NO. 22-6741

IN THE

UNITED STATES SUPREME COURT

DONATUS OKECHUKWU MBANEFO

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1). Whether, to establish a violation of Brady v. Maryland, 373 US 83 (1963), a defendant must show that he could not have obtained the suppressed, exculpatory evidence through his own independent efforts of "self-help" or "due diligence" as the 11th and other five circuits have held, or whether the defendant's failure to uncover the evidence independently is irrelevant as the other six courts of appeal have held.

2). Whether, the failure of the prosecutor to correct the testimony of two law enforcement officers which he knew were false was a Giglio/Napue misconduct which denied Petitioner due process of the law in violation of the 5th Amendment of the United States constitution.

LIST OF PARTIES

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

RELATED PROCEEDINGS

This case arises from and is related to:

1). United States District Court (MD of Ga.)

United States v. Biggs et al, 7: 16-Cr-02-06

Judgment date December 5, 2018.

Donatus Mbanefo v. United States, 108-Cv-02

Judgment date October 7, 2021.

Donatus Mbanefo v. United States,

New Trial Motion Denied on October 14, 2021

2). United States Court of Appeals (11th Circuit)

In RE. Donatus Mbanefo

21-12623 (09/01/2021)

Donatus Mbanefo v. United States

21-13575 (10/18/2021)

Donatus Mbanefo v. United States 21-13693

Judgment entered on July 28, 2022.

Rehearing Denied on September 27, 2022.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

COSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

CERTIFICATE OF CORPORATE DISCLOSURES

INTERESTS: No publicly traded company or corporation has an interest in the outcome of this petition.

OPINIONS BELOW

The opinion of the Eleventh circuit court of appeals on Petitioner's new trial motion is reported at USCA Case 21-13693 of 07/28/2022.

The opinion of the District Court on Petitioner's new trial motion is available at Doc. 603 of 10/14/2021 in United States v. Biggs et al 7:16-Cr.-02(M.D. of Georgia).

JURISDICTION

The Eleventh circuit court of appeals issued its opinion on July 28, 2022. Petitioner's timely motion for panel and en bank rehearing was denied on September 27, 2022. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States constitution provides that no person shall be deprived of life, liberty or property without due process of the law.

U.S. Const. Amend. V.

STATEMENT OF THE CASE

I). The Trial Court Proceedings.

Petitioner worked at the Relief Institute of Columbus (RIC) a pain management clinic, for three months from March 2013 to June 2013. Petitioner was arrested on February 25, 2016 and charged with: (1) Conspiracy to distribute controlled substances in violation of 18 U.S.C § 846; (2) and (3) two counts of unlawful dispensing of controlled substances in violation of 18 U.S.C. § 841; and, (4) Conspiracy to launder monetary instruments in violation of 18 U.S.C. § 1956. On June 13, 2018, Petitioner was found guilty on counts 1, 2 and 3 and sentenced to concurrent 96 months imprisonment on each of the counts to be followed by three years of supervised release. The appeal court affirmed on April 13, 2020.

(a) Government's Theory of Prosecution

The Government averred that 27 physicians (Doc 425 pg. 12) were variously employed at the RIC and the Wellness Center of Valdosta (WCV), and that their longevity ranged from one day to 27 months. The Government further submitted that the three physicians with the highest longevity were indicted and prosecuted. Petitioner had longevity of 3 months at the R.I.C but contrary to the Government's theory of prosecution, another physician with the same longevity in the same clinic was not indicted. The Pivot Table, which was the only document that specifically displayed data of the 27 physicians in individual arrays, depicting their individual longevity (amongst

other collated data) was suppressed by the Government to enable two law enforcement officers suborn perjury, and the prosecutors to repeatedly propagate a false theory of prosecution.

(b) Evidence of Longevity

The prescriptions written by Dr. Mosely on November 21, 2013 and on February 4, 2014, (See Appendix D) confirm that Dr. Moseley worked at the RIC for approximately three months. This permutation was only reflected in the Pivot Table which presented data as collated per individual physician for all the 27 physicians that worked at the RIC and the WCV. The Government produced several spreadsheets from data contained in 75 boxes of patient files. A Pivot Table was produced from the spreadsheets which summarized the data into a simplified tabular form. (Docs. 368 pgs. 144-145). Summarized charts were then prepared from the generated Pivot Table. The 75 boxes of patient files, several pages of spreadsheets, and the summary charts were made available to the defense but the Pivot Table which displayed the collated data in individual physician array was not disclosed to the defense. The contents of the Pivot Table were not known to the defense before or during the trial.

Events leading to this petition

a). The Section 2255 Motion

Petitioner filed a timely 28 U.S.C. §2255 motion raising a claim of ineffective assistance of counsel on several grounds.

b). The Magistrate's Report and Recommendations.

The Report and Recommendations of the Magistrate Judge found that Trial Counsel was not functionally deficient in all the grounds Petitioner raised in the 2255 motion.

c). The District Court's Opinion.

The District Court adopted the Report and Recommendations of the Magistrate Judge without making any findings of facts, conclusions of law, and also without an independent opinion for appellate review.

d). The Eleventh Circuit's Proceedings in the 2255 Motion.

Petitioner noticed appeals and the 11th Circuit granted certificates of appellability on 2 claims:

i). Whether the district court erred in denying Mbanefo's ineffective of counsel claim without an evidentiary hearing, where Mbanefo alleged that his attorney threatened to withdraw if Mbanefo insisted on testifying in his own defense.

ii). Whether the district court erred by not granting an evidentiary hearing when Trial Counsel withheld evidence supporting Mbanefo's proposed testimony that his prescription practices were medically legitimate.

The Eleventh Circuit's decision on Petitioner's 2255 motion is pending.

e). The New Trial Motion.

Petitioner filed a new trial motion citing; Brady violations, Juror Dishonesty, and Selective Prosecution which the district court denied.

f). The Eleventh Circuit's Opinion on Petitioner's New Trial Motion.

