No. _____

IN THE

Supreme Court of the United States

DEANGELO HORN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Florida First District Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court first announced the due process requirement that the State disclose favorable exculpatory or impeachment evidence in *Brady v. Maryland*, 373 U.S. 83 (1963). Forty years later, this Court declined to factor into the *Brady* analysis the defendant's own action, or lack thereof, in discovering material evidence withheld by the State, noting: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). However, many jurisdictions, including Florida, have imposed a due diligence standard on the defense in determining *Brady* claims.

The questions presented are:

1. May courts impose a due diligence requirement for *Brady* claims that focuses on the actions of the defense rather than the government, effectively limiting *Brady*'s reach to evidence that cannot be obtained by means other than government disclosure?

2. Must evidence be admissible to be material under *Brady*?

PARTIES TO THE PROCEEDING

Petitioner DeAngelo Horn, a prisoner serving a sentence of life without parole in Florida, was the appellant in Florida District Court of Appeals, First District.

Respondent, the State of Florida, was the appellee in the Florida District Court of Appeals, First District.

STATEMENT OF RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial:

Circuit Court of Leon County, Florida
State of Florida v. Deangelo Savoy Horn, Case No. 2010-CF-688
Judgment Entered: May 9, 2011

Direct Appeal:

Florida District Court of Appeals for the First District
Deangelo S. Horn v. State, 1D11-2695
Judgment Entered: September 19, 2012 (affirming)

Postconviction DNA Proceedings:

Circuit Court of Leon County, Florida
Horn v. State, 2010-CF-688
Judgment Entered: August 14, 2013 (denying motion for postconviction DNA testing)

Florida District Court of Appeals for the First District
Horn v. State, 1D13-4551
Judgment Entered: January 23, 2014 (affirming)

Initial Postconviction Proceedings:

Circuit Court of Leon County, Florida
Horn v. State, 2010-CF-688
Judgment Entered: November 22, 2013 (denying postconviction relief)

Florida District Court of Appeals for the First District
Horn v. State, 1D13-6190
Judgment Entered: June 11, 2014 (affirming)
Rehearing Denied: July 23, 2014

Second Postconviction Proceedings:

Circuit Court of Leon County, Florida

Horn v. State, 2010-CF-688
Judgment Entered: August 19, 2014 (denying postconviction relief)

Florida District Court of Appeals for the First District
Horn v. State, 1D14-3744
Judgment Entered: September 9, 2014 (affirming)

Federal Habeas Proceedings:
District Court for the Northern District of Florida
Horn v. Sec'y, Fla. Dep't of Corr., 4:15-cv-00101-RH-EMT
Judgment Entered: March 28, 2018 (denying habeas relief)

Eleventh Circuit Court of Appeals
Horn v. Sec'y, Fla. Dep't of Corr., 18-11801-D
Judgment Entered: August 6, 2018 (denying request for a certificate of appealability)

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (Case No. 18-6778)
Horn v. Jones, 139 S. Ct. 842 (2019)
Judgment Entered: January 7, 2019

Third Postconviction Proceedings:

Circuit Court of Leon County, Florida
Horn v. State, 2010-CF-688
Judgment Entered: November 21, 2019 (denying postconviction relief)

Florida District Court of Appeals for the First District
Horn v. State, 1D19-4659
Judgment Entered: October 21, 2020 (affirming)

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OPINION BELOW

The opinion of the Florida District Court of Appeal for the First District is available at 303 So. 3d 1285 (Fla. 1st DCA 2020), and is reprinted in the appendix at 1.[1]

JURISDICTION

The judgment of the First District Court of Appeals was entered on October 20, 2020. App. 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . 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.

[1] The record on appeal from the initial Rule 3.850 motion is cited as "PCR." The record from Mr. Horn's original trial is cited as "R."

STATEMENT OF THE CASE

A. Investigation

On March 5, 2010, the Florida Abuse Hotline, run by the Florida Department of Children and Families ("DCF"), received a call about a possible sexual battery of a child. PCR. 293. A Child Protective Investigator ("CPI"), Maryann White, immediately reached out to D.M., the alleged victim. *Id.*

Tallahassee Police Department ("TPD") Investigator Robert Todd met with D.M.'s immediate family at a Motel 6. PCR. 293. D.M.'s older sister, M.M., gave her version of events. She alleged that she had been sharing a motel room with D.M., her boyfriend DeAngelo Horn, her brother, and her cousin. *Id.* She alleged she woke up around 6:00 a.m. that morning to find Mr. Horn on the floor with her sister, who was 11 years old. *Id.* Mr. Horn's and D.M.'s pants were both down, and Mr. Horn's face was between D.M.'s breasts. *Id.* When M.M. turned on the light, Mr. Horn jumped up and pulled up his pants. *Id.* He followed M.M. into the bathroom, where he took her cell phone, put his hand around her throat, and told her that if she or D.M. told anyone, he would kill them. *Id.*

Investigator Todd and CPI White referred the case to the Child Protection Team ("CPT") for a medical examination. PCR. 295. Julia Pallentino, a medical professional employed by CPT, conducted the examination. PCR. 294. She found no injury but drew no conclusion as to whether this proved or negated any allegations of sexual assault. *Id.*

Police located Mr. Horn at his mother's house in Thomasville, Georgia and placed him under arrest. PCR. 262.

Five days later, CPT Case Specialist Kendra Walker conducted a forensic interview of D.M. to get her account of what had happened. PCR. 295. CPI Torria Richardson observed the interview. *Id.* D.M. wavered on when during the assault she woke up, but maintained she woke up when she felt something on her stomach. Mr. Horn was on top of her, and her pants were down. PCR. 211.

Mr. Horn was indicted in the Second Judicial Circuit Court, in and for Leon County, on five charges: (1) sexual battery on a child under 12 years of age; (2) lewd and lascivious molestation; (3) false imprisonment; (4) tampering with a witness; and (5) battery.

B. Pretrial Discovery and Hearings

Trial counsel Joel Remland filed a discovery motion on March 22, 2010. PCR. 232-33. The State Attorney's Office provided its initial answer on April 15, 2010. PCR. 235-36. This answer included the "names and addresses of all persons known to the prosecutor at the present time to have information which may be relevant to the offense charged and to any defense with respect thereto or to any similar fact evidence to be presented at trial . . . ." PCR. 235. The State's list featured various TPD and CPT employees who had worked on the case but did not include CPI White, CPI Richardson, or any other reference to DCF. *See id.* On May 6, 2010, the State provided Mr. Remland with an amended answer to demand for discovery. PCR. 246. In this discovery response, the State provided the name of Ms. Walker, the CPT case

specialist who had interviewed D.M., as well as a four-page report authored by Ms. Walker entitled "Summary of Forensic Interview." PCR. 247-50. Included in the report was a brief historical summary regarding prior abuse investigations. PCR. 249-52. The report mentioned that CPI White and Richardson had been involved in the case but did not specify that they were employees of DCF or that a CPI is a different position than that of someone working for the CPT. PCR. 247.

