No. _____

IN THE

Supreme Court of the United States

TIMOTHY ALAN DUNLAP,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Idaho

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****

QUESTION PRESENTED

Whether a defendant's ability to independently obtain exculpatory evidence is relevant to a *Brady v. Maryland*, 373 U.S. 83 (1963) claim?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Alan Dunlap respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Idaho.

OPINION AND DECISION BELOW

The opinion of the Supreme Court of Idaho (Pet. App. 1a–31a) is published at 516 P.3d 987. The decision of the district court (Pet. App. 32a–78a) is unpublished.

JURISDICTION

The Supreme Court of Idaho issued its opinion on January 5, 2022 (*Dunlap v. State*, No. 47179, 2022 WL 39096 (Idaho Jan. 5, 2022), *opinion withdrawn and superseded on reh'g*, 516 P.3d 987 (Idaho 2022)), and then granted rehearing, in part, on March 15, 2022. Following oral argument, the Idaho Supreme Court issued a substitute opinion on August 30, 2022. Pet. App. 1a-31a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This case concerns the vitality of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. More specifically, this case raises important questions about whether the prosecutor has an affirmative duty to disclose exculpatory *Brady* evidence, or whether

it is conditional and can only be triggered when a defendant is unable to independently find the exculpatory evidence.

There is a significant split of authority among state and federal courts that have considered the question. Many courts have held that *Brady* is an affirmative, independent duty of the prosecution unaffected by a defendant's ability to find the evidence from another source. Unfortunately, many others—including Idaho—have decided the prosecutor's duty to disclose exculpatory evidence is only triggered if the defense could not have independently found similar evidence. Only if the defense cannot independently find the exculpatory evidence will these courts find the prosecution has a duty under *Brady* to share exculpatory evidence with the defense. Given the extent of the split, the fundamental character of the rights at stake, and the fact that proper resolution of the issue turns on the interpretation of several of this Court's decisions, this question calls for the Court's immediate attention.

STATEMENT OF THE CASE

Background Law

"The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). A *Brady* violation has three components: (1) the evidence is favorable to the accused because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State; and (3) prejudice must have

ensued, i.e., there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). It would have been fair to assume this Court already answered the question of whether the prosecutor's *Brady* duty to disclose favorable evidence is only triggered if a defendant cannot independently obtain similar evidence from another source in *Banks v. Dretke*, 540 U.S. 668, 695 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). But even after *Banks,* the split persists. Given the split of authority in both federal and state courts, this is a question only this Court can answer.

Procedural History

1. Within a few months of absconding from a state mental hospital commitment in Madison, Indiana, on October 16, 1991, petitioner Timothy Dunlap entered and robbed a bank in Soda Springs, Idaho. In the course of the robbery, Mr. Dunlap shot and killed a teller. He fled the scene but subsequently surrendered to police officers. *State v. Dunlap*, 873 P.2d 784, 785 (Idaho 1993) (*Dunlap I*).

2. On December 30, 1991, Mr. Dunlap pled guilty to first-degree murder and use of a firearm in the commission of a murder, both charges arising from the Soda Springs bank robbery. The plea agreement allowed the State to seek the death penalty, which it did. At a hearing to determine both death eligibility and sentence selection, the judge found that Mr. Dunlap was eligible for the death penalty and sentenced him to death. *Id.* at 786.

3. Mr. Dunlap sought timely post-conviction relief and while his case was pending before the district court, the State conceded error requiring resentencing. *Dunlap v. State,* 106 P.3d 376, 382 (Idaho 2004) (*Dunlap II*). Following an appeal, Mr. Dunlap's case was set for jury sentencing in February of 2006. The State was represented by deputy attorneys general Ken Robins and Justin Whatcott of the Criminal Division of the Idaho Attorney General's (AG's) Office, and they sought the death penalty. *State v. Dunlap,* 313 P.3d 1, 20-22 (Idaho 2013) (*Dunlap III*). The jury found three aggravating circumstances,[1] concluded the mitigating circumstances were not sufficiently compelling to render death an unjust punishment for each aggravator, and Mr. Dunlap was sentenced to death. *Id.*

4. Following imposition of the death sentence, Mr. Dunlap sought post-conviction relief which was summarily denied without a hearing. *Dunlap III,* 313 P.3d at 14, 39. On appeal, the Idaho Supreme Court partially vacated the summary dismissal of a few claims and remanded them for an evidentiary hearing, but otherwise affirmed Mr. Dunlap's death sentence. The remanded claims included: (1) whether the State committed numerous *Brady* and *Napue* violations; (2) whether counsel's failure to adequately investigate and present mitigation evidence was ineffective; and (3) whether counsel's failure to rebut the State's aggravation evidence and malingering

[1] Only one aggravating circumstance survived appellate review, though the Idaho Supreme Court refused to identify which. *Dunlap III,* 313 P.3d at 21 (setting aside the felony murder with specific intent to kill aggravator due to defective jury instructions and recognizing deficient jury instructions resulted in the death verdict only being supportable by one aggravator, but declining to identify which).

theory was ineffective.[2] The *Brady/Napue* violations stemmed from the State's failure to disclose the fact that prison staff and prison mental health personnel believed Mr. Dunlap was mentally ill, its elicitation of contrary testimony from its own expert at trial, and its presentation of malingering testimony and evidence at sentencing. *Dunlap III,* 313 P.3d at 44–46.