The Eleventh Circuit affirmed the denial of the new trial motion. The Eleventh Circuit denied the Brady claim stating that Petitioner would have "with reasonable diligence" discovered the suppressed Pivot table. The Eleventh Circuit expressed no opinion about Petitioner's claim that two law enforcement officers gave false testimony that were refuted by the suppressed Pivot Table. Instead the Eleventh Circuit opined that the Brady suppression claim and the Giglio/Napue claim of false perjury fail for the same reason.

g). En Banc Ruling.

No active judge in the Eleventh Circuit voted to hear the case and the motion for rehearing en banc was denied on 09/27/2022.

REASONS FOR GRANTING WRIT

The decision below embodies a broad and acknowledged conflict among federal and state courts whether in order to prevail on a Brady claim, a defendant must demonstrate that he could not have learned of the exculpatory, suppressed information via other means. The circuit courts of appeals are split down the middle with every circuit that hears a criminal case having taken a position. This is an important and recurring issue in

criminal law that warrants this Court's review because it bears directly on the fundamental elements and purposes of the Brady doctrine and may be dispositive of due process claims in hundreds of federal and state prosecutions. Petitioner's case presents an ideal vehicle for resolving this important question because the Eleventh circuit squarely and exclusively relied on the requirement that a defendant take reasonable steps to locate the suppressed evidence to deny Petitioner's new motion trial.

I.The lower courts are intractably divided on Whether Due Process Requires a Defendant to Demonstrate Due Diligence In Trying to Obtain the Suppressed Evidence from Sources other than the Government.

The lower courts are intractably split on whether a Brady claim requires a defendant to show that he or she acted with diligence to seek the suppressed evidence. See Fontenot v. Crow, 4 F.4th 982, 1065-66 (10th Cir. 2021)("many of our sister circuits deem evidence 'suppressed' under Brady only if 'the evidence was not otherwise available to the defendant through the exercise of reasonable diligence'... [b]ut that is not the law in this circuit"); see also 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" concerning the application of due diligence rule); Kate Weisburd, Prosecutor's Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule, 60 UCLA L. Rev 138, 153

(2012)(discussing "divergence among courts" concerning application of "due diligence" rule in Brady analysis). The Government has acknowledged this split in prior filings. See Corey D. Yates v. United States, Nos 18-410 and 18-6336, Brief of United States in Opposition to Certiorari at 9 ("federal courts of appeals and state courts of last resort may disagree" on whether "reasonable diligence" is required).

a). The Federal Circuit Courts are Divided.

Five Circuits – the First, Fourth, Fifth, Seventh, Eighth, apply a rule like the Eleventh Circuit's, requiring the defendant to act "diligently" or exercise "self-help" to locate suppressed evidence despite this Court's decision in Banks v. Dretke, 540US 668, (2004). For example in the Eight Circuit, evidence is not considered to be "suppressed" by the Government unless a defendant can show that he lacks "access" to the suppressed evidence "through other channels" United States v. Anwar, 880 F.3d 958, 969 (8th Cir. 2018) ("[t]he Government does not suppress evidence in violation of Brady by failing to disclose evidence to which a defendant had access through other channels"); see also United States v. Sigillito 759 F.3d 913, 929 (8th Cir 2014)(One of the limits of Brady is that it does not cover information available from other sources") (internal quotation marks omitted).

So too in the Fifth Circuit where a "Brady claim fails if the suppressed evidence was discoverable through reasonable due diligence". Guidry v.

Lumpkin 2 F.4th 472, 487 (5th Cir. 2021) cert. denied, 142 S. Ct. 1212(2022). The First, Seventh and Eleventh Circuits follow the same reasoning. See United States v. Therrien, 847 F.3d 9, 16(1st Cir. 2017)("[E]vidence is not suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of" the evidence); Camm v. Faith 937 F.3d 1096, 1108 (7th Cir. 2019)(Evidence is suppressed only if it "was not otherwise available to the defendant through the exercise of reasonable diligence"); United States v. Stein 846 F.3d 1135, 1146 (11th Cir. 2017)("The Government is not obliged under Brady to furnish a defendant with information which ... with any reasonable diligence he can obtain himself").

In contrast six other circuits have rejected the requirement that a defendant exercise "due diligence" to make out a Brady claim. See Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995) ("[T]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge .... The fact that the defense counsel 'knew or should have known' about the [exculpatory] information .... Is irrelevant to whether the prosecution had an obligation to disclose [it]"); In Re Sealed Case No. 99-3096 (Brady Obligations), 185 F.3d 887, 896 (D.C. Cir. 1999)(rejecting the "Government's appellate argument that it did not breach a disclosure obligation" for information that was "otherwise available through 'reasonable pre-trial preparations by the defense'"); United States v. Howell 231 F.3d

615, 625(9th Cir. 2000)(The availability of particular statements through the defendant himself does not negate the Government's duty to disclose").

Three of these Circuits;- the Second, Third, and Sixth – reached this conclusion only after this Court decided Banks. The Sixth Circuit holding in United States v. Tavera, 719 F.3d 705 (6th Cir. 2013) is particularly instructive. Acknowledging that other courts and its own former precedents "were avoiding the Brady rule and favoring the prosecution with a broad defendant-due-diligence rule," the Sixth circuit held that under Banks, "the client does not lose the benefit of Brady when the lawyer fails to 'detect' the favorable formation" Id. At 712. The court emphasized that "Banks should have ended that practice" and "declined to adopt the due diligence rule" it had followed in "earlier, erroneous cases." Id.

In Tavera, the Government withheld exculpatory statements about the defendant that a co-conspirator made to prosecutors and federal agents in the weeks before trial. The government argued that it had not violated Brady because the defendant could have found the evidence if he had "exercised due diligence"' and asked the co-conspirator if he had talked to the prosecutor". Id. at 711. Rejecting that argument, the Sixth circuit emphasized that prosecutors have an "independent duty" to disclose exculpatory information and any "due diligence" rule would "punish the client who is in jail for his lawyer's failure to carry out a duty no one knew the lawyer had" Id at 712.

