NO. 22-6822

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY ALAN DUNLAP,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State of Idaho

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Timothy Alan Dunlap ("Dunlap") has raised the following question before this Court:

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

(Pet., p.i.)

Respondent State of Idaho wishes to rephrase the question before this Court as follows:

> Has Dunlap failed to establish the Idaho Supreme Court erred by concluding there was no violation of Brady v. Maryland, because there was no suppression of exculpatory evidence since the record "clearly shows Dunlap's counsel were aware of facts they claim were withheld by the prosecution"?

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STATEMENT OF THE CASE

In 1991, ten days after murdering his girlfriend, Belinda Bolanos, in Ohio by shooting her twice with a crossbow, State v. Dunlap, 652 N.E.2d 988, 991 (Ohio 1995), Dunlap walked into a bank in Soda Springs, Idaho, and pointed a sawed-off shotgun at bank teller Tonya Crane. Dunlap v. State (Dunlap III), 106 P.3d 376, 381 (Idaho 2005).[1] Dunlap ordered Tonya to give him all her money and, after receiving the money, "immediately and calmly pulled the trigger of his sawed-off shotgun, which was less than two feet from [her] chest, literally blowing her out of her shoes." Id. Dunlap pled guilty to first-degree murder for killing Tonya and was sentenced to death. Id. at 381-82. The conviction and death sentence were affirmed by the Idaho Supreme Court. *See generally* State v. Dunlap (Dunlap I), 873 P.2d 784 (Idaho 1993).

Dunlap filed a post-conviction petition two years later that was dismissed because it was untimely. Dunlap v. State (Dunlap II), 961 P.2d 1179, 1179-80 (Idaho 1998). Based upon unique circumstances, the Idaho Supreme Court reversed, concluding Dunlap did not know and could not reasonably have known that no post-conviction petition had been timely filed. Id. at 1180. Upon remand, the state conceded error occurred during Dunlap's sentencing that required him to be resentenced. Dunlap III, 106 P.3d at 382. However, the district court rejected Dunlap's guilt-phase claims, and that decision was affirmed by the Idaho Supreme Court. *See generally* Dunlap III. Later, the Idaho Supreme Court also affirmed the denial of Dunlap's successive post-conviction petition. *See generally* Dunlap v. State (Dunlap IV), 192 P.3d 1021 (Idaho 2008).

Deputy Attorney General Kenneth Robins was lead counsel for the state at Dunlap's resentencing. (Pet. App., p.10a.) In 2004, prior to resentencing commencing on February 6, 2006,

[1] Dunlap incorrectly numbered the respective Idaho Supreme Court decisions involving his case by citing only some of the cases. The state has cited all the cases and numbered them accordingly.

Dunlap filed a *pro se* civil rights complaint complaining about his housing situation in prison, naming Jay Green and Warden Greg Fisher as defendants. (Pet. App., pp.79a-86a.) Deputy Attorney General William Loomis was assigned to represent both defendants. (Pet. App., p.12a.) Although Robins and Loomis were both deputy attorneys general, they worked in entirely different units. (Pet. App., pp.10a, 12a.) Robins worked in the prosecutorial assistance unit, while Loomis worked in the Idaho Department of Correction Unit ("IDOC") representing IDOC. (Id.)

After being served with a copy of Dunlap's civil rights complaint, Loomis sent an email to Dr. Chad Sombke, Chief Psychologist at IDOC, asking for an explanation regarding Dunlap's housing. (Pet. App., pp.12a, 87a.) Dr. Sombke responded that "C-Block Tier is for the stable mentally ill and Mr. Dunlap would fit that category." (Pet. App., p.87a.) Sombke also advised that Dunlap "would be cleared psychologically to be moved to general population." (Id.) Loomis also emailed Warden Fisher, who responded that he "always defer[red] to the decision of Dr. Sombke as to whether or not [inmates] should be considered for other housing." (Pet. App., p.88a.)

Because of his involvement in Dunlap's prior post-conviction proceedings, Robins was aware that Dunlap's mental health would be an important issue at the resentencing. (Pet. App., p.44a.) Consequently, Robins contacted individuals at IDOC and inquired about any records that may have some bearing on Dunlap's mental health. (Id., pp.44a-45a.) Robins went to IDOC legal offices, met with paralegal Kevin Burnett, and was provided copies of Dunlap's prison records with his mental health records. (Id., p.45a.) Robins then sent copies to David Parmenter, one of Dunlap's resentencing attorneys, who reported he already had them. (Id.) Dr. Craig Beaver, Dunlap's retained neuropsychologist, itemized the documents he had reviewed to prepare for his resentencing testimony, which included "a large volume of records from the time that Mr. Dunlap

has spent at the Idaho State Maximum Security Institution, which included among other types of records psychiatric treatment records." (Id., pp.52a-53a) (quotes and citations omitted).

