No. 21-1428

In the Supreme Court of the United States

DONALD L. BLANKENSHIP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in determining that petitioner was not entitled to vacatur of his conviction under *Brady* v. *Maryland*, 373 U.S. 83 (1963), on the ground that he had not satisfied the requirement to show a reasonable probability that the pretrial disclosure of additional materials would have affected the outcome of his case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rule:

In the Supreme Court of the United States

No. 21-1428

DONALD L. BLANKENSHIP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 19 F.4th 685. A prior decision of the court of appeals is reported at 846 F.3d 663. The opinion of the district court (Pet. App. 22-66) is not published in the Federal Supplement but is available at 2020 WL 247313.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2021. A petition for rehearing was denied on February 4, 2022 (Pet. App. 139). The petition for a writ of certiorari was filed on May 5, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of West Virginia,

petitioner was convicted on one count of conspiring to violate federal mine safety and health standards, in violation of 18 U.S.C. 371 and 30 U.S.C. 820(d). Pet. App. 23. The district court sentenced petitioner to one year of imprisonment, to be followed by one year of supervised release, and fined him $250,000. *Ibid.* The court of appeals affirmed, 846 F.3d 663, and this Court denied a petition for a writ of certiorari, 138 S. Ct. 315 (2017).

In 2018, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. 22. The district court denied the motion, *id.* at 22-66, and the court of appeals affirmed, *id.* at 1-21.

1. Petitioner was the Chairman and Chief Executive Officer of Massey Energy Company, which owned the Upper Big Branch coal mine in Montcoal, West Virginia. Pet. App. 2. In April 2010, the Upper Big Branch mine was the site of the deadliest coal mine disaster in decades, a coal-dust explosion that killed 29 miners. *Id.* at 2-3. In the 15 months before the explosion, the mine had "received the third-most safety citations of any mine in the United States" for violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* Pet. App. 3.

In 2015, a grand jury returned a superseding indictment charging petitioner with conspiring to defraud the United States and to willfully violate mine safety standards, in violation of 18 U.S.C. 371 and 30 U.S.C. 820(d), making false statements to the Securities and Exchange Commission, in violation of 18 U.S.C. 1001, and engaging in securities fraud, in violation of 15 U.S.C. 78ff. Pet. App. 23.

During a six-week jury trial, the government presented evidence that petitioner had willfully failed to address the safety problems at Upper Big Branch, "favoring

coal-mine production and profits over safety." Pet. App. 2; see *id.* at 4. The government called numerous miners who described widespread safety violations at the Upper Big Branch mine and testified that Massey's safety policies were often ignored or never communicated to miners at all. *Id.* at 5; Gov't C.A. Br. 7. The government also presented evidence that petitioner knew about the safety problems at Upper Big Branch because, among other things, he maintained close supervision of mine operations and staffing, Pet. App. 5, and received daily reports reflecting the many citations for safety violations at the mine, *id.* at 4.

The jury also heard from Massey employees that petitioner had fostered a "lax attitude toward safety by directing mine supervisors to focus on 'running coal' rather than complying with safety standards." Pet. App. 5. Bill Ross, a senior Massey safety official, testified that he had warned petitioner about the serious safety problems at Upper Big Branch and the company's other mines, including by expressing to petitioner his concern that the company "would rather get violations, including unwarrantable actions, than wait for approval" from the Mine Safety and Health Administration, thereby "show[ing] a lack of concern for both safety and the law." *Id.* at 4. Chris Blanchard, the executive manager at the Upper Big Branch mine, testified that petitioner constantly pressured him on profit and costs, rarely said anything about safety violations, and communicated to him that "safety violations were the cost of doing business the way [petitioner] wanted it done." *Id.* at 5. The jury also heard that Massey reduced the staff at Upper Big Branch less than two months before the accident—a decision petitioner would have needed to approve—despite prior warnings to

petitioner that the lack of adequate staff was a key factor in the high number of safety violations at the mine. *Ibid.*

Petitioner's defense at trial centered on the argument that the safety violations had not been willful. Pet. App. 5-6. Defense counsel acknowledged that petitioner had pushed his subordinates to increase coal production while keeping costs down, but nevertheless maintained that petitioner took safety seriously. *Id.* at 6. Defense counsel cross-examined Blanchard for nearly five days and Ross for nearly two days; the defense also introduced numerous internal corporate documents. *Ibid.*; Gov't. C.A. Br. 8. Despite listing a number of high-level Massey employees on the pretrial witness list, defense counsel did not call any witnesses. Pet. App. 6. In closing, defense counsel stated that although he had told the jury in his opening statement "that it might take us a while to put on the evidence that indicated that Massey did not want citations," counsel "didn't realize that we were going to do it with the Government's key witness." *Id.* at 17 (emphasis omitted).