The Third Circuit went on en banc to reach the same conclusion. See Dennis v. Sec'y, Pennsylvania Dep't of Corr., 834 F.3d 263, 291-92 (3rd Cir. 2016) (En banc). In Dennis, a three-judge panel affirmed the denial of a Brady claim – which involved the prosecution's failure to disclose a time stamped receipt corroborating the defendant's alibi – because the defendant could have obtained it with "reasonable diligence" noting that the defendant's appellate counsel had indeed located the receipt during his post-conviction investigation. See Dennis v. Sec'y. Pennsylvania Dep't. of Corr., 777 F.3d 642, 645 (3rd Cir. 2015), opinion vacated on reh'g en banc, 834 F.3d 263 (3rd Cir. 2016).

The en banc Third Circuit vacated that holding noting that the Supreme Court's conclusion in Banks made clear that "the concept of 'due diligence' plays no role in the Brady analysis" 834 F.3d at 291. The Third Circuit rejected prior cases imposing such a due diligence requirement on the grounds that such holdings were "an unwarranted dilution of Brady's clear mandate" Id at 293. The Third Circuit also noted that the "only" time the Government is relieved of its obligation to turn exculpatory evidence over to the defense is when the Government "is aware that the defense counsel already has the material in his possession". Id at 292. Requiring proof of a defendant and his counsel's action would undermine Brady by adding "a fourth prong to the inquiry contrary to the Supreme Court's directive that we are not to do so" Id. At 293.

In Lewis v. Connecticut Com'r of Corr, 790 F.3d 109, 114 (2d Cir. 2015) the Second Circuit affirmed a lower court's grant of habeas corpus to defendant based on Connecticut's Brady violation. In Lewis the defendant was convicted of murder based largely on the testimony of one witness and the prosecution failed to share key facts about that witness with the defense, including that he had denied any knowledge of the crime over several occasions and implicated the defendant only after he was threatened by detectives. The Second Circuit found that the defendant's conviction violated clearly established law that "a defendant" has no duty "to exercise due diligence to obtain Brady material" Id. At 121 (Citing United States v. Argus, 427 US 97, 107 (1976)).

Addressing its prior holdings, the Second Court recognized that it had previously found that evidence was not "suppressed" if the defendant "knew or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." Id. At 121. But "this requirement speaks to facts already within the defendant's purview, not those that might be unearthed. It imposes no duty upon a defendant ... to take affirmative steps to seek out and uncover such information in the possession of the prosecutor in order to prevail under Brady" Id.

b). State Courts are divided.

State high courts have also split on the same question – at least 16 have imposed a due diligence requirement on the defendant in a Brady analysis and at least 8 others have rejected the notion entirely.

Many courts analyze the diligence of a defendant's conduct in identifying suppressed evidence under Brady. For instance, West Virginia considers a defendant's efforts to uncover the evidence as part of the determination whether it was suppressed. State v. Petersen, 799 S.E. 2d 98, 106 (W. Va. 2017) ("Evidence is considered suppressed when ..... [it] was not otherwise available to the defendant through the exercise of reasonable diligence"). Georgia and Mississippi consider a defendant's exercise of due diligence a distinct element of a Brady claim. Anglin v. State, 863 S.E.2d 148, 156 (Ga. 2021)(Requiring as element of Brady claim that the defendant must show that he "did not possess the favorable evidence and could not obtain it himself with any reasonable diligence"); Brown v. State, 306 So 3d 719,737 (Miss. 2020)(Requiring defendant to show that he "does not possess the evidence nor could he obtain it himself with any reasonable diligence" to state a Brady claim). And the Supreme Court of Florida has held that Brady material need not be turned over when it is "equally accessible" to the defense. Morris v. State 317 So. 3d 1054, 1071 (Fla. 2021). See also State v. Sosa-Hurtado, 455 P.3d 63, 78 (Utah 2019); State v. Green, 225 So. 3d 1033, 1037(La. 2017); State v. Kardor, 867 N.W. 2d 686, 688 (N.D. 2015); Commonwealth v. Roney, 79 A.3d 595, 608 (Pa. 2013); People v. Williams, 315 P.3d 1, 44 (Cal. 2013);

State v. Roney, 19 A.3d 92, 97 (Vt. 2011); State v. Mullen, 259 P.3d 158, 166 (Wash. 2011); Aguilera v. State, 807 N.W. 2d 249, 252-53 (Iowa 2011); Erickson v. Weber, 748 N.W. 2d 739, 745 (S.D. 2008); Stephenson v. State, 864 N.E. 2d 1022, 1057 (Ind. 2007); State v. Skakel, 888 A.2d 985, 1033 (Conn. 2006); Rippo v. State, 946 P.2d 1017, 1028(Nev. 1997).

Several other state high courts have made clear that anything akin to a "due diligence" requirement has no place in the Brady analysis. Most recently the Supreme Court of Ohio "repudiated the imposition of any due diligence requirements on defendants in Brady cases" Ohio State v. Bethel, 167 OH St. N.E. 3d 362, 2022-Ohio-783. The court noted that since this Court's decision in Banks, "multiple federal circuit courts and other state supreme courts have" reached the same conclusion. Id(collective cases). Similarly, in 2019, the Supreme Court of Wisconsin recognized that "[f]ederal courts are currently divided as to whether a defendant's ability to acquire ... evidence through 'reasonable diligence' or 'due diligence' forecloses a Brady claim". State v. Wayerski, 922 N.W.2d 468, 480 (Wisc. 2019).

The Wisconsin court declined to adopt a diligence requirement "due to its lack of grounding in Brady or other United States Supreme Court precedent". Id. At 481.