On January 9, 2006, Loomis called Robins to inquire regarding the status of the resentencing because the housing issue might become moot if Dunlap was not resentenced to death. (Pet. App., pp.13a, 89a.) Robins agreed to provide an affidavit so Loomis could request the civil rights case be stayed pending resentencing. (Pet. App., pp.13a, 90a-91a.) The subject of Dunlap's mental health never arose during the conversation because Robins had no reason to believe there were any mental health issues associated with the civil rights case involving a routine housing issue. (Pet. App., p.13a.)

At resentencing, the state presented multiple witnesses to describe the events surrounding Tonya's murder. (Pet. App., pp.10a-11a.) Dunlap presented several witnesses, including Dr. Mark Cunningham, a clinical and forensic psychologist, and Dr. Beaver, attempting to demonstrate Dunlap was mentally ill. (Pet. App., p.11a.) On rebuttal, the state called forensic psychiatrist Daryl Matthews, who opined that Dunlap was not mentally ill, but was a malingerer. (Pet. App., p.14a.) While Dr. Matthews focused upon four pages from Dunlap's IDOC mental health records, he also discussed other IDOC mental health records. (Pet. App., pp.14a-15a.) Ultimately, the jury found the state proved beyond a reasonable doubt three statutory aggravating factors, and that all the mitigating evidence, weighed collectively against each aggravator individually, was not sufficiently compelling to make imposition of the death penalty unjust, resulting in the district court sentencing Dunlap to death. (Pet. App., p.11a.)

After Dunlap's resentencing, Loomis filed a Motion for Summary Judgment with a supporting memorandum, asserting that Dunlap was appropriately housed based upon his mental health needs and the recommendations from Dr. Sombke. (Pet. App., pp.84a-115a.) The motion

was supported by a Statement of Undisputed Material Facts that was supported by an affidavit from Dr. Sombke that included several of Dunlap's mental health records (Pet. App., pp.117a-165a) that had been disclosed to Dunlap's attorneys prior to his resentencing (Pet. App., p.63a). The federal district court granted the state's motion. (Pet. App., pp.203a-212a.)

Dunlap subsequently filed a post-conviction petition, contending, among other claims, that the state withheld exculpatory evidence based upon the "disclosure of information revealed during Dunlap's federal civil rights action" involving Dr. Sombke's opinion that Dunlap had "'psychiatric needs' and should not be housed in the general population," in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963). State v. Dunlap (Dunlap V), 313 P.3d 1, 44-45 (Idaho 2013). He also contended the prosecutor failed to correct false testimony stemming from the same underlying facts in violation of Napue v. Illinois, 360 U.S. 264, 259 (1959). Dunlap V, 313 P.3d at 44-45. The district court summarily dismissed the claims. Id. at 14. In a consolidated appeal, the Idaho Supreme Court affirmed Dunlap's death sentence, *see* id. at 19-44, but reversed the summary dismissal of the Brady and Napue claims, remanding both for an evidentiary hearing. The court also remanded for an evidentiary hearing on Dunlap's ineffective of counsel claim stemming from counsels' investigation and presentation of mitigation evidence. Id. at 44.

On remand, the district court bifurcated the evidentiary hearing, holding the first hearing on the Brady and Napue claims and, after rendering a decision, holding the second hearing on the ineffective assistance of counsel claim. (Pet. App., p.11a.) The court rejected Dunlap's Brady claim, finding that all of Dunlap's IDOC records, including mental health records, were provided by Robins to Parmenter prior to resentencing. (Pet. App., pp.45a, 52a-53a, 61a-63a, 67a-68a.)[2]

[2] Because the district court concluded Dunlap failed to meet his burden of establishing evidence was withheld, the court declined to consider the prejudice prong of Brady. (Pet. App., p.71a.)

At the second evidentiary hearing, the district court admitted notes Parmenter took during a meeting with Dunlap. (Pet. App., p.13a.) Next to Sombke's name, Parmenter wrote, "also thinks Tim's crazy"; the word "crazy" was underlined. (Id.) Notes from a meeting defense mitigation expert Rosanne Dapsauski had with Dunlap were also admitted, which stated, Dunlap "got off [death] row in 2002 and then he was sent to C Block, Tier II because that is where Sombke said [Dunlap] should be housed," and Sombke "thinks [Dunlap] is crazy and should be on Tier [II] the rest of his life." (Id.) Dapsauski's notes were "provided to counsel." (Id.) Upon completion of the second hearing, the district court rejected all of Dunlap's ineffective assistance of counsel claims that were based upon the investigation and presentation of mitigation evidence. (Id.)

The Idaho Supreme Court affirmed the denial of the remaining post-conviction claims. (Pet. App., pp.10a-30a.) Addressing the Brady claim, the court held, "It is clear from the record that not only was Dunlap's defense team aware that Sombke believed Dunlap was mentally ill, but the defense team was also aware that Sombke believed Dunlap was appropriately housed due to his mental health issues." (Pet. App., p.13a.) The court concluded, "Because Dunlap's counsel were aware of the 'salient facts,' we conclude that there was no suppression by the State." (Id.) Because Dunlap had failed to establish suppression by the state, the court declined to "address the other two prongs of the *Brady* analysis." (Id.)