Because Chapter 39, Fla. Stat., requires a court order to disclose records regarding child abuse, Mr. Remland filed an unopposed motion to allow disclosure of information of alleged child abuse to obtain the reports of each CPT staff person listed in the State's witness disclosure. PCR. 300. This included Kendra Walker, Lisa Lustgarten, and Julia Pallentino. Specifically, Mr. Remland requested "all reports, summaries, case notes, case file and other documents containing information concerning the charges pending against the Defendant." PCR. 300, 302, 304. The trial court granted these motions. PCR. 307. By the time of trial, Mr. Remland had copies of Ms. Walker's CPT report, the video of the CPT interview, and reports summarizing Ms. Pallentino's findings. *See* PCR. 293-98 (reflecting all CPT records received by trial counsel). Despite asserting that its witness list included "all persons known to the prosecution at the present time" to have relevant information and that its obligation under Fla. R. Cr. P. 3.220 was "complete," the State did not provide any DCF reports or separately disclose any DCF employees.

On April 7, 2011, just prior to the beginning of the trial, the State made a motion in limine to prevent the admission of evidence about the alleged victim's prior

sexual conduct with people other than the defendant. R. 5-6. Mr. Remland responded that the defense theory is that D.M and her older sister M.M. lied and made up a story about Mr. Horn raping D.M. R. 7. Mr. Remland further argued:

> [O]ur defense theory here is based upon the sexual activity existing in an inappropriate way in the family and therefore - - and the attitudes and all the rest of it is not just character. It's the defense's theory that because of what this child was exposed to in the family, that she was led into this lie. . . .
>
> …And if credibility of the opposing stories or the opposing points of view is an issue in this case, which I think it is, credibility is a big factor in this case because when the jury hears this, they're going to go, oh, my God, he's saying that was planted. Oh, my goodness. And that's why I think the influences of the home and everything else are relevant to the theory and credibility of our entire defense in this case.

R. 8, 11.

The State argued that D.M.'s prior sexual conduct was protected by Florida's rape shield laws. R. 12. Nevertheless, it stated: "Now, that being said, Judge, if the defense would like to cross-examine the mother and the sister as to things consistent with their theory, then they are certainly entitled to." R. 13. The trial court granted the State's motion in limine as to D.M.'s prior sexual conduct, R. 13, but did tell Mr. Remland that he could question other witnesses about potential bias and motive, subject to the nature of the question and its relevancy. R. 14.

C. Defense at Trial

The defense contention from the start of trial was that M.M. and D.M. had planted the semen and fabricated the story of the sexual assault on D.M. R. 75. M.M. had recently performed oral sex on Mr. Horn, and she would save his ejaculate in a plastic bottle in the hopes of using it to get pregnant. R. 74, 386.

Mr. Horn was the only witness to testify for the defense, and his testimony best illustrates the defense at trial. Mr. Horn testified that on March 5, 2010, he was living in Thomasville, Georgia but had been staying with M.M. at the Collegiate Inn in Tallahassee, Florida for two months. R. 350. D.M. and her brother had been staying with Mr. Horn and M.M. for two days. R. 351.

The night before the alleged incident, Mr. Horn, M.M., D.M., and their brother were playing cards. R. 353. The children went to sleep about 10:00 or 11:00 p.m. *Id.* Mr. Horn stayed up watching television. *Id.* They all woke up in the morning around 7:00 a.m. R. 354. Around 8:00 or 9:00 in the morning, M.M. and D.M went to Publix to withdraw cash. *Id.*

While D.M. and M.M. were at Publix, Mr. Horn had a verbal disagreement with an employee at the hotel front desk about cleaning the room. R. 356. When M.M. and D.M. returned from Publix, they went to the hotel's front desk to pay for another night. *Id.* The woman at the front desk told them no and called the police because Mr. Horn had yelled at her. *Id.* When the police arrived, they talked to M.M. while Mr. Horn left to go meet up with friends. R. 357.

Sometime later, M.M. texted Mr. Horn to tell him that her Aunt Nita was taking M.M. and the children to the Motel 6. About an hour later, M.M. texted again to inform Mr. Horn that they had checked into the Motel 6 and asked if he needed a ride there. R. 360. M.M. and her Aunt Nita picked Mr. Horn up. *Id.* After dinner, D.M. got a phone call and went outside. R. 364. D.M. gave the phone to her brother, who then went outside. *Id.* He then gave the phone to M.M., who went outside. *Id.*

Mr. Horn asked M.M. what was going on. *Id.* M.M. said she did not know and that her mother was just screaming and crying. R. 383. Mr. Horn thought that S.M. had found out that D.M. had gotten into his liquor and gotten drunk two nights before. *Id.* Mr. Horn later received a text from his friend, Cedric, stating that M.M. and D.M. were lying about him touching D.M. R. 384. Mr. Horn panicked and went to his mother's house in Thomasville. *Id.*

Testimony by other witnesses established that when D.M. was examined for sexual abuse, the results were inconclusive. R. 90. No injuries were found. R. 88. There was no physical indication of any intercourse between Mr. Horn and D.M., despite the fact that Mr. Horn is a 6-foot, 5-inch man weighing over 300 pounds. R. 89. D.M. had showered and changed before the sexual assault examination. R. 84. D.M.'s underwear was collected into evidence, but it was unclear whether she had worn the underwear both before and after she showered, or whether it was fresh pair she had put on after showering. D.M. indicated to the nurse practitioner that she had seen "some white stuff in [her] panties." R. 84. DNA evidence matching Mr. Horn was developed from the sexual assault examination kit.

D. New Evidence Disclosed in Federal Habeas

During habeas corpus proceedings in federal court, Mr. Horn obtained records from DCF for the first time on November 29, 2017. He also received a previously undisclosed TPD report.

The DCF records showed that D.M. and M.M.'s family had an ongoing history of reporting seemingly false incidents to DCF and the police in retaliation for

perceived wrongs, while also accusing others of doing the same to them. In July 2004, DCF responded to an incident at the household where S.M., M.M., and D.M.'s mother were then residing. PCR. 54-55. S.M. had recently been dating Timothy Bibbins. PCR. 55. However, they had broken up two months before, and Mr. Bibbins started dating another woman, Denise McCaffee. *Id.* That July, Mr. Bibbins called DCF to make allegations about S.M. PCR. 50-51. After DCF went to investigate that report, Ms. McCaffee indicated that DCF was questioning Ms. McCaffee and Mr. Bibbins because S.M. and one of her relatives had called in a false report to retaliate. PCR. 51. Later, in 2010, when DCF contacted S.M. about Mr. Horn's case, S.M. again claimed that this 2004 child neglect report against her was a false accusation. PCR. 207.

A couple weeks later, after the first Bibbins accusation, S.M. claimed that there was a false report involving her boyfriend, Reginald Turner. PCR. 55. Mr. Turner was accused of having sex with M.M., who at the time was fourteen. S.M. and others in the household denied the allegations, pointing out that M.M. did not even live in the house at the time. *Id.* S.M. described the allegations as a "false report," and accused her ex-boyfriend Mr. Bibbins and his new girlfriend Ms. McCaffee of making the allegation because they were mad at her. *Id.*

In 2009, less than a year before the allegations in this case, D.M. had been removed from her mother's custody and was living with an aunt in Georgia. *Id.* D.M. missed her mother and wanted to move back home. PCR. 67. While there, D.M. alleged that her cousin, "Alphonso," had sexually abused her. PCR. 199. DCF got involved. A CPI interviewed D.M. about the incident, and CPI marked the incident

as "verified . . . due to the disclosure from the victims." PCR. 176. Kendra Walker, the CPT case specialist who also interviewed D.M. in Mr. Horn's case and testified at his trial, interviewed D.M. on or about May 20, 2009. PCR. 183. At that 2009 interview, D.M. "disclosed sexual abuse by Alphonso." *Id.* The CPI confirmation regarding D.M. appears to have been based solely on the interviews with D.M. As part of the investigation, DCF interviewed S.M. and M.M. to find out what they knew about the allegation against Peterson. S.M. denied that D.M. had ever told her about any problems in the home. PCR. 188. M.M. said that she "spoke with [D.M.] often and denied [D.M.] ever disclosed any problems in [her aunt] Shirley's care." *Id.* The Georgia Bureau of Investigation looked into the allegation, but the sexual abuse report was never referred to the District Attorney's Office in Georgia, and charges were never filed against Alphonso. After these allegations, D.M. returned to Florida to live with her mother.

