No. 18-36

In the Supreme Court of the United States

GREGORY BRICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
STRATTON C. STRAND
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's precedents in rejecting petitioner's claim that the government withheld material exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963).

2. Whether the court of appeals correctly affirmed the trial court's denial of petitioner's motion for a new trial under Rule 33 of the District of Columbia Superior Court Rules of Criminal Procedure.

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OPINIONS BELOW

The opinion of the D.C. Court of Appeals (Pet. App. 1a-11a) is unreported. The orders of the D.C. Superior Court (Pet. App. 14a-47a, 55a-70a, 71a-80a) are unreported.

JURISDICTION

The judgment of the D.C. Court of Appeals was entered on January 22, 2018. A petition for rehearing was denied on April 5, 2018 (Pet. App. 12-13a). The petition for a writ of certiorari was filed on July 5, 2018 (Thursday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

Following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted of first-degree murder while armed, in violation of D.C. Code §§ 22-2401, 22-3202 (LexisNexis 1995); carrying a pistol without a license, in violation of D.C. Code § 22-3204(a)

(LexisNexis 1995); possession of a firearm during a crime of violence or dangerous offense, in violation of D.C. Code § 22-3204(b) (LexisNexis 1995); escape, in violation of D.C. Code § 22-2601(a)(1) (LexisNexis 1995); and failure to appear, in violation of D.C. Code § 23-1327(a) (LexisNexis 1995). The D.C. Superior Court sentenced petitioner to 40 years to life imprisonment. Gov't C.A. Br. 1 & n.2. The District of Columbia Court of Appeals affirmed petitioner's convictions. Pet. App. 1a-11a.

In 2008, after three unsuccessful collateral attacks, petitioner moved to vacate his convictions and for a new trial under D.C. Code § 23-110 (LexisNexis 2007), Rule 33 of the D.C. Superior Court Rules of Criminal Procedure (Rule 33), and the Innocence Protection Act of 2001 (IPA), § 6, 49 D.C. Reg. 412 (Jan. 18, 2002) (D.C. Code § 22-4135 (LexisNexis 2007)). Pet. App. 14a-15a; Gov't C.A. Br. 8 n.6. Following evidentiary hearings, petitioner supplemented his motions in 2012 and 2014. Pet. App. 42a, 45a, 56a n.1, 62a. The D.C. Superior Court denied the motions. *Id.* at 14a-47a, 55a-70a. Petitioner then moved for discovery under Rule 6 of the Superior Court Rules Governing Procedures Under D.C. Code § 23-110 (Rule 6). The court denied that motion. Pet. App. 71a-80a. The D.C. Court of Appeals affirmed. *Id.* at 1a-11a.

1. On the evening of October 18, 1994, Gerald Hill was killed in an alley near the 5800 block of East Capitol Street, N.E., Washington, D.C. Pet. App. 2a; Gov't C.A. Br. 2-3. A police investigation determined that Hill had been walking in the alley with petitioner's friend, Darryl Hazel, when petitioner approached and shot Hill twice with a 9-millimeter firearm. Pet. App. 2a, 8a; Gov't C.A. Br. 2-3; Gov't Corrected C.A. App. (Gov't

C.A. App.) 6, 51. On October 21, 1994, police arrested petitioner at his grandmother's house, where he often stayed, and found the murder weapon under his bed. Pet. App. 2a; Gov't C.A. Br. 4; Gov't C.A. App. 52.

In a videotaped interview with the police on the day of his arrest, petitioner claimed that Hazel killed Hill in retaliation for the September 25, 1994, killing of Hazel's brother, Warren Davis (a.k.a. "Peanut"). Pet. App. 60a n.2, 64a-65a; Gov't C.A. Br. 37; Gov't C.A. App. 3-6. Petitioner described the sequence of events as follows: After Davis's death, there were rumors that Hill was in the car when the "Clay Terrace boys" shot Davis, was the actual shooter, and was boasting about it. When Hazel got out of prison, he "c[ame] up to the neighborhood" and said Hill was "bragging" about killing Davis. Petitioner suggested Hazel should, "Get him," and Hazel said, "All right." Then, shortly before the murder, Hazel came to petitioner with a gun and said, "'Man, I'm about to go get him,'" to which petitioner responded, "'I'll walk over there with you.'" Petitioner and Hazel went into the alley, where Hazel started talking to Hill. After Hazel and Hill walked farther down the alley, Hazel shot Hill, "pow, pow." Gov't C.A. App. 3-5; see *id.* at 10-12; Pet. App. 65a.

At the November 1, 1994, preliminary hearing, in the presence of petitioner's counsel, a detective testified to the substance of petitioner's interview statement. Gov't C.A. App. 15, 23-25. The detective specifically recounted petitioner's assertion that, before the murder, Hazel said Hill had been "bragging about how [Hill] was involved in the killing of [Davis]." *Id.* at 24.

2. On April 26, 1995, a grand jury returned an indictment charging petitioner with first-degree murder while armed, in violation of D.C. Code §§ 22-2401,

22-3202 (LexisNexis 1995); carrying a pistol without a license, in violation of D.C. Code § 22-3204(a) (LexisNexis 1995); and possession of a firearm during a crime of violence or dangerous offense, in violation of D.C. Code § 22-3204(b) (LexisNexis 1995). Pet. App. 15a. Petitioner was arraigned on May 1, 1995. Gov't C.A. App. 39. On May 12, 1995, he absconded from a halfway house, and his whereabouts were unknown for 13 months. *Ibid.* On May 15, 1996, a grand jury returned a separate indictment charging him with escape, in violation of D.C. Code § 22-2601(a)(1) (LexisNexis 1995); and failure to appear, in violation of D.C. Code § 23-1327(a) (LexisNexis 1995). Pet. App. 15a. Petitioner was finally apprehended on June 14, 1996. Gov't C.A. App. 54.