Dunlap sought rehearing, complaining that the Idaho Supreme Court should not have considered the defense team notes because they were not relied upon by the district court in deciding the Brady claim. (Pet. App., p.30.) Rejecting Dunlap's argument, the court explained, "we decline to allow strategy to prevail at the expense of truth," and reasoned it was not "precluded from considering evidence that bears on the merit of the *Brady* claim now on appeal." (Id.) Finally, the court explained it would not remand to the district court because "nothing would

prevent the district court from considering all the evidence it has already heard, including evidence from the second evidentiary hearing which clearly shows Dunlap's counsel were aware of facts they claim were withheld by the prosecution." (Id.)

REASONS FOR DENYING THE WRIT

Dunlap contends the state violated Brady v. Maryland, 373 U.S. 83 (1963), by allegedly withholding exculpatory evidence regarding Dr. Sombke's opinion that Dunlap was mentally ill at the time Dunlap filed a civil rights action regarding a routine housing issue. Specifically, Dunlap contends his attorneys were never advised by the state of Dr. Sombke's 2005 opinion, and that the Idaho Supreme Court's decision was based only upon "salient facts" possessed by the defense team, which, according to Dunlap, violates due process because he should not be required to "first prove he could not have independently discovered the suppressed evidence." (Pet., p.12.)

Dunlap has a fundamental misunderstanding of the state courts' decisions. While the Idaho Supreme Court certainly mentioned "salient facts," that discussion was based upon the fact that, "not only was Dunlap's defense team aware that [Dr.] Sombke believed Dunlap was mentally ill, but the defense team was also aware that [Dr.] Sombke believed Dunlap was appropriately housed due his mental health issues." (Pet. App., p.13a.) Indeed, on rehearing, the court found that the evidence "clearly shows Dunlap's counsel were aware of facts they claim were withheld by the prosecution." (Pet. App., p.30a.) Consequently, Dunlap's discussion of a "long-standing split" on the question of whether a defendant "must first prove he could not have independently discovered the suppressed evidence" (Pet., p.12) is unavailing because the Idaho Supreme Court held that Dunlap's defense team was actually aware – prior to the resentencing – of Dr. Sombke's opinions regarding Dunlap's mental health when Dunlap filed his civil rights case. In other words, contrary to Dunlap's contention (Pet., p.13), the Idaho Supreme Court's decision does not "conflict[ ] with

half of the federal circuit courts of appeal (federal circuits), a minority of state courts of last resort, and is [not] inconsistent with the principles of *Brady* and its progeny." (Pet. p.13.) Rather, this is a case where the Idaho courts' decisions were based upon the "accused's knowledge of information," not merely "access to substantive evidence." (Id.)

This Court has recently and repeatedly denied petitions for writs of certiorari asserting similar "conflicts." *See e.g.*, Blankenship v. U.S., 143 S.Ct. 90 (2022) (No. 21-1428); Guidry v. Lumpkin, 142 S.Ct. 1212 (2022) (No. 21-6374); Walker v. U.S., 139 S.Ct. 1168 (2019) (No. 18-6336); Yates v. U.S., 139 S.Ct. 1166 (No. 18-410); Georgiou v. U.S., 577 U.S. 954 (2015) (No. 14-1535); Rigas v. U.S., 562 U.S. 947 (2010) (No. 09-1456); Cazares v. U.S., 552 U.S. 1056 (2007) (No. 06-10088); Metz v. U.S., 527 U.S. 1039 (1999) (No. 98-6220); Schledwitz v. U.S., 519 U.S. 948 (1996) (No. 95-2034). The Court should follow the same course here, especially since the district court found there was no suppression of evidence because the state provided Dunlap's attorneys with all of his IDOC mental health records that included Dr. Sombke's opinions (Pet. App., pp.45a, 52a-53a, 61a-63a, 67a-68a), and the Idaho Supreme Court found that his attorneys "were aware of facts they claim were withheld by the prosecution" (Pet. App., p.30a). In other words, the Idaho courts' decisions were not based only upon Dunlap's "beliefs" regarding Dr. Sombke's opinions, but disclosure of all of Dunlap's IDOC mental health records.

Under Brady, and its progeny, the prosecution has a duty to disclose evidence that is both favorable to the defense and material to either guilt or punishment. 373 U.S. at 87. The suppression of such evidence violates due process. Id. at 86. To prove a Brady violation, Dunlap must show three components: "[T]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by

the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

The Idaho Supreme Court correctly found that Dunlap could not prevail on his Brady claim since "there was no suppression by the State because Dunlap's defense team was apprised of the purportedly suppressed evidence." (Pet. App., p.13a.) While the rule in Brady can arguably be applied in three different situations, "[e]ach involves the discovery, after trial of information which had been known to the prosecution but was **unknown to the defense**." U.S. v. Agurs, 427 U.S. 97, 103 (1976) (emphasis added); Giles v. Maryland, 386 U.S. 66, 96 (1967) (White, J., concurring in the judgment) ("In the end, any allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense.").