5. Upon remand, the *Brady/Napue* violation claims were bifurcated from the ineffective assistance of counsel (IAC) claims. Following a hearing on the *Brady/Napue* claims, the district court found that even though it did not disclose known evidence that prison officials and prison mental health providers believed Mr. Dunlap was mentally ill and housed appropriately on the mental health tier of the prison, the State had not "suppressed" such exculpatory evidence within the meaning of *Brady.* Specifically, the district court concluded that just as deputy AGs had tracked down and interviewed prison personnel and prison mental health providers in defense of Mr. Dunlap's civil lawsuit against the prison, so too could Mr. Dunlap, and such investigation would have led the defense to discover those witnesses' early 2005 opinions that Mr. Dunlap did not malinger mental illness but was mentally ill. Pet. App. 67a–72a. The district court concluded trial counsel's

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[2] The Idaho Supreme Court noted: "Dunlap has also presented significant evidence of prejudice. For example, counsel failed to present mitigation evidence regarding Dunlap's background and mental health that could have countered the State's theories regarding malingering and intent. Further, there were at least two affidavits by mental health professionals that could have undermined the State's theory that Dunlap was not really mentally ill, but merely malingering." *Dunlap III,* 313 P.3d at 44.

failure to track down exculpatory evidence or witnesses relieves prosecutors of their *Brady* obligations if the facts at issue are "readily available to a diligent defender." Pet. App. 67a.

Mr. Dunlap's IAC claims premised on counsel's failure to investigate and present mitigating evidence, and failure to rebut the State's aggravating evidence and malingering theory, were also denied following an evidentiary hearing held eighteen months after the *Brady/Napue* hearing.

6. Following the denial of post-conviction relief, Mr. Dunlap filed a direct appeal to the Supreme Court of Idaho alleging several errors in the proceedings, including the *Brady* issue presented here. Pet. App. 12a.

The Supreme Court of Idaho found no error in the district court's denial of relief based on the *Brady* violation, but relied on information not before the district court to do so. Specifically, the Idaho Supreme Court concluded the State did not suppress the exculpatory opinions of the prison psychologist, the prison warden, and other prison personnel that Mr. Dunlap was mentally ill and not malingering. The Court relied on testimony culled from the IAC hearing to support its conclusion that Mr. Dunlap's belief that the prison psychologist thought he was "crazy" and should be housed in "C-Block, Tier 2," gave his trial team knowledge of the "salient facts regarding the existence of the [evidence] that he claims [was] withheld." Pet. App. 12b. As a result, the Court concluded "there was no suppression by the State. This defeats Dunlap's *Brady* claim, and we need not address the other two prongs of the *Brady* analysis." *Id.*

Factual History – The Federal Lawsuit And Jury Sentencing

Prior to Mr. Dunlap's 2006 jury sentencing, he and an attorney with the Criminal Division of the AG's office were opposing parties in a federal lawsuit about his housing situation. In May of 2004, Mr. Dunlap sued the prison warden,[3] Gregory Fisher, for violating his civil rights by housing him on Tier 2 of C Block, rather than in general population. Pet. App. 79a-86a. Deputy AG William Loomis was assigned to defend Warden Fisher. In January of 2005, Loomis emailed Warden Fisher and Dr. Chad Sombke, the prison psychologist, asking why Mr. Dunlap was housed on Tier 2 of C Block and not general population. Pet. App. 87a. Dr. Sombke explained that Tier 2 of C Block is for the stable mentally ill and Mr. Dunlap fits that category. Pet. App. 87a-88a. Warden Fisher also responded, telling Loomis that he defers to Dr. Sombke when deciding where to house inmates with mental health issues. Pet. App. 88a.

A month before Mr. Dunlap's capital jury sentencing, Deputy AG Loomis called his colleague, Ken Robins, the Criminal Division Deputy AG prosecuting the capital sentencing case against Mr. Dunlap, to learn the status of the sentencing case. Pet. App. 89a. Loomis wanted to delay Mr. Dunlap's federal lawsuit until after the capital sentencing, and asked Robins to provide him an affidavit explaining the status of the capital sentencing case. Pet. App. 90a-91a. Robins agreed and Loomis submitted Robins' affidavit in support of his motion to stay the federal case. Pet. App. 90a-97a.

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[3] Mr. Dunlap was housed at the Idaho Maximum Security Institution (IMSI), one of several Idaho Department of Correction (IDOC or prison) facilities.

Neither Robins nor Loomis told Mr. Dunlap or defense counsel about Dr. Sombke's and Warden Fisher's 2005 opinions that Mr. Dunlap was mentally ill and housed appropriately on the mental health tier at the prison, even though Robins knew Mr. Dunlap's mental health was central to his plea for a life sentence.

As Robins anticipated, the defense focused almost exclusively on Mr. Dunlap's mental illness as a reason for the jury to spare his life, while the State argued as aggravation that Mr. Dunlap was not mentally ill but only malingered mental illness to avoid a death sentence. The State did not disclose Dr. Matthews' opinions or malingering theory to the defense until the next-to-the-last day of trial. Pet. App. 98a-101a.

To support its malingering narrative, the State presented testimony from its retained psychiatrist, Dr. Daryl Matthews. Dr. Matthews mostly relied on four pages of Mr. Dunlap's prison records[4] from the fall of 2002, including a note written by Dr. Sombke and one written by a housing officer documenting Mr. Dunlap's September 4, 2002 claim that he was malingering mental illness. Dr. Matthews and the deputy AGs ignored Dr. Sombke's and Warden Fisher's 2005 opinions that Mr. Dunlap is mentally ill and housed accordingly.

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[4] Mr. Dunlap has been at IMSI since he was first sentenced to death in 1992, with the exception of the time he was in jail in Hamilton County, Ohio, and Idaho county jails while awaiting his 2006 jury sentencing. By 2006, the prison had about twelve to thirteen years' worth of medical and hundreds—if not thousands—of pages of mental health, housing and disciplinary records for Mr. Dunlap.