Former Assistant United States Attorney (AUSA) David Smith was assigned as lead prosecutor. Pet. App. 24-25a. In preparing for trial, he met twice with Hazel to assess him as a witness. *Id.* at 25a, 43a. Immediately after the murder, Hazel had told police and prosecutors that petitioner killed Hill. *Id.* at 35a. Hazel also had testified before the grand jury that he saw petitioner shoot Hill, stating—consistent with the forensic evidence—that petitioner held the gun with his left hand. *Id.* at 25a; Pet. Limited C.A. App. (Pet. C.A. App.) 82. But "there were things . . . in his testimony that gave [Smith] pause." Pet. C.A. App. 76. After the meetings, Smith decided not to call Hazel. *Ibid.* Smith considered Hazel "not a strong witness" because he seemed "self-centered," "evasive," and "shifty," and he was "clearly reluctant" to be involved. *Id.* at 66, 76, 83. Smith also suspected that Hazel may have purposely lured Hill into the alley and that Hazel was afraid of petitioner, who was "notorious for killing people" who

turned on him. *Id.* at 82. Smith had successfully prosecuted petitioner for another homicide and knew that "a lot of people were afraid of him." *Id.* at 82-83; see *id.* at 84-85.

In pretrial discovery, AUSA Smith provided defense counsel a copy of the videotape of petitioner's police interview, as well as a transcript of the interview. Gov't C.A. Br. 37 n.37. Smith specified in the July 25, 1996 cover letter that petitioner "told police that Darryl Hazel told him he overheard Gerald Hill bragging about shooting [Davis]." Gov't C.A. App. 54. Also in pretrial discovery, Smith disclosed to defense counsel by telephone and in a November 7, 1996 follow-up letter that petitioner, his cousin Darryl Banks (identified as "Durrell" Banks), Hazel, and others had participated in a conversation in which "there was some speculation" about whether Hill had been involved in the death of Davis. Pet. C.A. App. 58. AUSA Smith's letter described the date, time, and location of the conversation informing defense counsel that it occurred between September 25, 1994 (when Davis was murdered) and October 18, 1994 (when Hill was murdered); at about 7:15 p.m.; in the circle at 57th Place, S.E., near where petitioner lived. *Ibid.* Smith added that Banks "may have said words to the effect of, 'When they shot [Davis] I saw [Hill] down there on Central Ave. with the Clay Terrace boys.'" *Ibid.*

3. In early January 1997, trial commenced before the Honorable Reggie Walton. Pet. App. 15a.

a. The government presented two eyewitnesses: Norman Isaac, age 15 at the time of the murder; and Hill's sister, Marguerite Jenkins. Isaac testified that, on the evening of October 18, 1994, he was leaving his grandmother's house when he noticed Hill and Hazel

walking together in a nearby alley. Gov't C.A. Br. 2. As they started to turn into another alley, petitioner walked up behind them. When petitioner was within six or seven feet of them, he said, "Don't run now." *Id.* at 3 (citation omitted); see *id.* at 2-3. Hill ran into the alley out of Isaac's view, and Isaac also lost sight of Hazel. Petitioner, who had begun to run after Hill and Hazel, pulled out a silver gun, extended his arm, and pointed the gun in their direction. Isaac heard two gunshots. A "split second" before hearing the shots, he lost sight of petitioner. *Id.* at 3 (citation omitted). But he was "completely certain" that petitioner was the person who pulled out the gun and pointed it just before the shots. *Ibid.* (citation omitted).

In a police interview a few hours after the murder, Isaac had identified "'Greg'" (Isaac did not know his last name) as the person who shot Hill. Gov't C.A. Br. 3 (citation omitted). Isaac had also identified Hill by name. And from a photo array, Isaac had selected a photo of petitioner, saying, "That's Greg." *Ibid.* (citation omitted).

Jenkins testified that, on the night of the shooting, she set out to find her brother (Hill) because some girlfriends had told her that he was high on PCP and acting stupidly. As she searched, she saw two boys in the area of 58th Street "walking down the alley" together and talking; she did not see their faces or otherwise recognize them. Gov't C.A. Br. 6 (citation omitted). The two boys were about the same height. When a shorter boy ran up behind them, one of the first two boys grabbed the other, "like don't run or something," and the other turned around to face the shorter boy. *Id.* at 7 (citation omitted); see *id.*at 6-7. The evidence established that Hill was 5'11"; Hazel was "a little taller"; and petitioner

was four or five inches shorter than Hazel. *Id.* at 7 n.5 (citations omitted). The shorter boy put a pistol to the neck of the boy who had been grabbed, and shot once. Jenkins reacted by running away, but later returned to the alley to find Hill's body on the ground. *Id.* at 7.

The government called Hazel and had him stand next to petitioner so the jury could compare their heights. The government did not elicit testimony from Hazel. Gov't C.A. Br. 7.

The government also put on evidence from the investigation. A medical examiner testified that Hill was killed by two rapidly-fatal gunshot wounds. One bullet entered the front portion of his neck and the other his left upper chest. Gov't C.A. Br. 3-4. The direction of both bullet wounds was "front to back, left to right[,] and downwards." *Id.* at 4 (citation omitted). Two bullet slugs were recovered from the body. Police witnesses testified that, on October 21, 1994, they executed a search warrant at petitioner's residence, where they found a loaded 9-millimeter Ruger semi-automatic pistol wedged into the bed frame in an upstairs bedroom. *Ibid.* A firearms and ballistics expert testified that a copper-jacketed bullet found in Hill's body and a shell casing recovered from the alley were fired by the 9-millimeter Ruger. *Ibid.*

Finally, the government put on evidence of petitioner's escape from the halfway house and failure to appear in court. Gov't C.A. Br. 4 n.3; Gov't C.A. App. 39.

b. The defense theory was that Hazel killed Hill.

Tracy Yelvercon testified that on the evening of the shooting, she was standing on 57th Street talking with a group of people, including Hill and Hazel. Petitioner was not there, but she had seen him earlier that afternoon sitting in front of his house on 57th Place. Hill and

Hazel left the group and walked up the street, and Yelvercon went inside. Gov't C.A. Br. 4-5. About ten minutes later, Yelvercon heard two gunshots and ran towards the alley. She saw Hill lying on the ground but did not see petitioner. *Id.* at 5. About 15 minutes later, Yelvercon saw petitioner sitting in front of his house, which was about "two blocks" from the shooting. *Ibid.* (citation omitted). She said that a person could walk from the scene of the shooting to petitioner's house in "a little more than five minutes." *Ibid.* (citation omitted).