Here, after hearing the evidence from the first evidentiary hearing, the district court found, "there is absolutely no evidence to support Dunlap's claim that the State withheld Dunlap's medical records, mental health records or other pertinent records which could arguably be characterized as exculpatory." (Pet. App., p.67a.) The court found that "Robins was provided with a binder of Dunlap's records from IDOC. [S]aid records were examined on site, copied and copies of the same were provided to Mr. Parmenter." (Pet. App., p.68a.) "Mr. Parameter's response upon receipt of these records was that he already had in his possession these records or 'most of them.'" (Id.) At the time of Dunlap's resentencing, Robins made a record regarding discovery, explaining, "My understanding is that Ms. Dapsauski was the one that obtained those from the department [IDOC]. And once we got those records, we went back and double-checked with the existing file with the Department of Correction and we got everything from the Department of Corrections [sic] and turned it over to counsel before [resentencing]." (Id.) Additionally, to prepare for his resentencing testimony, Dr. Beaver "itemized the documents he

had reviewed" that "included psychiatric records that began really in about 1975, a large volume of records from the time that Mr. Dunlap has spent at the Idaho State Maximum Security Institution which included among other types of records psychiatric and treatment records." (Pet. App., pp.52a-53a) (quotes, citations and ellipses omitted).

Consequently, the district court concluded "that Robins turned over to Dunlap's defense team in the resentencing proceeding all the information that it had that was germane to Dunlap's mental health." (Pet. App., p.69a.) And "in addition to the disclosures made by Robins and the State in Dunlap's resentencing proceedings, Dunlap both had access to the records and in fact had in their possession the records of which they now complain Dunlap was not provided." (Id.) The court later repeated that Robins "and the State's resentencing prosecution team conducted a reasonable inquiry into Dunlap's mental health issues by reviewing the IDOC files and disclosed the information contained within those files, including potentially exculpatory mental health information to Dunlap's resentencing defense team." (Pet. App., p.71a.)

Likewise, the Idaho Supreme Court concluded "there was no suppression by the State because Dunlap's defense team was apprised of the purported suppressed evidence." (Pet. App., p.13a.) The court's initial finding went beyond the district court's findings and was apparently based upon notes taken by Parmenter during a meeting with Dunlap where Parmenter wrote Dr. Sombke's name and that Dr. Sombke "also thinks [Dunlap's] crazy." (Id.) The court also discussed notes taken by Dapsauski during a meeting with Dunlap that state he "got off [death] row in 2002 and then he was sent to C Block, Tier II because that is where Sombke said he should be housed." (Id.) Dapsauski also wrote that Sombke "thinks [Dunlap] is crazy and should be on Tier [II] the rest of his life." (Id.) Consequently, the Idaho Supreme Court concluded, "It is clear from the record that not only was Dunlap's defense team aware that Sombke believed Dunlap was

mentally ill, but the defense team was also aware that Sombke believed Dunlap was appropriately housed due to his mental health issues." (Id.) And on rehearing, the court reaffirmed that all the evidence "clearly shows Dunlap's counsel were aware of facts they claim were withheld by the prosecution." (Pet. App., p.30a.)

Therefore, Dunlap's contention that the Idaho Supreme Court now requires defendants to "first prove [they] could not have independently discovered the suppressed evidence" (Pet., p.12), is a complete mischaracterization of the state courts' opinions. Not only did the state prove Dunlap's IDOC mental health records were provided to his defense team, but the state courts found the team was in actual possession of the records and Dr. Sombke's opinion that, at various times while incarcerated at IDOC, Dunlap was mentally ill. The district court even found that the IDOC records attached to Dr. Sombke's affidavit in the civil rights case were provided to Dunlap's counsel prior to the resentencing. (Pet. App., p.63a.) Indeed, Dunlap has not asserted his defense team was unaware of the records or the information in the records, including Dr. Sombke's opinion regarding Dunlap's mental health.

Accordingly, the Idaho Supreme Court correctly determined that Dunlap could not prevail on his Brady claim. (Pet. App, pp.12a-14a, 30a.) Contrary to Dunlap's argument, the Idaho Supreme Court did not rely upon the "requirement" that "the State had no obligation to tell [him] 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." (Pet., p.13.) Rather, the district court and Idaho Supreme Court found that Dunlap and his defense team were aware of Dr. Sombke's opinions because the state provided Dunlap's defense team with his IDOC records that presumably caused Dunlap to tell Parmenter and Dapsauski that Dr. Sombke believed he was "crazy."