The Colorado Supreme Court likewise rejected a due diligence requirement in 2018. See People v. Bueno, 409 P.3d 320. 328 (Colo. 2018) (rejecting

argument that "defense" must "search for a needle in the haystack" when the Government has represented that it has met its disclosure obligations. Id. (citing Banks 540 US at 668(2004) and Stickler v. Greene, 527 US 263, 281-82 (1999)). Likewise, in People v. Chenault, 845 N.W. 2d 731, 738 (Mich. 2014), the Michigan Supreme Court overturned a "four-factor" Brady test it had previously endorsed and declared that any "due diligence" requirement "undermines" the purpose of Brady. Id. "The Brady rule is aimed at defining an important prosecutorial duty; it is not a tool to ensure competent defense counsel. Adding a diligence requirement to this rule undermines the fairness that the rule is designed to protect". Id.

Four other states have reached this same conclusion. State v. Durant, 844 S.E. 2d 49, 55 (S.C. 2021)("Shifting the burden to defense counsel lessens the State's duty to disclose exculpatory evidence and has the risk of adding an additional element to Brady") Cert. denied, 141 S. Ct. 1423 (2021); State v. Reinert, 419 P.3d 662, 665 n.1 (Mont. 2018)("We will [now] decide issues regarding the withholding of exculpatory evidence without reference to a reasonable diligence requirement"); Commonwealth v. Tucceri, 589 N.E. 2d 1216, 1221-22(Mass. 1992)("As a general rule, the omissions of defense counsel ... do not relieve the prosecution of its obligation to disclose exculpatory evidence."); State v. Williams, 392 Md. 194, 227, 896 A 2d 973, 992 (2006)(citing Banks to conclude that a "defendant's duty to investigate

simply does not relieve the State of its duty to disclose exculpatory evidence under Brady").

This clear and broad disagreement among the courts of appeals and state high courts cries out for this Court's review. This issue frequently recurs and there is an established conflict among the federal and state courts as to the question presented. The split has intensified in recent years as many courts have abandoned their own prior decisions, recognizing them to be irreconcilable with Banks and other Brady decisions, while others have doubled down, rejecting claims that Banks requires a different approach. At this point, the split includes all circuit courts that hear criminal matters. The issue has fully percolated.

II. The Eleventh Circuit's Reasoning Conflicts with this Court's Precedent and Impermissibly Places the Burden on Defendants to Independently Find Brady Material as Opposed to Requiring the Government to Disclose it.

The 'self-help; rule endorsed by the Eleventh Circuit is in conflict with this Court's decision in Banks and does serious violence to the fundamental protection of Brady. Here the Eleventh Circuit denied an otherwise meritorious Brady claim - predicated on admittedly suppressed exculpatory evidence that emerged only after Petitioner discovered that a physician had the same longevity in the same clinic as Petitioner did, but was not indicted. The said physician was not prosecuted even after the Government experts

opined that all the prescriptions he wrote were unlawful. The Eleventh Circuit denied the Brady claim on the grounds that Petitioner could have with "reasonable diligence" discovered the 'Pivot Table' which was in the Government's possession and contained exculpatory evidence that impeached the Government's theory of prosecution, the false testimony of two law enforcement officers and the prosecutor's closing arguments. The Eleventh Circuit's opinion that Petitioner could have hired a team of experts to sift through 75 boxes of data to compile an exculpatory 'Pivot Table' did not relieve the Government of its disclosure obligations to release the 'Pivot Table' to Petitioner following Petitioner's motion for Brady materials (Doc. 75). Furthermore, the possibility that Petitioner could generate a 'Pivot Table' on his own is no substitute for access to the 'Pivot Table' in the Government's possession for comparative analysis. Here as in Banks v. Reynolds, 54 F.3d 1508, 1517 (1995), the 10th circuit stated that "That defense counsel knew or should have known about [exculpatory], information is irrelevant to whether the prosecutor had an obligation to disclose it". Id. At 1517.

III. The Eleventh Circuit's Erroneous Holding Conflicts with this Court's Precedent.

The Eleventh Circuit's holding conflicts with Banks. Banks reiterated that Brady has three "essential elements". (1) The evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; -[The

'Pivot Table' was favorable to Petitioner because it impeached the Government's theory of prosecution]. (2) That evidence must have been suppressed by the State, either willfully or inadvertently; - [the Government conceded the willful non-disclosure of the 'Pivot Table' to Petitioner, Appellee Br. Pg. 26]. (3) prejudice must have ensued". Banks, 540 US at 691 (citing Stickler, 527 U.S. at 281-82). [Prejudice – Petitioner was unable to advance arguments to impeach the false testimony of the law enforcement officers because of the suppression of the 'Pivot Table'].

In assessing the second element – whether evidence was "suppressed" by the Government, - this Court flatly rejected the notion that the defense actions were relevant: "[o]ur decision lends no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed" Banks 540 US at 695.

This Court drew from its decision in Stickler where the Government argued that a defendant could not show evidence was suppressed under Brady because the factual basis for the assertion of a Brady claim was available to .... counsel in the form of a careful review of witness testimony at trial and a public newspaper article published by the witness. Stickler, 527 US at 284. This Court "found this contention insubstantial". Banks 540 at 695. In particular, this Court focused on the fact that the Government had represented under its "open file" policy, it had shared all exculpatory evidence with the defense. Stickler, 527 U.S. at 284; Given those

representations, - which ultimately proved to be false – "it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld." Id. At 285; Following Petitioner's motion requesting for Brady material (Doc. 75), the Government represented under its open file policy that it had shared all the exculpatory evidence with the defense. As a result, "defense counsel has no procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred" Stickler 527 U.S. at 286-87.

The Eleventh Circuit's reasoning runs afoul of Banks. The court below did not acknowledge that the Government's need to comply with "Brady obligations was not obviated by the defendant's lack of due diligence" because the constitutional right to exculpatory evidence cannot be "so burdened". But it proceeded to do just that. The 11th circuit also did not suggest that Petitioner turned a willful blind eye to the Pivot Table to set up a Brady claim for new trial. The lower court focused its ruling exclusively on the fact that Petitioner should have discovered the evidence himself with the exercise of "reasonable diligence". United States v. Donatus Mbanefo, 21-13693 of 7/28/2022, pg. 8). This opinion was rendered oblivious of the materiality of the suppressed evidence in context and the suborned perjury by two law enforcement officers therefrom.

