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KATZ, J., with whom NORCOTT, J., joined, dissenting. The majority concludes that the trial court properly found that there had been no implied plea agreement between the state and one of its witnesses, Michael Younger, despite: the state's lack of opposition to Younger's motion to reduce a $50,000 bond to a promise to appear; the state's decision not to charge Younger with a violation of probation for his June 21, 1994 arrest on drug charges; the state's willingness to continue the proceedings until after Younger had testified as a state's witness; the evidence from Younger's attorney reflecting her hope that he would be given favorable consideration in his drug case; and the lenient treatment he in fact ultimately received. Following its thorough discussion of the procedural history and governing legal principles, the majority thereafter determines, inter alia, that, having provided an incomplete response to a specific discovery request, the state cannot hide behind the "public record" curtain. Accordingly, the majority concludes that the state suppressed impeachment evidence.

I agree with the majority that the state improperly suppressed impeachment evidence.[1] Therefore, the only issue remaining on appeal is whether the suppressed

evidence was material.[2] The majority concludes that the evidence was not material. I disagree.

In *United States* v. *Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), the Supreme Court held that favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." See *Kyles* v. *Whitley*, 514 U.S. 419, 433–34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

In *Kyles*, the court elaborated on the meaning of materiality under *Bagley*, stressing that a reviewing court must focus on the fairness of the trial the defendant actually received rather than on whether a different result would have occurred had the undisclosed evidence been revealed. Id., 434. As the *Kyles* court made clear, the test for materiality is not a sufficiency of the evidence test. Id., 434–35. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. "Indeed, a sufficiency-of-the-evidence test would require appellate courts to usurp the function of the jury, for judges would be forced to *guess*, based on a cold record, how the jury might have weighed the remaining evidence, standing alone, in a hypothetical error-free trial. Because such an inquiry is inherently unreliable, *Kyles* rightly focuses attention instead on the potential impact the undisclosed evidence might have had on the fairness of the proceedings." (Emphasis in original.) *United States* v. *Smith*, 77 F.3d 511, 515 (D.C. Cir. 1996).

"[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. . . . *Bagley*'s touchstone of materiality is a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the trial." (Internal quotation marks omitted.) Id., 514.[3] Thus, the amount of additional evidence indicative of guilt is not dispositive of the inquiry. Instead, we must decide whether the undisclosed information could have affected substantially the efforts of defense counsel to impeach the witness, thereby calling into question the fairness of the ultimate verdict.

Purporting to apply this test, the majority relies on the impeachment evidence utilized by the defendant to conclude that any additional impeachment evidence

would not have been material. I disagree. It is undisputed that the jury knew of Younger's criminal record, that drug charges against him had been pending for nearly eighteen months, that he was not being held in prison awaiting trial, and that, at the time of his arrest on these drug charges, he was on probation for a prior robbery conviction. Finally, Younger testified that, to his knowledge, the state had given him no consideration in exchange for his agreement to testify for the state.

Although Younger was impeached at trial, "the fact that other impeachment evidence was available to defense counsel does not render additional impeachment evidence immaterial." (Internal quotation marks omitted.) Id., 515, quoting *United States* v. *O'Conner*, 64 F.3d 355, 359 (8th Cir. 1995) (per curiam). We look not merely to the ways that defense counsel was able to impeach the witness, "but to the ways in which the witness' testimony was allowed to stand unchallenged." *United States* v. *Smith*, supra, 77 F.3d 515. "Thus, undisclosed impeachment evidence can be immaterial because of its cumulative nature only if the witness was already impeached at trial by the same kind of evidence." *United States* v. *Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996); see, e.g., *United States* v. *Maloney*, 71 F.3d 645, 653 (7th Cir. 1995), cert. denied, 519 U.S. 927, 117 S. Ct. 295, 136 L. Ed. 2d 214 (1996); *United States* v. *Quintanilla*, 25 F.3d 694, 699 (8th Cir.), cert. denied, 513 U.S. 978, 115 S. Ct. 457, 130 L. Ed. 2d 365 (1994); *United States* v. *Kozinski*, 16 F.3d 795, 819 (7th Cir. 1994); *United States* v. *DeLuna*, 10 F.3d 1529, 1534 (10th Cir. 1993); *United States* v. *Marashi*, 913 F.2d 724, 732–33 (9th Cir. 1990).