Numerous circuits have reasoned that there is no Brady violation when the defendant or a member of the defense team is aware of the evidence that was allegedly withheld. For example, in Amado v. Gonzalez, 758 F.3d 1119, 1135 (9th Cir. 2014), the Ninth Circuit concluded, "The prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence. However, defense counsel cannot lay a trap for prosecutors by failing to use evidence of which defense counsel is reasonably aware for, in such a case, the jury's verdict of guilty may be said to arise from defense counsel's stratagem, not the prosecutions failure to disclose." *See also* Hill v. Mitchell, 842 F.3d 910, 946 (6th Cir. 2016) ("Hill's trial counsel was aware of the conversation–and Hill was obviously aware–so the evidence was known to the defense and *Brady* was inapplicable."); Dennis v. Sec., Penn. Dep't of Corr., 834 F.3d 263, 292 (3rd Cir. 2016) (en banc) ("Only when the government is aware that the defense counsel already had the material in its possession should it be held to not have 'suppressed' it in not turning it over to the defendant."); Walker v. Kelly, 589 F.3d 127, 142 (4th Cir. 2009) (there was no Brady violation because the evidence supported the district court's conclusion "that the Commonwealth turned over these materials to the defense"); Allen v. Lee, 366 F.3d 319, 325 (4th Cir. 2004) ("Because Allen had personal knowledge of any medications he might have received, his *Brady* claim is without merit."); U.S. v. Wilson, 787 F.2d 375, 389 (8th Cir. 1986) ("The government is under no obligation to disclose to the defendant that which he already knows.").

Dunlap attempts to create a "long-standing split" of authority (Pet., pp.12-23) by contending that some federal court of appeals and state courts have determined that the nondisclosure of exculpatory evidence did not violate Brady where the defendant did not actually possess the evidence in question but could have discovered it in the exercise of due diligence, while other circuits have opined there is no "duty on the defense to prove he could not

independently find exculpatory evidence to prevail on a *Brady* claim (Pet., pp.14-17). However, this is not a "due diligence" case because Dunlap and his defense team possessed the mental health records from IDOC and were aware of Dr. Sombke's opinion regarding Dunlap's mental health.

Dunlap cites Amado, 758 F.3d at 1135, for his contention that "the Ninth Circuit has unequivocally rejected a diligence requirement." (Pet., p.15, n.6.) Again, due diligence is not the issue in Dunlap's case; the district court found that Dunlap's mental health records, which included Dr. Sombke's notes and opinions discussing Dunlap's mental health while incarcerated at IDOC, were provided to Parmenter and familiar to both Dr. Beaver and Dapsauski. (Pet. App., pp.45a, 52a-53a, 61a-63a, 67a-68a.) Likewise, the Idaho Supreme Court found that Dunlap was personally aware of Dr. Sombke's opinion regarding Dunlap's mental health and that the evidence established "Dunlap's counsel were aware of facts they claim were withheld by the prosecution." (Pet. App., p.30a.) Dunlap cannot establish a Brady violation when his defense team possessed the salient facts associated with Dr. Sombke's opinions.

In Lewis v. Connecticut Comm. of Correction, 790 F.3d 109, 113-15 (2nd Cir. 2015), it was not until after the defendant's trial that the defense learned that the state failed to disclose that it's "key" witness "repeatedly denied having any knowledge of the murders and only implicated [the defendant] after a police detective promised to let [the witness] go if [the witness] gave a statement in which he admitted to being the getaway driver and incriminated [the defendant] and another individual." The Second Circuit explained that, while "evidence is not 'suppressed' for *Brady* purposes if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence," "[*Brady*] imposes no duty upon a defendant, who was reasonably unaware of exculpatory information, to take affirmative steps to seek out and uncover such information in the possession of the prosecution in order to prevail under *Brady*."

Id. at 121 (brackets and citations omitted). Indeed, if the state court "had a valid basis for determining that all exculpatory information was turned over to the defense, … there was no *Brady* violation." Id. at 122. Here, the district court concluded all the evidence regarding Dr. Sombke's opinions involving Dunlap's mental health were "turned over" to the defense (Pet. App., p.69a), and the Idaho Supreme Court agreed, explaining that the evidence "clearly shows Dunlap's counsel were aware of facts they claim were withheld by the prosecution." (Pet. App., p.30a.) *See* U.S. v. Diaz, 922 F.2d 998, 1007 (2nd Cir. 1990) ("[T]here is no improper suppression within the meaning of *Brady* where the facts are already known to the defendant."); U.S. v. Robinson, 560 F.2d 507, 418 (2nd Cir. 1977) (en banc) ("Since this information was already known to Robinson, … disclosure was not required under *Brady*."). Consequently, Dunlap would not prevail under the approach adopted in Lewis.

