No. 18-410

IN THE

Supreme Court of the United States

COREY YATES,
Petitioner,
v.

UNITED STATES,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

CATHERINE M.A. CARROLL
Counsel of Record
CHARLES C. SPETH
DAVID P. YIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
catherine.carroll@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTORY PROVISIONS

OTHER AUTHORITIES

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The government does not dispute that federal and state courts are divided as to whether a failure to disclose exculpatory evidence violates *Brady* where the defendant could have secured the evidence on his own through the exercise of due diligence. Opp. 15-16; *see also* Pet. 7-15. The government also does not dispute that the split is an important and growing one that this Court should address. Opp. 15-16; *see also* Pet. 15-24. Instead, the government contends (at 9) that this case is "not a suitable vehicle for addressing any such disagreement" because Corey Yates allegedly already knew that witness W-10 was present when he urged Meeko Carraway to surrender to police, and the circumstances of this case therefore do not implicate the circuit split. That argument conflates a defendant's knowledge of information and his possession of evi-

dence, and it misstates both the relevant case law and the decisions below. Properly characterized, this case directly implicates an intractable split of uncontested importance. The Court should grant review.

A. The Decision Below Directly Implicates The Undisputed Split

The government principally asserts that Yates already knew that witness W-10 was present during his conversation with Carraway, contending that the D.C. Court of Appeals' rejection of his *Brady* claim therefore did not depend on the application of any due-diligence requirement. But the court of appeals did not simply hold that a defendant's actual knowledge of undisclosed facts bars a *Brady* claim, and such a ruling could not have disposed of Yates's claim. Rather, the court specifically relied on a due-diligence requirement, ruling that the government is "not obliged under *Brady* to furnish a defendant" with information that "with any reasonable diligence, he can obtain himself." Pet. App. 25a (quotation marks omitted). Applying that due-diligence standard was necessary to the holding because, as the court of appeals recognized, Yates did *not* know "that W-10 told the grand jury what he already knew she could say." *Id.* The court ruled that Yates's "ignorance of the government's possession of W-10's grand jury testimony did not prevent him from presenting the same exculpatory information from the same witness at trial" because exercising reasonable diligence would have allowed Yates to obtain "the same exculpatory information" on his own. *Id.*

In support of that analysis, the court of appeals relied on cases holding that "[e]vidence is not 'suppressed' if the defendant either knew, or *should have known*, of the essential facts permitting him to take ad-

vantage of any exculpatory evidence," Pet. App. 25a n.46 (quoting *United States* v. *LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982)) (emphasis added), and that "the Government is not required to disclose grand jury testimony to a defendant who is 'on notice of the essential facts *which would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish*,'" *id.* (emphasis added). The government itself equates those formulations and authorities with a due-diligence requirement, acknowledging federal and state court decisions holding—like the D.C. Court of Appeals here, and in contrast to other courts—that "'evidence is not suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence.'" Opp. 15-16 (quoting *Ellsworth* v. *Warden*, 333 F.3d 1, 6 (1st Cir. 2003) (en banc), and citing *LeRoy*, 687 F.2d at 618).

The trial court record further confirms that the decision below necessarily rested on an application of the due-diligence rule. At the hearing on Yates's motion for a new trial, the trial court suggested that Yates could have sought W-10's testimony himself because he supposedly knew that she heard him urge Carraway to surrender, Pet. App. 57a-58a, and defense counsel responded that it was "not unreasonable to think" Yates might have forgotten that W-10 was present, Pet. App. 58a-59a; *see also* Pet. App. 59a (citing circumstances "underlin[ing] the sincerity of our representation that he didn't remember"). Counsel then asked whether an evidentiary hearing on that question might "make a difference." Pet. App. 61a. After a recess, rather than resolving that factual issue, the trial court stated:

> You said you didn't know, but the question is: With reasonable diligence, should you have known?

Pet. App. 63a. In the trial court's view, the dispositive question "[wa]s the reasonable diligence here" as to whether Yates could have obtained W-10's testimony on his own. *Id.*; *see also* Pet. App. 63a-69a; Pet. App. 73a ("there was at least one question with … one of the statements on whether reasonable diligence would have found that statement").