The jury found petitioner guilty of conspiring to violate 30 U.S.C. 820(d) and acquitted him on the remaining charges. Judgment 1. The district court sentenced petitioner to one year of imprisonment, to be followed by one year of supervised release, as well as a $250,000 fine. Judgment 2-3, 6; see Pet. App. 6. The court of appeals affirmed, and this Court denied a petition for a writ of certiorari. Pet. App. 6.

2. After his conviction, petitioner continued to request evidence that he believed the government had improperly suppressed. Pet. App. 6-7. In response to petitioner's requests, the government provided petitioner with documents that it had not previously produced. *Id.* at 7.

Those documents included memoranda prepared by FBI and Department of Labor investigators summarizing their interviews of Ross, Blanchard, and five others who had been high-ranking Massey employees during the time period charged in the indictment (2008 to 2010): Mark Clemens, Massey's senior vice president of operations; Sabrina Duba, Massey's vice president of subsidiary accounting; Charlie Bearse, president of a Massey resource group; Stephanie Ojeda, Massey's in-house counsel; and Steve Sears, president of Massey Coal Sales, Pet. App. 7, 43-44, 106, 373, 380, 408. Clemens, Duba, Bearse, Ojeda, and Sears did not testify at trial, but petitioner had included four of them (all except Sears) on his pretrial witness list. *Id.* at 7.

The interview memoranda from the Massey employees included statements that petitioner asserts would have been favorable to his defense. Clemens stated that "'there was pressure at Massey to run coal, but not enough pressure to overlook safety' and that he had 'initiated a non-fatal days lost * * * audit' at [petitioner's] direction after MSHA found that not all accidents were being reported." Pet. App. 13; see Pet. 10-11. Duba assisted with the daily violation report that petitioner received and "stated that [petitioner] 'wanted to know' the identities of 'the repeat offenders.'" Pet. App. 13; see Pet. 11-12. Bearse admitted "that the mines he supervised 'receiv[ed] a lot of citations' but stated that '[t]he [i]ntent was always zero violations' and that 'he could make a list of safety things that he was involved with' and that 'the list would be half' as long without [petitioner's] involvement." Pet. App. 13 (brackets in original); see Pet. 11. Bearse also stated that Massey's staffing "'was the industry standard' and that while '[petitioner] was very aggressive and in your face,' 'safety

was implied.'" Pet. App. 13-14; see Pet. 11. Ojeda, whom petitioner's counsel interviewed a few weeks before her government interview, opined that petitioner "'seemed to think that Ross was legitimate' and that she thought he was 'looking for solutions from Ross.'" Pet. App. 14; see Pet. 12. And Sears opined that "'Massey's primary focus was safety' and that '[petitioner] [had] started a safety program . . . and pushed safety more than any other CEO in the industry.'" Pet. App. 13 (second set of brackets in original); see Pet. 11.

On May 30, 2018, the Office of Professional Responsibility found that the government had failed to disclose materials that should have been disclosed under the Department of Justice's internal discovery rules. Pet. App. 142-335. It made no finding as to whether a constitutional violation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), which addresses the Due Process Clause's requirements for the disclosure of potentially exculpatory evidence by the prosecution, had occurred. Pet. App. 146, 157-158, 274-275, 317-319, 333-334.

3. a. On April 18, 2018, petitioner moved to vacate his sentence under 28 U.S.C. 2255. Pet. App. 336-361. The magistrate judge recommended that the motion be granted. *Id.* at 67-138. On de novo review, the district court denied the motion, finding "no *Brady* violation resulting from prosecutorial failure to disclose the [interview memoranda] for these witnesses." *Id.* at 48; see *id.* at 22-66.

Although the district court viewed some of the information in the five interview memoranda as "favorable" to petitioner, it determined that it is "the exculpatory interview information contained in the [memoranda] or the *substance* of the [memoranda], that is really at issue for purposes of *Brady*, not the [memoranda]

documents." Pet. App. 43, 46-47. And it found that "[t]he actual substance was clearly available to [petitioner]." *Id.* at 47 (emphasis omitted).