The state has already addressed Dennis, *supra*., which involved the state's failure to disclose a timestamped receipt that would have supported defendant's alibi, the existence of which was unknown to the defendant at the time of trial and was not "publicly available." Id. at 289; *see also* id. at 275-76, 288-290. That decision does not conflict with the Idaho state courts' decisions, which involved information of which Dunlap and his attorneys were aware. Additionally, the Third Circuit construed a prior decision, which it reaffirmed, that "rejected defendant's argument that certain documents were *Brady* material and somehow 'suppressed' when the government had made the materials available for inspection and they were defendant's own documents." Id. at 292-93 (citing U.S. v. Pelullo, 399 F.3d 197, 212 (3rd Cir. 2005)). That is the situation here; there was no suppression because Dunlap and his defense team knew of Dr. Sombke's opinions.

In U.S. v. Tavera, 719 F.3d 705, 711 (6th Cir. 2013), the Sixth Circuit, relying upon Banks v. Dretke, 540 U.S. 668, 696 (2004), opined a due diligence rule did not require the defense to

attempt a witness interview to discover exculpatory evidence. However, the court expressly reaffirmed Bell v. Bell, 512 F.3d 223, 235 (6th Cir. 2008) (en banc), which "distinguished *Banks* on the ground that *Bell* involved 'public sentencing records' rather than 'information known to investigating officers that defendants had no reason to know about,'" Tavera, 719 F.3d at 712 n.4. As repeatedly explained, Dunlap's case does not involve information known to the state that he had no reason to know about because he and his defense team actually knew about Dr. Sombke's mental health opinions.

The state recognizes that in U.S. v. Howell, 231 F.3d 615, 625 (9th Cir. 2000), the Ninth Circuit opined that "[t]he availability of particular statements through the defendant himself does not negate the government's duty to disclose," because "[d]efendants often mistrust their counsel, and even defendants who cooperate with counsel cannot always remember all of the relevant facts or realize the legal importance of certain occurrences." However, this case does not involve "the Government's duty to disclose evidence of a flawed police investigation." Id. at 625. Moreover, in this case, not only did Dunlap believe that Dr. Sombke thought he was "crazy," but he disclosed that information to Parmenter and Dapsauski. (Pet. App., p.13a.) Additionally, in Tennison v. City and County of San Francisco, 570 F.3d 1078, 1090-91 (9th Cir, 2009), the Ninth Circuit reconciled Howell with Raley v. Ylst, 470 F.3d 792, 804 (9th Cir. 2006) (there was no Brady violation because the defendant "knew that he had made frequent visits to medical personnel at the jail" and "knew that he was taking medication that they prescribed for him"). In Tennison, the court narrowed the broad statements from Howell, explaining that knowledge regarding one's medical history is not analogous to a defendant's awareness that a witness "might have information helpful to their case." Tennison, 570 F.3d at 1091. Here, Dunlap's personal belief about Dr. Sombke's opinions was information that Dunlap knew might be helpful, which is presumably why

he shared it with Dapsauski and Parmenter. More importantly, the district court repeatedly found the information containing Sombke's opinions was disclosed by the state to Dunlap's attorneys prior to Dunlap's resentencing (Pet. App., pp.45a, 52a-53a, 61a-63a, 67a-68a), and the Idaho Supreme Court concluded the evidence "clearly shows Dunlap's counsel were aware of facts they claim were withheld by the prosecution" (Pet. App., p.30a). Consequently, Dunlap and his attorneys "had all the 'salient facts regarding the existence of the [evidence] that he claims [was] withheld.'" Rhoades v. Henry, 638 F.3d 1027, 1039 (9th Cir. 2011) (brackets in original) (quoting Raley, 470 F.3d at 804).

The Tenth Circuit also used exceptionally broad language in Fontenot v. Crow, 4 F.4th 982, 1066 (10th Cir. 2021) (quotes, citation, brackets omitted), opining that "the *Brady* rule imposes an independent duty to act on the government, an obligation to disclose favorable evidence when it reaches the point of materiality, regardless of the defense's subjective or objective knowledge of such evidence." However, the court was focused upon evidence supporting the defendant's alibi defense, and while the defendant certainly was aware of where he was at the time of the criminal acts, he was not aware of the corroborative evidence that was not disclosed by the state that supported the alibi defense. Id. at 1063-65, 1067-68. The Tenth Circuit made the same broad statement in 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."). However, the court also reasoned, "Whether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation. Obviously if the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material." Id.; *see also* U.S. v. Quintanilla, 193 F.3d 1139, 1149 (10th Cir.

1999) ("[A] defendant's independent awareness of the exculpatory evidence is critical in determining whether a *Brady* violation has occurred. If a defendant already has a particular piece of evidence, the prosecution's disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial.").