The jury found three statutory aggravating circumstances, concluded all the mitigating evidence weighed against each aggravator was not sufficiently compelling to make death an unjust punishment, and returned with a death verdict.

Within a month after Mr. Dunlap's death sentence was imposed, Loomis asked the federal district court to summarily dismiss Mr. Dunlap's lawsuit. Pet. App. 102a-103a. Loomis argued Mr. Dunlap's mental illness justified the prison's decision to house him on C-Block, Tier 2 (the mental health tier) rather than in general population. Pet. App. 104a-105a. In support of his argument, Loomis filed a statement of undisputed material facts asserting Mr. Dunlap's mental illness was an undisputed fact. Pet. App. 117a-118a, 121a-122a. The State's motion was corroborated by the sworn affidavits of Dr. Sombke, Pet. App. 125a-165a, and Warden Fisher. Pet. App. 166a-202a. These affidavits memorialized Dr. Sombke's and Warden Fisher's January–February of 2005 opinions regarding Mr. Dunlap's mental illness and housing that were shared with Loomis at that time. The federal district court relied on the State's undisputed facts and these affidavits to dismiss Mr. Dunlap's federal lawsuit. Pet. App. 203a-212a.

Factual History – Post-Conviction and Appeal

Mr. Dunlap pursued post-conviction relief and through his own investigation, discovered the federal lawsuit, including the state's motion for summary judgment and memorandum in support, its statement of undisputed material facts, and the affidavits of Dr. Sombke and Warden Fisher. Pet. App. 102a-202a. Mr. Dunlap raised *Brady* and *Napue* claims stemming from the prosecution's suppression of this

exculpatory evidence, along with its presentation of contrary malingering testimony and evidence, but those claims were summarily dismissed. On appeal, the Idaho Supreme Court vacated the order summarily dismissing Mr. Dunlap's *Brady* and *Napue* claims and remanded them for an evidentiary hearing, concluding:

> [Dunlap] has demonstrated the existence of a genuine issue of material fact whether the State was aware of exculpatory evidence that it did not disclose.
>
> The evidence in question here is related to Dunlap's mental health, which was the primary focus of the defense at sentencing. [A]n evidentiary hearing was required to determine whether, taken as a whole, there is a reasonable likelihood that timely disclosure of this evidence would have had a substantial effect on Dunlap's mitigation case, especially with respect to rebutting the State's theory that Dunlap was a malingerer.

Dunlap III, 313 P.3d at 45–46.

Following court-ordered discovery and the State's disclosure of additional relevant materials, an evidentiary hearing was held before the state district court. In addition to documentary evidence, Mr. Dunlap presented live testimony from Deputy AG Robins, Deputy AG Loomis and the prison's paralegal, Kevin Burnett, along with sworn affidavit testimony from Dr. Sombke, Warden Fisher, Dr. Kenneth Khatain (the prison psychiatrist), Royce Creswell (prison mental health clinician), and Michael Shaw (a correctional officer/clinician). The State, still represented by the AG's office, offered no testimony and presented a handful of discovery-related documents from the jury sentencing case.

The district court then denied Mr. Dunlap relief on his *Brady* claims, concluding the state's disclosure of prison records alone was sufficient to give the

defense knowledge of the pertinent players who *may have* had knowledge of Mr. Dunlap's mental health. And just as the prison did in defense of Mr. Dunlap's federal case, the district court found: "Dunlap's defense team in the resentencing and/or their psychologist and expert, Dr. Beaver, could have tracked these individuals, interviewed them, and if their testimony was deemed beneficial to Dunlap at his resentencing hearing, subpoenaed them to testify." Pet. App. 69a-70a. In so doing, the district court adopted the First Circuit Court of Appeals reasoning in *United States v. Hicks*, 848 F.2d 1, 4 (1st Cir. 1988) (citing *Lugo v. Munoz*, 682 F.2d 7, 9–10 (1st Cir. 1982)), that a prosecutor has "no *Brady* burden when facts are readily available to a diligent defender."

On appeal, the Idaho Supreme Court affirmed the district court's decision, using slightly different language. The Idaho Supreme Court concluded prosecutors were free to withhold the 2005 opinions of Dr. Sombke and Warden Fisher that Mr. Dunlap is mentally ill and was housed accordingly at the state prison—because that information was known by Mr. Dunlap and should have been tracked down by his defense team. The Court relied on testimony it culled from a hearing held eighteen months after the *Brady/Napue* hearing to support its conclusion that Mr. Dunlap's *own belief* that the prison psychologist *thought* he was "crazy" and should be housed in "C-Block, Tier 2," gave his trial team knowledge of the "salient facts regarding the existence of the [evidence] that he claims [was] withheld." Pet.App. 13a.

> "[W]hen a defendant possesses 'the salient facts regarding the existence of the [evidence] that he claims [was] withheld,'" there is no *Brady* violation. *Hall*, 163 Idaho at 831, 419 P.3d at 1129 (quoting *Raley v. Ylst*,

> 444 F.3d 1085, 1095 (9th Cir. 2006)). If "a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government." *Id.* at 831–32, 419 P.3d at 1129–30 (quoting *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991)). Because Dunlap's counsel were aware of the "salient facts," we conclude that there was no suppression by the State.

Pet. App. 13a.

Specifically, because Mr. Dunlap told his lawyer and mitigation specialist he *believed* Dr. Sombke *thought* he was mentally ill, and also told them he *believed* Dr. Sombke *thought* he should be housed on C Block, Tier 2—with no explanation of what C Block, Tier 2 is or who is housed there—the Idaho Supreme Court concluded "there was no suppression by the State. This defeats Dunlap's *Brady* claim, and we need not address the other two prongs of the *Brady* analysis." Pet. App. 13a.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Is The Subject Of A Long-Standing Split.