The district court observed that "all of these people were current or past employees of Massey," Pet. App. 43, the "very company of which [petitioner] was CEO," *id.* at 44. It determined that petitioner "was actually in a better position than the United States to know what the testimony of these witnesses, relative to production, sales, safety and staffing, was likely to be." *Ibid.* It noted that "all but one of the witnesses were on [petitioner's] trial witness list," and found that petitioner's failure to call them "was an apparent tactical decision, rather than a constitutional deprivation." *Id.* at 45 (citation and internal quotation marks omitted). And it observed that "most of the favorable substance of these [memoranda] were brought out as evidence during the trial making the statements in the [memoranda] cumulative, at best." *Id.* at 48.

b. The court of appeals affirmed, rejecting petitioner's claim that the government violated *Brady* by failing to disclose the five employees' interview memoranda. Pet. App. 1-21.

"To be clear," the court of appeals emphasized, "the government's need to comply with its *Brady* obligations is not obviated by the defendant's lack of due diligence." Pet. App. 16. But it cautioned that a defendant cannot "be allowed to turn a willfully blind eye to available evidence and thus set up a *Brady* claim for a new trial." *Id.* at 17. And it found that here, petitioner "had the evidence before him and undoubtedly was aware of it, as he indicated his choice to use the very same employees as his own witnesses at trial." *Id.* at 16.

The court of appeals observed that "the information was in [petitioner's] own house and held by in-house witnesses close to him." Pet. App. 14. It also observed that "each of these five witnesses held high positions in Massey and, from those positions, interacted closely with [petitioner]." *Ibid.* And it further observed that "[t]he statements in these interview memoranda that might have been helpful to [petitioner's] defense generally pertained to things that [petitioner] himself had said or done with respect to safety" and that petitioner "knew what he had told them and asked them to do." *Id.* at 13-14.

The court of appeals additionally found that the district court had "appropriately noted the lack of materiality" because petitioner "was able to elicit most of the favorable substance of the statements * * * through the cross-examination of Ross and Blanchard and then decided, as a matter of strategy, not to call any witnesses to testify." Pet. App. 17. The court thus determined that "the suppression of the interview memoranda for * * * the five potential defense witnesses did not prejudice [petitioner]." *Ibid.*

ARGUMENT

Petitioner renews his claim (Pet. 25-35) that he is entitled to vacatur of his conviction under *Brady* v. *Maryland*, 373 U.S. 83 (1963), on the theory that his constitutional rights were violated by the nondisclosure of statements of five Massey employees who were not witnesses at the trial. The lower courts correctly rejected that claim, and to the extent that federal courts of appeals and state courts of last resort may disagree in their application of *Brady* to material that a defendant could have discovered with reasonable diligence, this case is not a suitable vehicle for addressing any such

disagreement. The court of appeals expressly rejected a due-diligence requirement, instead finding that petitioner could not carry his burden in asserting a *Brady* claim when he was "undoubtedly" aware of the undisclosed information. Pet. App. 16. And it found, in the alternative, that the undisclosed evidence was not material under *Brady* because petitioner elicited the substance of that evidence at trial. *Id.* at 17.

This Court has recently and repeatedly denied petitions for writs of certiorari asserting similar conflicts. See, *e.g.*, *Guidry* v. *Lumpkin*, 142 S. Ct. 1212 (2022) (No. 21-6374); *Walker* v. *United States*, 139 S. Ct. 1168 (2019) (No. 18-6336); *Yates* v. *United States*, 139 S. Ct. 1166 (2019) (No. 18-410); *Georgiou* v. *United States*, 577 U.S. 954 (2015) (No. 14-1535); *Rigas* v. *United States*, 562 U.S. 947 (2010) (No. 09-1456); *Cazares* v. *United States*, 552 U.S. 1056 (2007) (No. 06-10088); *Metz* v. *United States*, 527 U.S. 1039 (1999) (No. 98-6220); *Schledwitz* v. *United States*, 519 U.S. 948 (1996) (No. 95-2034). It should follow the same course here.

1. To establish a *Brady* claim, a defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the establishment of the defendant's guilt or innocence. *Brady*, 373 U.S. at 87. Evidence is material under *Brady* if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion)).

a. The court of appeals correctly determined that petitioner could not prevail on his *Brady* claim based on undisclosed interviews of Clemens, Duba, Bearse,

Ojeda, and Sears. The *Brady* rule is designed to ensure disclosure of "information which had been known to the prosecution but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976); see *Giles* v. *Maryland*, 386 U.S. 66, 96 (1967) (White, J., concurring in the judgment) ("[A]ny allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense.").

