No. 11-783

In The Supreme Court of the United States

JAMES A. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The recent case of *Smith v. Cain*, 132 S. Ct. 627 (2012), and the report by Henry Schuelke[1] revealing calculated *Brady* violations and misconduct in the prosecution of former Alaska Senator, Ted Stevens, highlight crucial and recurring problems that demand this Court's attention. Here, as in *Stevens*, many exculpatory statements appear only in raw notes of government interviews of key players. In *Brown*, the Enron Task Force actually yellow-highlighted these notes before trial – along with prior testimony and FBI 302s – indicating that the information met the requirements of *Brady* and was material, but suppressed them anyway. While continuing to deny that any evidence fell within *Brady*, new prosecutors recently disclosed 6,300 pages including much (but still not all) of the evidence suppressed by the Task Force. Brown's perjury and obstruction convictions are the last vestiges of this debacle. App. 113a-172a ("*Brown I*").

The government's brief in opposition (BIO) itself demonstrates why this Court should grant *certiorari*. Despite the alarming, manipulative, and unethical practices detailed in the Schuelke Report and prosecutors' own yellow-highlighted evidence here, the government still denies its obvious *Brady* violations and elides the Fifth Circuit's determination that the

[1] Report to Hon. Emmet G. Sullivan of Investigation, *In re Special Proceedings*, No. 09-0198 (D.D.C. Mar. 15, 2011), regarding *United States v. Stevens*, No. 08-231 (D.D.C. 2009) (hereinafter "Schuelke Report").

prosecutors "plainly suppressed" favorable evidence. App. 22a-23a. ("*Brown III*"). It avers that the prosecutors complied with *Brady* when they produced the court-ordered summaries, but ignores that those summaries were misleading, sometimes false, and never reviewed for accuracy by the district court.[2] Instead, the government urges this Court to ignore the disturbing and pervasive *Brady* issues Brown's petition squarely presents.

Meanwhile, the Fifth Circuit's decision sets a dangerous precedent – excusing the government from *Brady*'s requirements despite finding that favorable evidence from the government's "key player" was "plainly suppressed." By applying the wrong standard of review and the wrong definition of materiality, the court licensed the government's use of misleading and false summaries and allowed prosecutors to conflate the post-trial materiality inquiry into their own pretrial determination of whether to produce favorable evidence. This alarming and increasingly frequent practice – also used in *Smith* and *Stevens*[3] – stands

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[2] The government's four-line summary of McMahon's notes (including yellow-highlighted pages), App. 212a-227a, said that McMahon "does not recall" a guarantee. However, McMahon declared that neither he nor Fastow made a guarantee. App. 218a ("NO – never guaranteed to take out [Merrill Lynch] w/rate of return."). Even under its clear error standard, the Fifth Circuit reversed the district court on this point. App. 22a.

[3] This pattern extends far beyond *Stevens* and *Brown*, cases which shared one high-ranking prosecutor. *See*, *e.g.*, *Smith*, 132 S. Ct. at 630-31 (government withheld detective's notes of interviews with critical witness that directly contradicted trial

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Brady on its head. Empowered by the confusion surrounding materiality, the government has become sloppy or – worse – deceptive.

Brady aims to preserve "the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *See Kyles v. Whitley*, 514 U.S. 419, 440 (1995); *see also United States v. Bagley*, 473 U.S. 667, 682-83 (1985) (opinion of Blackmun, J.).[4] Prosecutors, as advocates, harbor their own cognitive biases.[5] Defendants should not have to rely on a prosecutor's assessment – defense counsel is the best judge of materiality to the defense. *United States v. Agurs*, 427 U.S. 97, 108-09 (1976).

Brown's case provides an excellent and timely opportunity to reinvigorate and clarify *Brady*. *First*, this

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testimony); *United States v. Johnson*, 592 F.3d 164, 171-72 (D.C. Cir. 2010) ("undisclosed evidence directly contradicted the government's [ ] theory"); *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 165 (2d Cir. 2008) ("government could not explain . . . why the notes were withheld.").

[4] *See also Disimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006) ("if there were questions about the reliability of the exculpatory information, it was the prerogative of the defendant and his counsel – and not of the prosecution – to exercise judgment in determining whether the defendant should make use of it. . . . If the evidence is favorable to the accused, * * * then it must be disclosed") (internal quotation marks and citations omitted; asterisks in original).