Around the same time, another child in the household, B.J., reported that a cousin, Willie Peterson, had sexually assaulted her. D.M. told DCF she had witnessed this assault. PCR. 182. She said that she had walked into the room to find Peterson and B.J. in bed "humping," and that when she walked in, he jumped up and pulled his pants up. *Id.* This incident means that D.M. had witnessed a sexual assault similar to the one she recounted in this case less than a year before, providing the details necessary for her and her sister to fabricate the allegation against Mr. Horn.

In addition to the DCF records, the TPD also possessed a police report indicating a false allegation by M.M. She had called the police after getting in an

argument with her former boyfriend, Dexter Robins. PCR. 225. M.M. accused Mr. Robins of tussling with her, threatening her, and kicking open the door to his house to get to her. *Id.* Despite the violence detailed in her accusations, the police who arrived at the scene did not find any signs of physical harm to M.M. While she alleged that Mr. Robins had kicked the door open in order to get to her, the police did not see any damage to the door. PCR. 230. The police referred the case to the State Attorney's Office, which declined to prosecute Mr. Robins. *Id.* This allegation by M.M. had been dismissed because of a lack of physical evidence, teaching her that sometimes her word was not enough to achieve her desired result. Not only did this incident show another false allegation by M.M., but it showed one under similar circumstances—anger at a man she was dating—and how she may need physical evidence to support her allegations.

Through these varied incidents, none of the accused faced criminal charges or suffered any other consequences. D.M. and M.M.'s family did not face any criminal consequences for filing false reports, and in at least one incident, D.M. benefited from her false allegation—when she was removed from her aunt's house and returned to her mother. Because D.M. and M.M.'s family had been rewarded for prior false allegations, while the subjects of those allegations had experienced only trivial consequences, is it less likely that D.M. and M.M. understood the severity of making such accusations. They would have had little hesitation in doing the same to Mr. Horn. This information and the inferences that a reasonable jury could make from it

were all favorable to the defense theory that D.M. and M.M. had fabricated the allegations and that their testimony was not credible.

E. *Brady* Proceedings in State Court

Based on these newly disclosed records, Mr. Horn filed a *Brady* claim in state court. The basis of Mr. Horn's claim was that the State violated its *Brady* obligations when it failed to disclose DCF and TPD records that contained information to impeach the credibility of the State's two key witnesses, D.M. and M.M. As a result, the jury was unaware that investigators assigned to D.M.'s case found her account to be unsubstantiated and that she was unable to recall what happened to her without getting prompts from others. The jury also did not know D.M. and M.M.'s family's pattern of prior false allegations and their history of using such allegations as a tool to exact revenge. Finally, the jury did not know that one year earlier, D.M. had witnessed a sexual assault with similarities to her accusations against Mr. Horn potentially providing her with the details necessary to later make a false allegation.

The circuit court denied Mr. Horn's claim without a hearing because it found this evidence was neither favorable nor material. In support, the court concluded the evidence would not be admissible, and that the references in the disclosed CPT report were sufficient for counsel to follow up and seek more records. The District Court of Appeals affirmed on the same grounds. In relevant part, the court ruled that the reports were not favorable because they were inadmissible, and that the CPT report's description as a "brief summary" put counsel on notice that more information was available.

REASONS FOR GRANTING THE PETITION

I. There is a Split among the Federal Circuits and State Courts Regarding whether *Brady* Includes a Due Diligence Requirement Focused on the Actions of the Defense Rather than the Government

Notwithstanding this Court's implicit rejection of a defense-due-diligence requirement in the *Brady* context, some lower courts have read this Court's discussion of materiality in *Kyles v. Whitley*, 514 U.S. 419 (1995), where this Court described "an item of favorable evidence unknown to the defense," to effectively limit *Brady*'s reach to evidence the defense cannot obtain by means other than government disclosure.

Seven federal circuits and a majority of the states now subscribe to this view. Other jurisdictions, however, have remained silent on the issue, declined to decide it, or rejected the suggestion that *Brady* is anything other than a review of the government's improper withholding. Still other jurisdictions have reversed their previous adoption of a defense-due-diligence requirement to dispose of it, or apply the requirement inconsistently across cases.

This Court's intervention is needed to resolve confusion among the lower courts regarding the role defense diligence plays in the *Brady* analysis.

A. Jurisdictions that Expressly Impose a Diligence Requirement

Seven circuits and the majority of states impose a diligence standard on the defense in reviewing *Brady* claims. The Eleventh Circuit, for instance, even identifies a separate diligence prong as a fourth prong of the *Brady* test, a direct departure from this Court's three-part *Strickler v. Greene*, 527 U.S. 263 (1999), test. *See LeCroy v.*

Sec'y, Fla. Dept. of Corrs., 421 F.3d 1237, 1268 (11th Cir. 2005) (one prong of the *Brady* test requires the defense to show "the defendant did not possess the evidence and could not have obtained it with reasonable diligence").

In most cases, the jurisdictions imposing a defense-diligence standard view it through the lens of suppression: the government cannot suppress evidence the defense has, or should have, anyway. This is the approach of most federal circuits requiring defense diligence. *See, e.g.*, *United States v. Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1998) ("The government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defender, as they were here."); *United States v. Zackson*, 6 F.3d 911, 918 (2d Cir. 1993) ("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.") (internal citation omitted); *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) ("In situations such as this, where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine."); *West v. Johnson*, 92 F.3d 1385, 1399 (5th Cir. 1996) ("'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.'") (quoting *United States v. Zackson*, 6 F.3d 911, 918 (2d Cir. 1993); *United States v. Kimoto*, 588 F.3d 464, 492 (7th Cir. 2009) (evidence is only suppressed where it was "not otherwise available to the defendant through the exercise of reasonable diligence"); *Ienco v. Angarone*, 429 F.3d 680, 683 (7th Cir. 2005) ("Evidence is

'suppressed' for *Brady* purposes when (1) the prosecution failed to disclose the evidence in time for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence."); *United States v. Coplen*, 565 F.3d 1094, 1097 (8th Cir. 2009) *(*"'The government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels.'") (quoting *United States v. Zuazo*, 243 F.3d 428, 431 (8th Cir. 2001).

This is also the approach of the majority of state jurisdictions imposing a similar rule. *See* App. 1 (Table of State Jurisdictions Imposing the Defense Diligence Requirement).