Even if the Tenth Circuit has determined that the state has an independent obligation to disclose exculpatory evidence irrespective of the fact that the defendant was aware of the evidence, as found by the state courts in this case, the evidence of Dr. Sombke's opinions was disclosed. (Pet. App., pp.45a, 52a-53a, 61a-63a, 67a-68a.) And on rehearing, the Idaho Supreme Court concurred, stating the evidence "clearly shows Dunlap's counsel were aware of facts they claim were withheld by the prosecution." (Pet. App., p.30a.) Moreover, not only would the Tenth Circuit be an outlier, but such a duty would be contrary to this Court's precedent. The purpose of the Brady rule, "is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." U.S. v. Bagley, 473 U.S. 667, 675 (1985) (footnotes omitted). "Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." Id. (footnotes omitted); *see also* Kyles v. Whitely, 514 U.S. 419, 436-37 (1995) ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense."). Brady's focus upon the fairness of the trial, rather than the broader considerations put forth by Dunlap, supports the conclusion that due process is not violated when the state, as here, "clearly shows Dunlap's counsel were aware of facts they claim were withheld by the prosecution." (Pet. App., p.30a.) There is no authority for the bold proposition that the state must flag evidence turned over to the defense as exculpatory. And rightfully so, because the state may not know the nature of a defendant's defense

and what evidence might be exculpatory, which is why this Court has approved the use of "open file policies" by the state to comply with Brady, providing all exculpatory evidence is contained within the prosecutor's file. *See* Strickler, 527 U.S. at 283-84; Kyles, 514 U.S. at 437.

Finally, In re Sealed Case No. 99-3096, 185 F.3d 887, 896-97 (D.C. Cir. 1999), also has no application because it does not hold that a Brady violation occurs when the state does not provide information that the defendant already knows. Rather, the D.C. Circuit, similar to the Sixth Circuit in Tavera, concluded the "due diligence" rule did not require the defense to attempt an interview with a trial witness to discover exculpatory evidence, especially since the government could not "confidently assert that defense counsel could have learned the contents of Jones' agreements when the government concedes that it has no idea what those contents are." Id. at 896.

The state cases upon which Dunlap relies (Pet., pp.18-23) are also unavailing because none of them involve a finding, as this case does, that the defendant's counsel "were aware of facts they claim were withheld by the prosecution" (Pet. App., p.30a). Because Dunlap has failed to cite any federal or state case that expressly holds the state is required to disclose evidence a defendant already possesses or of which he is aware, the parade of horrors offered by Dunlap involving different Brady protections depending on where a defendant is prosecuted or the contention that the Idaho Supreme Court's decision conflicts with Ninth Circuit precedent that would allegedly result in federal habeas litigation (Pet., pp.23-25) is simply not true.

Dunlap's reliance upon Banks, 540 U.S. at 696 (Pet., pp.25-26), is also unavailing because it involves an entirely different situation. In Banks, prosecutors told defense counsel there was no need to file formal Brady motions because the state was willing to provide all discovery "to which [the defense was] entitled." Id. at 677. However, not only did the state suppress information that a key government witness had set up the defendant's arrest and had previously served as a paid

police informant, but the state actually covered up the paid-police-informant fact during trial by failing to correct the witness' false testimony that he was not a paid informant. Id. at 678-84. It was not until discovery was ordered for a federal evidentiary hearing that Banks learned of the suppressed information. Id. at 684-85. The state asserted that Banks' failure to locate the witness during post-conviction proceedings and ascertain his "true status" or to interview the investigating officers, failed to demonstrate "appropriate diligence in pursuing the [ ] *Brady* claim." Id. at 695. This Court rejected the argument, explaining, "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." Id. This Court characterized the state's argument as being that "the prosecution can lie and conceal and the prisoner still has the burden to discover the evidence, so long as the potential existence of a prosecutorial misconduct claim might have been detected" which is "not tenable in a system constitutionally bound to accord defendants due process." Id. at 696 (quotes, citations, ellipses omitted).

Here, Dunlap was not required to "scavenge for hints of undisclosed *Brady* material" because the state not only represented all the material was disclosed, but the prosecutor actually disclosed the IDOC records, which included Dr. Sombke's opinions regarding Dunlap's mental health. (Pet. App., pp.45a, 52a-53a, 61a-63a, 67a-68a.) Additionally, Dapsauski's note revealed that Dunlap told her that Dr. Sombke "thinks Tim is crazy," while Parmenter's note revealed that Dunlap told him that Dr. Sombke "also thinks Tim's crazy." (Pet. App., p.13a.) Consequently, the Idaho Supreme Court properly reasoned that, "[b]ecause Dunlap's counsel were aware of the 'salient facts,' we conclude that there was no suppression by the State." (Id.) Addressing Dunlap's rehearing argument – that the Idaho Supreme Court could not consider evidence from the second evidentiary hearing – the court's opinion was even stronger, stating, "if we were to remand the

Brady issue to the district court, nothing would prevent the district court from considering **all the evidence it has already heard**, including evidence from the second evidentiary hearing which clearly shows Dunlap's counsel were aware of facts they claim were withheld by the prosecution." (Pet. App., p.30a) (emphasis added). In other words, not only did the Idaho Supreme Court consider the evidence from the second evidentiary hearing, which was detailed in the original opinion (Pet. App., p.13a), but the court recognized that evidence would only bolster what the district court had found from the evidence presented at the first evidentiary hearing. And all that evidence "clearly shows Dunlap's counsel were aware of facts they claim were withheld by the prosecution." (Pet. App., p.30a.) Banks did not address a situation where the defendant was aware of the information underlying the Brady claim and has never claimed otherwise.