The Idaho Supreme Court's decision refusing to find a *Brady* violation reflects the current conflict among federal and state courts over whether a defendant alleging a *Brady* violation must first prove he could not have independently discovered the suppressed evidence. This is in addition to the defendant's burden of proving three components of a successful *Brady* claim: (1) the evidence is favorable, either because it is exculpatory or impeaching; (2) the evidence was suppressed—either willfully or inadvertently—by the State; and (3) prejudice must have ensued. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

By the Idaho Supreme Court's logic, if a defendant could have tracked down the suppressed evidence on his own, there is no suppression of that evidence by the State. Pet. App. 13a. The Idaho Supreme Court's decision conflicts with half of the federal circuit courts of appeal (federal circuits), a minority of state courts of last resort, and is inconsistent with the principles of *Brady* and its progeny. In addition to imposing a burden on a defendant claiming a *Brady* violation that was never contemplated by this Court, the Idaho Supreme Court's decision reflects federal circuits' and state high courts' conflation of an accused's *knowledge* of information or a witness, with access to substantive evidence.

This important and recurring issue warrants this Court's review because it reflects confusion among the federal circuits and state high courts as to whether a defendant bears a threshold investigative obligation that must be met before he or she can prevail on a *Brady* claim. Mr. Dunlap's case presents an ideal vehicle for resolving this important question because the Idaho Supreme Court exclusively relied on this requirement to deny Mr. Dunlap *Brady* relief, concluding the State had no obligation to tell Mr. Dunlap the prison psychologist and prison warden believed as late as February of 2005 that he is mentally ill and was housed accordingly at the prison. Because due process and fair trial rights should not depend on where a person is prosecuted, this Court should grant review to resolve this important constitutional question. *See* U.S. Sup. Ct. R. 10 (b), (c) (recognizing federal circuit split and splits among state high courts as compelling reasons for granting review on a writ of certiorari).

A. The Federal Circuits Appeal Are Evenly Divided Over The Question Presented.

Since *Brady* was decided in 1963, an even split of authority has developed among the federal circuits about the applicability of *Brady* to exculpatory evidence a defendant could have independently found. The federal circuits are equally divided over whether prosecutors can withhold exculpatory evidence when a defendant could have discovered it through another source.

Six circuits—the First, Fourth, Fifth, Seventh, Eighth and Eleventh–apply a rule like the Idaho Supreme Court's, requiring a defendant claiming a *Brady* violation to prove he could not independently find the exculpatory evidence. Sixteen states, relying exclusively on federal circuit decisions, impose a similar requirement.

For example, in the First Circuit, evidence is not suppressed by the government "if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st Cir. 2003).[5] This is similar to the Fourth Circuit's approach, which says "the *Brady* doctrine is not available where the favorable information is available to the defendant and lies in a source where a reasonable defendant would have looked." *United States v. Blankenship*, 19 F.4th 685, 697 (4th Cir. 2021). The Fifth, Seventh, Eighth and Eleventh Circuits have adopted similar reasoning, requiring a defendant to prove an inability to independently find the exculpatory evidence

[5] Unless otherwise indicated, all case cites omit internal quotations, modifications and citations.

through reasonable diligence before proceeding on a *Brady* claim. *See Guidry v. Lumpkin*, 2 F.4th 472, 487 (5th Cir. 2021) ("*Brady* does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence."); *Carvajal v. Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008) ("Suppression does not occur when the defendant could have discovered it himself through reasonable diligence."); *United States v. Jones*, 160 F.3d 473, 479–80 (8th Cir. 1998) ("There is no *Brady* violation if the defendants, using reasonable diligence, could have obtained the information themselves."); *Ferguson v. Sec'y for Dep't of Corr.*, 580 F.3d 1183, 1205 (11th Cir. 2009) (holding that to prevail on a *Brady* claim, a defendant must show he "did not possess the evidence and could not have obtained it with reasonable diligence.").

In contrast, the other six circuits–the Second, Third, Sixth, Ninth,[6] Tenth and District of Columbia—have refused to impose a duty on the defense to prove he could not independently find exculpatory evidence to prevail on a *Brady* claim. *See Lewis v. Connecticut Com'r of Correction*, 790 F.3d 109, 121 (2d Cir. 2015) (recognizing a

[6] The Ninth Circuit's approach to this issue has been admittedly inconsistent. *Compare Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (finding no *Brady* violation where the state did not disclose exculpatory evidence contained in the defendant's jail medical records, including prescribed medications, where defendant knew of his medical visits and records, and could have obtained records through discovery) *with 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."). Most recently, the Ninth Circuit has unequivocally rejected a diligence requirement. *See Amado v. Gonzalez*, 758 F.3d 1119, 1135 (9th Cir. 2014) ("The prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence.").

