No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Chamontae Walker,

Petitioner

v.

The United States,

Respondent

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

Thomas C. Paynter
1151 4th Street SW #416
Washington, DC 20024
tompaynter@gmail.com
(206) 551-5833
CJA attorney and Counsel of Record for the
Petitioner, Chamontae Walker

QUESTION PRESENTED

This petition raises an issue on which courts are divided: is the government relieved of its *Brady v. Maryland* duty disclose evidence favorable to the accused if the defense could obtain the evidence through due diligence? Or is the government only relieved of its duty when the disclosure would be redundant because the defense already has the evidence?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

NOTICE OF COUNSEL'S APPOINTMENT UNDER THE CJA

Attorney Paynter advises the Court that he was appointed to represent Petitioner on December 7th, 2012 by the District of Columbia Court of Appeals under the Criminal Justice Act, D.C. Code Sec. 11-2601 et. seq. (2010). Under Supreme Court Rule 9.1 attorneys appointed under the Criminal Justice Act are exempt from the requirement that they be admitted to practice before this Court. Therefore, counsel asks that this Court accept the Petition for filing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Statutes

Other Authorities

Constitutional Provisions

OPINION BELOW

Petitioner Chamontae Walker respectfully asks that a writ of certiorari issue to review the opinion of the Court of Appeals of the District of Columbia, issued on August 24th, 2017, affirming his convictions. The opinion is attached as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Petition for rehearing *en banc* was denied on May 18th, 2018. This petition is filed within 90 days of the denial, in compliance with S.Ct. Rule 13.3.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Fourteen, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The government failed to disclose to petitioner that it possessed grand jury testimony favorable to his defense to the charge of accessory after the fact. The D.C. Court of Appeals held that the failure to disclose did not violate *Brady v. Maryland*, 373 U.S. 83 (1963), because petitioner was aware of the witness. According to the court, the government did not suppress the evidence because it is not required to disclose evidence that the defense possesses or could obtain with reasonable diligence.

Chamontae Walker, along with codefendants Corey Yates and Meeko Carraway, was indicted on charges related to the September 25th, 2010, murder of Darrell Hendy. Carraway, who fired the shots that killed Hendy, pleaded guilty to second-degree murder. Walker and Yates went to trial on charges of conspiracy, first-degree murder while armed, and accessory after the fact. Walker was also charged with weapons offenses and with assaulting, resisting, or interfering with a police officer. The jury convicted Walker of conspiracy, first-degree murder while armed, accessory after the fact, and resisting, but acquitted him of the weapons offenses. The jury acquitted Yates of conspiracy and of first-degree murder, but convicted him of second-degree murder and accessory after the fact.

The basis for the accessory charges was evidence that Walker and Yates helped Carraway hide out in North Carolina a few days after the shooting when it became clear to them that the police were about to arrest Carraway for Hendy's murder. Carraway soon returned to the District of Columbia and, on October 12, 2010, he turned himself in to the police.

Walker presented no witnesses, but Yates put on two witnesses, both of whom were relevant to the accessory charges. The first was Detective Robert Cephas, who testified that he

interviewed Yates on September 27th, 2010—two days after the murder—and Yates identified Carraway as the person who shot Hendy. The second was attorney Samuel Hamilton. Hamilton testified that Yates came to see him in late September 2010 to inquire whether it would be wise for a person who might be facing some charges "to get a lawyer and to approach the authorities." Hamilton said Yates also expressed vague concerns about possible retaliation. Hamilton had a subsequent meeting with Yates, Walker, and Carraway, in which they asked him whether an attorney could help someone "who might have some concerns about people in the community about maybe retaliating against him or doing something in the community because they think that he might have been involved in something, some criminal activity." The testimony of Cephas and Hamilton supplied the evidentiary predicate for Yates's defense claim that any actions he took following Hendy's murder were not done with the intent to hinder or prevent Carraway"s arrest.