In attempting to liken this case to situations where the defendant "already knows" of the undisclosed evidence without having to exercise any diligence, the government isolates the court of appeals' statement that "Yates does not claim to have been unaware that W-10 was present and heard him urge Carraway to surrender." Opp. 12, 16-17 (quoting Pet. App. 25a). In doing so, the government—like the court of appeals—blurs the distinction between knowing a fact and possessing evidence of a fact. *See* Pet. 20-21. But that blurring of knowledge and evidence is itself an application of a due-diligence rule. Under the court of appeals' view, echoed by the government, Yates should have capitalized on any memory he might have had of W-10's presence during the critical conversation to develop additional evidence—such as the testimony the prosecution withheld. The court of appeals thus emphasized that Yates's knowledge of W-10's presence mattered because it meant that he could have "secured W-10's testimony" on his own even though he did not know about W-10's grand jury testimony. Pet. App. 25a.

Although the government fails to confront it, courts have carefully observed that distinction between knowledge and evidence. Pet. 21. In *United States* v.

Severdija, 790 F.2d 1556 (11th Cir. 1986), for example, the government suppressed a written report of a conversation between the defendant and a member of a Coast Guard boarding party that contained evidence of the defendant's state of mind, relevant to whether he "knowingly and intentionally conspire[d] to possess and distribute marijuana." *Id.* at 1559. Although the Eleventh Circuit found that the defendant "was in all likelihood aware of the statement he had made," it recognized that the "evidence at issue, however, is not [the] statement," but "rather, [the] recordation of those statements." *Id.* at 1559-1560. "Without the crucial written statement, [the defendant] would have been at the mercy of [the witness's] memory, had he known [the witness's name] and called him as a witness." *Id.* at 1560. Similarly, in *Tennison* v. *City & County of San Francisco*, 570 F.3d 1078 (9th Cir. 2009), the Ninth Circuit held that a defendant's knowledge that a witness "might have information about the shooting" was "not the same as [the witness's] extensive statements to the police," which were recorded in an undisclosed memo. *Id.* at 1091. As the Ninth Circuit observed, "[d]efendants cannot always remember all of the relevant facts or realize the legal importance of certain occurrences. Consequently, defense counsel is entitled to plan his trial strategy on the basis of full disclosure by the government." *Id.* (quoting *United States* v. *Howell*, 231 F.3d 615, 625 (9th Cir. 2000)) (quotation marks omitted). Here, the government does not explain how Yates could have known of, much less obtained, the undisclosed evidence at issue—W-10's secret grand jury testimony—even assuming he had remembered that W-10 was present at a conversation. And the government never disputes that sworn grand jury testimony

is qualitatively different from a defendant's belief as to what a witness could testify to.[1]

Correctly understood, the decisions below imposed a due-diligence requirement for Yates to prevail on his *Brady* claims and therefore directly implicate the established and undisputed split among federal and state courts. The government's attempts (at 16-23) to evade review by distinguishing cases that reject a due-diligence rule on the basis that they "do not involve information that was within the defendant's knowledge" are therefore unavailing. For example, in *United States* v. *Tavera*, 719 F.3d 705 (6th Cir. 2013), the Sixth Circuit held that the defendant was not required "'to interview' a witness," known to him, "who could have furnished the exculpatory evidence the prosecutor did not disclose." *Id.* at 711-712 (citation omitted). As in *Tavera*, Yates did not know what W-10 said in secret proceedings with a prosecutor and grand jury—that was "information known to [the government] that [Yates] had no reason to know about." *Id.* at 712 n.4. Similarly, in *Dennis* v. *Secretary, Pennsylvania Department Corrections*, 834 F.3d 263 (3d Cir. 2016) (en banc), the defendant took a bus with and "waved to" a potential alibi witness on the day of the alleged crime. *Id.* at 271, 274. The en banc Third Circuit held that the