Antonio Stone was a friend of petitioner's and had known petitioner's family for some time. He was also friendly with Hill and knew Hazel. Stone testified that, on the night of the shooting, he saw Hill and Hazel walking slowly in the alley, practically beside each other, when Hazel pulled Hill down and shot him twice. Hazel and Hill were the only people Stone saw; in his account, petitioner was not there. Although Stone knew that his friend petitioner had been arrested for Hill's murder, he did not tell police that petitioner was innocent. Gov't C.A. Br. 5.

Margaret Brice, petitioner's grandmother, testified that she lived at 132 57th Place, S.E., along with petitioner, her son Darryl Brice, and Lydell and Darryl Banks. Brice testified that Hazel was a friend of petitioner's and stayed at her home for "a couple of nights after the shooting," although she did not "really remember the dates." Gov't C.A. Br. 6 (citation omitted). Darryl Banks, petitioner's cousin, confirmed that he lived at 132 57th Place. He claimed that petitioner was not living there in October 1994. *Ibid.*

In questioning Banks, defense counsel asked what Banks had said in a conversation with Hazel. When the prosecutor objected, counsel said that, based on the

government's discovery letter, he wanted to elicit that Banks had told Hazel that, on the day Davis was killed, Banks saw Hill in the company of the Clay Terrace Boys; counsel said this evidence would show that Hazel had a motive to kill Hill. Gov't C.A. Br. 38. After clarifying that Banks did not see Davis get killed, and thus could not say that Hill was present at the murder, the court sustained the objection. *Ibid.*; Pet. App. 61a. The court explained that, without proof that the Clay Terrace Boys killed Davis or that Hazel knew or had reason to believe they had done so, the motive inference was too speculative. Gov't C.A. Br. 38-39; Pet. App. 61a-62a. Petitioner proffered no additional evidence to address the court's concerns. Gov't C.A. Br. 39.

Through Joseph Greene, petitioner also sought to introduce a hearsay statement, allegedly made by Hazel while incarcerated with petitioner and Greene at the D.C. Jail, that Hazel had shot Hill several times and killed him. Gov't C.A. Br. 24; see Pet. C.A. App. 170.[1] The court declined to admit the hearsay, explaining that Hazel was available to testify because he had waived his Fifth Amendment privilege by testifying before the grand jury. Gov't C.A. Br. 24, 35 n.32; Pet. App. 66a n.4. Although Hazel's counsel represented that Hazel would testify if called, petitioner did not put Hazel on the stand. Pet. App. 66a-67a & n.4.

c. In closing argument, the government was agnostic about whether petitioner had killed Hill "with or

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[1] In an unsigned, typewritten paragraph dated September 19, 1996, Greene claimed that Hazel made the statement in July 1995. Pet. C.A. App. 170. Greene added that Hazel said that "he and his girlfriend Keyshawn was going to put it on little Greg" and that Keyshawn was "going to the Grand Jury to testify." *Ibid.* The murder indictment, however, had been returned in April 1995. Pet. App. 15a.

without Darryl Hazel's help." Gov't C.A. App. 38. But the government's primary theory of premeditation was that petitioner "knew [Hill] was coming" and "was waiting for him." *Id.* at 35. In support, the government cited the evidence that "Hazel essentially walked Gerald Hill into the alley," and that Hazel grabbed Hill before petitioner shot him. *Ibid.*; see *id.* at 35-37. As the government later reiterated, Hazel "may well have been an aider and abett[o]r." *Id.* at 38.

d. The jury found petitioner guilty as charged. Pet. App. 17a. The trial court sentenced petitioner on March 7, 1997, and the court of appeals affirmed his convictions on October 26, 1998. Gov't C.A. Br. 1; Gov't C.A. App. 56-59.[2]

4. The government's star witness, Isaac, was murdered on June 3, 1997. Pet. App. 2a-3a & n.1. Thereafter, Hazel provided petitioner a series of statements purporting to absolve petitioner of Hill's murder. Each account, however, "differ[ed] as to Hazel's involvement" and "coincid[ed] with all or a portion of [petitioner's] then theory of defense." *Id.* at 35a-36a.

a. In May 1998, Hazel allegedly sent a letter to petitioner saying he told Isaac to testify against petitioner and claiming that he himself implicated petitioner only because the grand-jury prosecutor, former AUSA L. Jackson Thomas, threatened him. Pet. App. 18a-19a. In March 1999, petitioner moved for a new trial based on (1) Hazel's unauthenticated letter and (2) a purported

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[2] Petitioner's first post-conviction motion, filed during the pendency of his direct appeal, alleged that Isaac's testimony was false and had been "'purchased'" by Hazel or others. Gov't C.A. Br. 8 n.6. Judge Walton denied that motion without a hearing, finding that petitioner had provided no factual support for it. *Ibid.* Petitioner did not appeal. *Ibid.*; see Gov't C.A. App. 58.

letter from Isaac to Hazel, also unauthenticated, in which Isaac allegedly recanted his trial testimony. *Id.* at 18a, 40a. The purported letter from Isaac was found in Hazel's prison cell in 1998 after Hazel was charged with killing another inmate, and the government turned it over to the defense. *Ibid.* Petitioner proffered that, if called to testify, Hazel would swear that *Isaac*, not petitioner, killed Hill. *Ibid.* But at an evidentiary hearing held by the Honorable Henry Greene in 2001, Hazel invoked his Fifth Amendment privilege, neither implicated Isaac nor himself, nor explicitly recanted his grand-jury testimony. *Id.* at 19a-20a.[3] (A defense investigator testified that Hazel told him that Isaac shot Hill while Hazel was trying to stop an argument between the two. *Id.* at 19a.) Judge Greene found Hazel "utterly incredible" and denied petitioner's motion. *Id.* at 35a; see *id.* at 20a-21a. In doing so, Judge Greene not only fully credited AUSA Thomas's testimony (which was corroborated by that of Hazel's counsel), Gov't C.A. App. 66-67, but also noted that "the most compelling evidence" of petitioner's guilt—the discovery of the murder weapon under his bed—remained "wholly undisputed"; as Judge Greene observed, "there has never been a proffer of any newly discovered or other evidence to meet the enormous force of that circumstance," *id.* at 76-77.

b. Hazel's next statement purported to supply just such evidence. In February 2005, petitioner moved to vacate his convictions, alleging ineffective assistance of trial counsel on the grounds (*inter alia*) that counsel