Contrary to the Government's assertion that Petitioner was aware of the Pivot Table and failed to request specifically for it (Appellee Br pg. 26), the

Eleventh Circuit found otherwise, opining that "with reasonable diligence Petitioner could have analyzed the spreadsheet data himself to generate the Pivot Table. As in Banks, the government here suppressed exculpatory information from the defense. Compare Appellee Br. 26 (Mbanefo failed to object to the United States non-disclosure of the full table), with *Banks*, 540 US at 693 (stating that Government "knew of but kept back" the key evidence). The suppressed evidence was similar – crucial information tabulated from spreadsheets data that would have impeached the Government's theory of prosecution. *Compare Appendix D* (evidencing that the Pivot Table contained favorable proofs of the longevity of various physicians that impeached the testimony of the law enforcement officers with Banks, 540 U.S. at 694 (describing suppressed evidence that key witnesses had misrepresented to the jury their dealings with the police). And in both cases, the Government represented that it had complied with its discovery obligations including having produced exculpatory evidence. Compare Appellee Br. 25 – Suggesting instead of disclosures that *the Government had notified Mbanefo of the existence of the 'Pivot Table'*. There is no place in the Brady doctrine for the *notification* of the existence of exculpatory materials. Furthermore, the Government cannot cite in the records where the said *notification* was made. Government stated in response to Petitioner's request for Brady materials that it had complied with its Brady obligations. Petitioner cannot be faulted for relying on that representation.

Indeed, other circuit and state high courts have concluded that the practice of "avoiding the Brady rule and favoring the prosecution with a broad defendant due-diligence rule" was disavowed by the "clear holdings in Banks"". United States v. Tavera 719 F.3d 705,712(6th2013); see also e,g Chenault 845 N.W. 2d at 733(holding that "diligence requirement is not supported by Brady or its progeny" and "[t]hus, we are overruling" prior precedent); Dennis, 834 N.W 2d at 291 (recognizing pre-Banks case law as "inconsistent" and "clarifying rule that "the concept of 'due diligence' plays no role in the Brady analysis".

IV. The Eleventh Circuit's Rule Ignores the Reality of Criminal Proceedings.

The rule endorsed by the Eleventh Circuit assumes that Government's knowledge of any exculpatory evidence equates to access to that evidence for the defense. The Eleventh Circuit in effect assumed that these evidence will be both (a) discoverable by Petitioner and (b) that an analysis by Petitioner's data experts will arrive at the same conclusion as the Government's expert's analysis. The Eleventh Circuit opined that:

> "Because that spreadsheet contained all the data Mbanefo wanted from the 'Pivot Table'- including the prescription records for the other physicians at the clinic – his Brady claim and his Giglio claim fail. Mbanefo cannot complain because with reasonable diligence, he could have analyzed the spreadsheet data himself'.

(United States v. Donatus Mbanefo, 21-13693 of 7/28/2022 pg. 8)

This opinion is flawed because the 75 boxes of patient files and the hundreds of columns of spreadsheets, did not display any physician's longevity which was only displayed in the Pivot Table sheet. The Government cannot identify any physician's longevity from the spreadsheets or from the 75 boxes of patient files. This singular differentiation characterized the 'Pivot Table' as discoverable under the Brady doctrine contingent on the relatedness of the data presented therein to the Government's theory of prosecution.

The Eleventh Circuit opinion taken to its logical conclusion can absolve the Government from sharing the spreadsheets with the Petitioner '*because the 75 boxes of patient files contained all the information Petitioner wanted from the spreadsheets.*

This logic is unrealistic in criminal practice. The Government possesses immense resources to afford to fly in 19 out of state data experts and accommodate them for months to analyze data for the prosecution. Eleventh Circuit's opinion is that Petitioner should have done the same with reasonable diligence to generate a Pivot table. This opinion defies reality. No amount of 'diligence' reasonable or otherwise will enable Petitioner to generate the Pivot Table from thousands of rows and hundreds of columns of data compiled from over 75 boxes of patient files, because of the cost outlay and the expertise involved.

The Eleventh Circuit and the district court opined that Petitioner had access to the spreadsheets and could have generated the Pivot table from the spreadsheets with reasonable diligence. This opinion is inconsistent with the prosecutor's Brady disclosure obligations.

Second the Eleventh Circuit and district court failed to recognize the material and potential strategic importance of the contents of the Pivot Table. Without doubt, the data as presented in the Pivot Table would have corroborated Dr. Moseley's three months longevity (Appendix D) thereby impeaching the Government's theory of prosecution. Also, Petitioner could have potentially used the substance of the Pivot Table to impeach the false testimony of the law enforcement officers. Moreover, the very existence of the table could have affected critically important tactical decisions.

V. The Eleventh Circuit's Ruling is Self-Contradictory and Undermined Brady's Purpose.

The 11th Circuit opined that:

"The Government did not withhold the evidence [Pivot Table] despite what Mbanefo says to the contrary"

USCA 11 Case 21-13693 of 07/28/2022 pg. 8.

This cited opinion inferred that the Government disclosed the Pivot Table to the defense. The lower court further opined on the same page that:

"Because the spread sheet contained all the data Mbanefo wanted from the Pivot Table – including the prescribing records for the other physicians at the clinic – his Brady claim and his Giglio claim fail".

USCA11 Case 21-13693 of 07/28/2022 pg. 8.

This opinion inferred that the Pivot Table was not disclosed to the defense. Furthermore, Eleventh Circuit's reliance on a "reasonable diligence' requirement implied that the Pivot Table was not disclosed to Petitioner. The prosecutor confirmed that the Pivot Table was not disclosed to the defense by stating that:

"Mbanefo failed to object to the United States non-disclosure of the full table".

Appellee Br. Pg. 25.