[1] The government's undeveloped assertion that grand jury testimony is generally inadmissible, Opp. 15 n.3, is inapposite. *Brady* requires disclosure of impeachment evidence. *United States* v. *Bagley*, 473 U.S. 667, 676 (1985). And grand jury testimony, like deposition testimony in civil cases, is highly valuable for fact development and trial strategy and admissible for refreshment or impeachment purposes. *E.g.*, *Marshall* v. *Randall*, 719 F.3d 113, 116 (2d Cir. 2013). The D.C. Court of Appeals here thus acknowledged that "W-10's testimony might have been admissible" to show that Yates's intent "was not to shield Carraway from arrest but rather to encourage him to surrender." Pet. App. 24a.

defendant—even though armed with knowledge of the witness and what she information could confirm—was not required to independently discover evidence the witness had provided to the government that could have corroborated the defendant's alibi and corrected the witness's memory. *Id.* at 290. *Brady*, the court held, required "disclosure by the prosecutor, not diligence by defense." *Id.*

The government's attempt to distinguish *Banks* v. *Dretke*, 540 U.S. 668 (2004), fails for similar reasons. The government contends (at 14) that *Banks* "did not address a situation where the defendant was aware of the relevant information and did not claim that he could not secure the evidence or testimony underlying the *Brady* claim." But the defendant in *Banks* knew the witness the government had failed to disclose as a paid government informant, knew the witness had previously been an informant, and knew the lead officer whom the informant had tipped off. *Id.* at 676, 678, 680. This Court nonetheless rejected the court of appeals' reasoning that the defendant could not prevail on his *Brady* claim for want of diligence. The court of appeals had faulted the defendant for failing to "attempt[] to locate [the informant] and question him" and failing to "ask[] to interview [the lead officer] and other officers involved." *Id.* at 688. But this Court held that defendants are not required to "scavenge for hints of undisclosed *Brady* material." *Id.* at 695. Here, Yates was no more aware of the relevant information than the defendant in *Banks*, and he was no more obligated than the defendant in *Banks* to "attempt to locate" W-10 "and question" her to establish a *Brady* violation.

As the foregoing suggests, even accepting the government's emphasis on Yates's failure to claim he was "unaware of the exculpatory information," Opp. 17, the

decisions below would still implicate the split among the federal and state courts as to the scope of the prosecution's *Brady* obligations. As the petition demonstrates (at 7-15), some courts have made clear—echoing this Court's own precedent—that a "true *Brady* violation" has "three components": that the evidence was favorable to the defendant, that the evidence was suppressed, and that prejudice ensued. *Strickler* v. *Greene*, 527 U.S. 263, 281-282 (1999); *see also, e.g.*, *People* v. *Chenault*, 845 N.W.2d 731, 738-739 (Mich. 2014) (rejecting "four-factor" test). The en banc Third Circuit, for example, has set a simple rule that generally "[t]he government must disclose all favorable evidence." *Dennis*, 834 F.3d at 292-293. "Only when the government is aware that the *defense counsel* already has *the material* in its possession"—*i.e.*, not simply knowledge of relevant information—"should [the government] be held to not have 'suppressed' it in not turning it over to the defense. Any other rule presents too slippery a slope." *Id.* (emphasis added); *see also id.* ("To the extent that we have considered defense counsel's purported obligation to exercise due diligence to excuse the government's non-disclosure of material exculpatory evidence, we reject that concept as an unwarranted dilution of *Brady*'s clear mandate."). Likewise, the Ninth Circuit found a *Brady* violation in *Tennison* where a memo recording a witness statement was suppressed, even though "[defendants] had heard that [the witness] might have information about the shooting," because "not only did defense counsel not even know [the witness's name], but he certainly did not know the extent of the information that [the witness] had given to [the police]." 570 F.3d at 1091.