Other jurisdictions look to a tipping point, where once prosecutors have disclosed enough information, diligence applies. *See, e.g.*, *State v. Hall*, 419 P.3d 1042, 1129-30 (Idaho 2018) ("When, as here, a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.") (internal citation omitted); *State v. Davila*, 357 P.3d 636 (Wash. 2015) (finding suppression where the defense had no reason to ask specific questions of a witness given what it knew); *Wright v. State*, 91 A.3d 972, 991-92 (Del. 2014) ("Although Wright's counsel knew that Samuels had entered into a plea agreement, the State did not disclose the details and terms of his cooperation under that agreement—information that would have been useful impeachment evidence for Wright. Moreover, the limited disclosure of Samuels' record was insufficient because Wright's trial counsel could not adequately use the information or conduct any

meaningful investigation given the State's timing of the addition of Samuels as a witness."); *Milke v. Mroz*, 339 P.3d 659, 666 (Ariz. Ct. App. 2014) ("Where a defendant doesn't have enough information to find the *Brady* material with reasonable diligence, the state's failure to produce the evidence is considered suppression.") (internal citation omitted); *Aguilera v. State*, 807 N.W. 2d 249, 252-53 (Iowa 2011) (while evidence is not suppressed "if the defendant knew or should have known the essential facts permitting him to take advantage of the evidence[,] . . . [b]efore we will say that defense counsel lacked diligence or should have known of the exculpatory evidence, defense counsel must be aware of the potentially exculpatory nature of the evidence and its existence.") (internal citations omitted).

Some states, like Tennessee, couch the obligation in terms of whether the exculpatory nature of the evidence is "obvious," at which point there is no diligence requirement. *See State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995) ("The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not."). Similarly, other states rely on a test of "equal access." *See, e.g.*, *Commonwealth v. Bagnall*, 235 A.3d 1075, 1091 (Pa. 2020) (affirming that "no *Brady* violation occurs where the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence.'") (quoting *Commonwealth v. Morris*, 822 A.2d 684, 696 (Pa. 2003);[2] *Taylor v. Commonwealth*,

[2] Notably, in the time between Pennsylvania announcing this rule in *Morris* and reaffirming it in *Bagnall*, the Third Circuit renounced the diligence requirement after this Court's opinion in *Banks*. *See infra* at 16.

611 S.W.3d 730, 738 (Ky. 2020) (no *Brady* violation for "public information . . . "[that] could have been obtained by the defense."); *Geralds v. State*, 111 So. 3d 778, 789 (Fla. 2010) (finding no suppression where evidence is "equally available" to both parties).

B. Jurisdictions that have Rejected the Defense Diligence Requirement

Other jurisdictions have directly rejected any defense-diligence requirement, largely due to the fact that this Court has never actually announced one. Often, non-diligence jurisdictions find that this Court has itself *discouraged* this requirement. Among the federal circuits, the Third, Sixth, Ninth, Tenth, and D.C. Circuits have rejected the diligence standard.

This Court's opinion in *Banks* especially altered the trajectory of many courts evaluating a purported due diligence requirement. *Banks*' warning against rules permitting prosecutors to hide favorable material and making defense counsel seek it encouraged those courts to shift away from a diligence requirement. The Third Circuit vigorously rejected the defense diligence requirement in *Dennis v. Sec'y, Pa. Dep't of Corr.* because "the United States Supreme Court has never recognized an affirmative due diligence duty of defense counsel as part of *Brady*, let alone an exception to the mandate of *Brady* as this would clearly be." 834 F.3d 263, 290 (3d Cir. 2016). Relying on this Court's opinion in *Banks*, the Third Circuit explained: "To the contrary, defense counsel is entitled to assume that prosecutors have 'discharged their official duties.'" *Id.* (quoting *Banks*, 540 U.S. at 696). The Third Circuit described a prosecutor's *Brady* obligation as "absolute" and observed that "*Brady*'s mandate and its progeny are entirely focused on prosecutorial disclosure, not defense

counsel's diligence." *Id.* The court found any reversal of this burden to contradict this Court's *Brady* jurisprudence:

> Construing *Brady* in a manner that encourages disclosure reflects the Court's concern with prosecutorial advantage and prevents shifting the burden onto defense counsel to defend his actions. Requiring an undefined quantum of diligence on the part of defense counsel, however, would enable precisely that result—it would dilute *Brady*'s equalizing impact on prosecutorial advantage by shifting the burden to satisfy the claim onto defense counsel.

Id.

The Third Circuit also noted that in the *Brady* line of cases, this Court often imposes a burden on the government not seen "in the traditional adversarial system." *Id.*; *see also id.* ("'[b]y requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model' because the prosecutor is not tasked simply with winning a case, but ensuring justice." (quoting *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985)); *Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case."). Ultimately, the Third Circuit opined that "[t]he imposition of an affirmative due diligence requirement on defense counsel would erode the prosecutor's obligation under, and the basis for, *Brady* itself." *Dennis*, 834 F.3d at 290. *See also Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 279 (3d Cir. 2021) ("While we had previously suggested that defendants had to search for exculpatory evidence themselves, *Dennis* made clear that a defendant can reasonably expect—and is entitled to presume—that the

government fulfilled its *Brady* obligations because the prosecution's duty to disclose is absolute and in no way hinges on efforts by the defense.").

As the *Dennis* Court was reviewing a *Brady* claim in the context of AEDPA, the Third Circuit went so far as to find that the imposition of any diligence standard on the defense would be tantamount to adding a fourth prong to *Brady*, which would be contrary to clearly established federal law. *But see LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1268 (11th Cir. 2005) (one prong of the *Brady* test requires the defense to show "the defendant did not possess the evidence and could not have obtained it with reasonable diligence").

The Sixth Circuit had a similar reversal after *Banks*. In *United States v. Tavera*, the Sixth Circuit stated: "Prior to *Banks*, some courts, including the Sixth Circuit, . . . were avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule. But the clear holding in *Banks* should have ended that practice." 719 F.3d 705, 712 (6th Cir. 2013). It described the flaws in enforcing a diligence requirement: "If the prosecution and the dissent are right, we must punish the client who is in jail for his lawyer's failure to carry out a duty no one knew the lawyer had. The *Banks* case makes it clear that the client does not lose the benefit of *Brady* when the lawyer fails to 'detect' the favorable information." *Id.* Instead, it found, "[t]he *Brady* rule imposes an independent duty to act on the government, like the duty to notify the defendant of the charges against him." *Id.*

Then in 2014, despite contrary circuit precedent, the Ninth Circuit announced that the prosecution has an "obligation to produce that which *Brady* and *Giglio*

require him to produce" and that a "requirement of due diligence would flip that obligation, and enable a prosecutor to excuse his failure by arguing that defense counsel could have found the information himself." *Amado v. Gonzalez*, 758 F.3d 1119, 1136 (9th Cir. 2014). It continued: "No *Brady* case discusses such a requirement, and none should be imposed." *Id.* at 1137.