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[3] In 2000, Hazel testified in an unrelated case, where he repeatedly denied lying to the grand jury in this case, while at the same time claiming that what he told the grand jury was not true. See Pet. C.A. App. 130-134.

failed to call Hazel as a witness and allegedly coerced petitioner into not testifying. Pet. App. 21a-22a; Gov't C.A. App. 92. On appeal from the denial of that motion, petitioner, acting *pro se*, sent the court of appeals a notarized letter purportedly signed by Hazel on December 2, 2005 (the signature misspells Hazel's first name as "Daryl"), in which Hazel states that: *Hazel* killed Hill because Hill killed Davis; although petitioner "was out there," the person Hazel had "with him" was Isaac; and after the murder, Hazel went to petitioner's "mother's house" and put the gun under the bed without petitioner's knowledge. Pet. App. 22a-23a; Gov't C.A. App. 93 & n.3; Pet. C.A. App. 142-143.[4]

5. In March 2008, petitioner filed the instant motion to vacate his convictions and for a new trial based on Hazel's 2005 notarized letter. The trial court construed the motion to include a claim under the IPA. Pet. App. 14a-15a & n.1; Gov't C.A. Br. 1.

a. The Honorable Gerald Fisher held three hearings.

The first hearing was on July 9, 2010. Attorney Lisbeth Sapirstein testified that she interviewed Hazel in October 2009 while both Hazel and petitioner were incarcerated at the D.C. Jail. Hazel told her he did not believe petitioner killed Hill but had implicated petitioner because detectives showed him a video of petitioner implicating Hazel. Hazel also said that he told Isaac what to say about the murder, but that Isaac eventually "said something completely different." Gov't

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[4] In November 2007, the court of appeals affirmed the denial of petitioner's motion but without prejudice to his filing a new motion under D.C. Code § 23-110 (LexisNexis 2007) based on Hazel's "purported" notarized letter. Gov't C.A. App. 96-97.

C.A. Br. 10 (citation omitted). Sapirstein "did not recall Hazel ever telling her that he killed Hill." Pet. App. 23a.

The second hearing was on June 17, 2011, after several continuances requested by petitioner to secure Hazel's attendance. Judge Fisher heard testimony from Hazel, petitioner, and James Parks. Hazel himself again generally invoked his right to silence, refusing to answer questions about either the purported letter from Isaac or the December 2005 notarized letter. As to the latter, he refused to say even whether he recognized it. Pet. App. 24a. Parks testified that he facilitated the development and transmission of Hazel's 2005 notarized letter while Parks, Hazel, and petitioner were incarcerated together, and Parks heard Hazel express a desire to help petitioner. Pet. App. 23a-27a.

Judge Fisher also took testimony from AUSA Smith, who described his meetings with Hazel and his determination that Hazel would not be a credible witness. See p. 4, *supra*; Pet. App. 25a. Smith affirmed that Hazel had not claimed that he or anyone other than petitioner committed the murder. Pet. C.A. App. 75. Based on his notes from a December 19, 1995 meeting with Hazel (December 19, 1995 Notes), *id.* at 120-121, an unredacted copy of which was marked as an exhibit, Smith "assume[d]" that he discussed with Hazel the rumor that Hill killed Davis, because the notes mentioned "Peanut," and Smith was aware of the rumor. *Id.* at 77; see *id.* at 76-78; see also *id.* at 81 (affirming discussion "about . . . the fact that in the air was this rumor"). But Smith could not remember "what exactly [he] asked [Hazel]" or "exactly what was said" in the conversation, which had occurred 15 years before. *Id.* at 76-77.

In what Judge Fisher would later describe as a "remarkable coincidence," about a week after that second

hearing, Hazel told an inmate he had never spoken to before, Joseph Thomas, that he killed Hill. Pet. App. 33a; see *id.* at 27a-28a. Specifically, when Hazel learned that Thomas was represented by the same attorney then representing petitioner, Hazel told Thomas that he (Hazel) killed Hill because Hill killed Davis. *Id.* at 27a. Hazel also said—contrary to the 2005 letter's statement that Hazel hid the gun under petitioner's bed without petitioner's knowledge—that he got the gun from petitioner and returned it *to petitioner* after the murder. *Ibid.* Hazel explained that he "got the gun from [petitioner] and told him let him get rid of the gun when he finished," *ibid.*, but that petitioner insisted on taking the gun back, see *id.* at 27a-28a.

The third hearing was on April 13, 2012. After reopening the hearing at petitioner's request, Judge Fisher heard testimony from Thomas about Hazel's 2011 statement and from Hazel. Pet. App. 27a-28a. Hazel again invoked his right to silence. He refused to answer whether he ever talked to Thomas, whether he said he killed Hill, and all related questions. *Id.* at 28a.

b. In October 2012, over a year after AUSA Smith's testimony, petitioner claimed for the first time that Smith's testimony revealed that the government had failed to disclose material exculpatory information before trial, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Pet. App. 45a, 57a. Specifically, petitioner contended that the government had failed to disclose evidence that Hazel was aware of and believed the rumor that Hill killed Davis. *Id.* at 42a-43a, 45a, 59a. In July 2014, petitioner expanded his claim to assert that the December 19, 1995 Notes constituted additional

Brady evidence because they reflected Hazel's acknowledgment that he had engaged in a violent feud with the Clay Terrace boys. *Id.* at 56a n.1, 57a-58a, 62a.