The issue in this petition arose when, after trial, the government informed Yates about the grand jury testimony of "W-10," who was Carraway's mother, and who had not been a witness at trial. She told the grand jury that on October 12th, 2010—the day Carraway turned himself in—Carraway, accompanied by Walker and Yates, came to her place of work to speak with her. Carraway told his mother that he was in some trouble and was going to turn himself in but would not tell her any details. Walker and Yates were with Carraway and they seemed to be rushing him. She heard Yates telling him, "We need to go, if you're going to do this, you need to go now before you decide not to do it. You said you were going to turn yourself in today, let's go." The government explained that it came across this evidence in the course of reviewing its files in response to Yates's motion for a new trial.

On appeal both Walker and Yates asked the court to vacate their accessory after the fact convictions because the prosecution withheld evidence materially favorable to the defense (Carraway's mother's testimony), in violation of their right to due process as set forth in *Brady*. The D.C. Court of Appeals agreed that W-10's testimony might have been admissible to show that Yates did not intend to shield Carraway from arrest, but rather to encourage him to surrender. Decision at 31. (The court addressed this section of its opinion to Yates alone, perhaps because the claim was raised in Yates's pleadings, albeit adopted by Walker.) According to the court, however, the government did not suppress the evidence. Yates was present for the interaction and so already knew that W-10 was present and could testify to Yates urging Carraway to turn himself in. "It is well-settled that '*Brady* only requires disclosure of information unknown to the defendant.'" *Id.* at 31 [Citing *United States v. Derr*, 990 F.2d 1330, 1335 (D.C. Cir. 1993), overruled on other grounds by *United States v. Bailey*, 36 F.3d 106 (D.C. Cir. 1994).] "[T]he government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." At 31-32, quoting *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984). Yates did not claim to be unaware that W-10 was present and heard him urge Carraway to surrender. Yates was ignorant only of W-10's testimony to the grand jury, which did not prevent him from calling her at trial. Decision at 32.

Because the court found that the evidence was not suppressed, it did not address whether or not the evidence was material. *Id.* 31.

REASONS FOR GRANTING THE PETITION

Contrary to the court's statement that there is a "well-settled" reasonable- or due-diligence exception to the *Brady* duty to disclose, courts are divided on the question of whether the the government must disclose favorable evidence to the accused under *Brady* when the accused may already know the underlying facts or could learn them with reasonable diligence. As the D.C. Court of Appeals itself said four years ago, "[t]he Supreme Court has not explicitly addressed and state and federal courts are split on this 'due diligence' question." *Biles v. United States*, 101 A.3d 1012, 1023 n.10 (D.C. 2014). The Court should grant this petition in order to clarify this disputed area of the *Brady* rule.

Before moving to the split between courts, note that the distinction between *evidence favorable to the accused* and *knowledge of the underlying facts* is an important one which the opinion below elided. The focus of the *Brady* inquiry is "defendant's 'knowledge of the government's possession of possibly exculpatory information,' in contrast to defendant's independent knowledge of how the offense transpired." *United States v. Clarke*, 767 F. Supp. 2d 12, 52-53 (D.D.C. 2011) (quoting *United States v. Derr*, 990 F.2d 1330, 1335 (D.C. Cir. 1993), overruled in part on other grounds by *United States v. Bailey*, 36 F.3d 106 (D.C. Cir. 1994) (en banc)). *See generally* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 167-175 (2012); *see also United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000) ("The government's contention that it had no duty to disclose the mistake to the defense because Howell knew the truth and could have informed his counsel is wrong. The availability of particular statements through the defendant himself does not negate the government's duty to disclose…. Defendants often mistrust their

counsel, and even defendants who cooperate with counsel cannot always remember all of the relevant facts or realize the legal importance of certain occurrences.")

