No. 21-1428

IN THE
Supreme Court of the United States

DONALD L. BLANKENSHIP,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

This case squarely presents a significant and pressing question about the fairness of our criminal justice system with broad implications for prosecutors and criminal defendants: under *Brady v. Maryland*, can a prosecutor's willful refusal to provide exculpatory evidence to the defendant be excused because the defendant's lawyers could have engaged in "due diligence" or "self-help"? The government does not dispute that this question deeply divides the federal courts of appeals and state high courts. And the National Association for Defense Counsel's amicus brief underscores the "nationwide importance" of the question, urging this Court to resolve the "uncertainty about the scope of *Brady*'s protections." NACDL Amicus Br. 2, 7. Defense lawyers need to know whether they can rely upon prosecutors' statements that the government has turned over all exculpatory evidence or whether counsel has a duty to uncover the information already in the hands of the government. And prosecutors need to know the scope of *Brady*'s requirements. The conflict in the circuits is intolerable.

The circumstances of this case, moreover, provide compelling reasons for this Court's intervention. The Department of Justice's own Office of Professional Responsibility (OPR) labeled the prosecutors' conduct as "reckless." There is no dispute that the prosecutors, driven by the U.S. Attorneys' intentional decision to withhold material in response to trial counsel's zealous advocacy, suppressed 61 witness interview reports containing dozens of exculpatory statements. Pet. App. 144-45, 147, 196-98. That included five memoranda which contained undeniably favorable evidence

for the defense from five witnesses. *See* Pet. 5-10. OPR found the prosecutors' disclosures "inadequate and incomplete." Pet. App. 147. Each lower court to consider the suppressed evidence concluded that the reports contained information favorable to Blankenship. When the magistrate judge initially recommended that Blankenship's § 2255 motion be granted, not even the government objected. And yet the district court *sua sponte* denied relief—and the Fourth Circuit affirmed—based on a diligence, or self-help, requirement. None of the previous petitions that raised the question presented here involved these compelling circumstances. This case cries out for this Court's review.

The government's opposition to the Court's review hinges on two fictitious vehicle problems. First, the government asserts that the case does not implicate the widespread conflict because the Fourth Circuit "found" that, notwithstanding the prosecutors' misconduct, Blankenship knew of the suppressed, exculpatory information. But the Fourth Circuit did not—and indeed cannot—make factual findings. Nor did the district court make factual findings about Blankenship's personal knowledge or that of his attorneys. Although the government faults Blankenship for not submitting further evidence concerning his lack of knowledge, the government *opposed* Blankenship's request below for an evidentiary hearing where facts regarding his knowledge could have been presented, and the district court denied Blankenship's request.

What is more fundamental, however, is that whatever Blankenship and his lawyers may have thought or even hoped the potential witnesses might

be willing to testify about, the defense's views were skewed by the prosecutors' repeated promises that they had satisfied their *Brady* obligations and turned over all exculpatory material. *E.g.* Pet. App. 147 (government's "misleading" statements "may have led" the court and Blankenship to "erroneously … believe that the government had disclosed all MOIs in its possession").

Second, the government claims that the Fourth Circuit's decision rests on an alternate holding. But that too is wishful reading of the opinion. To be sure, the Fourth Circuit made a passing reference to the district court's "note[]" that Blankenship's counsel elicited testimony from other witnesses at trial concerning "most" of the suppressed evidence. Pet. App. 17. But the Fourth Circuit did not style that note as an alternate holding. The Fourth Circuit's observation was only that *a portion* of similar evidence came in at trial during cross-examination of other witnesses. If the Fourth Circuit believed that is sufficient to immunize a clear refusal to provide exculpatory evidence, it is wrong. It merely shows the constitutional violation was not completely devastating; the prosecution's action remains fundamentally unfair.

Finally, the government makes several arguments seeking to bolster the "due diligence" rule. But in its own statement of the elements of a *Brady* claim, the government nowhere lists a "due diligence" requirement. And the government's defense of it never articulates from which element it could arise. In any event, a full response to the government's merits arguments is unwarranted now because they provide no

reason for the Court to deny the petition. The petition for a writ of certiorari should be granted.