In February 2015, petitioner sought discovery of any documents mentioning Gerald Hill contained in the case files of the two defendants, Leon Timberlake and Leonard Johnson, who were tried and acquitted of Davis's murder. Pet. App. 4a, 67a n.5; see 8 C.A. ROA (No. 15-CO-641) Doc. 58, at 1 (May 5, 2015) (Doc. 58). The government voluntarily searched the files and found no such documents. Doc. 58, at 1, 10-11. In fact, the government found no "proof whatsoever of Hill's involvement in Davis'[s] murder or a connection between Hill and the Clay Terrace Boys." Pet. App. 67a n.5. The government did, however, find prosecutor's notes dated May 10, 1995 (May 10, 1995 Notes), which referred to Hazel's being "jumped" by "CT boys" and then going out with Davis and others to "look for CT boys." Doc. 58, Ex. B; see *id.* at 11 n.7. In May 2015, the government provided petitioner a redacted copy of the May 10, 1995 Notes and redacted copies of two sets of undated prosecutor's notes (Undated Notes) that were the basis for AUSA Smith's pretrial letter describing the conversation among petitioner, Hazel, and others that had included speculation that Hill killed Davis. *Id.* at 1, 9-10; see *id.* at Ex. A; see also p. 5, *supra*. In November 2015, petitioner moved for unredacted copies of the three sets of notes. Pet. App. 73a, 76a-77a; Gov't C.A. Br. 2.

c. Judge Fisher denied petitioner's motions and supplemental claims in three lengthy written opinions.

i. On April 25, 2014, the trial court rejected petitioner's motion for a new trial based on newly discovered evidence. Pet. App. 14a-47a. The court explained that to succeed on such a motion, a defendant must show

that the evidence "is of a nature that it would probably produce an acquittal." Pet. App. 29a (quoting *Ingram* v. *United States*, 40 A.3d 887, 901 (D.C. 2012), cert. denied, 568 U.S. 1204 (2013)). The court reasoned that applying that standard here required a determination of whether Hazel's hearsay statements—the 2005 notarized letter and the 2011 oral statement to Thomas—would be admissible at a trial as statements against penal interest. *Id.* at 29a-30a. The court further observed that the relevant hearsay exception requires that "the corroborating circumstances regarding the making of the statement * * * clearly indicate its trustworthiness." *Id.* at 30a (emphasis omitted) (citing *Laumer* v. *United States*, 409 A.2d 190, 199 (D.C. 1979) (en banc)).

The trial court found that neither of Hazel's hearsay statements qualified for the exception, because neither was trustworthy. Pet. App. 31a-41a. The court based this finding on: (1) the long delay (11 years and almost 17 years, respectively) between the murder and the two ostensible confessions; (2) the "evolving" nature of Hazel's statements over the years, including the "critical discrepancy" between his 2005 claim that he placed the gun under the bed without petitioner's knowledge and his 2011 claim that he returned the gun to petitioner at petitioner's insistence; (3) the inherently suspicious circumstance of one inmate taking responsibility for the crimes of another; (4) the implausibility of Hazel's making a genuine confession to Thomas, a relative stranger; and (5) the likelihood that Hazel did not believe his statements would actually subject him to criminal sanctions, given the government's failure to prosecute him for the murder or perjury and his repeated success in remaining silent about his grand-jury testimony and later statements. *Id.* at 34a-39a.

The trial court found in the alternative that, even were the statements admissible, they probably would not produce an acquittal. Specifically, no reasonable juror would be likely to credit the statements given the suspicious circumstances of their making and Hazel's "numerous and contradictory statements." *Id.* at 42; see *id.* at 41a-42a.

ii. On May 27, 2015, the trial court denied petitioner's *Brady* claim. Pet. App. 55a-70a. "There are three components of a *Brady* violation," the court explained: "(1) evidence that is favorable to the accused; (2) suppression of that evidence by the Government, either willfully or inadvertently; and (3) prejudice to the Defendant." *Id.* at 58a (citing *Strickler* v. *Greene*, 527 U.S. 263, 281-282 (1999)). The court observed that, to show prejudice, a defendant must demonstrate a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Ibid.* (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.). And the court noted that a "'probability' reaches the level of 'reasonable' when it is high enough to 'undermine confidence in the verdict.'" *Ibid.* (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995)).

As to the alleged evidence that Hazel told AUSA Smith that he was aware of and believed the rumor that Hill killed Davis, the trial court found that no such evidence existed. Pet. App. 59a-60a. The court observed that the December 19, 1995 Notes "make no reference at all" to such a rumor and that Smith testified he could not recall whether he asked Hazel about the rumor and only "assumed" he did. *Id.* at 60a. Further, even if that assumption were correct, Smith never testified that Hazel acknowledged that he was aware of the rumor, much

less that he believed it. *Id.* at 60a. Petitioner thus failed to show that the government suppressed evidence that Hazel believed Hill was responsible for killing Davis. *Ibid.*

As to the evidence that Hazel had been involved in a violent feud with the Clay Terrace Boys, the trial court held that the evidence was not favorable. Pet. App. 68a. The court reasoned that, absent a proffer or evidence that Hazel wanted to kill Hill based on a generalized animosity toward the Clay Terrace Boys, evidence of Hazel's animosity toward that group would not have been probative of motive to kill Hill. *Id.* at 63a-64a. The court also found that, even if the evidence could "somehow be deemed exculpatory," *id.* at 64a, its non-disclosure was not prejudicial, *id.* at 64a-69a. The court gave three reasons.

First, the trial court noted that petitioner never asserted in any of his pleadings that he was unaware of the violence between Hazel and the Clay Terrace Boys. Pet. App. 65a. Second, the court observed that petitioner already knew of, but declined to present at trial, specific evidence that not only connected Hill with the Clay Terrace Boys but also directly established Hazel's independent motive to kill Hill. *Id.* at 64a-65a. The court reasoned that petitioner's failure to present that "far more compelling" evidence of Hazel's motive undermined any claim of prejudice from the non-disclosure of the "rather attenuated" feud evidence. *Id.* at 64a-67a. Third, the court explained, evidence that Hazel had a motive, however attenuated, to kill Hill would have been consistent with both the government's proof and its primary theory that Hazel lured Hill into the alley and grabbed him so that petitioner could shoot him. *Id.* at 59a, 69a. As the court put it, "evidence that Hazel had

a motive to kill Hill may have increased the jury's belief that Hazel played a part in the murder, but it would have done nothing to diminish the conclusion that he acted in concert with [petitioner] and that [petitioner] fired the fatal shot." *Id.* at 59a.

iii. On March 14, 2016, the trial court rejected petitioner's request for unredacted versions of the May 10, 1995 Notes and the Undated Notes. Pet. App. 71a-80a. The court found that petitioner had failed to show the requisite "good cause," *id.* at 73a (quoting Rule 6)—specifically, that the requested information would be material under *Brady*. *Id.* at 73a-75a.