[5] Even well-intentioned prosecutors may find the task of judging materiality very difficult. *See generally* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006).

Court should establish a *de novo* standard of review for *Brady* issues in all circumstances. *Second*, to prevent the government's "private deliberations" from dictating the outcome of trials, this Court should clarify the definition of materiality and untether it from the prosecutor's unequivocal obligation to produce all evidence favorable to the defense. *Third*, this Court can mandate fairness by (a) adopting the rule of several circuits requiring a new trial when the government capitalizes on its concealment and (b) rejecting the use of "summaries" that are incomplete, false, or misleading. *See Amici* Br. 11-15 (summaries are no substitute for the evidence). Simply put, summaries "are an opportunity for mischief." Tr. of Mot. Hr'g 9, *Stevens*, No. 08-231 (D.D.C. Apr. 7, 2009).

STATEMENT IN REPLY

The government's statement depends heavily on facts and charges that did not survive the original appeal. The conduct of the Merrill Defendants was "not a federal crime under the honest services theory of fraud." App. 114a. After disclosing the evidence withheld, new prosecutors dismissed all the conspiracy and fraud charges, so those allegations have never been proved.

Brown's prosecutors discounted, rationalized, and failed to disclose evidence that conflicted with their theory that: McMahon made the guarantee; Fastow ratified it with a "wink and a nod"; and, the Merrill Defendants hid everything from their

lawyers. Accordingly, the government concealed explicit statements of the two purported guarantors (McMahon and Fastow) and of Merrill Counsel, Zrike, that squarely refute the government's theory. Simultaneously, it crafted its case with hearsay testimony by Fastow's and McMahon's subordinates and drafts of documents later rejected by counsel. BIO 8-9. No government witness was a party to the alleged guarantee; and the government suppressed the specific, exculpatory statements of those actual parties and counsel.[6]

1. *De Novo* Review of *Brady* Should Be Uniform Across the Circuits

"A *Brady* violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out." *See Connick v. Thompson*, 131 S. Ct. 1350, 1385 (2011) (Ginsburg, J., dissenting). Defense counsel cannot know what he does not know, and few courts question prosecutors' rote, and sometimes disingenuous, claims of compliance.[7]

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[6] The government continues its sharp tactics against Brown, who alone pressed these *Brady* claims. Contrary to the government's representation, BIO 10 n.2, prosecutors recently filed objections to Brown's belated resentencing to "time-served" (of one year) for perjury and obstruction, arguing that Brown should receive an additional term of imprisonment of six to twelve months now. Dkt.1293, *United States v. Brown*, No. 03-363 (S.D. Tex. March 26, 2012).

[7] *See*, *e.g.*, App. 205a ("the Court expects the Government to furnish *Brady* material to counsel for defendants in accordance

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In acknowledging that (a) materiality must be reviewed *de novo*, (b) "circuits have provided varying articulations" of the standard of review, and, (c) "this Court has not afforded deference to lower court determinations about materiality of undisclosed evidence", the government concedes both the existence of a circuit conflict and the Fifth Circuit's position on the wrong side of it.[8] BIO 17-18. The Fifth Circuit, moreover, did not merely give "some deference" to the district court. It applied the most deferential standard of review – clear error – to the issue of materiality. App. 26a. *See also* Pet. 15-16. *De novo* review of *Brady* is consistent with decades of this Court's jurisprudence, Pet. 19-24, but should be made explicit now. *Napue v. Illinois*, 360 U.S. 264, 271 (1959) ("The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does,

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with the law"); App. 209a (without reviewing disclosure, court concludes that government met its *Brady* obligations); Schuelke Report 50-51, 469-70.

[8] The government misleadingly asserts there is no "conflict on the [*in camera* review] exception to *de novo* review." BIO 22. But the real and important conflict is whether deferential review of materiality is ever appropriate. It is not. Application of clear error review to the court's pretrial *in camera* assessment is simply one aspect of the acknowledged conflict, BIO 18, and an especially flawed one because materiality can only properly be assessed *after* trial. Pet. 23-24 (citing cases). The government also misstates the facts. The court ordered production but allowed the government to craft summaries (instead of producing the documents), and then never reviewed the summaries for accuracy or completeness.

on our solemn responsibility for maintaining the Constitution inviolate.").