The Tenth Circuit has always rejected the defense diligence requirement. It has acknowledged that "[w]hether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation." *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). However, this is because the failure to disclose evidence the defense already has would be cumulative and thus not material. *Id.* Ultimately, however, "the prosecutions' obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge", and "[t]he only relevant inquiry is whether the information was 'exculpatory.'" *Id.*

Finally, the D.C. Circuit places great emphasis on the defense reliance on the prosecution's duty and accepts diligence once the defense has made its *Brady* request of the government. *See In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 897 (D.C. Cir. 1999) (quoting *Strickler*, 527 U.S. at 275 n.12). For example, it declined to hold defense counsel at fault for not subpoenaing police officers who had *Brady* information regarding witness deals because "defense counsel was no more required to subpoena the officers to learn of their agreements than she was to subpoena the prosecutor to learn of hers. The appropriate way for the defense counsel

to obtain such information was to make a *Brady* request of the prosecutor, just as she did." *Id.*

A significant number of states have rejected the defense diligence requirement for similar reasons. *See, e.g.*, *State v. Wayerski*, 922 N.W.2d 468, 478 (Wis. 2019) ("We renounce and reject judicially created limitations on the second *Brady* component that find evidence is suppressed only where: (1) the evidence was in the State's 'exclusive possession and control'; (2) trial counsel could not have obtained the evidence through the exercise of 'reasonable diligence'; or (3) it was an 'intolerable burden' for trial counsel to obtain the evidence."); *State v. Davila*, 357 P.3d 636, 645 (Wash. 2015) (defense's knowledge of a witness did not "waive the defendant's constitutional *Brady* protections); *State v. Taliaferro*, No. A-3056-12T4, 2014 WL 6836150, at *3 (N.J. Super. Ct. Dec. 5, 2014) ("The defendant need not demonstrate that he acted with diligence to discover what the prosecutor should have disclosed and evidence useful to impeach a State's witness is not discounted."); *People v. Bueno*, 409 P.3d 320, 328 (Colo. 2018) ("The Supreme Court has at least rejected arguments similar to the People's assertion that the defense must make reasonable efforts to locate *Brady* materials."); *State v. Durant*, 844 S.E.2d 49, 54 (S.C. 2020) ("However, we believe the better approach is to hold the State responsible for fulfilling its prosecutorial duties, including the duty to disclose under *Brady*.").

Like the Third Circuit, the Supreme Court of Connecticut relied on *Bagley* and its recognition that "an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense

that the evidence does not exist", 473 U.S. at 682, to find that prosecutors had represented the undisclosed information did not exist, so they could not later claim certain documents were public records that the defendant could have discovered through due diligence. *State v. Floyd*, 756 A.2d 799, 824 (Conn. 2000).

The Court of Criminal Appeals in Arizona and the Michigan Supreme Court align with the Third Circuit in holding that courts cannot impose additional prongs outside those announced by this Court in *Strickler*. *See People v. Chenault*, 845 N.W.2d 731, 738-39 (Mich. 2014) ("We hold that the controlling test is that articulated by the Supreme Court in *Strickler*, no less and no more: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material."); *State v. Finck*, No. 2 CA-CR 2012-0186, 2013 WL 6327649, at *7 (Ariz. Ct. App. Dec. 5, 2013) (relying on *Strickler* to explain that the duty to disclose impeachment and exculpatory evidence is "applicable even though there has been no request by the accused").

And, like the Sixth Circuit, the Rhode Island Supreme Court had a similar shift in precedent following *Banks*. As the concurrence in *Tempest v. State*, 141 A.3d 677 (R.I. 2016), explains, the court initially imposed a due diligence requirement in *State v. Clark*, 754 A.2d 73, 78 n.1 (R.I. 2000), but *Banks* undermined that rationale and the Rhode Island Supreme Court has "never articulated" such a requirement since *Clark*. *Tempest*, 141 A.3d at 696 n.12 (Suttell, J., concurring).

C. Jurisdictions that inconsistently apply the defense diligence requirement

Even within jurisdictions, the application of a diligence standard can vary. Given the lack of clarity on this issue, some jurisdictions vacillate between analyzing the defense's diligence and finding it inapplicable, in a way that appears outcome-determinative. Where courts find the government violated *Brady*, the actions of the defense become less relevant to the courts' analyses. Where the courts deny relief, *Brady* claims are easily dismissed by placing blame on the defendant and his counsel. As a result, both the prosecutors and the defense are left without clear guidance as to their constitutional obligations, and repeated violations are foreseeable.

Florida itself, where Mr. Horn's case originates, has relied on conflicting messages about the due diligence requirement. In *Horn*, the First District Court of Appeal found that because the report indicated it was a "summary" and indicated D.M.'s family's past involvement with DCF, counsel was on notice and could have requested further records himself. *Horn v. State*, 303 So. 3d 1285, 1287-88 (Fla. 1st DCA 2020). Therefore, the court concluded, the State did not violate *Brady*. *Id.* The Florida Supreme Court has made similar findings in other cases. *See e.g.*, *Geralds v. State*, 111 So. 3d 778, 789 (Fla. 2010) (finding no suppression where evidence is "equally available" to both parties); *Way v. State*, 760 So. 2d 903, 911 (Fla. 2000) ("this Court has broadly stated that evidence was not 'suppressed' where it was equally available to the State and the defense."); *Occhicone v. State*, 768 So. 2d 1037, 1041-42 (Fla. 2000) (no *Brady* violation where State failed to disclose favorable witness

notes because the defense knew who the witnesses were and could have obtained this information from them directly).

Yet, the Florida Supreme Court affirmatively denounced the diligence requirement after *Strickler*. *Deren v. State*, 985 So. 2d 1087, 1088 (Fla. 2008) (rejecting the Court of Appeals use of a diligence prong). Other Florida courts have followed suit. Thus, it is entirely unclear to the lower courts and to practitioners in the State whether the due diligence requirement applies. *See, e.g.*, *Archer v. State*, 934 So. 2d 1187, 1203 (Fla. 2006) ("a defendant is not required to compel production of favorable evidence which is material"); *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003) ("*Brady* does not require that the defendant compel production of exculpatory material, or even that a defendant remind the State of its obligations."); *Hoffman v. State*, 800 So. 2d 174, 179 (Fla. 2001) ("The State argued that the defense should have inquired about the results of the report after learning it existed. The court here says that is not the case, and the burden was on the State to disclose the results of the report to the defense as it was exculpatory."); *Ward v. State*, 984 So. 2d 650, 654 (Fla. 1st DCA 2008). (explaining that because "the burden to disclose all duly requested exculpatory information rests solely with the State", the defense has "no duty to exercise due diligence to review *Brady* material until the State disclose[s] its existence.").

Other jurisdictions have been similarly inconsistent. *Compare State v. Williams*, 896 A.2d 973, 992 (Md. 2006) (relying on *Banks* to find "[a] defendant's duty to investigate simply does not relieve the State of its duty to disclose exculpatory

evidence under *Brady*"), *with Yearby v. State*, 997 A.2d 144, 153 (Md. 2010) (explaining "under *Brady* and its progeny, the defense is not relieved of its 'obligation to investigate the case and prepare for trial" and thus "'offers a defendant no relief when the defendant knew or should have known facts permitting him or her to take advantage of the evidence in question or when a reasonable defendant would have found the evidence.'") (quoting *Ware v. State*, 702 A.2d 699, 708 (Md. 1997)).

Even the Ninth Circuit, in excoriating the diligence requirement in *Amado*, acknowledged cases where it found otherwise and made a weak attempt at distinguishing those cases because the defendant "ignored" what was given to him. *See Amado*, 758 F.3d at 1137.