Petitioner sought an unredacted version of the May 10, 1995 Notes because the portion disclosed referred to Hazel, Davis, and another person's going to look for "Phil + Jerryl" after Hazel got jumped by the Clay Terrace Boys, and petitioner believed that "Jerryl" referred to Hill. Pet. App. 76a. Based on an affidavit from AUSA Smith and the trial court's review of the full unredacted note, however, the court found that "Jerryl" referred to Gerald Stokes, a friend of Davis's. The note thus provided no evidence that Hazel believed Hill was allied with the Clay Terrace Boys. *Ibid.*

Petitioner sought the identity of the witness whose interviews were reflected in the Undated Notes, because he believed that a line in one of them—"'[Banks] said when they shot [Davis], I saw Gerald down there (on Central Avenue) with the Clay Terrace Boys'"—was a verbatim quote of Banks rather than a paraphrase, as AUSA Smith had informed the defense before trial. Pet. App. 77a (citation and emphasis omitted). The trial court disagreed with this reading of the notes, and disagreed that access to the witness—whose identity petitioner already knew, because he was part of the

conversation—could have affected the verdict. The court explained that proffering a witness with a recollection of Banks saying that he saw Hill at the murder of Davis would not likely have caused Judge Walton to allow Banks's different testimony that he simply saw Hill with the Clay Terrace Boys on the day the murder occurred. The court further reasoned that even if it had, presenting "conflicting versions" of that statement would not have affected the jury's decision. Pet. App. 78a; *id.* at 77a-79a.

6. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1a-11a.

a. The court of appeals affirmed the determination that the government did not violate *Brady*, rejecting petitioner's argument as to each *Brady* element. Pet. App. 5a-7a.

First, the court of appeals determined that the allegedly suppressed evidence was not favorable. To be favorable, the court explained, evidence must be exculpatory or impeaching. And "[t]he remote possibility that the evidence * * * might have been favorable to the defense is not, by itself, sufficient to invoke the principles of *Brady*." *Id.* at 6a (quoting *March* v. *United States*, 362 A.2d 691, 703 (D.C. 1976)). The evidence that Hazel had a motive to kill Hill was not exculpatory, the court reasoned, because while it may have strengthened the jury's belief that Hazel played a part in the murder, it "would have done nothing to diminish the conclusion that he acted in concert with [petitioner] and that [petitioner] fired the fatal shot." *Ibid.* (quoting trial court). Nor did the court find the evidence impeaching, because it neither contradicted the government's witnesses nor tended to show that petitioner was misidentified. *Id.* at 6a-7a.

Second, and "[i]n any event," the court of appeals determined that the government did not suppress any information about Hazel's motive. Pet. App. 7a. The court reasoned that petitioner himself was the original source of the information—telling police that Hazel said he overheard Hill bragging about killing Davis—and that the government disclosed this information in its July 25, 1996 discovery letter. The court also observed that petitioner was a party to the conversation referenced in the Undated Notes; thus, he already knew of the conversation, and nothing in the notes would have given him an additional investigative lead. *Ibid.*[5]

Third, the court of appeals determined that evidence that Hazel had a motive to kill Hill was not material because it "would not have affected the verdict." Pet. App. 7a. The court reasoned that the jury credited the eyewitness testimony identifying appellant as the shooter; the murder weapon was found under petitioner's bed; and petitioner had admitted to being present at the scene of the murder. *Id.* at 8a. Thus, evidence that Hazel had a motive to kill Hill might have led the jury to conclude that Hazel was involved in the murder, but such evidence would not have "undermine[d] the conclusion that [Hazel] acted in concert with [petitioner]." *Id.* at 7a-8a.

b. On abuse-of-discretion review, the court of appeals upheld the trial court's denial of petitioner's discovery motion under Rule 6. Pet. App. 8a. Having itself reviewed the unredacted version of the May 10, 1995 Notes, the court agreed with the lower court that those

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[5] On appeal, petitioner relied on only one set of the Undated Notes to support his *Brady* claim. Pet. C.A. Br. 9, 18-19, 25; Pet. C.A. Reply Br. 3, 8; see Pet. C.A. App. 123.

notes referred to "'Gerald Stokes'" rather than "'Gerald Hill.'" *Ibid.*

c. Finally, on abuse-of-discretion review, the court of appeals upheld the denial of petitioner's new-trial motion under Rule 33 and the IPA. Pet. App. 8a-11a. The court agreed with the lower court that Hazel's 2005 and 2011 statements would not be admissible at a retrial, because "there were insufficient corroborating circumstances to indicate their trustworthiness." *Id.* at 9a. Specifically, Hazel had given varying and inconsistent accounts of the shooting; Hazel and petitioner were friends; and they were incarcerated together. *Ibid.* The court also agreed that, even if admitted, the hearsay statements would not likely produce an acquittal. Specifically, the record "firmly supported" the trial court's finding that a jury would not believe Hazel's confessions given (*inter alia*): (1) Hazel's "numerous and contradictory" statements, including his contradictory grand-jury testimony; (2) the "highly suspicious circumstances" surrounding the making of the 2005 and 2011 statements; (3) petitioner's admission that he was present at the scene of the crime (which contradicted his only purported eyewitness's testimony); and (4) the testimony of Isaac and Jenkins, which corroborated petitioner's role in the shooting. *Id.* at 10a.

ARGUMENT

Petitioner contends (Pet. 14-25) that the government violated its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by withholding information that Hazel had a motive to murder Hill. The court of appeals correctly rejected that argument, and its non-precedential, fact-bound decision does not conflict with any decision of this Court, a federal court of appeals, or a state court of last resort. Petitioner further contends (Pet. 25-30)

that the court of appeals erred in holding, as matter of District of Columbia law, that the trial court did not abuse its discretion in denying petitioner's motion for a new trial based on newly discovered evidence. This holding presents no question of generally applicable federal law. See Sup. Ct. R. 10(b). Further review is unwarranted.