Here, the court of appeals found that petitioner was "'not entitled to the benefit of the *Brady* doctrine'" because petitioner "had the evidence before him and undoubtedly was aware of it." Pet. App. 15-16 (citation omitted). The court observed that the information was in petitioner's "own house" and held by witnesses "close to him." *Id.* at 14. "Indeed," the court emphasized, petitioner "listed four of the five individuals as potential witnesses to testify *on his behalf* in his pretrial witness list, surely knowing how they might help his case." *Ibid.*

Petitioner argues (Pet. 29) that knowledge of a witness's identity does not mean that a defendant has access to that witness's information, because potential witnesses may not be willing to speak with defense counsel. But petitioner does not assert that the Massey employees here refused to speak with the defense. Petitioner in fact interviewed both Ojeda and Ross (who testified for the government) before trial (see Pet. App. 405-406; C.A. App. 2118), and does not allege that he was prevented from interviewing any other potential witness before trial.

In any event, the court of appeals found that petitioner not only knew these witnesses' identities, but also knew the substance of the statements in the interview memoranda. As the court explained, "each of these five witnesses held high positions in Massey and, from those

positions, interacted closely with [petitioner]." Pet. App. 14. The statements in the interview memoranda "generally pertained to things that [petitioner] himself had said or done with respect to safety or to the employees' overall perception of the company's commitment to safety." *Id.* at 13. Accordingly, the court found that petitioner "undoubtedly was aware" of the information in their statements, because he "knew what he had told them and asked them to do, and undoubtedly he also had a sense of their views about the company's approach to safety." *Id.* at 14, 16. And petitioner has never directly asserted that he was not aware of the information in the memoranda.[1]

Accordingly, the court of appeals correctly determined that petitioner could not prevail on his *Brady* claim. Pet. App. 12-17; see *United States* v. *Paulino*, 445 F.3d 211, 227 (2d Cir.) (finding no *Brady* violation where the government failed to disclose statements made by counsel for another defendant because the statements contained only "information already known in substance to the defense"), cert. denied, 549 U.S. 980 (2006); *Allen* v. *Lee*, 366 F.3d 319, 325 (4th Cir.) (en banc) (per curiam) (finding no *Brady* violation where the defendant had "personal knowledge" of the

[1] Petitioner further argues (Pet. 31-32) that even if he were aware of the substance of the memoranda, the "very existence of the memoranda" is independently significant under *Brady* because "they indicate to defense counsel what the witness will likely say if called to the stand" and "can assist in the presentation of a witness' testimony." But that would mean that any nondisclosure of witness interview memoranda would violate *Brady*, irrespective of a defendant's own knowledge of the information contained therein (or, potentially, access to equivalent information). Petitioner identifies no court of appeals that has read *Brady* to impose such a high obligation.

information contained in undisclosed jail records), cert. denied, 543 U.S. 906, and 543 U.S. 919 (2004); *United States* v. *Wilson*, 787 F.2d 375, 389 (8th Cir.) ("The government is under no obligation to disclose to the defendant that which he already knows."), cert. denied, 479 U.S. 857, and 479 U.S. 865 (1986).

b. Petitioner contends (Pet. 26-29) that the court of appeals' ruling contravenes this Court's decisions in *Strickler* v. *Greene*, 527 U.S. 263 (1999), and *Banks* v. *Dretke*, 540 U.S. 668 (2004). That contention lacks merit.

In *Strickler*, the Court addressed a *Brady* claim on federal postconviction review but expressly stated that its decision "d[id] not reach, because it [wa]s not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them." 527 U.S. at 288 n.33.

In *Banks*, the state prosecutor did not disclose information about a paid informant and rehearsal sessions with a prosecution witness. 540 U.S. at 675-678. Moreover, the State covered up the suppression during trial. *Ibid.* On federal postconviction review, the Court rejected the state's argument that the defendant had failed to use "appropriate diligence in pursuing" his *Brady* claim, explaining that its "decisions lend no support to the notion that a defendant must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695. But the Court did not address a situation where the defendant was aware of the information underlying the *Brady* claim and has never claimed otherwise.