In *United States* v. *Smith*, supra, 77 F.3d 515, the court recognized the significance of the ability to contest testimony, even in an area that had already been addressed. In that case, the defendant knew that the witness had entered into a plea agreement with the government under which ten of eleven counts against him in federal court had been dismissed, and that the government had agreed to file a motion recommending a downward departure in sentencing. Nevertheless, the government did not disclose that it also had agreed to dismiss two felony charges pending against the witness. The court held that this additional evidence was not cumulative because the defense could have used it to impeach the witness' testimony, which went unchallenged, that he had disclosed the full extent of his plea agreement with the government. Id., 515–16.

In *United States* v. *Cuffie*, supra, 80 F.3d 515, the defendant challenged his conviction based upon the government's failure to disclose evidence involving a witness' prior perjury. The government had maintained that this undisclosed impeachment evidence was immaterial because the witness' testimony had not been essential to the prosecution's case against the defend-

ant. Id., 518. Besides the witness' testimony, the government had presented circumstantial evidence that the defendant had possessed the drugs found in the bedroom of the witness' apartment: "namely that [the defendant] was in the apartment when the search warrant was executed; that he had a key to the locked bedroom containing the drugs on his person; that neither [the witness] nor [a codefendant] had a key to the locked bedroom on his person when he was arrested; and that there was other evidence of drug activity in the apartment." Id.

The court in *Cuffie* recognized that the remaining evidence, standing alone, would have been sufficient to convict. Nevertheless, it acknowledged that "materiality inquiry [of *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] is not an assessment of the sufficiency of the evidence." *United States* v. *Cuffie*, supra, 80 F.3d 518. Accordingly, the court noted that the amount of additional evidence indicating guilt is not dispositive of the inquiry. Id. It sufficed that "[the witness'] testimony was an important part of the government's case against [the defendant] because, as [the defendant's] counsel argued to the jury, it established the only direct connection between [the defendant] and the drugs found during the search of [the witness'] apartment." Id. In reversing the defendant's conviction, the court observed that, "[i]n light of the axiomatic importance of truthful testimony for the integrity of judicial proceedings, undisclosed evidence of a witness' prior perjury has a significant impact on the fairness of the trial." Id. For these reasons, the court was "unconvinced that the jury verdict [was] 'worthy of confidence' . . . ." Id. A cross-examination of the witness that revealed evidence casting serious doubt upon his truthfulness as a witness in a judicial proceeding could have changed the nature of the defendant's trial in *Cuffie*. Id., 519; cf. *United States* v. *Smith*, supra, 77 F.3d 516. Although the jury was presented with other reasons not to believe the witness' testimony, the state's failure to disclose the witness' prior perjury was significant.

In the present case, although the jury heard that Younger's case had been pending for eighteen months, it did not know that: although he had been held initially on a $50,000 bond, over the recommendation by the bail commissioner that bail be set at $10,000, the state agreed to have Younger released on a promise to appear; the state itself had orchestrated the numerous continuances in the defendant's case; the state's attorney had decided not to prosecute Younger for a violation of probation despite his arrest; when the state sought its last continuance date, January 5, 1996, which was the day after the defendant's trial, it indicated that it did not expect the case to "provide business" for the jury docket; and finally, Younger's attorney, Catherine E. Teitell, had written a letter to the state on September 28, 1994, asserting her confidence in Younger's ability

to cooperate. All of this evidence arguably constituted a reward for Younger's earlier cooperation with Sergeant Joseph Sherbo, as well as an inducement for continued favorable treatment by the state, and lent credence to Teitell's "good faith basis" for her hope that Younger's cooperation with the state could favorably influence the disposition of his case. This evidence not only reflected the favors Younger had already received, but it also reasonably could have created in the minds of the jurors the distinct impression that Younger, an experienced criminal, expected a substantial benefit in exchange for testifying against the defendant.[4]