The 11th Circuit's opinion is flawed because the 75 boxes of patient files and the thousands of rows/hundreds of columns of the spread sheets did not specifically display individual physician longevity. The longevity and prescribing practices of the 27 physicians were collated and displayed only in the Pivot Table from which the Government prepared summary charts (GX 62 A-H) that were tendered as evidence. (Docs. 368 pgs. 144-145). The Pivot Table which contained impeaching evidence was intentionally suppressed.

Brady is based on the fundamentally American precept that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair". Brady 373 US at 87. The key to Brady's promise is that it limits prosecutorial

conduct, not to punish the Government, but to ensure that criminal defendants' rights are protected. See id. (explaining that Brady is necessary for due process "not [as] punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused") (citing Mooney v. Holohan, 294 US 103 (1935); see also Stickler, 527 US at 281 (emphasizing that "the basis for the prosecution's broad duty of disclosure" is due to his "special status" in the American legal system) (quoting Berger v. United States, 295 US 78, 88 (1935)). Put differently, *Brady's* "mandate and its progeny are entirely focused on *prosecutorial disclosure*, not defense counsel's diligence." Dennis 843 F.3d at 290.

Thus, this Court has consistently defined the contours of Brady by addressing conduct of the prosecutor, not the defendant or defense counsel. Cf. Banks, 540 at 695-696 (counsel has no "procedural obligation" to protect his client's Brady rights, based on "mere suspicion" of prosecutorial misconduct). For instance, Giglio requires prosecution to disclose evidence bearing on witness credibility. Giglio v. United States, 405 US 150, 154(1972) ("It is the responsibility of the prosecutor" to disclose evidence "affecting credibility" of witnesses.). Data as presented in the Pivot Table affected the credibility of the law enforcement officers and the Pivot Table should have been disclosed. Bagley ensured prosecutor turn over impeachment evidence. United States v. Bagley, 473 US 667, 676 (1985). Data as collated and presented in the Pivot Table impeached the Government's theory of prosecution and failure to turn

over the Pivot Table to the defense was a Bagley violation. And in United States v. Argus, 427 US 97(1976), this Court clarified that prosecutors are bound by disclosure obligations regardless of specific requests from defendants or their counsel. Id. At 107 ("[P]rosecutor's duty ... [applies equally to] cases in which there has been merely a general request for exculpatory matter and cases in which there has been no request at all"). The prosecutor's contention that Government failed to hand over the 'Pivot Table' because "Mbanefo did not specifically request for the 'Pivot Table' (Appellee Br. Pg. 25) is unpersuasive and is foreclosed by this Court's clarifications above in United States v. Argus 427 at 107.

VI. The Government conceded to a Brady non-disclosure violation.

The Government stated that:

"Because Mbanefo was aware of the Pivot Table and failed to object to *the United States non-disclosure of the full table* or remarks concerning the table, there is no violation of due process resulting from prosecutorial non-disclosure". Appellee Br. Pg.25.

The Government's argument clearly evidenced concession to a Brady suppression violation by admitting to prosecutorial non-disclosure. Petitioner was not aware of the impeaching contents of the Pivot Table. Furthermore, failure of Petitioner to object to the Government's non-disclosure of the table does not relieve the Government of its disclosure obligations under the Brady doctrine. Following Petitioner's motion for Brady materials (Doc.75), the Government indicated that it had made all the necessary disclosures.

Petitioner cannot be faulted for failing to object to Government's non-disclosure after Government had inferred that it had made all the necessary disclosures. This Government's contention is foreclosed by this Court's contours of a prosecutor's disclosure obligations whether specific or general requests were made by the defense or not. See United States v. Argus, 427 US 97, 107 (1976). Also "The duty to disclose under Brady is absolute. It does not depend on the defendant's or counsel's actions" Smith v. Secy. Pennsylvania Dept. of Corr., 834 F3d 263, 292(3rd Cir. 2016) (En Banc). The Eleventh Circuit failed to address the merits of the Government's concession of non-disclosure of the Pivot Table.

VII. The "due diligence" requirement

The "due diligence" or "self-help" rule flips Brady's principle of disclosure on its head, and impermissibly, "shifts the burden of disclosure from the Government to the defendant". Weisburd, 60 UCLA L. Rev. at 142. It also introduces a highly speculative element to the Brady analysis: whether the defendant *could have* located the information independently. As happened here, that element invites courts to assume what might have happened, rather than analyzing what actually happened, i.e., if favorable evidence was suppressed and also if perjury was suborned. This element, which this Court has never embraced, necessarily weakens the Brady standard and makes Brady claims more difficult for lower courts to administer. It also invites

prosecutors, who must in the first instance decide what material to produce to the defense, to withhold favorable information if the prosecutor believes the defendant could possibly have a route to identifying the information independently. Brady protects a fundamental due process right; the decision below invites prosecutorial gamesmanship.

VIII. The Eleventh Circuit ruling failed to distinguish between a Brady suppression violation and a Giglio/Napue material perjury violation.

The 11th Circuit denied Petitioner's claim stating that;

"Both claims [Brady and Giglio/Napue] fail for the same reason: the government did not withhold the evidence despite what Mbanefo says to the contrary. As the government witness explained, a "pivot table" is "a tool" built into Excel "that helps you summarize or visualize" data in a spreadsheet. And no one disputes that the government provided both the 75 boxes of patient data and the Excel spreadsheet compiling that patient data to Mbanefo. Because that spreadsheet contained all the data Mbanefo wanted from the "Pivot Table" – including the prescribing records for the other physicians at the clinic- his Brady claim and his Giglio claim fail. Mbanefo cannot complain because, with reasonable diligence, he could have analyzed the spreadsheet data himself. See United States v. Jordan, 316 F.3d 1215, 1253(11th Cir. 2003)" USCA11 Case 21-13693 of 07/28/2022 pg. 8 of 9.