As the court of appeals explained, "[t]he circumstances in *Banks* in no way describe those here," because here, "[t]o obtain access to the testimony of individuals who had once been his own employees, [petitioner] would not have been required to scavenge, guess, search, or seek." Pet. App. 16. "He had the evidence before him and undoubtedly was aware of it, as he indicated his choice to use the very same employees as his own witnesses at trial." *Ibid.*; see also *id.* at 14 ("These facts do not describe a circumstance where [petitioner] was required to scavenge for hints of undisclosed *Brady* material or which amounted to a hide-and-seek process in which [petitioner] was the seeker.") (citation and internal quotation marks omitted).

Petitioner argues (Pet. 33-34) that *Brady* should be interpreted to require disclosure of exculpatory evidence without regard to a defendant's knowledge of the information or his ability to obtain the evidence with due diligence, in order to "limit[] prosecutorial conduct" without regard to defense counsel's conduct. The purpose of the *Brady* rule, however, "is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. "Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Ibid.* (footnote omitted); see *Kyles*, 514 U.S. at 436-437 ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense."). *Brady*'s concern for the fairness of trial, rather than the broader policy considerations put forth by petitioner, supports the conclusion that due process is

not violated when the defendant, as here, "had the evidence before him and undoubtedly was aware of it." Pet. App. 16.

Petitioner's related argument (Pet. 34) that the court of appeals' approach requires courts to "speculat[e]" as to whether the defendant could have located exculpatory evidence is likewise incorrect. The court of appeals did not engage in "speculation"; rather, after "giv[ing] the record a close review," Pet. App. 3, the court of appeals concluded that petitioner was aware of the substance of the information in the interview memoranda based on petitioner's relationship with his employees and his knowledge of what he told them and asked them to do, *id.* at 14. As noted, see p. 11, *supra*, petitioner has never directly claimed that he was unaware of the undisclosed information, proffered an affidavit to that effect, or otherwise put anything into the postconviction record to show lack of knowledge.

At all events, petitioner's disagreement with the court of appeals' factbound determination—which was consistent with the district court's findings, Pet. App. 43-48—does not warrant this Court's review. See Sup. Ct. R. 10; see also *Kyles*, 514 U.S. at 456-457 (Scalia, J., dissenting) ("[U]nder what [the Court] ha[s] called the 'two-court rule,' th[at] policy has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Petitioner provides no reason to depart from the usual practice here.

2. The decision below does not conflict with the decision of a federal court of appeals or a state court of last resort.

a. Petitioner observes (Pet. 17-18) that some federal courts of appeals and state courts have determined that the nondisclosure of exculpatory evidence did not violate *Brady* in circumstances where the defendant did not actually possess the evidence in question but could have discovered it in the exercise of due diligence. See, *e.g.*, *Guidry* v. *Lumpkin*, 2 F.4th 472, 487 (5th Cir. 2021) (per curiam) (reasoning that a "*Brady* claim fails if the suppressed evidence was discoverable through reasonable due diligence") (citation omitted), cert. denied, 142 S. Ct. 1212 (2022); *Camm* v. *Faith*, 937 F.3d 1096, 1108 (7th Cir. 2019) (reasoning that evidence is suppressed only if it "was not otherwise available to the defendant through the exercise of reasonable diligence.") (citation omitted); *United States* v. *Anwar*, 880 F.3d 958, 969 (8th Cir. 2018) (reasoning that "[t]he government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels") (citation omitted; brackets in original); *United States* v. *Therrien*, 847 F.3d 9, 16 (1st Cir.) (reasoning that "evidence is not suppressed if the defendant either knew, or should have known of the essential facts permitting him to take advantage of" the evidence) (citations omitted), cert. denied, 137 S. Ct. 2227 (2017); *United States* v. *Stein*, 846 F.3d 1135, 1146 (11th Cir.) (reasoning that "the government is not obliged under *Brady* to furnish a defendant with information which * * * with any reasonable diligence, he can obtain himself.") (citations omitted; brackets in original), cert. denied, 138 S. Ct. 556 (2017).

