court of appeals independently concluded that petitioner "could have made only very little use of them" by impeaching McMahon's out-of-court statement of a guarantee. *Id.* at 23-24. The court reached the same conclusion with respect to Zrike's statements, determining that they "would have been of little marginal benefit to" petitioner because Zrike already testified at trial that she believed there was no guarantee to buy back the barges, and that testimony was refuted by numerous Enron and Merrill witnesses. *Id.* at 25-26.

The court's discussion of the strength of the government's other evidence of guilt underscores this point. The court observed that where "impeached testimony" is "strongly corroborated," as it was here, the impeaching evidence "generally is not found to be material, * * * *let alone* on clear-error review and when the witness is an out-of-court declarant." Pet. App. 24 (emphasis added; internal quotation marks omitted). This statement strongly suggests that the standard of review was not outcome-determinative because the court concluded on its own that the evidence was not material. See also *id.* at 26 ("Nothing in [Zrike's] allegedly suppressed testimony would have weakened the prosecution's successful argument" that there was a guaranteed buyback.). Because petitioner would not prevail even under *de novo* review, further review is unwarranted.

2. Petitioner raises (Pet. 25-38) a number of additional challenges to the court of appeals' resolution of his *Brady* claim. None warrants this Court's review.

a. Petitioner first contends that the court of appeals used an incorrect legal standard for assessing materiality because it required him to show a "'substantial probability of a different outcome'" rather than a "'reasonable' probability." Pet. 25 (quoting Pet. App. 26). That is incorrect. Quoting language from this Court's cases, the court of appeals recognized that "[e]vidence 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,'" Pet. App. 14 (quoting *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.)), and it noted that a "'reasonable probability' is less than 'more likely than not,'" *id.* at 15 (quoting, *inter alia*, *Strickland* v. *Washington*, 466 U.S. 668, 693 (1984)). The court further explained that the standard is met when a defendant shows that because of the government's suppression of evidence, he did not "receive[] a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 14 (quoting *Kyles*, 514 U.S. at 434).

The court drew the term "substantial" (Pet. App. 15) from this Court's recent decision in *Harrington* v. *Richter*, 131 S. Ct. 770, 792 (2011), which held that, under *Strickland*'s prejudice requirement, "[t]he likelihood of a different result must be substantial, not just conceivable." As the court of appeals noted, and as petitioner appears to concede (Pet. 26 & n.15), "the same 'reasonable probability' standard that applies in ineffective-assistance * * * cases applies in *Brady* cases as well." Pet. App. 15 n.11; see *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.). Accordingly, the court appropriately relied on *Harrington*, and the context makes clear that the court used the term "substantial" as part of its "reasonable probability" analysis, rather than holding peti-

tioner to a higher standard than this Court's precedents have established.

b. Petitioner incorrectly contends (Pet. 27 & n.16) that the court of appeals determined the materiality of the undisclosed evidence item-by-item rather than cumulatively. The opposite is true: the court stated that it "assess[ed] the materiality of the suppressed evidence cumulatively, not item by item," and it made clear throughout its analysis that it did not believe the allegedly suppressed items were material even when "taken together." Pet. App. 15-16, 27; see *id.* at 23 & n.21, 25; see also *id.* at 78 (district court). That approach is consistent with the court's post-*Kyles* precedent requiring cumulative consideration of suppressed evidence. See, *e.g.*, *Skilling*, 554 F.3d at 580; *Sipe*, 388 F.3d at 478 & n.11.

c. Petitioner argues (Pet. 36-38) that this Court should adopt a "bright-line rule" that suppressed evidence is always material "when the government takes advantage of its suppression by attempting to prove what the suppressed evidence negates or undermines." Review is not warranted for that purpose.

As an initial matter, petitioner did not advocate any such per se rule in the court of appeals, and the court therefore did not consider such a rule. Rather, petitioner argued (*e.g.*, Pet. C.A. Br. 37-42, 46) that the allegedly suppressed McMahon notes and Zrike testimony were material on the facts of this particular case because the government's arguments to the jury contradicted those items. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quo-

tation marks omitted), and petitioner provides no good reason for an exception here.

Petitioner has not cited any court of appeals decision that has adopted the per se rule he proposes. He asserts (Pet. 36) that the outcome of his case would be different in other circuits, but he does not cite any difference in the circuits' legal rules. The cases he cites (Pet. 36 & n.23) simply reflect that courts sometimes reach different outcomes on materiality on different facts.

A prosecutor's bad-faith exploitation of suppressed evidence may be a factor indicating materiality on the specific facts of any given case. See *United States* v. *Mitchell*, 365 F.3d 215, 255 (3d Cir.) (declining to "adopt * * * a rule of *per se* materiality in the face of bad faith withholding by the prosecution," but pointing out that "the existence of bad faith on the part of the prosecution is a factor for the court to consider in weighing the materiality of the withheld evidence"), cert. denied, 543 U.S. 974 (2004); see also *LaCaze* v. *Warden*, 645 F.3d 728, 737-738 & n.1 (5th Cir. 2011), cert. denied, 132 S. Ct. 1137 (2012); *United States* v. *Jackson*, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986).

But a per se rule would be in tension with this Court's holding that an alleged *Brady* violation "is [not] measured by the moral culpability, or the willfulness, of the prosecutor" but by "'avoidance of an unfair trial to the accused.'" *United States* v. *Agurs*, 427 U.S. 97, 110 & n.17 (1976) (quoting *Brady*, 373 U.S. at 87). The court of appeals' analysis was consistent with this Court's teachings in that regard. See Pet. App. 14 (materiality depends on whether the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence" (quoting *Kyles*, 514 U.S. at 434)).