Here, there is no suggestion that the prosecution was "aware that the defense counsel already ha[d]" W-

10's grand jury testimony "in its possession." *Dennis*, 834 F.3d at 293. And there is no insinuation that Yates or his counsel knew of "the extent of the information that [W-10] had given" to the prosecution. *Tennison*, 570 F.3d at 1091. Thus, even accepting the government's characterization that the D.C. Court of Appeals rejected Yates's *Brady* claim solely because he "already knew" that W-10 had knowledge of his conversation with Carraway—and not because he failed to exercise additional diligence to secure her grand jury testimony or other evidence—that knowledge alone would not have precluded the *Brady* claim in other courts.

As the petition details, courts are openly and increasingly divided as to the question presented. The government does not deny the importance of that split or the need for this Court to resolve it. And the government's contention that the split is not implicated here rests on a fatal mischaracterization of the facts and decision below. The split is real, and it was decisive in this case.

B. The Government's Vehicle Arguments Fail

The government's remaining arguments focus on two asserted reasons why this case would not be a "suitable vehicle" in which to consider the question presented. Neither should preclude review.

First, the government notes (at 23-24) the trial court's conclusion that the prosecution's failure to disclose W-10's grand jury testimony was not material. But Yates challenged that ruling on appeal, and as the government concedes (at 23), the court of appeals did not address the issue. For example, the court of appeals did not consider the prosecutor's own statement that Yates could have used W-10's testimony to

"'demonstrate his lack of intent to help Carraway evade arrest.'" Pet. App. 23a n.43. In any event, the possibility that there might remain issues on remand that might bar ultimate relief does not preclude this Court's review of an issue of independent importance. This Court is one "of final review and not first view," and therefore regularly grants certiorari to consider important questions warranting review even where ultimate relief depends on other factors. *Holland* v. *Florida*, 560 U.S. 631, 654 (2010) (reversing judgment that equitable tolling could not apply, but remanding for the court of appeals "to determine whether the facts in this records entitle [the defendant] to equitable tolling"); *see also*, *e.g.*, *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 851 (2018) (reversing the court of appeals on one issue and remanding for court of appeals to consider remaining issues in the first instance).

Second, the government suggests that even if Yates's accessory conviction was obtained in violation of *Brady*, that is of no moment because Yates is also serving a longer, concurrent sentence for a separate conviction. But Yates has an undeniable dignity interest in clearing his record of an unjust conviction. And the government cites no authority for its bold suggestion that a preserved constitutional error may be disregarded as harmless so long as its reversal would not directly alter the length of the defendant's incarceration. To the contrary, an unconstitutional conviction, "even if it results in no greater sentence, is an impermissible punishment." *Ball* v. *United States*, 470 U.S. 856, 865 (1985). It "does not evaporate simply because of the concurrence of the sentence," but might have "potential adverse collateral consequences that may not be ignored." *Id.* at 864-865. This Court has acknowledged "the obvious fact of life that most criminal con-

victions do in fact entail adverse collateral legal consequences" including, for example, use "to impeach [a defendant's] character should he choose it put it in issue at any future criminal trial" and as part of the defendant's criminal record for "consideration in [any future] sentencing." *Sibron* v. *New York*, 392 U.S. 40, 55-56 (1968); *see also* D.C. Code § 14-305(b)(1); D.C. Voluntary Sentencing Guidelines Manual § 2.2 (2018).

The government does not contend—nor could it—that either of these alleged vehicle problems would actually impede this Court's consideration or resolution of the question presented. And apart from the relief that Corey Yates might derive from a decision on the merits, the government does not dispute that the issue presented here is a recurring one that has significant practical effects for numerous criminal cases. Pet. 23.[2] The question is cleanly presented here, and there is no reason to delay this Court's resolution of the broad and deepening divide among the federal and state courts on this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[2] Indeed, the government concedes (at 9) that "similar questions" arise repeatedly before this Court. While the government notes a few petitions that this Court has denied, it does not suggest that the issue is unworthy of review; and its citation of selected examples to suggest otherwise assumes (at 9) that the decision here did not depend on the application of a due-diligence rule, which—as discussed—is incorrect. *Supra* pp. 2-7.

Respectfully submitted.

CATHERINE M.A. CARROLL
Counsel of Record
CHARLES C. SPETH
DAVID P. YIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
catherine.carroll@wilmerhale.com

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