As an initial matter, the Eleventh Circuit opinion is contradicted by the Appellee brief. Compare:

"The Government did not withhold the evidence despite what Mbanefo says to the contrary" (Eleventh Circuit opinion)

With:

"Mbanefo was aware of the 'Pivot Table' and failed to object to the United States non-disclosure of the full table or remarks concerning the table" Appellee Br. 26.

Whereas the United States and Mbanefo both affirmatively concede that the Pivot Table was not disclosed to the defense, the Eleventh Circuit erred in opining that *"the Government did not withhold the evidence despite what Mbanefo says to the contrary".(Id.).*

The Government never disclosed the Pivot Table prior to or during the trial. Disclosure of the contents of the Pivot Table would have invalidated the Government's theory of prosecution. The Pivot Table cannot be cited in the records and its non-disclosure mandates a materiality review of the contents of the suppressed table.

A Brady violation occurs when a prosecutor suppresses material evidence in his possession Brady v. Maryland, 373 US 83(1963). On the contrary, a Giglio/Napue violation occurs when the suppressed evidence proved that the prosecutor failed to correct the testimony of a witness which he knew to be false. Napue v. Illinois, 360 US 269, 272 (1959). The critical element in a Brady claim is the suppression of material evidence while at the core of a Giglio/Napue error is uncorrected material perjury. The 11th Circuit failed to

make a determination, irrespective of the disclosure or non-disclosure of the Pivot Table:

i) Whether or not the law enforcement officers suborned perjury; and

ii) If the law enforcement officers suborned perjury, whether such perjury rose to the level of material significance or not.

The following statements made by two law enforcement officers and the prosecutor were false, material, and struck at the core of Government's theory of prosecution that the three physicians with the highest longevity were indicted.

First Perjury:

The DEA Case Agent Charles Sikes testified falsely under oath in response to the prosecutor as follows:

Q. "And a number of those doctors you were asked about only worked for that clinic [RIC] for a matter of a day or two days or a week at most?"

A. *"Very short periods of time".* (Doc. 367 Pg. 33).

Second Perjury

The GBI Special Agent Striplin Luke also testified falsely under oath in response to the prosecutor:

Q. "And you said that Dr. Frances Raul or Raul Frances was listed on the Business license"?

A. "Yes Sir, during the course of the investigation, overall, we have three primary doctors. When you look at the number of prescriptions written, the first one is Dr. Bacon, the second one is Dr. Shah and the third one was Dr. Mbanefo.

So after that we look at all the doctors that we had employed, the majority of the turnover of doctors were here in the Columbus and the amount of prescriptions they wrote versus everybody else was like 1% or less than 1%. And so there was 10 or 15 ..... 10 doctors who were there at the Columbus clinic after Dr. Mbanefo that *were there for short periods of time*" (Doc. 367 Pg. 111).

Third Perjury

The prosecutor made the same false and misleading statements to the jury in his closing arguments when the defense had no opportunity to impeach the false statement:

The prosecutor stated during closing arguments that:

"Drs. Bacon, Shah, and Mbanefo were the top three prescribers at these clinics. There were many other doctors, but *they were only there for very brief periods of time.* And the doctors that have been referenced as far as their testimony – you will recall their testimony – one was there for a day and said, "No, not for me. I am not doing this. No, I can't do this." And what does he do? He leaves and the next day he reports it to the DEA, what's going on." (Doc. 373 pg. 121).

These material perjuries were refuted by these two prescription scripts written by Dr. John Moseley dated November 21, 2013(Doc. 356-3 pg. 41) and February 4, 2014(Doc. 362-8 pg. 37-38) [Appendix D] which prove that Dr. John Moseley worked at the RIC after Petitioner for approximately 3 months but was not prosecuted. Proof of Dr. Moseley's longevity and that of other physicians were tabulated in the Pivot Table which

was suppressed by the prosecutor. There is no indication anywhere in the records that Dr. Moseley was of any assistance to the Government.

"A lie is a lie", regardless of its subject and if it is in any way relevant to the case, the prosecutor has a duty to correct what he knows to be false and elicit the truth". Napue at 269-270. Furthermore, "in some circumstances, prosecutorial statements may be treated as testimony for this [Giglio] purposes" United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995). In this case, the failure of the prosecutor to correct the perjury of two law enforcement officers at the time they occurred amounted to prosecutorial misconduct and a denial of Petitioner's due process rights in violation of the 5th Amendment.

IX. Materiality of suborned perjury

The materiality standard for Brady purposes is met when the Government knowingly used perjured testimony or failed to correct what it subsequently learned was false testimony. Where either of those events has happened, the falsehood is deemed to be material "if there is any reasonable probability that the false testimony could have affected the judgment of the jury" United States v. Argus, 427 US 97, 103(1976); Giglio v. United States, 405 U.S. 150, 154(1972); Napue v. Illinois, 360 U.S. 264, 271(1959). These cited decisions deal with false testimony as obtainable in the instant case. A physician's longevity was the determinant factor before the jury that set indicted physicians apart from unindicted physicians. The various quantity of drugs prescribed by the unindicted physicians was not presented to the jury for consideration. Rather their brief longevity was alluded to persuasively to the jury as a testament of their non-culpability in the alleged conspiracy. Therefore, false testimony about a physician's longevity was material and determinative of guilt or innocence. A lower materiality

standard should apply where there is deliberate and repeated knowing use of perjured testimony involving prosecutorial misconduct and a corruption of the truth-seeking function of the trial. Bagely at 680, Agurs 427 U.S. at 104.

If knowledge of the fact that other physicians who had longevity of 3 months were not prosecuted, could reasonably have led the jury to disbelieve the testimony of the law enforcement officers and the prosecutor's closing arguments, it follows that the perjury did in fact affect the judgment of the jury and Petitioner's conviction is constitutionally void. This Court's precedents define materiality in terms of a "Reasonable probability of a different outcome, and such reasonable probability results when non-disclosure places the case in a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 US 419, 435(1995).