Still other courts have not yet made up their minds. In Oregon, the Court of Appeals has noted that this question has not been decided in the state, but that the rule imposing the due diligence requirement is "far from universal or uniform." *Fisher v. Angelozzi*, 398 P.3d 367, 374 (Or. Ct. App. 2017); *see also Eklof v. Steward*, 385 P.3d 1074, 1085 n.9 (Or. 2016) (recognizing "there may be viable arguments in this type of case that failure to disclose information to defense attorneys does not constitute a *Brady* violation because the criminal defendant or defense counsel knew the information from other sources."). Similarly, in Maine, the Supreme Judicial Court has cited to federal circuits imposing a diligence requirement but has itself left the question open. *See State v. Nisbet*, 191 A.3d 359, 369 n.7 (Me. 2018) (noting only that there is federal case law imposing a diligence requirement, but not reaching the question in this case or suggesting any state law on the issue).

Throughout these decisions, this nationwide inconsistency leaves both prosecutors and defense counsel uncertain about their constitutional obligations. Defense counsel cannot know whether to continue compelling the release of evidence when they do not even know if it exists, or if they can rely on the State's assertions that it does not and that the State has disclosed all favorable material. And, prosecutors cannot accurately determine whether they must disclose evidence or if they are relieved of their duties if their belief is that defense counsel may find it anyway. As the Third Circuit acknowledged in deciding not to impose a defense diligence requirement, this leads to "subjective speculation" that may be "inaccurate." *See Dennis*, 834 F.3d at 293. This Court should grant certiorari and offer the necessary clarity.

D. This Court Should Take This Opportunity to Affirmatively Rule that there is No Diligence Requirement in the *Brady* Analysis

This Court should take this opportunity to affirmatively rule that there is no diligence requirement in the *Brady* analysis. Importantly, the due diligence requirement does not stem from this Court's *Strickler* test laying out the elements of a *Brady* claim but instead from references in *United States v. Agurs*, 427 U.S. 97 (1976), and *Kyles v. Whitley*, 514 U.S. 419 (1995). In *Agurs*, this Court referred to *Brady* evidence as "information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103. Later, this Court's discussion of materiality in *Kyles* described "an item of favorable evidence unknown to the defense." Based on this reference to evidence "unknown to the defense", the lower courts now imposing the defense diligence requirement extend *Brady*'s mandate only to that evidence the

defense cannot otherwise obtain. *See, e.g.*, *West v. Johnson*, 92 F.3d 1385, 1399 (5th Cir. 1996); *Pena v. State*, 353 S.W.3d 797, 810 (Tex. Crim. App. 2011).

In contrast, the courts that reject the defense-diligence requirement have in turn rejected this interpretation of the *Kyles* language. The Michigan Supreme Court directly addressed this in ruling against a diligence requirement, explaining: "The [*Agurs*] phrase "unknown to the defense" is best understood as a general description of what constitutes *Brady* evidence, instead of the imposition of a new hurdle for defendants. We see no additional meaning to the phrase given its context." *People v. Chenault*, 845 N.W.2d 731, 737 (Mich. 2014). To the contrary, it instead pointed out that if this Court "wanted to articulate a diligence requirement, it would do so more directly. It has not." *Id.* at 738. It instead "[did] not believe the goals of *Brady* counsel in favor of adopting a diligence standard", and that "[t]he *Brady* rule is aimed at defining an important prosecutorial duty; it is not a tool to ensure competent defense counsel." *Id. See also Durant*, 844 S.E.2d at 54 ("This rule is sound, as faulting defense counsel for failing to discover material information about the State's own witnesses 'breathes uncertainty into an area that should be certain and sure' because 'subjective speculation as to defense counsel's knowledge or access may be inaccurate.'") (quoting *Dennis*, 834 F.3d at 293).

In changing its rule from imposing a diligence standard to rejecting it in *Dennis*, the Third Circuit also relied on this Court's jurisprudence and arrived at the opposite conclusion of the defense-diligence jurisdictions. It explained that the defense must be permitted to rely on the assertions of the prosecutor, stating: "In

Strickler, [this Court] reasoned that because counsel was entitled to rely on the prosecutor fulfilling its *Brady* obligation, and had no reason for believing it had failed to comply, the failure to raise the issue earlier in habeas proceedings was justified." 834 F.3d at 291; *see also id.* ("Similarly here, the prosecutor's duty is clear. Dennis's counsel was entitled to rely on the prosecutor's duty to turn over exculpatory evidence."). Accordingly, it described an "[assessment] whether [defense counsel] could or should have discovered the receipt" as "beside the point." *Id.*

In affirmatively ruling against the defense diligence requirement, the *Dennis* court looked to this Court's cases to conclude that "the concept of 'due diligence' plays no role in the *Brady* analysis." *Id.* at 291. It continued: "To the contrary, the focus of the Supreme Court has been, and it must always be, on whether the government has unfairly 'suppressed' the evidence in question in derogation of its duty of disclosure." *Id.* at 291-92.

The Third Circuit had several further concerns regarding a defense-diligence requirement. It held that prosecutors "must disclose all favorable evidence" unless it is completely "aware that defense counsel already has the material in its possession", and that "[a]ny other rule presents too slippery a slope." *Id.* at 292; *see also Durant*, 844 S.E. 2d at 55 (South Carolina Supreme Court agrees with the Third Circuit that there should be no diligence inquiry into the defense and that "'[a]ny other rule presents too slippery a slope.'") (quoting *Dennis*, 834 F.3d at 292). It feared that "[s]ubjective speculation as to defense counsel's knowledge or access may be inaccurate, and it breathes uncertainty into an area that should be certain and sure."

Id. at 293. It also discouraged adding a fourth prong to the *Brady* test "contrary to the Supreme Court's directive that we are not to do so." *Id.* at 293. *See also id.* ("Adding due diligence, whether framed as an affirmative requirement of defense counsel or as an exception from the prosecutor's duty, to the well-established three-pronged *Brady* inquiry would similarly be an unreasonable application of, and contrary to, *Brady* and its progeny.").

Finally, conclusively denying a defense diligence requirement does not contradict defense counsel's own obligation of providing of effective representation, as some courts have suggested. These are two separate constitutional duties owed to criminal defendants, derived from two separate amendments. Under the Sixth Amendment, counsel must provide effective representation, including the duty to conduct a reasonable investigation. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003). And, under the Fourteenth Amendment due process clause, the State must disclose favorable exculpatory and impeachment evidence. *Brady*, 373 U.S. at 86. Both conditions must be met for a criminal defendant to have a fair trial.

Thus, numerous compelling justifications exist for this Court to reject the defense diligence requirement in the context of *Brady* analyses. This Court should take this opportunity to do expressly what it has silently done throughout its *Brady* jurisprudence: impose an obligation on prosecutors to disclose favorable evidence without requiring an inquiry into the diligence of the defense.

Mr. Horn's case is an ideal vehicle to make this ruling because it shows the many pitfalls in imposing such a requirement. After Mr. Horn's request for *Brady*

evidence, the State provided the CPT report and some police reports but did not specify that there was a separate file with investigation notes maintained by DCF. It did not list any DCF employees, including CPI Richardson, in its witness disclosure list. *See* PCR. 234-46. When trial counsel requested discovery under 3.220, the State responded that it had provided everything. When trial counsel made a specific request for the disclosure of child abuse records, the State provided only documents from CPT. While trial counsel only sought disclosure of the reports and records from the specific CPT witnesses listed in the State's discovery response, that would have put the State directly on notice that trial counsel was unaware of the separate DCF investigation. The only reference to DCF or CPI was in the brief introduction to the CPT report, where it mentioned that CPI White responded to the hotline call and CPI Richardson was assigned and present for the CPT interview. PCR. 293, 296. However, this brief reference in the CPT report was insufficient. *See Jackson v. Wainwright*, 390 F.2d 288, 298 (5th Cir. 1968) (where the State merely provided the witness' name and address but not the substance of her exculpatory information, the "prosecution's partially truthful disclosure amounted to affirmative misrepresentation"). The brief reference to CPI Richardson in the CPT report did not make clear that CPI in any way differed from CPT. And the omission of CPI Richardson from the witness disclosure list indicated that she did not have much of a role in this case.