In U.S. v. Blankship, 19 F.4th 685, 693-94 (4th Cir. 2021), the defendant asserted that Banks required the reversal of several Fourth Circuit opinions, including U.S. v. Wilson, *supra.* While recognizing "the government's need to comply with its *Brady* obligation is not obviated by the defendant's lack of due diligence," the Fourth Circuit detailed the facts from Banks, and concluded it was readily distinguished because, "[t]o obtain access to the testimony of individuals who had once been his own employees, Blankenship would not have been required to scavenge, guess, search, or seek. He had the evidence before him and undoubtedly was aware of it." Id. at 694. Like Blankenship, this is not a situation "where [Dunlap] was required to scavenge for hints of undisclosed *Brady* material or which amounted to a hide-and-seek, process in which [Dunlap] was the seeker. Id. at 693. "[C]ommon sense should not be ignored," and Dunlap "should not be allowed to turn a willfully blind eye to available evidence and thus set up a *Brady* claim for a new trial." Id. at 694; *see also* Ellsworth v. Warden, 333 F.3d 1, 7 (1st Cir. 2003) ("The 'should have known' standard refers to trial preparation; and whether or not Ellsworth was careless in his perusal

of the file while a cottage teacher does not matter. But if he in fact knew of the note at the time of his trial and failed to pursue the lead, then his *Brady* claim might well be barred.").

Dunlap also relies upon Brady to support his argument that the Idaho Supreme Court is wrong, contending if the "salient facts analysis [had] been applied to the facts in *Brady*, this Court would not have granted Brady sentencing relief." (Pet. pp.26-27.) At his separate trial, Brady admitted he participated in the crime, but asserted that his co-defendant, Charles Boblit, did the actual killing. Brady, 373 U.S. at 84. While the prosecutor disclosed several of Boblit's statements, his ultimate confession to committing the murder was withheld and did not come to light until after Brady's conviction and death sentence were affirmed. Id. Dunlap contends that, "[h]ad this Court applied a salient fact 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." (Pet., p.27.) However, while Brady may have known that Boblit committed the murder, there were no salient facts that would suggest Boblit actually confessed to the murder. Personal knowledge of who committed a murder is far different than knowledge that another person actually confessed. Here, not only did Dunlap convey his belief to his attorney and mitigation specialist that Dr. Sombke believed he was "crazy," but his attorneys "were aware of facts they claim were withheld by the prosecution," which included not only Dunlap's statements to his attorney and mitigation specialist but Dunlap's mental health records from IDOC that contained Dr. Sombke's opinions. (Pet. App., p.30a.) Rather than "encourage[ing] prosecutorial misconduct and dishonesty, and [ ] dilut[ing] an accused's due process rights" (Pet., p.28), adopting Dunlap's argument encourages defense counsel to "lay a trap for prosecutors by failing to use evidence of which defense counsel is reasonably aware." Amado, 758 F.3d at 1135. Such gamesmanship cannot be tolerated in an adversary system. *See* Bagley, 473 U.S. at 675.

Finally, Dunlap contends the question is "squarely presented" and "[t]he facts are undisputed and straightforward: The state did not disclose the exculpatory 2005 opinion of Dr. Sombke and Warden Fisher that Mr. Dunlap was mentally ill and housed accordingly." (Pet., p.28.) As detailed above, if those are the facts that Dunlap contends are "undisputed and straightforward," he is simply wrong, especially because of the district court's findings detailed above (Pet. App., pp.45a, 52a-53a, 61a-63a, 67a-68a) that were, at a minimum, implicitly adopted by the Idaho Supreme Court on rehearing (Pet., p.30a). Of course, if Dunlap is referring to Dr. Sombke and Warden Fisher's affidavits that were filed by Loomis after Dunlap was resentenced and never disclosed to Robins, there is no Brady violation because the state is not required to disclose evidence that was unknown prior to trial or sentencing. Irrespective, those affidavits were based upon Dunlap's IDOC mental health records that were disclosed to his attorneys prior to the resentencing. In other words, based upon Dunlap's interpretation of "the facts," this is clearly a fact-bound case that requires not only an interpretation of the Idaho Supreme Court's decision, especially on rehearing, but a factual determination of what was actually provided to Dunlap's attorneys regarding Dr. Sombke's opinions, which is one more reason Dunlap's case does not warrant review by this Court. *See* Sup. Ct. R. 10.

CONCLUSION

The state respectfully requests that Dunlap's Petition for a Writ of Certiorari be denied.

DATED this 19th day of May, 2023.

Respectfully submitted,
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