defendant has no duty to exercise due diligence to find *Brady* material); *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 291–92 (3d Cir. 2016) (3d Cir. 2016 (en banc)) ("To the extent that we have considered defense counsel's purported obligation to excuse the government's non-disclosure of material exculpatory evidence, we reject that concept as an unwarranted dilution of *Brady*'s clear mandate."); *United States v. Tavera*, 719 F.3d 705, 711 (6th Cir. 2013) ("The *Banks v. Dretke*, 540 U.S. 668 (2004) case makes it clear that the defendant does not lose the benefit of *Brady* when the lawyer fails to detect the favorable information. In sum, we follow the Supreme Court in *Brady, Strickler,* and the recent *Banks* case, and decline to adopt the due diligence rule that the government proposed based on earlier, erroneous cases."); *United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000) ("The government's contention that it had no duty to disclose the mistake to the defense because Howell knew the truth and could have informed his counsel is wrong. The availability of particular statements through the defendant himself does not negate the government's duty to disclose."); *Fontenot v. Crow,* 4 F.4th 982, 1065-66 (10th Cir. 2021) (holding *Brady* is an independent duty of the government to disclose favorable evidence to the defense, regardless of the defense's objective or subjective knowledge of the evidence, and such knowledge is only relevant to the prejudice analysis, not suppression); *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 896–97 (D.C. Cir. 1999) (rejecting government's argument that it did not suppress the witness's cooperation agreements because they were available had the defense investigated and questioned the cooperating witness himself: "The appropriate way

for defense counsel to obtain such information was to make a *Brady* request, just as she did.").

Three federal circuits—the Second, Third and Sixth—all changed positions on this question after this Court decided *Banks*. As the Sixth Circuit acknowledged:

> Prior to *Banks*, some courts, including the Sixth Circuit, were avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due diligence rule. But the clear holding in *Banks* should have ended that practice. [I]f the lawyer lost the benefit of *Brady* by his failure to "seek" (as the Supreme Court describes it in *Banks*), the lawyer most certainly would have been guilty of ineffective assistance of counsel. According to the prosecution here, as the government argued in *Banks*, it was the lawyer's responsibility to "discover this evidence." If the prosecution and the dissent are right, we must punish the client who is in jail for his lawyer's failure to carry out a duty no one knew the lawyer had. The *Banks* case makes it clear that the client does not lose the benefit of *Brady* when the lawyer fails to "detect" the favorable information.

Tavera, 719 F.3d at 712. The Third Circuit had a similar epiphany after *Banks*. *See Dennis*, 834 F.3d at 291–92 (recognizing *Banks* made clear that a defendant's diligence plays no role in the *Brady* analysis: "To the extent that we have considered defense counsel's purported obligation to exercise due diligence to excuse the government's non-disclosure of material exculpatory evidence, we reject that concept as an unwarranted dilution of *Brady*'s clear mandate."). The same is true of the Second Circuit. *See Lewis*, 790 F.3d at 114 (acknowledging Supreme Court precedent imposes no due diligence or affirmative duty on a defendant to obtain exculpatory evidence in the state's possession to prevail on a *Brady* claim).

B. State High Courts Have Relied Exclusively On Federal Circuit Decisions To Answer The Question Presented.

The Idaho Supreme Court joins sixteen state high courts in imposing an investigative burden on the defense as a condition precedent to establishing a *Brady* violation. **Every** state high court decision imposing an investigative burden on a defendant claiming a *Brady* violation—including Idaho—has found that requirement in decisions of the federal circuits, not the decisions of this Court.[7] *See People v. Morrison,* 101 P.3d 568, 580 (Cal. 2004) (citing Fifth and Eighth Circuit cases[8] to conclude there is no *Brady* violation if the exculpatory information is available to a defendant before trial by exercise of reasonable diligence); *State v. Skakel,* 888 A.2d 985, 1033 (Conn. 2006) (relying on Second Circuit cases[9] for proposition that *Brady* does not relieve the defense of its obligation to diligently seek favorable evidence); *Hegwood v. State,* 575 So. 2d 170, 172 (Fla. 1991) (relying on Eleventh Circuit case[10] to require a defendant alleging a *Brady* violation to prove "that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence"); *Zant v. Moon,* 440 S.E.2d 657, 663-64 (Ga. 1994) (relying on Eleventh

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[7] The high courts of California, Connecticut, Florida, Georgia, Indiana, Iowa, Louisiana, Mississippi, Nevada, North Dakota, Pennsylvania, South Dakota, Utah, Vermont, Washington, and West Virginia join Idaho in imposing a burden on the defendant alleging a *Brady* violation to first show he could not independently obtain the exculpatory evidence.

[8] *See United States v. Martinez-Mercado,* 888 F.2d 1484, 1488 (5th Cir. 1989); *United States v. Stuart,* 150 F.3d 935, 937 (8th Cir. 1998).

[9] *See, e.g., United States v. LeRoy,* 687 F.2d 610, 618 (2d Cir. 1982).

[10] *See United States v. Meros,* 866 F.2d 1304, 1308 (11th Cir. 1989).

Circuit case[11] to require the defense to prove it did not possess favorable evidence and could not have obtained it through "any reasonable diligence"); *Stephenson v. State,* 864 N.E.2d 1022, 1057 (Ind. 2007) (relying on Seventh Circuit case[12] to require a defendant to show exculpatory information was unavailable to him through the exercise of reasonable diligence); *DeSimone v. State*, 803 N.W.2d 97, 103 (Iowa 2011) (relying on Seventh and Eleventh Circuit cases[13] to hold that State does not violate *Brady* for failing to disclose favorable evidence if the "defendant either knew or should have known of the essential facts permitting him to take advantage of the evidence"); *State v. Green,* 225 So.3d 1033, 1037 (La. 2017) (relying on Fifth Circuit cases[14] to conclude that "a defendant shows no entitlement to relief if the information is available to him through other means by the exercise of reasonable diligence."); *King v. State*, 656 So. 2d 1168, 1174 (Miss. 1995) (citing Eleventh Circuit decision[15] to require a defendant claiming a *Brady* violation to prove "that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence"); *Rippo v. State,* 946 P.2d 1017, 1028 (Nev. 1997) (citing Second, Fifth, Ninth and Eleventh Circuit cases prior to 1996[16] for proposition that "[f]ederal courts

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[11] *See id.*

[12] *See United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir. 1996).