Despite Younger's testimony denying any quid pro quo, there was clearly identifiable evidence demonstrating a cognizable effort by the state to induce him to testify.[5] This evidence not only provided the incentive to testify, but it also called into question Younger's denial that he had been given any consideration by the state in exchange for his testimony. Armed with full disclosure, the defendant could have pursued damaging cross-examination of Younger challenging his denials and suggesting that perhaps there were other "favors" provided in exchange for his testimony. Therefore, looking not just to the ways in which the defendant was able to impeach Younger, but also to the ways in which his testimony was allowed to stand unchallenged, I disagree with the majority's characterization of the impeachment value of the suppressed evidence as "merely incremental." I consider the potential impact of cross-examination by counsel armed with the aforementioned information sufficient to undermine confidence in the verdict.

In deciding that the evidence regarding Younger was immaterial, the majority also relies upon the testimony of two witnesses, Alex Delgado and Reginald Barry. Delgado testified that, on January 21, 1994, he and a friend, Jose Avellanet, were walking down Clinton Avenue in Bridgeport on their way to purchasing some marijuana when they were approached by the defendant, Eric Floyd, whom Delgado knew but had not seen in approximately six years. The defendant approached the two men, carrying a nine millimeter handgun. Delgado called for Avellanet to pull out his gun. When Avellanet failed to respond, the defendant, according to Delgado, accused the two men of being there to rob him. Suddenly, someone from behind punched Delgado on the back of the head, knocking him to the ground. Delgado did not recognize this other individual and could not determine whether he also had a weapon. As soon as Delgado got back up on his feet, the defendant began firing shots at the ground near Delgado's feet. He fired three or four shots in total. Delgado gave the defendant money and Avellanet also gave money and jewelry to the defendant and the other man who had punched Delgado. According to Delgado, approximately ten minutes later, the defendant called out the

name “Mickey”[6] and suddenly two men began running toward them. Before he could see their faces, Delgado turned and ran. The defendant, while yelling at him to return, fired three or four additional shots in his direction. Delgado testified that “[w]hen I ran, [Avellanet] ran.” As he got a few blocks away, Delgado heard six to eight more shots being fired. Although Delgado and Avellanet were “real good friends,” Delgado did not run to the police. Indeed, he did not even walk to the station. Rather, he gave a statement to the police some two and one-half months later, and then only after he had been brought in by the police. Finally, Delgado denied being in the area to seek revenge for a drug raid that had occurred at Avellanet’s house one day earlier, despite the fact that Avellanet was carrying a pair of handcuffs and a semi-automatic Glock fully loaded with fifteen rounds.

Although their stories overlapped on some facts, Barry painted a somewhat different picture. Barry testified that in the very early morning of January 21, 1994, he had been selling narcotics from a site about two houses away from his own home when he heard several gunshots nearby. He was in his twelfth day of continuous crack cocaine use and was highly intoxicated. At that time, Barry had been using $100 to $200 of crack each day. He knew the defendant, and had seen him in the area once a week prior to the night in question. The defendant was always alone. At trial, Barry testified that he had not seen the defendant on the evening of the homicide.

Barry had been convicted of narcotics related offenses five or six times as a result of incidents that occurred prior to the night in question. Nearly three weeks after the incident, following a twelve day drug binge, Barry was arrested for selling narcotics and was taken to the police station for questioning. He provided a tale regarding a schoolteacher and masked men, but because, at the time of that arrest, he claimed he was exhausted and intoxicated, he testified that he had no recollection of what he had stated to the police. In that statement, which was introduced at trial for substantive purposes as a prior inconsistent statement, Barry told the police that he was in the driveway of a house on Clinton Avenue when two men wearing masks approached. The two men had circled the block several times in a black vehicle moments earlier, leading Barry to believe that they were going to rob him. Barry felt threatened and yelled out for help for someone named “Fugi.” The defendant appeared carrying a large weapon. The defendant told the two men to get on the ground and he pistol whipped them and removed a gun from both while they were on the ground. According to Barry, the defendant shot at one of the two men as he ran away, and yelled at the man who remained, whom Barry identified as a schoolteacher. The defendant then pistol whipped the schoolteacher again and fired five

gunshots at him. During this incident, a white or cream colored vehicle pulled up, carrying four other men. One of the men, known to Barry as "Mickey," exited the vehicle, firing two additional shots at the man on the ground.