1. a. A prosecutor's constitutional duty of disclosure stems primarily from the Supreme Court's decisions in *Brady* and *Giglio* v. *United States*, 405 U.S. 150 (1972). In those cases, the Court held that the government has a constitutional duty to disclose favorable evidence to the accused where such evidence is "material" either to guilt or to punishment, *Brady*, 373 U.S. at 87, and that favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness, *Giglio*, 405 U.S. at 154. See *Smith* v. *Cain*, 565 U.S. 73, 75-76 (2012). In subsequent decisions, the Court has explained 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." *Turner* v. *United States*, 137 S. Ct. 1885, 1893 (2017) (citation omitted). As the Court made clear in *Kyles* v. *Whitley*, 514 U.S. 419 (1995), undisclosed evidence is material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

b. Petitioner contends (Pet. 17) that the government violated *Brady* by suppressing evidence that "Hazel knew the rumor" that "Hill murdered Hazel's brother." See also Pet. 2 (claiming government suppressed evidence that "Hazel knew that Hill was believed to have

murdered Hazel's brother").[6] The court of appeals correctly rejected that argument because, although the motive evidence in question arguably was favorable, the government did not suppress it, and the evidence was not material.

i. The court of appeals correctly determined that the government did not suppress evidence that Hazel had a motive to kill Hill. *Brady* claims involve "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976); see *Kyles*, 514 U.S. at 437 (same). As the court of appeals observed, petitioner himself was the original source of the information, telling police three days after the murder that (1) there were rumors that Hill and the Clay Terrace Boys had killed Davis and that Hill was bragging about it; and (2) Hazel said he knew of Hill's bragging and intended to kill him in retaliation. Pet. App. 7a; Gov't C.A. App. 3-4. The government apprised the defense of petitioner's statement both at the November 1, 1994 preliminary hearing, Gov't C.A. App. 23-24, and in its July 25, 1996 discovery letter; that letter enclosed a copy of the videotape (and a transcript) of petitioner's statement and informed defense counsel that petitioner "told police that Darryl Hazel told him he overheard Gerald Hill bragging about shooting [Davis]." Gov't C.A. App. 54. Similarly, petitioner was a party to the conversation referenced in the Undated Notes, and the government apprised defense counsel of that conversation—including that the conversation involved

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[6] Petitioner does not re-raise (Pet. 2, 14-25), and therefore has abandoned, his argument that the government violated *Brady* by suppressing evidence that Hazel's feud with the Clay Terrace Boys gave him a separate motive to retaliate against Hill.

speculation about Hill's role in Davis's death—both by telephone and in its November 7, 1996 discovery letter. Pet. C.A. App. 58. "[W]ithout a showing that certain evidence has been withheld there is nothing to support a *Brady* claim." *United States* v. *Thomas*, 763 F.3d 689, 696 (7th Cir. 2014).

Petitioner's arguments to the contrary rest on erroneous assertions about the record. Petitioner asserts (Pet. 16, 18) that Hazel told AUSA Smith on December 19, 1995, that Hazel knew of the rumor that Hill murdered his brother. Judge Fisher, however, found to the contrary. After hearing AUSA Smith's testimony and reviewing the December 19, 1995 Notes, Judge Fisher found that "Smith never said that Hazel acknowledged he was aware of the gossip" and likewise found "no evidence" that "Hazel must have informed Smith he believed Hill had participated in the murder of Davis." Pet. App. 60a. Petitioner does not contend that those factual findings were clearly erroneous, nor could he. See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Further, asserted error based on allegedly "erroneous factual findings" does not merit certiorari review. Sup. Ct. R. 10.

Petitioner also asserts (Pet. 16-17) that the May 10, 1995 Notes and the Undated Notes memorialize the government's interviews with witnesses "who stated that Hazel believed that Hill had been responsible for the murder of Hazel's brother." But as both the trial court and the court of appeals found, the May 10, 1995 Notes contain no reference to Hill. Pet. App. 8a, 75a-76a; see Doc. 58, Ex. B. And the set of Undated Notes on which petitioner relied on appeal reflect an interview

with the witness to the conversation disclosed in the government's November 7, 1996 discovery letter. Pet. App. 76a-77a. In that interview, the witness said that s/he: "recalled people talking about Gerald Hill's role in killing [Davis]"; "does remember Darrell [Banks] (and others?) saying they thought Hill may have helped set up [Davis] b/c he may have been in the area"; and "Darryl H was there" during the conversation. Pet. C.A. App. 123. The government's disclosure thus accurately conveyed what the witness had said.

Petitioner lastly asserts (Pet. 17) that the government behaved deceptively in objecting to Banks's proffered trial testimony "about what he had observed concerning Davis' murder and what he had told Hazel." Pet. App. 61a. But as discussed, petitioner was aware—both through personal knowledge and through the government's disclosures—of the rumors that Hill and the Clay Terrace Boys had killed Davis and that Hill was bragging about it; of Hazel's statement that he knew of Hill's bragging and intended to kill him in retaliation; and of "whatever Banks said to Hazel about the murder, Hill's involvement in it, and Hill's connection to the [C]lay Terrace Boys." *Id.* at 64a. Yet defense counsel did not at the time of the proffer, "or at any other time during the trial, offer some of the other linking evidence Judge Walton sought." *Id.* at 62a. The government was not responsible for that lack of proof, and "there was nothing improper in the Government[']s objection." *Ibid.*

In sum, there was no error in the court of appeals' determination that the government did not suppress motive evidence. And that independent determination was alone sufficient to affirm the denial of petitioner's *Brady* claim.

ii. The court of appeals also correctly determined that, even if the motive evidence had been suppressed by the government, it was not material. Pet. App. 7a. As the court recognized, undisclosed 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." *Ibid.* (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). A "reasonable" probability, the court explained, is one that "undermine[s] confidence in the verdict." *Ibid.* (brackets in original) (quoting *Kyles*, 514 U.S. at 435).

Assessing the exculpatory potential of the motive evidence in the context of petitioner's trial, the court of appeals determined that such evidence would not have "undermine[d] the conclusion that [Hazel] acted in concert with [petitioner]." Pet. App. 7a-8a. That determination was correct. Both the defense and the government presented testimony placing Hazel in the alley and participating in the murder. The defense evidence was from Stone, who claimed he saw Hazel and Hill walking in the alley and Hazel pulling Hill down and shooting him; Stone claimed that Hazel and Hill were the only people he saw, and that petitioner was not there—an assertion at odds with petitioner's own statement to the police. Gov't C.A. Br. 5; Gov't C.A. App. 3-5, 10-12. The government's witnesses, Isaac and Jenkins, collectively described Hazel walking Hill into the alley and petitioner walking up behind them and shooting Hill, but only after Hazel grabbed Hill and prevented him from running away. Gov't C.A. Br. 2-3, 6-7 & n.5. The jury clearly rejected Stone's testimony. But even the government's evidence strongly suggested that Hazel was

involved in the murder. As AUSA Smith argued to the jury:

> There's evidence that Darryl Hazel essentially walked Gerald Hill into the alley. You can make reasonable inferences * * * . And one of those inferences is that it's just a little too coincidental that Gerald Hill was walked by Darryl Hazel into that alley at the time [petitioner] is there. And that, therefore, the inference is that [petitioner] was waiting for him. He knew he was coming.