[13] *See United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002); *United States v. LaDoucer*, 573 F.3d 672, 674 (11th Cir. 1983).

[14] *See United States v. Newman,* 849 F.2d 156, 161 (5th Cir. 1988).

[15] *See United States v. Spagnoulo*, 960 F.2d 990, 994 (11th Cir. 1992); *Meros*, 866 F.2d at 1308.

[16] *See United States v. Brown*, 582 F.2d 197, 200 (2d Cir. 1978); *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994); *United States v. Dupuy*, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985); *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983).

have consistently held that a *Brady* violation does not result if the defendant, exercising reasonable diligence, could have obtained the information."); *State v. Sievers*, 543 N.W.2d 491, 496 (N.D. 1996) (relying on Fifth, Sixth and Eleventh Circuit cases prior to 1996[17] to conclude: "The *Brady* rule does not apply to evidence the defendant could have obtained with reasonable diligence."); *Commonwealth v. Paddy,* 800 A.2d 294, 305 (Pa. 2002) (relying on Third, Fifth, Sixth and Eleventh Circuit cases prior to 1992[18] to conclude that "no *Brady* violation occurs if the evidence in question is available to the defense from non-governmental sources, or if the defendant knew, or with reasonable diligence could have known of such evidence."); *State v. Wilde*, 306 N.W.2d 645, 647 (S.D. 1981) (relying on Second and Fifth Circuit cases[19] for principle that "[i]f a defendant knows or should know of the allegedly exculpatory evidence, it cannot be said that the evidence has been suppressed by the prosecution."); *State v. Bisner,* 37 P.3d 1073, 1082-83 (Utah 2001) (citing Sixth Circuit case[20] for proposition that the "government's failure to disclose potentially exculpatory information does not violate *Brady* where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available to defendant from another source."

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[17] *See Meros*, 866 F.2d at 1308; *United States v. Boling,* 869 F.2d 965 (6th Cir.1989); *United States v. Valera*, 845 F.2d 923 (11th Cir. 1988); *Newman*, 849 F.2d at 161.
[18] *See United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991); *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986); *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984); *United States v. Campagnuolo*, 592 F.2d 852, 861 (5th Cir. 1979).
[19] *See United States v. Ruggiero*, 472 F.2d 599, 604 (2d Cir. 1973); *United States v. Brown*, 628 F.2d 471 (5th Cir. 1980).
[20] See *United States v. Mullins*, 22 F.3d 1365, 1371 (6th Cir. 1994).

(citations and quotations omitted)); *State v. LeClaire,* 819 A.2d 719, 849 723 (Vt. 2003) (relying on Second Circuit case[21] to conclude "where the defendant has notice of the essential facts which would allow the defendant to take advantage of the any exculpatory evidence, and fails to do so, the defendant cannot then argue under *Brady* that the prosecution suppressed or failed to disclose such evidence); *Matter of Personal Restraint of Benn,* 952 P.2d 116, 141 (Wash. 1998) (relying on Third, Fourth, Fifth, Seventh, Eighth and Eleventh Circuit decisions prior to 1996[22] to hold that there is no *Brady* violation if a defendant acting with due diligence could have obtained the exculpatory information); *State v. Youngblood,* 650 S.E.2d 119, 130 n.21 (W. Va. 2007) (relying on Seventh Circuit case[23] to conclude the state only suppresses evidence if "it was not otherwise available to the defendant through the exercise of reasonable diligence.").

By contrast, every state high court decision refusing to impose an investigative burden on a defendant claiming a *Brady* violation has done so by relying on *Brady* and its progeny.[24] *See People v. Bueno,* 409 P.3d 320, 328 (Colo. 2018) (observing that the United States "Supreme Court has at least twice rejected arguments similar to

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[21] *See United States v. Zackson,* 6 F.3d 911, 918 (2d Cir. 1993).

[22] *See United States v. Perdomo,* 929 F.2d 967 (3d Cir. 1991); *Hoke v. Netherland,* 92 F.3d 1350 (4th Cir. 1996); *Williams v. Scott,* 35 F.3d 159, 163 (5th Cir. 1994); *United States v. Hamilton,* 107 F.3d 499 (7th Cir. 1997); *United States v. Willis,* 997 F.2d 407 (8th Cir. 1993); *Mills v. Singletary,* 63 F.3d 999 (11th Cir. 1995).

[23] *See United States v. Knight,* 342 F.3d 697, 705 (7th Cir. 2003).

[24] The high courts of Colorado, Massachusetts, Michigan, Montana, Ohio, South Carolina, and Wisconsin have explicitly refused to impose a burden on a defendant alleging a *Brady* violation to prove he could not independently obtain the exculpatory evidence, relying on *Brady* and its progeny to reach that conclusion.