ARGUMENT

I. The Court of Appeals' Decision Implicates a Widespread, Entrenched Conflict on a Recurring Question of Constitutional Law.

The government does not dispute that the "federal courts of appeals and state courts of last resort … disagree" on whether a *Brady* claim requires a defendant to show that he acted with diligence to seek the suppressed evidence. BIO 8. Federal courts of appeals, lower courts, and academics have all recognized the deep, persistent division between courts on this question. *See Fontenot v. Crow*, 4 F.4th 982, 1065–66 (10th Cir. 2021) (explaining divergence from "many of our sister circuits" on this question); *State v. Wayerski*, 922 N.W.2d 468, 480 (Wis. 2019) (("Federal courts are currently divided as to whether a defendant's … [lack of] 'due diligence' forecloses a *Brady* claim."); Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and Brady in the Balance*, 28 Geo. J. Legal Ethics 1, 10 (2015) (describing "split among circuit courts" on question).

The question presented is also frequently recurring. Just since this petition was filed in early May, several lower court cases have applied either rule to pending *Brady* claims and reached divergent holdings. *Compare, e.g.*, *State v. McNeal*, 2022 WL 3204729, at *5 (Ohio. Sup. Ct. Aug 9, 2022) (finding lower court abused its discretion by not granting new trial because *Brady* "does not require a defendant in a

criminal case to discover evidence suppressed by the state") (citation omitted), *with Prible v. Lumpkin*, No. 20-70010, 2022 WL 3152909, at *13 (5th Cir. Aug. 8, 2022) (reversing district court's grant of new trial to criminal defendant because he "possessed, or by reasonable means could have obtained," suppressed *Brady* material). The "resolution of this circuit split is crucial" to the uniform "administration of justice across the nation." *See* NACDL Amicus Br. 3.

The government principally argues that the Fourth Circuit opinion does not implicate the split because Blankenship not only could have found the suppressed information, he in fact "was 'undoubtedly' aware" of it. BIO 9. To support this assertion, the government repeatedly claims that the appellate court made a factual finding about Blankenship's knowledge, claiming that the Fourth Circuit "found" that Blankenship "undoubtedly was aware" of the suppressed evidence, *e.g.* BIO 7, and "not only knew these witnesses' identities, but also knew the substance of the statements in the interview memoranda." *Id.* at 10.

The government's position, on which nearly the entire opposition rests, cannot withstand even the most cursory scrutiny. "Appellate courts . . . do not make . . . factual findings in the first instance." *In re Naranjo*, 768 F.3d 332, 351 (4th Cir. 2014). "As this Court frequently has emphasized … appellate courts are not to decide factual questions" because "factfinding . . . 'is the basic responsibility of district courts,'" not appellate courts. *Maine v. Taylor*, 477 U.S. 131, 144–45, (1986). Here, the Fourth Circuit neither made a factual finding in the first instance nor

affirmed one. Nor did the district court—it concluded that there were "no pending factual disputes" because the parties "agree[] to the underlying facts regarding nondisclosure." Pet. App. 65. There are no factual findings concerning Blankenship's knowledge of the suppressed evidence at all in the record.

It is Blankenship's position that because Brady contains no "due diligence" or "self-help" requirement, it is not incumbent on the defendant to prove what he did or did not do to learn of exculpatory information in the government's possession. But even if evidence of Blankenship's lack of knowledge were necessary, Blankenship has never had a chance to demonstrate to a factfinder the extent of his and his trial team's knowledge of the suppressed evidence and how the proper disclosure of that evidence may have affected the trial strategy. Blankenship sought an evidentiary hearing before the District Court, which the government opposed, and that request was rejected at the same time his motion under § 2255 was denied, on the theory that one was not "needed" because there were no "factual issues" to "resolve." *Id.* The government's claim that he never attempted to do so is unfounded. *See* BIO 14 (chiding Blankenship for not "proffer[ing] an affidavit … or otherwise put[ting] anything into the postconviction record to show lack of knowledge").