Further, the government would have this Court deny *certiorari* on the remarkable notion that the Fifth Circuit did not really apply the clearly erroneous standard of review that it repeatedly invoked. BIO 22-23.[9] However, "tak[ing] the Court of Appeals at its word . . . the decision below cannot stand." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011). It is an open invitation to prosecutors and courts to circumvent *Brady*'s protections. Only *de novo* review can fully effectuate this Court's precedents and protect the fundamental fairness of criminal trials.

The government urges this Court to ignore inconsistent standards among the Circuits and claims they do not cause disparate results. However, the government simply ignores the direct conflict with the Ninth Circuit's decision in *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011) – a case strikingly similar to *Brown*. In *Kohring*, new prosecutors

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[9] *See*, *e.g.*, App. 16a ("we review that decision only for clear error"); App. 17a ("we review its decision as to those items [McMahon notes and Zrike testimony] for clear error"); *id*. ("We therefore review materiality for clear error as well."); App. 22a-23a ("[T]he district court did not clearly err in holding that the suppressed information was not cumulatively material."). The government claims that it argued for *de novo* all along. *See* BIO 17-18 & n.3. Below, however, it argued repeatedly for clear error review, citing the exact line of authority on which the panel relied. Gov't C.A. Br. 28-29, 47-48.

produced thousands of pages of material, including evidence that impeached a key government witness. *Id*. at 900-03, 911-12. The Ninth Circuit reviewed the issues *de novo* and reversed the district court's determination that the suppressed evidence was not material.[10]

2. This Court Should Refine *Brady*'s Materiality Standard

The oral argument in *Smith v. Cain*, No. 10-8145 (U.S. Nov. 8, 2011), revealed confusion regarding the prosecutor's fundamental obligation to disclose favorable evidence and the post-trial determination of materiality. *See* Tr. Of Oral Arg. 45-51. Prosecutors routinely collapse the two inquiries – insisting that they have no obligation to disclose information they deem not material.[11] At the same time, courts readily trust the government's claims of compliance.

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[10] The government also points to the "leading case" of *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004), BIO 20, to argue that different standards do not lead to "measurably different results." However, the author of the opinion below was the lone and vigorous dissenter from the grant of new trial in *Sipe*. He would have held "there is no *Brady* violation that merits a new trial," *Id.* at 493 (Smith, J., dissenting) – the view he brought to bear here. *Sipe* thus contradicts any suggestion that "the result would be the same here under *de novo* review." BIO 22.

[11] *See* Schuelke Report 319-20 (prosecutors did not credit interview statements that were inconsistent with their theory of the case).

This fundamental distortion causes *Brady* violations and one-sided trials.[12]

The government's case against Brown was not as strong as either the government argues or the Fifth Circuit imagined. Pet. 28-30. One judge in *Brown I* would have acquitted Brown outright. The jury found that he did not interfere with the administration of justice. Little, if any, evidence in the government's case would have escaped impeachment by the suppressed evidence.[13] The fact that impeachment was attempted without the vital *Brady* evidence has no bearing on whether the result would have been different with it. "It makes little sense to argue that because [the defendant] tried to impeach [the witness] and failed, any further impeachment evidence would be useless. It is more likely that [the defendant] may have failed to impeach [the witness] because the most damning impeachment evidence in fact was withheld by the government." *United States v. Service Deli*, 151 F.3d 938, 944 (9th Cir. 1998).

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[12] In *Brown*, prosecutors asserted they met their *Brady* obligations by producing merely names of witnesses, App. 209a-210a, denied the existence of any *Brady* evidence, *id*., and created distorted summaries. App. 210a. The district court adopted the government's view and believed that the summaries "may be more than is required by *Brady*." Dkt.290:8; App. 210a.

[13] *See* Pet. 6-8, 27-34. Hearsay would have been admissible to impeach hearsay, and the suppressed documents contained direct evidence from Zrike and McMahon (who were under constant threat but never indicted) that Brown could have used to foreclose the government's arguments.

Pointing to five of its witnesses, the government claims that "evidence of a guarantee was overwhelming." BIO 28. But it ignores that in every telling, the alleged guarantee originated with McMahon and was therefore refuted by the highlighted interview notes from McMahon that neither he nor Fastow made any guarantee.[14] Suppressing the McMahon and Zrike evidence was the only way the government could orchestrate its case premised on the "McMahon guarantee."