Petitioner contends (Pet. 18-25) that those decisions conflict with decisions from other federal and state courts holding that there is no due-diligence requirement for a *Brady* claim. This Court has repeatedly and

recently denied certiorari in petitions asserting that conflict. See p. 9, *supra*. And in any event, any disagreement is not implicated by the decision below, because the court of appeals expressly stated that the government's *Brady* obligation "is not obviated by the defendant's lack of due diligence." Pet. App. 16. The decision below instead rested on the narrower determination that no *Brady* violation occurred where petitioner had the evidence from his employees "before him and undoubtedly was aware of it, as he indicated his choice to use the very same employees as his own witnesses at trial." *Ibid.*; see pp. 10-11, 14, *supra*.[2] The court of appeals' narrow and context-specific decision makes this case an inappropriate vehicle for considering the broader question that petitioner presents, and none of the cases cited by petitioner establish a conflict on the narrower question.

b. Petitioner fails to identify another court of appeals or state court of last resort that would necessarily have reached a different result on the facts of this case. Although the Tenth Circuit stated in *Banks* v.

---

[2] Petitioner argues that the court of appeals effectively imposed a "due diligence" test, Pet. 27 (citation omitted)—notwithstanding its express rejection of that test, Pet. App. 16—by invoking "the common-sense notion of self-help imputable to a defendant in preparing his case," *id.* at 17. In context, the court used the term "self-help" to mean that petitioner was not entitled "to turn a willfully blind eye to available evidence" to "set up a *Brady* claim for a new trial." *Ibid.* The court did not impose a due-diligence requirement on petitioner to scavenge for evidence; rather, the court emphasized that there was no *Brady* violation here because petitioner "undoubtedly was aware" of the evidence in the first place. *Id.* at 16. And any ambiguity in the opinion on this issue would suggest that further clarification by the court of appeals is possible, and that review by this Court would be premature.

Reynolds, 54 F.3d 1508 (1995), that "the fact that defense counsel 'knew or should have known' about [exculpatory] information, therefore, is irrelevant to whether the prosecution had an obligation to disclose," *id.* at 1517, in that case the defendant knew only that two other suspects had been arrested for the crime; the prosecution failed to disclose not only that already known fact, but also eyewitness accounts placing those suspects at the scene, a report that one of the suspects had confessed to the crime, and potentially exculpatory information from their criminal histories. *Id.* at 1510-1511. Petitioner has not cited a case in which the Tenth Circuit has identified a *Brady* violation where, as here, the defendant did not claim he was unaware of the exculpatory information.

To the contrary, the Tenth Circuit has recognized that "a defendant's independent awareness of the exculpatory evidence is critical in determining whether a *Brady* violation has occurred" because that awareness renders the nondisclosed evidence "immaterial." *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (1999), cert. denied, 529 U.S. 1029 (2000); see *Fontenot* v. *Crow*, 4 F.4th 982, 1066 (10th Cir. 2021) ("[A] defendant's knowledge instead implicates the element of prejudice, or materiality"), cert. denied, 142 S. Ct. 2777 (2022). And in another case, the Tenth Circuit explained that the government has no obligation under *Brady* to produce exculpatory evidence "[i]f the means of obtaining the * * * evidence has been provided to the defense." *United States* v. *Wolf*, 839 F.2d 1387, 1391, cert. denied, 488 U.S. 923 (1988).

The Ninth Circuit's decision in *United States* v. *Howell*, 231 F.3d 615 (2000), cert. denied, 534 U.S. 831 (2001), likewise presented circumstances distinct from

this case. There, the government gave the defense two police reports containing material errors that misidentified the codefendant as carrying contraband at the time of arrest, when the contraband was in fact found on the defendant. *Id.* at 623. The prosecutor learned of the material errors in the reports before trial, yet failed to disclose them to the defense, which then crafted its trial strategy around the erroneous police reports, only to discover mid-trial that the government disavowed their accuracy. *Id.* at 623-624. The court of appeals rejected the government's argument that the prosecutors had no duty to disclose the mistakes because the defendant knew "the truth" and therefore knew that the reports were "wrong." *Id.* at 625. Unlike in *Howell*, this case does not involve "the government's duty to disclose evidence of a flawed police investigation." *Ibid.* And in other cases, the Ninth Circuit has found no *Brady* violation when the defendant "had all the 'salient facts regarding the existence of the [evidence] that he claims [was] withheld.'" *Rhoades* v. *Henry*, 638 F.3d 1027, 1039 (quoting *Raley* v. *Ylst*, 470 F.3d 792, 804 (9th Cir. 2006), cert. denied, 552 U.S. 833 (2007)) (brackets in original), cert. denied, 565 U.S. 946 (2011); see *Cunningham* v. *Wong*, 704 F.3d 1143, 1154 (9th Cir.) (same), cert. denied, 571 U.S. 867 (2013); *United States* v. *Bond*, 552 F.3d 1092, 1095 (9th Cir. 2009) ("[W]here the defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression.") (citations and internal quotation marks omitted).