Gov't C.A. App. 35. Evidence that Hazel had a motive to kill Hill thus might have strengthened the inference that Hazel was (in Smith's words) "an aider and abett[o]r," *id.* at 38, but it would have done little to show that Hazel acted alone. Indeed, both Isaac and Jenkins testified that there were three boys in the alley, and their mutually reinforcing testimony was corroborated by the relative heights of the boys (as confirmed by the in-court comparison), the medical evidence, the discovery of the murder weapon under petitioner's bed, and petitioner's pre-trial flight. Gov't C.A. Br. 3-4 & n.3, 6-7 & n.5.

Petitioner's arguments to the contrary again rely on assertions that the record does not support. He claims (Pet. 22) that the defense presented "two eyewitnesses who pointed to Hazel as the perpetrator," when, in fact, Yelvercon testified that she did not witness the shooting. Gov't C.A. Br. 4-5. He claims (Pet. 20) that Jenkins's testimony was already suspect, because she testified that the shorter boy shot Hill in the neck "from behind," whereas the medical examiner testified that Hill was shot from the front; in fact, however, Jenkins testified that the shorter boy fired after the taller boy had grabbed Hill and Hill had turned around to face the

shorter boy. Gov't C.A. Br. 6-7. And petitioner claims that the motive evidence would have entailed "an entirely new theory" in which petitioner was "an accomplice in a two-person crime—*a theory never advanced by the government*." Pet. 20-21 (emphasis added). Yet the government advanced the two-person-crime theory as the primary basis for an inference of premeditation. Gov't C.A. App. 35-36.

Petitioner also errs in suggesting (Pet. 13-14, 21) that the court's analysis is irreconcilable with the materiality standard of *Kyles*. In *Kyles*, prosecutors withheld prior inconsistent statements from some of the government's eyewitnesses that would have "substantially reduced or destroyed" the value of their testimony. 514 U.S. at 441; see *id.* at 441-445. This Court found those statements, combined with other withheld exculpatory evidence, to be material. *Id.* at 454. This case is not analogous because the motive evidence did not cast doubt on the testimony of any particular eyewitnesses. Rather, it would have supported the testimony of both Isaac and Jenkins; it would have provided a motive for petitioner as well, given his close friendship with Hazel; and it would have been consistent with the government's two-person-crime theory. Far from "put-[ting] the whole case in * * * a different light," *id.* at 435, it might well have strengthened the government's case. Cf. *Strickler* v. *Greene*, 527 U.S. 263, 292 (1999) ("[T]the strong evidence that Henderson was a killer is entirely consistent with the conclusion that petitioner was also an actual participant in the killing.").

Finally, petitioner misapprehends the materiality standard. His unsupported suggestion (Pet. 20, 25) that materiality should be judged in light of non-*Brady*

"post-trial revelations," such as Isaac's purported recantation and Hazel's purported confessions, is incorrect. "In the *Brady* context, * * * it is inappropriate to consider evidence developed post-verdict. To do otherwise would contradict [this Court's] cases applying *Brady* by analyzing how withheld evidence might have affected the jury in light of all other evidence it heard." *Browning* v. *Trammell*, 717 F.3d 1092, 1104 (10th Cir. 2013); see, *e.g.*, *Apanovitch* v. *Bobby*, 648 F.3d 434, 437 (6th Cir. 2011) (explaining that "[n]ew, non-*Brady*, evidence is enlightening as to whether a petitioner is—seen as of now—actually innocent" but is not relevant to the *Brady* inquiry), cert. denied, 565 U.S. 1263 (2012).

c. Petitioner contends (Pet. 22-24) that the court of appeals' materiality analysis conflicts with decisions of several other courts of appeals. Even if that were correct, the court's non-precedential decision could not create a conflict warranting this Court's review. See D.C. Ct. App. R. 28(g) (with exceptions not applicable here, "[u]npublished orders or opinions of this court may not be cited in any brief").

In any event, the court of appeals' case-specific decision does not conflict with any of the decisions on which petitioner relies. None of those decisions involved undisclosed evidence that was consistent with the government's evidence and theory at trial. Indeed, under similar circumstances, courts have found evidence implicating a third party not material. See, *e.g.*, *United States* v. *Zuno-Acre*, 44 F.3d 1420, 1426-1430 (9th Cir.) (undisclosed evidence suggesting that murder was instigated by victim's romantic rival, while exculpatory as to defendant, was not material in light of other evidence at trial), cert. denied, 516 U.S. 945 (1995); see also *Evans*

v. *State*, 28 P.3d 498, 510 (Nev. 2001) (to undermine confidence in trial's outcome, undisclosed information must not only link others to the crime but exclude defendant).

2. Petitioner further contends (Pet. 4, 25-30) that the court of appeals erred in affirming the trial court's denial of his motion for a new trial under Rule 33 of the D.C. Superior Court Rules of Criminal Procedure. Even if that were correct (which it is not, see Gov't C.A. Br. 8-32) (explaining why Hazel's 2005 affidavit and his 2011 statement to Thomas were not sufficiently trustworthy to be admissible as statements against interest and would have been unlikely to produce an acquittal), such an error would not warrant this Court's review because it presents no general question of federal law. See Sup. Ct. R. 10. Petitioner attempts (Pet. 25-26) to reframe the issue as a question of constitutional law by arguing that the trial court's failure to "revisit" Judge Walton's exclusion of the alleged 1995 confession by Hazel violated his due-process rights. But petitioner did not press, and the court of appeals did not pass on, any constitutional argument below. See Pet. C.A. Br. 1-44; Pet. App. 1a-11a. The question therefore is not properly presented here. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (stating that this Court's "traditional rule * * * precludes a grant of certiorari" when "'the question presented was not pressed or passed upon below'") (citation omitted); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
STRATTON C. STRAND
Attorney

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