The court's elision of the distinct between *evidence favorable to the accused* and *knowledge of the underlying facts* rests on a number of impractical assumptions that illustrate the danger inherent in the due-diligence rule. It is not practical or realistic to assume, for example, that criminal defendants will always have total recall of all events or conversations of which they were a part and can thus be imputed with knowledge of all exculpatory facts to which they may at one time have been exposed. *See Schledwitz v. United States*, 169 F.3d 1003, 1013 (6th Cir. 1999) ("We do not believe that due process stretches so far as to hold a defendant accountable for every conversation he has ever had in his lifetime regardless of the surrounding and intervening circumstances.") Nor is it realistic to assume that criminal defendants will always be able to identify which facts in their memory are legally significant and to communicate those facts to their lawyers.

The court's decision appears to take the approach that—unless Walker presented evidence to the contrary—it is to be assumed that Walker remembered urging Carraway to turn himself in, that Walker was aware of and remembered Carraway's mother overhearing this conversation, and that Walker should have recognized the legal significance of these facts and tried to secure her testimony. These kinds of assumptions are neither practical nor realistic in cases like this one, where the *Brady* material withheld by the Government contains facts that may have been known to the defendant. Even presuming that Walker was aware of the underlying facts, "...he did not know that the government had evidence that would prove this point for him." *Clarke*, 767 F. Supp. 2d at 53.

Perhaps for the above reasons, courts tend to sort undisclosed favorable information into two categories: information actually known to defense counsel on the one hand, and information that could be discovered with reasonable or due diligence on the other. Information that may have been known to or in the possession of the defendant is not treated as a third category, but is sorted into the due diligence category. For instance, in *United States v. Nelson*, 979 F.Supp.2d 123 (D. D.C. 2013), *reconsideration denied in United States v. Nelson*, 59 F.Supp.3d 15 (D. D.C. 2014), Nelson pled guilty to interstate travel for illicit sexual conduct after engaging in an email conversation with an undercover detective. *Id.* at 126. The government provided several packets of emails to the defense, but omitted an exculpatory email (the "1:44 p.m. email") indicating Nelson's goal may have been to use methamphetamine, not to engage in illicit sex.

Nelson admitted that he had read the 1:44 p.m. email and that it remained in his email inbox. However, "he could not 'specifically recall the content of each and every communication with Detective Palchak"...particularly since Nelson was communicating with a number of other people at the same time[.]" *Id.* at 132. Even though Nelson actually had possession of the email, "the evidence suggests that Nelson did not recall the specific e-mail, or, more importantly, know that it was missing from the discovery packet that the government disclosed to his counsel." *Id.* at 133. The government contended that the defense could have discovered the email through due diligence; the court discussed it under the due diligence rubric, holding that "...*Brady* does not excuse the government's disclosure obligation where reasonable investigation and due diligence by the defense could also lead to discovering exculpatory evidence." *Id.* at 133. *See also Biles*, 101 A.3d at 1023 n.10 ("[W]hether the government could have 'suppressed' evidence for *Brady* purposes if the defendant himself may have known about it" is a "'due diligence'" question.)

So whether courts are addressing evidence that may be known to the defendant or evidence that could be discovered, the question is whether defense due diligence is a factor under *Brady.* Information that is actually known to the defense, of course, cannot be the basis of a *Brady* claim. "Only when the government is aware that the defense counsel already has the material in its possession should it be held to not have 'suppressed' it in not turning it over to the defense." *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 292 (3d Cir. 2016) (en banc); *Amado v. Gonzalez*, 758 F.3d 1119, 1135 (9th Cir. 2014) ("The prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence. However, defense counsel cannot lay a trap for prosecutors by failing to use evidence of which defense counsel is reasonably aware for, in such a case, the jury's verdict of guilty may be said to arise from defense counsel's stratagem, not the prosecution's failure to disclose.")