In *Lewis* v. *Connecticut Commissioner of Corrections*, 790 F.3d 109 (2d Cir. 2015), it was not until after the defendant's trial that the defense learned, from a retired police officer who had assisted in the

defendant's arrest, that the state prosecutor failed to disclose that the prosecution's prime witness "repeatedly denied having any knowledge of the murders and only implicated [the defendant] after a police detective promised to let [the witness] go if [the witness] gave a statement in which he admitted to being the getaway driver and incriminated [the defendant] and another individual." *Id.* at 113; see *id.* at 113-115. In reviewing the defendant's habeas petition, the Second Circuit noted that "[e]vidence is not 'suppressed' [for *Brady* purposes] if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *Id.* at 121 (citation omitted; brackets in original). Although the Second Circuit declined to apply a due-diligence requirement where a defendant "was reasonably unaware of exculpatory information," *ibid.*, it did not relieve a defendant of an obligation to interview an individual whom the defendant knew had witnessed an exculpatory incident, which it viewed as involving "facts already within the defendant's purview," *ibid.*; see *United States* v. *Diaz*, 922 F.2d 998, 1007 (2d Cir. 1990) ("[T]here is no improper suppression within the meaning of *Brady* where the facts are already known by the defendant."), cert. denied, 500 U.S. 925 (1991); see also *Paulino*, 445 F.3d at 224-225; *United States* v. *Robinson*, 560 F.2d 507, 518 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978). Because petitioner was aware of the substance of the statements in the pretrial interviews of his employees, he would not prevail under the approach described in *Lewis*.

Dennis v. *Secretary*, 834 F.3d 263 (3d Cir. 2016) (en banc) involved the prosecution's failure to disclose a timestamped receipt that would have supported the

defendant's alibi defense, the existence of which was unknown to the defendant at the time of trial and which was not "publicly available." *Id.* at 289; see *id.* at 275-276, 288-290. That decision does not conflict with the decision here, which involved information of which petitioner was aware. Furthermore, in finding a *Brady* violation on those facts, the Third Circuit construed a prior decision, which it reaffirmed, as "reject[ing] defendant's argument that certain documents were * * * somehow 'suppressed' when the government had made the materials available for inspection and they were defendant's own documents." *Id.* at 292-293 (citing *United States* v. *Pelullo*, 399 F.3d 197, 212 (3d Cir. 2005), cert. denied, 546 U.S. 1137 (2006)) (emphasis added).

In *United States* v. *Tavera*, 719 F.3d 705, 711-712 (6th Cir. 2013), and *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 892-894, 896-897 (D.C. Cir. 1999), the courts of appeals reasoned that a due-diligence rule did not require the defense to attempt to interview trial witnesses to discover exculpatory information that was provided to police or prosecutors. *In re Sealed Case* additionally reasoned that a due-diligence rule did not require a defendant to subpoena police officers to learn whether they had negotiated cooperation agreements with witnesses. *Id.* at 897. Neither case held that a *Brady* violation occurs when the government does not provide information that the defendant already knows or could reasonably obtain. To the contrary, the court in *Tavera* noted that the facts of that case involved "information known to investigating officers that defendants had no reason to know about," contrasting it with a prior case in which the circuit had determined that *Brady* did not apply to publicly available sentencing records. *Tavera*, 719 F.3d at

712 n.4 (quoting *Bell* v. *Bell*, 512 F.3d 223, 235 (6th Cir.) (en banc), cert. denied, 555 U.S. 822 (2008)).

c. The state cases on which petitioner relies (Pet. 23-25) likewise indicate no conflict warranting this Court's review. In *People* v. *Chenault*, 845 N.W.2d 731 (Mich. 2014), the prosecution failed to disclose videotaped witness interviews that were arguably inconsistent with the witnesses' written statements; the defendant did not know the contents of the recorded interviews. *Id.* at 734. The Michigan Supreme Court declined to adopt "a rule requiring a defendant to show that counsel performed an adequate investigation in discovering the alleged *Brady* material," but made clear that "evidence that the defense knew of favorable evidence, will reduce the likelihood that the defendant can establish that the evidence was suppressed for purposes of a *Brady* claim," *id.* at 738. That approach is consistent with the result in this case.