The government argues that the court of appeals "g[ave] the record a close review" and made a "factbound" determination that Blankenship knew about the suppressed evidence. BIO 14. The government broadly cites five pages of the District Court's opinion to support this conclusion, offering

little indication to which specific factual "findings" it is referring. *Id*. (citing Pet. App. 43-48). In reality, those pages are not factual findings about what Blankenship actually knew or did not know. There was no evidence provided on that topic and no evidentiary hearing occurred despite Blankenship's request for one. They rather reflect the district court's *legal conclusion*, later echoed by the Fourth Circuit, that because Blankenship was the former CEO of the company and these witnesses were company employees with whom he interacted on some level at some point, he was chargeable with knowledge of their information as a matter of law.[1] *See, e.g.*, Pet. App. 44 (concluding with no citation that "the substance of those MOIs was available to [Blankenship] through employees of the very company of which he was CEO"); *id.* at 45 (supposing that it was "unlikely that persons listed as potential trial witnesses by the defense were not interviewed"). The Fourth Circuit's and district court's use of the words "unlikely" and "undoubtedly," demonstrate that the supposed "factual findings" on which the government rests its opposition are simply legal supposition. Nothing here detracts from the fundamental question of whether the government has a duty to disclose and whether that duty can be eliminated if the courts surmise that the defense could

[1] These assumptions lack any basis—the witnesses were represented by counsel, some no longer worked at the company, and Blankenship had not been the CEO for years at the point of the prosecution. *See* Pet. 30-31. And a defendant is generally ill-advised to contact potential witnesses during a criminal investigation or prosecution as the government may see that as potential witness tampering.

have done more to obtain the information already in the Government's possession.

Separately, the government claims that the decision below does not implicate the conflict on the question presented because the decision below did not actually impose a due diligence requirement. BIO 9. But Fourth Circuit law is clear that the "government has no *Brady* burden when facts are available to a diligent defense attorney." *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990). The panel below relied upon that precedent. *See* Pet. App. 14-15 ("[T]his circumstance . . . is governed by our holding in *Wilson* that '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.'"); *id.* at 15 ("[W]e have continued to apply *Wilson* following *Banks*.").

To be sure, the panel below did attempt to distinguish its diligence requirement from this Court's rejection of it in *Banks* by describing its requirement as the "common-sense notion of self-help." Pet. App. 17. But the fundamental question posed by the Circuit conflict over *Brady* is whether the prosecutor has an absolute duty to provide all exculpatory information in its position or instead does the defendant have some duty to try to replicate the government's efforts in order to benefit from *Brady*. Whether the duty is labeled as "self-help" or "due diligence" makes no difference. The circuits are deeply split on what *Brady* requires and the Fourth Circuit is on the wrong side of the divide. *See, e.g.*, *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 292 (3d Cir. 2016) (en banc)

("[T]he duty to disclose under *Brady* is absolute—it does not depend" on the defendant or his counsel's actions.); *People v. Chenault*, 845 N.W.2d 731, 738 (Mich. 2014) (rejecting *Brady* "rule requiring a defendant to show that counsel performed an adequate investigation in discovering").

II. This Case Is an Ideal Vehicle For Considering The Question Presented.

This case is an ideal vehicle for resolving this important, widespread conflict. Whether a defendant's actions with respect to the suppressed evidence should be considered under *Brady* was squarely before the Fourth Circuit and was central to its holding. The court's denial of Blankenship's *Brady* claim hinged on "defendant's role in preparing his defense" and defendant's supposed failure to exercise the "common-sense notion of self-help" to succeed under *Brady*. Pet. App. 16-17; *see* Pet. 35-36.

The government contends that this case is an inappropriate vehicle because the Fourth Circuit determined in the "alternative" that "disclosure of the information would not have affected the outcome of the trial." BIO 9, 22. But that contention is not supported for three reasons.