Shockingly, the government effectively concedes that it sacrificed Brown's right to exculpatory evidence to ensure its conviction of Skilling. BIO 27. Any valid interest in protecting "an ongoing investigation" – *if* the government had asserted one pretrial – could have been met with a protective order while giving Brown a fair trial. Instead, the government adamantly maintained it exceeded its *Brady* obligations.

The government focuses on an email Brown wrote more than fourteen months after the relevant transaction, after the alleged conspiracy terminated, about an unrelated leasing transaction in which an oral guarantee would have been lawful. BIO 15, 28.

[14] The suppressed testimony contradicted every aspect of the government's case. Pet. 29 & n.19, 31 & n.21 (Trinkle); 27-30 (Long, Boyt, Glisan, and Kopper). Brown repeatedly argued below that if armed with the suppressed evidence, he (a) could have testified as he had done voluntarily three times before, Pet. C.A. Br. 6, (b) sought immunity for McMahon (who was never indicted), Pet. 30 n.20; Pet. C.A. Rep. Br. 25-26, and (c) impeached the case agent and other witnesses. Pet. C.A. Br. 15, 30-31.

But that short-hand, off-the-cuff, and factually inaccurate email (*see* App. 171a) is too thin a reed to sustain the Fifth Circuit's "conviction" that the suppressed evidence was not material. App. 26a. Further, the fact that the Fifth Circuit had to imagine an entirely different trial to excuse the suppression itself proves that the evidence was material. Pet. 28-30. Brown need not show that he is entitled to an acquittal to prevail on *Brady*. *Kyles*, 514 U.S. at 434. He is entitled to a new trial including all of the evidence corroborating his sworn testimony. Courts may not imagine a case different from the one the prosecution presented to save the prosecutors from their suppression of contradictory or impeaching evidence. *Id*. at 444; Pet. 27-30.

3. The Court Should Make Uniform The Rule in at Least Five Circuits that Prosecutors' Capitalization on Suppression Establishes Materiality as a Matter of Law

The government and the Fifth Circuit disregard the fact that the prosecutors repeatedly capitalized on their suppression of evidence. Prosecutors built their case on hearsay testimony from cooperating witnesses that could not be controverted or impeached without the concealed evidence. They argued to the jury at least sixteen times in closing that McMahon, who was "the key," made a guarantee, while they concealed McMahon's explicit statements to the contrary. App. 218a.

A rule of materiality *per se* is warranted when a prosecutor capitalizes on suppression of evidence by using misleading "summaries" (as the Fifth Circuit implicitly found here) or arguing the opposite of what was suppressed. No tension exists between this proposed rule of materiality *per se* and this Court's holding that a *Brady* violation is not "measured by the moral culpability, or the willfulness of the prosecutor." *Agurs*, 427 U.S. at 110. Rather, such a rule would acknowledge the fundamental unfairness of a trial infected with such conduct – whether deliberate or merely sloppy – and would impose accountability on prosecutors.[15]

To "avoid an unfair trial to the accused," *Brady v. Maryland*, 373 U.S. 83, 88 (1963), this Court should refine *Brady*'s materiality prong and impose consequences for the prosecution's abuse of summaries or capitalizing on suppression. The government's tactics and its inexorable defense of those tactics erode faith in our judicial system and cannot be reconciled with this Court's mandate that "justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

[15] The government erroneously suggests this argument was not pressed below. BIO 25-26. On the contrary, Brown repeatedly argued that the government's capitalization required reversal. *See*, *e.g.*, Pet. C.A. Br. 37 ("The ETF then capitalized on its misconduct. . . .") (citations omitted); 38 ("By pointing to Glisan's testimony 52 times and to Kopper's 27 times, the government exacerbated the prejudicial effect of its concealment of this crucial *Brady* material."). *Cf*. *id*. at 20-21, 35, 45.

CONCLUSION

Only unethical prosecutors benefit from the confusion surrounding these issues. Defendants, ethical prosecutors, and already-overworked trial judges would welcome clear rules. For these reasons and those in Brown's Petition, *certiorari* should be granted, the judgment reversed, and a new trial ordered.

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Respectfully submitted,

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