The other state cases are inapposite because they did not involve a finding, as this case does, that the defendant "undoubtedly was aware" of the nondisclosed material. Pet. App. 16. See *People* v. *Bueno*, 409 P.3d 320, 322-323, 327-329 (Colo. 2018) (en banc) (investigative reports detailing evidence of threats against inmates that would have supported defendant's "alternate-suspect" defense that were unknown to the defense and whose nondisclosure would violate *Brady* "even if * * * a reasonable diligence requirement" applied); *State* v. *Williams*, 896 A.2d 973, 993 (Md. 2006) (informant status of government witness); *Commonwealth* v. *Tucceri*, 589 N.E.2d 1216, 1217-1224 (Mass. 1992) (police pretrial photographs of the defendant); *State* v. *Reinert*, 419 P.3d 662, 666 (Mont. 2018) (state medical examiner's letter questioning credentials of State's forensic expert);

State v. *Bethel*, No. 2020-648, 2022 WL 838337, at *5-*7 (Ohio 2022) (pretrial investigation report that the defendants did not know about before trial); *State* v. *Durant*, 844 S.E.2d 49, 53-55 (S.C. 2020) (criminal history of government witness), cert. denied, 141 S. Ct. 1423 (2021); *State* v. *Wayerski*, 922 N.W.2d 468, 481-482 (Wis. 2019) (pending charges against government witness).

3. This case would, in addition, not be a suitable vehicle to review the question presented for the independent reason that both the court of appeals (Pet. App. 17) and the district court (*id.* at 48) determined that disclosure of the information would not have affected the outcome of the trial, because corresponding evidence was presented at trial and the information at issue here would have been cumulative.

That determination has substantial record support. As the court of appeals noted, through his cross-examination of Blanchard and Ross, and his presentation of "numerous Massey documents," petitioner "showed that he took safety seriously and had led a successful initiative in 2009 to cut down citations at all the Massey mines, including the Upper Big Branch mine." Pet. App. 6. That evidence included petitioner's work with Ojeda, Duba, Bearse, and Clemens. Both Blanchard and Ross repeatedly referred to the roles played by these employees at Massey, as well as their communications with petitioner and other Massey employees. See, *e.g.*, C.A. App. 632 (DX 26); *id.* at 1163-1164 (DX 333); *id.* at 1874-1900, 2000-2002, 2244-2246 (Ojeda); *id.* at 486, 670, 773-774, 862, 1095, 1318-1319 (Duba); *id.* at 634-637 (DX 41 and 43) (Bearse); *id.* at 471, 622, 773, 862, 1318 (Clemens). Accordingly, in closing argument, petitioner contended that the June 2009 meeting

between Ross and Ojeda showed that he tried to reduce violations at the mines, *id.* at 2655, and referred to an exculpatory e-mail that he had sent to Clemens and others, *id.* at 2644.

As the lower courts observed, Pet. App. 7, 14, 45, petitioner had four of the five employees whose statements are at issue here on his witness list, and decided not to call them. And as the lower courts recognized, that decision was not based on ignorance about material exculpatory information that those witnesses could have provided, but instead "a matter of trial strategy" based on petitioner's ability "to elicit most of the favorable substance of the statements in the interview memoranda through the cross-examination of Ross and Blanchard." Pet. App. 17; see *ibid.* (highlighting defense counsel's statement during closing that although he had told the jury in his opening "that it might take us a while to put on the evidence that indicated that Massey did not want citations," he had not "realize[d] that we were going to do it with the Government's key witness") (emphasis omitted). No sound reason exists to presume that petitioner would have reached a different judgment for the one of the five employees who was not on his witness list (Sears), whose nondisclosed statements were similar and cumulative of the evidence at trial that petitioner opted not to bolster with defense testimony. See pp. 22-23, *supra*; see also, *e.g.*, C.A. App. 905, 2627 (evidence and argument about petitioner's disciplining of employees who committed safety violations).

Petitioner does not mention—let alone challenge—the additional determination by the courts below, which provides an independent basis for rejecting petitioner's claim. And the fact-bound determination is both

inappropriate for this Court's review and preclusive of a different result in this case, even if the Court were to decide the question presented in petitioner's favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
THOMAS E. BOOTH
Attorney

AUGUST 2022