First, there was no alternative holding. The Fourth Circuit made only a brief reference to the district court's "note[]" about Blankenship's ability to elicit some of the suppressed evidence through cross-examination. *Compare* Pet. App. 11-17 (12 paragraph discussion of diligence rule) *with* Pet. App. 17 (three

sentence mention of materiality). The passing mention was not styled as a "holding." Under the Fourth Circuit precedent it would not be treated as such. *See Karsten v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, 36 F.3d 8, 11 (4th Cir. 1994) ("If the first reason given is independently sufficient, then all those that follow are surplusage; thus, the strength of the first makes all the rest *dicta*.").

Second, the "note" concerned the same materiality element of *Brady* that the rest of the panel's discussion resolved against the defense because Blankenship's lawyers did not satisfy the duty the court imposed on them by the court of appeals.

Finally, the "note" could not serve as an alternative holding supporting dismissal of Blankenship's *Brady* claim. Contrary to the government's suggestion, the court of appeals did not determine that the suppressed evidence would have been cumulative of information presented at trial. BIO 22. The district court noted that Blankenship elicited only "*most* of the favorable" material from five witnesses who did not testify via the cross-examination of two prosecution witnesses who did testify. Pet. App. 17 (emphasis added). That qualifier makes clear that some of the suppressed evidence did *not* enter the record via the witnesses who were cross-examined. *Brady* does not require the government to produce "most" of the exculpatory evidence to a defendant; it requires all of it to be produced. Thus, the cross-examination alone could not support the court's materiality finding.

III. The Court of Appeals' Decision Below Is Wrong.

Finally, review is warranted because the court of appeals' imposition of a diligence or self-help requirement on a prosecutor's *Brady* obligations is wrong and inconsistent with this Court's precedent. *See* Pet. 25-35. The National Association of Defense Counsel's amicus brief provides a compelling overview of why the government's proposed rule lacks grounding in criminal practice, fails to establish a cogent standard for prosecutors, and dilutes Brady's constitutional protections. *See generally* NACDL Amicus Br. 7-16. While a full response to the government's argument can await a later stage of the case, several points are worth noting here.

First, it is telling that the government's own recitation of the elements necessary to prove a *Brady* claim fails to identify a "due diligence" element. The government correctly recognizes that to prove a *Brady* claim the defendant must show only that: (1) the prosecution suppressed the 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. BIO 9 (citing *Brady*, 373 U.S. at 87). A due diligence requirement is not among those elements. Although the lower courts have at least attempted to find a home for due diligence in one of *Brady*'s elements, they cannot agree. *See* Pet. 18 n.5. And the government simply makes no attempt.

Second, instead of grounding a due diligence requirement in a recognized *Brady* requirement, the

government rests instead on *Brady*'s capacious "concern for the fairness of trial." BIO 13. But if that is the standard for this case, the Fourth Circuit's decision is even more indefensible. The prosecutors here affirmatively misrepresented—several times to the court and Blankenship—that all exculpatory evidence had been appropriately disclosed. *See* Pet. 7 (collecting government's misrepresentations related to compliance with discovery obligations); Pet. App. 158 (prosecutor made "inadequate and incomplete" discovery disclosures in "reckless disregard" of his obligations); *Id.* (prosecutors filed "three arguably misleading pleadings with the court" and made one "arguably misleading statement" in open court).

The government ignores the prosecutors' repeated misrepresentations and attempts to minimize OPR's report by claiming that it did not find the government violated *Brady*. BIO 6. That was because OPR's mandate did not dictate a review of the entire record, thus OPR could not assess appropriately how badly Blankenship was prejudiced by the failure to disclose. Pet. App. 158. The report's findings are nonetheless extraordinary, and the government's belated attempt to sweep the OPR report under the rug should be rejected. The proceedings below were flatly inconsistent with "*Brady*'s concern for the fairness of trial." BIO 13. And the court of appeals' self-help requirement serves only to insulate that unfairness. It is wrong and warrants this Court's immediate review.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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