Imposing a diligence standard on defense counsel given these circumstances would condone the State's gamesmanship, after it made repeated assertions that it had disclosed all the necessary information, both in terms of witnesses and

documents, and allowed unexplained abbreviations to cover the true nature of different agencies' involvement in the case. Indeed, during Mr. Horn's federal habeas proceedings, the district court found that trial counsel had not erred in failing to seek additional records based on the information he had. *See Horn v. Sec'y*, 4:15-cv-101-RH, Mar. 26, 2018 Tr. at 165 (describing it as "a stretch" that trial counsel should have done any further investigation beyond the CPT report). Trial counsel's diligence here had no constitutional bearing on the State's obligation to disclose these records.

II. There is a Split among the Federal Circuits and State Courts Regarding whether Evidence Must be Admissible to be Material under *Brady*

There is a recognized circuit split regarding whether a state's nondisclosure of exculpatory, yet inadmissible, evidence constitutes a *Brady* violation. This Court's decision in *Wood v. Bartholomew*, 516 U.S. 1 (1995), addressed the issue of inadmissible evidence, but instead of providing clarity for the lower courts, further division has spooled out of the courts' interpretations. The courts have grappled with if and how admissibility should be analyzed under the materiality prong of *Brady*. The lower courts have documented their lack of clarity. *See, e.g.*, *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999) ("The Fifth Circuit has not clearly specified how to deal with Brady claims about inadmissible evidence—a matter of some confusion in federal courts"). This Court should provide guidance and resolve the fractures among the jurisdictions on this issue.

A. Jurisdictions that Hinge Materiality on Admissibility

The majority of the courts requiring admissibility for *Brady* eligibility buttress their strict approaches by interpreting the dicta from *Wood* as the bright-line rule controlling inadmissible evidence in *Brady* claims. *Wood* described the withheld results of a polygraph examination as "not 'evidence' at all" 516 U.S. at 6. This Court's analysis did not end there but continued on to hold that the materiality posited by the lower court could not succeed because it was "based on mere speculation." *Id.* However, the jurisdictions that treat inadmissible evidence as per se exclusions of *Brady*, interpret the dicta of *Wood* as controlling.

One federal circuit and a few states find inadmissibility to be dispositive when evaluating the *Brady* materiality prong. The Fourth Circuit interprets *Wood* to mean that inadmissible evidence is "immaterial" for *Brady* purposes "as a matter of law." *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996).

Likewise, ten state jurisdictions end their materiality inquiry once the evidence is deemed inadmissible. *See State v. Solether*, 2008 WL 4278210, at *1 (Ohio Ct. App. 2008) ("[T]he state did not fail to provide appellant with 'material' evidence as set forth in Brady v. Maryland because the victim's polygraph examination results were inadmissible at trial"); *Pena v. State*, 353 S.W.3d 797, 814 (Tex. Crim. App. 2011) ("The State does not have a duty to disclose favorable, material evidence if it would be inadmissible in court."); *State v. Radke*, 821 N.W.2d 316, 326 (Minn. 2012) ("Radke cannot demonstrate prejudice because the evidence in question was not admissible."); *Ferguson v. State*, 325 S.W.3d 400, 412 (Mo. Ct. App. 2010) ("When the undisclosed

material in question is inadmissible at trial, a Brady violation cannot occur in light of the fact that the material in question could have had no direct effect on the outcome of trial"); *State v. Allen*, 731 S.E.2d 510, 522 n.7 (N.C. Ct. App. 2012) (results of the polygraph examination could not be considered "material" evidence for *Brady* purposes because it was not admissible); *Wilkins v. State*, 190 P.3d 957, 972–73 (Kan. 2008) (defendant's *Brady* claim breaks down because polygraph results are inadmissible in Kansas); *Hunter v. State*, 2017 WL 3048474, at *5 (Md. Ct. Spec. App. July 19, 2017) ("This Court has held that 'to be material, the evidence must be admissible, useful to the defense, and capable of clearing or tending to clear the accused of guilt or of substantially affecting his possible punishment.'") (quoting *Tobias v. State*, 37 Md. App. 605, 628 (Md. Ct. Spec. App. 1977)); *State v. Durant*, 844 S.E.2d 49, 55 (S.C. 2020) (conducting materiality analysis on only the evidence that was deemed likely admissible); *People v. Howell*, No. 323671, 2017 WL 2989061, at *8 (Mich. Ct. App. July 13, 2017) ("One of the initial requirements for demonstrating a Brady violation is that the proffered evidence was admissible at trial; otherwise it would not constitute evidence."); *State v. Brown*, 335 N.W.2d 542, 546 (Neb. 1983) (*Brady* does not focus on the defendant's ability to prepare for trial because *Brady* is not a rule for discovery).

B. Jurisdictions that Factor Admissibility into the Materiality Analysis

Conversely, the majority of jurisdictions have ruled that inadmissible evidence may be material for *Brady* purposes. These jurisdictions holistically consider the analysis conducted in *Wood* within the context of *Brady* and its progeny:

> Given the policy underlying Brady, we think it plain that evidence itself inadmissible could be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it. *Wood v. Bartholomew*, 516 U.S. 1, 6–8, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995), implicitly assumes this is so.

Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) (en banc).

Despite converging on the permissive end of the spectrum, these courts differ on how they incorporate admissibility into the materiality analysis.

A few courts have simply acknowledged that admissibility is not determinative in materiality analysis. *See Matter of Grand Jury Investigation*, 152 N.E.3d 65, 78 (Mass. 2020) ("Moreover, the ultimate admissibility of the information is not determinative of the prosecutor's Brady obligation to disclose it."); *Mazzan v. Warden, Ely State Prison*, 993 P.2d 25, 37 (Nev. 2000) ("[d]iscovery in a criminal case is not limited to investigative leads or reports that are admissible in evidence.") (quoting *Jimenez v. State*, 918 P.2d 687, 693 (Nev. 1996)). In the same vein, New Jersey's Supreme Court merely lists admissibility as a factor to consider when deciding materiality. *State v. Brown*, 201 A.3d 77, 90 (N.J. 2019).

Meanwhile, the Eight Circuit, the Tenth Circuit, the Supreme Court of California, and the Supreme Court of New Mexico derive their standard from *Wood*'s conclusion that proving the materiality of inadmissible evidence could not be based on "mere speculation." *See Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998) ("[T]he district court's attempt '[t]o get around this problem' is 'based on mere speculation.'"); *In re Miranda*, 182 P.3d 513, 539 (Cal. 2008) ("*Wood* was not based on a per se rejection of inadmissible evidence as a basis for a *Brady* claim. *Wood* found

the evidence not material because, even based on the assumption that this inadmissible evidence might have led respondent's counsel to conduct additional discovery leading to admissible evidence, the evidence's influence on the outcome of the case was speculative."); *State v. Worley*, 476 P.3d 1212, 1221 (N.M. 2020) ("For Brady purposes, exculpatory evidence cannot be purely speculative") (quoting *Case v. Hatch*, 183 P.3d 905, 920 (N.M. 2008)); *United States v. Fleming*, 19 F.3d 1325, 1331 (10th Cir. 1994) ("The mere possibility that evidence is exculpatory does not satisfy the constitutional materiality standard.").