the People's assertion that the defense must make reasonable efforts to locate *Brady* materials."); *State v. Williams,* 896 A.2d 973, 992-93 (Md. Ct. App. 2006) (relying on *Banks,* 540 U.S. at 696, to reject State's argument that a defendant's duty to investigate relieves it of its duty to disclose exculpatory evidence under *Brady*); *Commonwealth v. Tucceri,* 589 N.E.2d 1216, 1221 (Mass. 1992) (holding defense counsel's omissions do not relieve the prosecution of its duty to disclose exculpatory evidence but may provide a defendant with an independent ineffective assistance of counsel claim); *People v. Chenault,* 845 N.W.2d 731, 733, 738 (Mich. 2014) ("[A] due diligence requirement is not supported by *Brady* and its progeny.... The *Brady* rule is aimed at defining an important prosecutorial duty; it is not a tool to ensure competent defense counsel."); *State v. Reinert,* 419 P.3d 662, 665 n.1 (Mont. 2018) (recognizing prior decisions declining to find a *Brady* violation where the defense could have obtained exculpatory evidence through reasonable diligence, but abiding by Ninth Circuit's decision in *Amado v. Gonzalez,* 758 F.3d at 1136, and concluding a due diligence requirement "is contrary to federal law and unsound public policy"); *State v. Bethel,* 192 N.E. 3rd 470, 477 (Ohio 2022) ("It is well settled that a defendant is entitled to rely on the prosecution's duty to produce evidence that is favorable to the defense. A defendant seeking to assert a *Brady* claim therefore is not required to show that he could not have discovered suppressed evidence by exercising reasonable diligence."); *State. v. Durant,* 844 S.E.2d 49, 55 (S.C.2020) (rejecting state's argument that its failure to disclose information readily available to the public is not a *Brady* violation, noting that shifting the duty to defense counsel risks adding an additional

element to *Brady* and "the better approach is to hold the State responsible for fulfilling its prosecutorial duties, including the duty to disclose under *Brady*."); *State v. Wayerski*, 922 N.W.2d 468, 481 (Wis. 2019) (declining state's invitation to impose a reasonable or due diligence burden on a defendant claiming a *Brady* violation "due to its lack of grounding in *Brady* or other United States Supreme Court precedent.").

Because ***every*** state high court decision requiring a defendant alleging a *Brady* violation to first prove he could not independently find the exculpatory evidence—including Idaho—is based on decisions of the federal circuits, not this Court, resolution of the split between the states and among the federal circuits requires this Court's intervention. This issue frequently recurs and there is an established conflict among the federal circuits and state high courts that must be resolved.

II. The Question Presented Is Important And Recurs Frequently

The importance of this issue—whether a defendant asserting a *Brady* violation must first prove he could not independently find the exculpatory evidence—is self-evident. *See Tavera*, 719 F.3d at 711 (recognizing that imposing a burden on the defense to discover exculpatory evidence "releases the prosecutor from the duty of disclosure," "relieves the government of its *Brady* obligations," and punishes "the client who is in jail for his lawyer's failure to carry out a duty no one knew the lawyer had.").

The duty to disclose exculpatory evidence as set forth in *Brady* is one compelled by the Due Process Clause. *Brady*, 373 U.S. at 87. Due process "embodies the fundamental conceptions of justice which lie at the base of our civil and political

institutions." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). *Brady* makes good on the uniquely American precept that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* *Brady* speaks not to the role of the defendant or defense counsel to ensure fairness and justice, but instead recognizes the special and unique role prosecutors play in guaranteeing they are not the "architect[s] of a proceeding that does not comport with standards of justice." *Brady*, 373 U.S. at 88; *see also Strickler*, 527 U.S. at 281; *Berger v. United States*, 295 U.S. 78, 99 (1935).

Given the current state of the federal circuit split and the majority of state high court decisions on the question presented, *Brady* is an empty promise in half of this country. Right now, the applicability of the due process protections provided by *Brady* depend entirely on where an accused is prosecuted. This Court—not the federal circuits and not State high courts—must ensure geography does not dictate whether and to what extent federal constitutional protections apply.

The issue is now of special importance in Idaho. Because the position adopted by the Idaho Supreme Court conflicts with that of the Ninth Circuit, the standard for whether a defendant can prevail on a *Brady* claim will differ depending upon whether the claim arises in federal or state court. Because these standards influence prosecutors' understanding of their professional responsibilies, the many attorneys (including deputy AGs) who appear before both state and federal courts face conflicting guidance and expectations. Moreover, criminal defendants in Idaho will

have to engage in federal habeas litigation about whether the position adopted by the Idaho Supreme Court below is "contrary to, or involved an unreasonable application of" this Court's precedents. 28 U.S.C. § 2254(d)(1).

III. The Decision Below Is Wrong And Deeply Troubling.

The Idaho Supreme Court's decision is wrong and seriously erodes the Fourteenth Amendment right to due process and a fair trial by transforming prosecutors' constitutional duty to disclose exculpatory evidence into "[a] rule thus 'declaring prosecutors may hide, defendant must seek,'" *Banks*, 540 U.S. at 696, which is "not tenable in a system constitutionally bound to accord defendants due process." *Id.* The decision endorses prosecutorial dishonesty and injects unreliability into the discovery process by imposing a duty on the defense to independently search for evidence the prosecution represents it has already disclosed. Such a position encourages the State to argue with impunity that a defendant is feigning mental illness in one court, and to argue that he suffers from legitimate mental illness in another. *See Banks*, 540 U.S. at 695 ("Our decisions lend 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.").

It would be easy to fall into the trap of the court below, which, like other courts adopting a similar position, have made the unsound assumption that an accused's knowledge of a fact or existence of a witness, has the same value as substantive

evidence[25] of that fact, or that witness's testimony. Pet. App. 13a. But that is simply wrong and contradicts *Brady*.

Brady addresses the prosecution's suppression of *evidence*, not facts: "We now hold that the suppression by the prosecution of *evidence* favorable to an accused . . . violates due process where the *evidence* is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87 (emphasis added). If it were true that an accused's *knowledge* of "salient facts" has the same value as substantive *evidence* of those salient facts for due process purposes, *Brady* itself would have been decided differently.