Exclusion of the Pivot Table by the Government was both a tactical decision and a constitutional deprivation because the data as presented in the Pivot Table impeached the Government's theory of prosecution and the false testimony of two law enforcement officers. Suppression of the Pivot Table allowed the prosecutor and the law enforcement officers, to repeatedly inject false and material testimony into the proceedings that was gross prosecutorial misconduct and a due process violation which satisfied both a Brady suppression violation and a Giglio/Napue false testimony violation. Furthermore, failure of the prosecutor to correct the false testimony of the law enforcement officers when it occurred was a constitutional breach.

Petitioner was denied due process in violation of the 5th Amendment when the prosecutor suppressed the Pivot Table and also when the prosecutor

failed to correct the false and material testimony of two law enforcement officers, when they occurred. "The cases hold that the duty to correct the testimony of a Government witness is on the prosecutor. That duty arises 'when [the false evidence] appears'" Napue 360 at 269. This Court had long established that "a conviction obtained through use of false testimony must fall under the Fourteenth Amendment", Mooney v. Holohan, 294 US 103.

X. The District Court's Ruling is not Supported by the Records.

The Ruling states:

Brady Claim

"Defendant's motion for new trial fails because he has not shown that the Government did not disclose evidence of Dr. Moseley's involvement at the clinics prior to trial" (Doc. 603 p. 7)

Giglio Claim

"Defendant's motion for new trial again fails because he has not shown that the evidence he highlights was not disclosed prior to trial. Nor has Defendant demonstrated that the Government knowingly suborned perjury" (Doc. 603 p. 7)

There is no documentation of Dr. Moseley's longevity anywhere in the records prior to or during trial and the span of the dates in the prescriptions in Appendix D is proof that the law enforcement officers knowingly suborned perjury.

XI. This Case Is an Ideal Vehicle For Considering The Questions Presented.

This case is an ideal vehicle for resolving the conflict among the lower courts with respect to whether a "due diligence" or "self-help" burden may be imposed on a defendant's Brady claim. The Eleventh Circuit rested its decision solely on the legal requirement of "reasonable diligence" and not on any factual distinctions unique to this case. (See United States v. Donatus Mbanefo, 21-13693, of 07/28/2022 pg. 8) (Denying Brady claim because Mbanefo failed to exercise "reasonable diligence" to analyze the spread sheet data himself). Accordingly, the law enforcement officers made several false and material statements which they would not have otherwise made if they knew Petitioner was in possession of the Pivot Table. The failure of Petitioner to obtain the Pivot Table after "reasonable diligence", did not grant the law enforcement officers the right to mislead the jury with false testimony. Petitioner was prejudiced by the suppression of the Pivot Table which denied him of the factual basis to forge a credible defense against the Government's theory of prosecution and to impeach the testimony of the GBI and DEA agents whose investigations and testimony were central and crucial to the charges against Petitioner.

The questions in this petition are determinative of the outcome of this case. Petitioner would have prevailed on his Brady claim if not for the "reasonable diligence" burden imposed by the Eleventh Circuit. There is no dispute here as both the Government and the Petitioner conceded that the Pivot Table which Petitioner considered impeaching and favorable to Petitioner's defense was suppressed. The suppressed Pivot Table upends the Government's theory of prosecution since it proved that another physician with the same longevity as Petitioner was not prosecuted. The Government therefore harbored an ulterior motive that instigated the suppression of the Pivot Table to readily impute credibility to the false testimony of the DEA and GBI Agents and also to the Prosecutor's closing arguments which were all refuted only by the data as presented in the suppressed Pivot Table. Therefore, the exclusion of the Pivot Table by the Government was both a constitutional deprivation and a tactical decision.

XII. Constitutional violation

Physicians' longevity was the only factor presented to the jury that set apart indicted from unindicted physicians. Therefore, longevity was determinative of the issue of guilt. The Government cannot cite any document from the records that indicated the longevity of the various physicians from which its theory of prosecution derived. The undisclosed 'Pivot Table' demonstrates that the prosecutor's case included perjured testimony and that the prosecution knew of the perjury and failed to correct it. This Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any

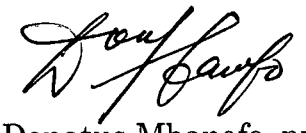
reasonable likelihood that the false testimony could have affected the judgment of the jury. The fact that a physician with the same longevity as Petitioner was not indicted gave rise to legitimate doubts on the issue of guilt being determined by longevity. This Court should find that evidence that impeached the Government's theory of prosecution must be of substantial material significance. The data in the 'Pivot Table' displaced the foundational basis of the determinant (longevity) of the prosecution. The proper standard of materiality must reflect the overriding concern with the finding of guilt. If the omitted evidence creates a reasonable doubt that did not otherwise exist, a constitutional error has been committed. See United States v. Argus at 112. In other words, if knowledge of the longevity data as presented in the suppressed 'Pivot Table' could have led the jury to doubt the Government's theory of prosecution and the testimony of law enforcement officers, "a reasonable doubt that did not otherwise existed" could have been created and a constitutional error has occurred from suppression of the 'Pivot Table'. This constitutional error denied Petitioner due process in violation of the Fifth Amendment of the constitution. This constitutional error was further buttressed by prosecutorial misconduct in the closing arguments when the prosecutor presented false testimony (Giglio error) to the jury and argued it as a relevant matter for the jury to consider. See United States v. Sanfilippo 564 F2d 176, 179 5th Cir. 1977). The prosecutor's argument to the jury capitalizing on the perjured testimony reinforced the deception of the

knowing use of false testimony by the law enforcement officers. No misconduct can be more prejudicial and more unfair to the defense than the deliberate suppression of evidence that impeached the Government's theory of prosecution and the testimony of key law enforcement officers.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully, submitted this December 21, 2022.



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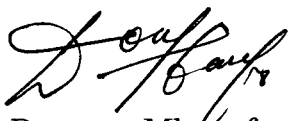
CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the Type-volume limitations set forth in the United States Supreme Court Rules. This petition contains 37 pages and employs proportionally spaced 12-point characters in Century School Book font. This petition contains 8,420 words.

Dated, December 21, 2022.



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