The majority of jurisdictions interpret *Wood* to demand a more concrete standard. These courts hold that inadmissible evidence may qualify as material evidence under *Brady* if it leads to material, admissible evidence. *See* App. 31 (Table 2: Jurisdictions Allowing Inadmissible Evidence as *Brady* Material if it leads to Admissible Evidence).

C. Jurisdictions that Reject Distinguishing between Admissible and Inadmissible Evidence

The Fifth Circuit hewed to its pre-*Wood* principles without engaging with *Wood*. *Felder*, 180 F.3d at 212 n.7 (5th Cir. 1999). The materiality standard is derived from *United States v. Bagley*, which asks if there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. 667, 682 (1985). This analysis applies the same standard to admissible and inadmissible evidence alike. The Seventh Circuit and the states of Alabama, Arkansas, Kentucky, Mississippi, Montana, Nevada, Oregon, Pennsylvania, Tennessee, and Virginia also utilize this materiality standard. *See,*

e.g., *United States v. Lee*, 88 F. App'x 682, 685 (5th Cir. 2004) ("'[I]nadmissible evidence may be material under Brady.' The key is 'whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different.'") (internal citations omitted); *United States v. Silva*, 71 F.3d 667, 670 (7th Cir. 1995) ("evidence that would not have been admissible at trial is immaterial because it could not have affected the trial's outcome"); *see also* App. 33 (Table 3: State Jurisdictions that do not Distinguish between Admissible and Inadmissible Evidence).

Previously, the Third Circuit had ruled that inadmissible evidence may be material for *Brady* purposes if the information led to the discovery of admissible, material evidence. *See Maynard v. Gov't of Virgin Islands*, 392 F. App'x 105, 115-16 (3d Cir. 2010); *Johnson v. Folino*, 705 F.3d 117, 129–30 (3d Cir. 2013). However, in *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 307 (3d Cir. 2016), the Third Circuit stated that the Pennsylvania Supreme Court had "grafted an admissibility requirement onto the traditional three-prong *Brady* inquiry." The Third Circuit not only disagreed with the interpretation of *Wood*, but held that requiring admissibility as a dispositive factor in *Brady* analysis was an unreasonable application of constitutional law.

D. Jurisdictions that Inconsistently Interpret the Materiality Requirement

In addition to the inter-jurisdictional split, several jurisdictions have intra-jurisdictional splits where courts have been inconsistent in their approach to inadmissible evidence.

In this case, the First District Court of Appeal denied Mr. Horn's *Brady* claims because the reports would not have been admissible evidence. In contrast, the Florida's Supreme Court has repeatedly held that "withheld information, even if not itself admissible, can be material under *Brady* if its disclosure would lead to admissible substantive or impeachment evidence." *Rogers v. State*, 782 So.2d 373, 383 n.11 (2001); *see also Floyd v. State*, 902 So. 2d 775, 781–82 (Fla. 2005); *Hurst v. State*, 18 So. 3d 975, 1000 (Fla. 2009); *Davis v. State*, 136 So. 3d 1169, 1185 (Fla. 2014).

Similarly, the Court of Appeals of Wisconsin denied a *Brady* claim because the "evidence of the deferred prosecution agreement and the ordinance violations was not material because it was not admissible and, therefore, would not have affected the outcome of the trial." *State v. Chu*, 643 N.W.2d 878, 886 (Wis. Ct. App. 2002). However, the Supreme Court of Wisconsin interpreted ethics rule SCR 20:3(f)(1) to be consistent with the requirements of *Brady* and its progeny. The rule provides that a prosecutor must make a timely disclosure of all evidence or information, regardless of the admissibility of the exculpatory information. *In re Riek*, 834 N.W.2d 384, 390 (Wis. 2013). In *Harrell v. State*, 962 S.W.2d 325 (Ark. 1998), Arkansas Supreme Court held that no prejudice could be proven where the evidence cited by an appellant in an alleged *Brady* violation would not have been admissible to impeach the credibility of a witness for the State.

The Fifth Circuit, Ninth Circuit, and New York have explicitly noted the inconsistent or ambiguous rulings in their jurisdictions. Although acknowledging lack of clarity, the Ninth Circuit and New York have avoided hammering out a clear

rule. *See Felder*, 180 F.3d at 212 (5th Cir. 1999) ("The Fifth Circuit has not clearly specified how to deal with Brady claims about inadmissible evidence"); *Paradis v. Arave*, 240 F.3d 1169, 1179 (9th Cir. 2001) ("It appears that our Circuit's law on this issue is not entirely consistent . . . The instant case does not require resolution of that possible conflict."); *People v. Garrett*, 18 N.E.3d 722, 733 (N.Y. 2014) (stating that, "[t]his Court has not squarely addressed whether, as some federal courts have held, inadmissible evidence may be considered 'material' under Brady so long as it 'could lead to admissible evidence,'" but avoiding engagement because the defendant had failed to show what admissible evidence the information would have led to) (internal citations omitted).

E. This Court should take this Opportunity to Affirmatively Rule that there is No Admissibility Requirement in the *Brady* Analysis

This Court should affirmatively rule that there is no admissibility requirement in the *Brady* analysis given the confusion among the courts and the importance of the issue. This issue bears on the defendant's trial and pre-trial due process rights. As explicated by the Third Circuit's opinion in *Dennis*, the admissibility prong required by several courts contravenes the principles set forth by *Brady* and its progeny. The current circuit split results in arbitrary violations of defendants' due process rights.

As examined in *Dennis*, the way this Court assesses materiality in *Brady* and its progeny, in particular, *Kyles v. Whitley*, 514 U.S. 419 (1995*)*, *Strickler v. Greene*, 527 U.S. 263 (1999), and *Cone v. Bell*, 556 U.S. 449 (2009), demonstrates that *Brady* intends for the defendant to have a right to inadmissible exculpatory evidence.

Dennis, 834 F.3d at 309. In each of those cases, this Court has considered evidence in spite of its ambiguous admissibility status. *Dennis*, 834 F.3d at 309. ("When the Court has reviewed applications of the 'reasonable probability' standard, it has weighed the strength of the suppressed evidence against the strength of disclosed evidence to evaluate its impact, not critiqued the character of the evidence itself.") (citing *Strickler*, 527 U.S. at 290-94). The *Brady* line of cases focuses on whether information has "been disclosed to the defense." *Dennis*, 834 F.3d at 309. Appending an admissibility requirement "improperly shifts the focus." *Id*.

Moreover, in alignment with this cohesive interpretation of *Brady*, the majority of the federal circuits have interpreted *Brady* and its progeny, including *Wood*, to mean that inadmissible evidence can be material for the purposes of *Brady*. *Id*. at 310. This Court should take this opportunity to clarify for all jurisdictions that there is no admissibility requirement in the *Brady* analysis.

CONCLUSION

For the reasons stated above, this Court should grant the writ.

Respectfully submitted,

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MARCH 2021