Moving now to the approaches taken by courts on whether there is a due-diligence exception to the *Brady* duty to disclose, note first that this Court has never adopted the due-diligence rule. Indeed, such a rule is inconsistent with the Court's *Brady* jurisprudence because it shifts the focus of the *Brady* inquiry away from the actions of the prosecutor and effectively creates a fourth element that a defendant must prove in order to establish a *Brady* violation. The Court's jurisprudence makes clear that there are only three elements to a successful *Brady* claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999).

Lower courts have taken a variety of approaches to the question. In 2012 one commenter found that "[a]ll federal courts of appeal, except the Tenth and D.C. Circuits, apply some form of the defendant due diligence rule[.]" *Nelson*, 979 F.Supp.2d at 133 fn.7, citing Weisburd, *supra*, 153 & n.80 (citing cases). Subsequently several other courts have rejected the due-diligence rule. In 2016 the Third Circuit considered the issue in *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263 (3d Cir. 2016) (en banc). The evidence in *Dennis* was a receipt corroborating Dennis's alibi. *Id.* at 269. The Commonwealth of Pennsylvania, pointing to Dennis's acquisition of the receipt post-trial, argued that the receipt was publically available and so the government was not obligated to disclose it. *Id.* at 289. The *Dennis* court held that "The government must disclose all favorable evidence." *Id.* at 292. "Inquiries into prosecutorial suppression" are inquiries into "the actions of the prosecutor—they do not place affirmative duties on defense counsel pre-trial." *Id.* (citing *United States v. Agurs* , 427 U.S. 97, 108 (1976)). The court noted that "the United States Supreme Court has never recognized an affirmative due diligence duty of defense counsel as part of *Brady*…." *Id.* at 290. "Only when the government is aware that the defense counsel already has the material in its possession should it be held to not have 'suppressed' it in not turning it over to the defense." *Id.* at 292.

Other courts rejecting the due-diligence rule include the Ninth Circuit in *Amado, supra*; the Sixth Circuit in *United States v. Tavera*, 719 F.3d 705 (6th Cir. 2013) (finding that this Court's decision in *Banks v. Dretke*, 540 U.S. 668 (2004) rejected the due-diligence rule); and the Supreme Court of Michigan in *People v. Chenault*, 845 N.W.2d 731 (Mich. 2014) (Holding that the due-diligence rule is "contrary to *Brady*" but that "evidence that the defense knew of

favorable evidence, will reduce the likelihood that the defendant can establish that the evidence was suppressed[.]")

In a 1995 decision the Tenth Circuit took a different approach, holding that defense knowledge of the favorable evidence goes not to suppression, but to materiality. "[T]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge." *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). However, "Whether the defense knows or should know about evidence" matters because "if the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material." *Id.* In petitioner's case the court considered Walker's supposed ability to secure the evidence through due diligence to go to suppression, not materiality. Decision at 31.

This Court should grant the petition to resolve whether the government need not disclose favorable evidence if the defense can obtain the evidence through due diligence, or if the government is obligated to disclose unless it knows that the defense does in fact have the evidence. The former rule would create a morass of uncertainty involving questions such as what did the defendant know of the underlying facts, what did he or she understand of their legal significance, and what was communicated to defense counsel. It would also invite prosecutors to "speculate about what a defendant or defense lawyer could discover through due diligence. Prosecutors are not privy to the investigation plan or the investigative resources of any given defendant or defense lawyer." *Dennis*, 834 F.3d at 293. The better rule is to do away with the due-diligence requirement and impose a broad duty to disclose, unless the government knows

that disclosure would be redundant (and lack of disclosure would be immaterial) because the defense already has the evidence.

In petitioner's case, the prosecution could not have known that Walker's defense attorneys had Carraway's mother's grand jury testimony in their possession, because they did not. Nor could the prosecution have known whether or not defense counsel had learned the underlying facts of Carraway's mother's presence at and memory of the conversation from Walker. Under the better, no-due-diligence rule, Walker suffered a violation of his rights under *Brady*.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: _____

Respectfully submitted, _____

Thomas C. Paynter