Measuring the state's suppression of the impeachment evidence against the testimony and statements of these "eyewitnesses," I do not agree that the evidence that the state failed to disclose was immaterial. These witnesses were neither compelling nor unimpeachable. Both Delgado and Barry were directly involved in the altercation, and both were there to engage in criminal activity. Only Younger was sufficiently removed, thereby allowing his testimony to be viewed through a different lens. Therefore, I would conclude that the defendant has "show[ed] that the favorable evidence [regarding Younger] could reasonably [have been] taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles* v. *Whitley*, supra, 514 U.S. 435; *Hughes* v. *Johnson*, 191 F.3d 607, 629 (5th Cir. 1999), cert. denied, U.S , 120 S. Ct. 1003, 145 L. Ed. 2d 945 (2000).

"The prosecutor's obligation to disclose material information to the defense is a fundamental component of the guarantee that criminal defendants receive fair trials. Thus, we do not lightly excuse *Brady* violations." *United States* v. *Smith*, supra, 77 F.3d 517. I do not mean to suggest that the constitution is violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. Nor do I propose that the constitution demands an open file policy. "While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see [*Brady* v. *Maryland*, supra, 373 U.S. 87]), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles* v. *Whitley*, supra, 514 U.S. 437–38.

Because the state's nondisclosures in this case signifi-

cantly impaired defense counsel's ability to impeach the credibility of a principal prosecution witness, I would reverse the judgment of conviction and remand the case for a new trial.

[1] For purposes of this discussion, I assume, without deciding, that the trial court properly determined that there had been no implied plea agreement between the state and Younger.

[2] It bears mention that although the state's good or bad faith in depriving the defendant of exculpatory evidence is irrelevant; *Rector* v. *Johnson*, 120 F.3d 551, 558 (5th Cir. 1997), cert. denied, 522 U.S. 1120, 118 S. Ct. 1061, 140 L. Ed. 2d 122 (1998); the state not only suppressed the impeachment evidence regarding Younger, but also attempted to capitalize on the defendant's ignorance in its closing argument by asking the jury to draw an adverse inference from the defendant's failure to call Younger's attorney as a witness to testify about what consideration Younger expected in exchange for his testimony.

[3] *Kyles* also made it clear that, "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review." *Kyles* v. *Whitley*, supra, 514 U.S. 419; *United States* v. *Smith*, supra, 77 F.3d 514. "As the [*Kyles*] Court pointed out, no *Bagley* error can ever be harmless because a reasonable probability of a different result 'necessarily entails the conclusion that the suppression must have had a substantial and injurious effect or influence in determining the jury's verdict.' " *United States* v. *Smith*, supra, 514; see *United States* v. *Lloyd*, 71 F.3d 408, 411 (D.C. Cir. 1995) (adhering to same line of analysis).

[4] The majority relies on the fact that Younger had given a statement concerning the killing to the police before receiving favorable treatment by the state as an indication that he had not been influenced principally by the state's beneficence. This reliance is misplaced. Because the statement was never introduced into evidence, was not marked for identification, and its subject matter was not otherwise disclosed to the jury through testimony, we cannot legitimately draw any conclusions about its contents. Additionally, because Younger gave the statement about the killing only after having been arrested, its existence does little to advance the majority's position.

[5] The majority states that "there is no indication in the record that Younger was aware that he had received favorable treatment from the state as a result of his testimony . . . ." I disagree. The various transcripts of Younger's court appearances provided to this court by the defendant demonstrate that the state's requests for continuances were made in open court, in the defendant's presence. Additionally, when seeking a bond reduction, in an attempt to remind the trial court of why Younger's $50,000 bond should be reduced to a promise to appear Teittel referred to "a substantial change in circumstances . . . [that had been] discussed . . . in chambers . . . ." At another of Younger's many court appearances, the state referred to discussions "in chambers" supporting its request for an additional continuance to January 5, 1995.

[6] This individual is identified as both "Mickey" and "Mikey" in the transcripts. For purposes of consistency and clarity, we refer to him in this opinion as "Mickey."