Petitioner repeatedly asserts (Pet. 8, 11, 34-35, 37-38) that prosecutors in this case deliberately suppressed exculpatory evidence and then attempted to capitalize on that suppression. Those assertions are unfounded. Before the first trial, the government provided materials to the district court to review *in camera*. The district court instructed the government to provide the defendants with summaries of material exculpatory evidence (as opposed to the evidence itself) to satisfy the government's *Brady* obligations. See 7/14/2004 D. Ct. Order 8-9 (Docket entry No. 290). In compliance with the district court's order, the government provided those summaries to the defense.[5] The summaries provided petitioner with notice that McMahon and Zrike potentially could provide helpful testimony for the defense. When petitioner was scheduled for retrial, new prosecutors provided the defense with various files, rather than summaries (as the district court previously had required), because there was no longer an ongoing investigation.[6] No court has found that the government acted in bad

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[5] Petitioner focuses (Pet. 3, 8, 11 n.4, 13, 38) on the fact that the government highlighted some statements when it gave materials to the district court to review but did not disclose those statements verbatim. The government provided the defense with summaries, rather than the underlying materials, because the district court ordered it to provide summaries.

[6] Contrary to petitioner's contention (Pet. 21 n.11), disclosure of these files was not "accidental"; the government intentionally provided the files that it had previously summarized. The portion of the pretrial hearing petitioner cites does not address the interview notes of McMahon (it addresses notes of Merrill banker Schuyler Tilney), and it does not establish that the disclosure was accidental (only that there was confusion about which Tilney document petitioner's counsel was referring to). See 6/24/2010 D. Ct. Tr. 15-17 (Docket entry No. 1212).

faith, and especially given the findings of the courts below that no material exculpatory information was suppressed, petitioner's contrary assertion is entirely without foundation.

d. Finally, petitioner disagrees (Pet. 27-34) with the court of appeals' assessment of the significance of the allegedly undisclosed evidence. The decision below is correct, and petitioner's fact-bound disagreement with it does not warrant this Court's review.

Petitioner's primary argument is that the McMahon and Zrike evidence "would have altered the entire trial." Pet. 30, 32. The courts below reviewed the evidence and comprehensively explained their reasons for rejecting that argument. Pet. App. 22-27 (court of appeals); *id.* at 58-64, 78-80 (district court). Certiorari is not warranted to consider petitioner's renewed fact-bound assertions of materiality. In any case, his assertions lack merit.

At most, petitioner could have used the allegedly undisclosed McMahon evidence—namely, that McMahon told Senate investigators Enron did not "promise" to get Merrill out of the barge deal but assured Merrill it would undertake "best efforts" instead (Pet. App. 23)—to impeach McMahon's out-of-court declaration of a guarantee. But the other evidence of a guarantee was overwhelming: Trinkle, Boyt, Long, Kopper, and Glisan all testified to it, and it was reflected in the companies' course of dealings and a wide range of documents, including petitioner's own email unequivocally stating that Merrill got Fastow to "*promise to pay us back no matter what*." *Id.* at 10-11, 24; see pp. 4-6, *supra*. As the court of appeals explained, the jury would not have rejected this compelling confluence of evidence based on the mere impeachment of an out-of-court declarant. See Pet. App. 24; accord *King*, 628 F.3d at 703-704 ("[A]s a

general matter, evidence that merely impeaches those who do not testify lacks * * * materiality.").[7]

Likewise, the court of appeals correctly concluded that Zrike's testimony to the grand jury and SEC about how the barge deal was documented was not material. Zrike testified for the defense at trial, telling the jury repeatedly that she believed the deal involved an unenforceable assertion that Enron would attempt to remarket the barges, not a guarantee. Tr. 4100-4106; see Pet. App. 6, 25-26; Gov't C.A. Br. 49. As the court of appeals pointed out (Pet. App. 26), the government "neutralized" that testimony on cross-examination by demonstrating that Zrike had been cut out of the important December 22 and 23 calls and had not been told of their contents. See also Gov't C.A. Br. 51-52. Testimony about how Zrike, with that incomplete knowledge, had attempted to document the deal could not have affected the verdict where she had already stated that she did not believe it involved a guarantee, and petitioner's grand-jury testimony related only to whether there was a guarantee, not how the deal was documented.[8]

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[7] Petitioner suggests (Pet. 30-31) that he could have used McMahon's Senate statements to impeach several government witnesses, even where they were not relating McMahon's out-of-court declaration. Petitioner does not cite any rule of evidence for that proposition, and none supports it. The rules of evidence allow use of a declarant's out-of-court statements to attack his own credibility under certain circumstances, see Fed. R. Evid. 806, but not to attack the credibility of other witnesses. And as the court of appeals observed (Pet. App. 24), petitioner could not have used McMahon's statements substantively.

[8] Petitioner claims (Pet. 33) he "likely" would have testified at trial if he had known what Zrike told the grand jury and SEC. But he did not make that representation in the court of appeals, and that court did not consider it. Moreover, petitioner heard Zrike's trial testimony before he had to decide whether to testify. Zrike testified about how

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the deal was documented and stated her view that "if Enron could not re-market the equity interest in these barges to a third party," Merrill would have no recourse. Tr. 4239; see Tr. 4237-4239. That testimony, along with the government's pretrial disclosure (Pet. App. 185) that Zrike did not believe Enron had made any "guarantee" or "legally binding commitment," was sufficient for petitioner to make an informed decision about whether to testify. In any case, the materiality standard does not "focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial" but rather the impact "of the evidence [on] the issue of guilt or innocence." *Agurs*, 427 U.S. at 112 n.20.