In *Brady v. Maryland,* John Brady and his co-defendant, Charles Boblit, participated in a robbery gone awry. Both men took the victim's money but Boblit acted alone when he strangled the victim. *See Brady*, 373 U.S. at 84; *Boblit v. Maryland,* 154 A.2d 434, 434 (Md.Ct.App. 1959). Both men were charged with first-degree felony murder and tried separately. *Boblit,* 154 A.2d at 434. The prosecution shared Boblit's pretrial statements with Brady's counsel, but withheld Boblit's murder confession. Brady testified at trial and admitted his involvement in the robbery, but claimed Boblit killed the victim, not him. *Brady*, 373 U.S. at 84. The jury found Brady guilty and sentenced him to death. *Id.* After his conviction and death

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[25] Evidence is "[s]omething (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact," BLACK'S LAW DICTIONARY, p.635 (9th ed. Garner 2009), or "all means by which a fact in issue is established or disproved." Bryan Gardner, GARDNER'S MODERN ENGLISH USAGE, p.358 (Oxford Univ. Press, 4th ed. 2016).

sentence were affirmed on appeal, Brady discovered Boblit's murder confession, and sought a new trial. *Id.* at 84–85. The state appellate court granted Brady sentencing relief but not a new merits trial, concluding the prosecution's suppression of Boblit's confession deprived Brady of due process at sentencing but would not have made a difference at trial. *Id.* at 84–85. This Court agreed. *Id.* at 87.

Had the Idaho Supreme Court's salient facts analysis been applied to the facts in *Brady,* this Court would not have granted Brady sentencing relief because it would have concluded Brady knew the salient facts of Boblit's confession. Brady knew Boblit killed the victim, not him. And he knew Boblit made statements to the police about the crime. However, what Brady did not have in his possession was evidence proving Boblit killed the victim, i.e., Boblit's confession. Had this Court applied a salient facts analysis, it would have denied Brady relief because he knew the salient facts of Boblit's murder confession and should have found it on his own. But that is not what this Court decided in *Brady,* and it is not the analysis it applied.

Likewise, in this case, Mr. Dunlap's defense team knew Mr. Dunlap *believed* Dr. Sombke *thought* Mr. Dunlap was "crazy" and should be housed on Tier 2. But untethered to time and context, Mr. Dunlap's *beliefs* about the *thoughts* of Dr. Sombke offered no **evidence** of Dr. Sombke's 2005 professional opinion that Mr. Dunlap was mentally ill—not malingering—and housed accordingly. Nor did Mr. Dunlap's beliefs convey any salient facts about Warden Fisher's opinion that Mr. Dunlap's housing was dictated by his mental illness, and that Warden Fisher deferred to Dr. Sombke when making housing decisions about inmates with mental

health issues. Mr. Dunlap's statements to his attorney and mitigation specialist did not convey **evidence** of Dr. Sombke's opinions, only Mr. Dunlap's beliefs about Dr. Sombke's beliefs about his mental health. And those statements conveyed nothing about Warden Fisher.

If allowed to stand, the decision below renders *Brady* and its progeny meaningless, it encourages prosecutorial misconduct and dishonesty, and it dilutes an accused's due process rights. It is time for this Court to correct this egregious misunderstanding of *Brady* being perpetrated by half of the federal circuit courts and a majority of the state high courts who have decided the issue and are following the federal circuits' lead.

IV. The Question Presented Is Squarely Presented.

The question upon which the federal circuits are divided is the only issue passed upon by the court below to dispose of Mr. Dunlap's *Brady* claim and is thus squarely presented. The facts are undisputed and straightforward: The State did not disclose the exculpatory **2005** opinions of Dr. Sombke and Warden Fisher that Mr. Dunlap was mentally ill and housed accordingly. Pet App. 12a-14a. Nor did it disclose its belief that the existence of Mr. Dunlap's mental illness was an undisputed fact. Mr. Dunlap could not have independently unearthed the evidence, irrespective of his suspicions. Dr. Sombke's and Warden Fisher's 2005 opinions were shared directly—by email and telephonically—with the deputy AG, but they were not part of Mr. Dunlap's prison file and were not otherwise shared with him or his counsel.

At Mr. Dunlap's capital sentencing, his mental illness was the centerpiece of his plea for the jury to spare his life. In its quest for a death sentence, the State pursued a malingering or not-mentally-ill narrative. The State presented testimony of Dr. Matthews to support that narrative. In turn, Dr. Matthews told the jury to give great weight to four pages of Mr. Dunlap's prison records from the fall of 2002 which memorialized Mr. Dunlap's claim to Dr. Sombke, a housing officer and a prison clinician, that he was not mentally ill but was faking it. The State failed to mention the 2005 opinions of Dr. Sombke and Warden Fisher. Nor did it mention the opinion of its own agents in March of 2006, sworn to under penalty of perjury, that Mr. Dunlap's mental illness was an undisputed fact.

The salient facts of Dr. Sombke's and Warden Fisher's 2005 opinions were unknown to Mr. Dunlap and his counsel, and unknowable. By contrast, not only were the "salient facts" of these opinions known to the State and its agents, so were the opinions themselves. Despite this knowledge, and despite knowing that Mr. Dunlap's mental illness was the crucial evidence he relied on to plead for his life, the State hid this critical information from Mr. Dunlap and his counsel. Adding insult to injury, the State not only ignored the evidence of mental illness but argued to jurors Mr. Dunlap was a liar who faked his mental illness to avoid the death penalty. They went so far as presenting expert testimony and cherry-picked prison documents to support a malingering narrative that even it did not believe. "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Banks*, 540 U.S. at 696.

No reasonable argument could be made that this issue requires further percolation. As noted, every federal circuit court of appeals has resolved the question presented, as have nearly half of all state high courts.

CONCLUSION

The petition for a writ for certiorari should be granted.

Respectfully submitted,

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