No.

IN THE SUPREME COURT OF THE UNITED STATES

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CIARAN PAUL REDMOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

_____

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

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PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether, to establish a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a defendant must show that his attorney could not have obtained the undisclosed exculpatory evidence through his own diligence.

2. To the extent that there is some type of diligence requirement, what is the applicable level of diligence and does it foreclose a *Brady* violation where the undisclosed exculpatory documents were filed in an unpublished and procedurally unrelated case decided several years earlier.

STATEMENT OF RELATED CASES

- *United States v. Ciaran Paul Redmond*, No. 15CR00532-SVW, U.S. District Court for the Central District of California. Judgment entered January 25, 2017 and February 16, 2021.

- *United States v. Ciaran Paul Redmond*, No. 17-50004, U.S. Court of Appeals for the Ninth Circuit. Judgment entered October 24, 2018.

- *Ciaran Paul Redmond v. United States*, No. 18-8719, Supreme Court of the United States. Petition for a writ of *certiorari* denied October 7, 2019.

- *Ciaran Paul Redmond v. United States*, No. 20CV05170-SVW, U.S. District Court for the Central District of California. Judgment entered February 16, 2021.

- *Ciaran Paul Redmond v. United States*, No. 21-55142, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 26, 2022, rehearing and rehearing *en banc* denied December 5, 2022.

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INTRODUCTION

Under *Brady v. Maryland*, 373 U.S. 83 (1963), "the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 565 U.S. 73, 75 (2012). The questions presented in this petition implicate an important circuit-split (and state-court-split) regarding this due process right – whether a defendant must show that his attorney could not otherwise have obtained the evidence through his own due diligence in order to establish a *Brady* violation? Furthermore, to the extent that there is such a requirement, what is the applicable level of diligence?

Earlier this Term, this Court denied a somewhat similar petition in *Blankenship v. United States*, No. 21-1428, but the government essentially conceded that "federal courts of appeals and state courts of last resort may disagree in their application of *Brady* to material that a defendant could have discovered with reasonable diligence," and instead pointed out that *Blankenship* was not a suitable vehicle for review because the lower court found that the purportedly undisclosed information was not material and its substance had been elicited at trial. Brief in Opposition at 8-9; *see United States v. Blankenship*, 19 F.4th 685, 692-95 (4th Cir. 2021). Likewise, other somewhat similar petitions in the past have all been unsuitable vehicles for review in numerous respects. *See,*

e.g., *Yates v. United States*, Nos. 18-410 and 18-6336, Brief in Opposition (claim raised for the first time in this Court and defendant was aware of the information, which in any event was not material and would only implicate counts that would not reduce the overall sentence); *Georgiou v. United States*, No. 14-1535, Brief in Opposition (evidence was not in the possession of the government, defense was actually aware of the evidence, and lower courts found that the evidence was not exculpatory or material).

This case, on the other hand, squarely presents these important questions concerning the fundamental *Brady* right, and it is otherwise an ideal vehicle for review. The district court found that the undisclosed evidence concerning the jurisdictional element of the offense was in the possession of the government and could have caused a reasonable juror to acquit if the defense and documents were presented; likewise, Judge Ikuta found that the undisclosed evidence created so much doubt about the jurisdictional element that it was insufficient to convict. The government has never suggested that petitioner himself had any idea about the undisclosed evidence, nor have the lower courts; given the technical nature of the jurisdictional documents, it is obvious that he did not know about the evidence.

The *only* basis for the Ninth Circuit's rejection of petitioner's *Brady* claim was that his attorney could have conceivably discovered the evidence by

unearthing an obscure, unpublished, district-court case through unspecified computerized research. Even to the extent that there is some type of diligence requirement in the *Brady* analysis, no court has ever extended it that far, and, unlike past petitions, this one also raises the alternative question concerning the contours of any diligence standard that may be required to establish a violation. This case therefore presents an ideal context to decide these important questions of criminal procedure implicating a core due process right, and the Court should grant review.

OPINIONS BELOW

On direct appeal, the Ninth Circuit issued an unpublished memorandum, with Judge Ikuta dissenting, that can be found at *United States v. Redmond*, 748 Fed. Appx. 760 (9th Cir. Oct. 24, 2018), *cert. denied*, 140 S. Ct. 150 (2019). The district court's opinions denying petitioner's 28 U.S.C. § 2255 motion and granting a certificate of appealability can be found at *Redmond v. United States*, 2021 WL 1534974 (C.D. Cal. Jan. 13, 2021) and *Redmond v. United States*, 2021 WL 1156845 (C.D. Cal. Feb. 16, 2021). The Ninth Circuit's decisions affirming the denial of the § 2255 motion can be found at *Redmond v. United States*, No. 21-55142, 2022 WL 1658445 (9th Cir. May 25, 2022), *withdrawn and superseded*, 2022 WL 4461379 (9th Cir. Sep. 26, 2022).

JURISDICTION

The court of appeals filed its superseding memorandum opinion on September 26, 2022 and denied a petition for rehearing and rehearing *en banc* on December 5, 2022. App. 1-3.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 U.S.C. § 7:

> The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:
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> * * *
>
> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any

[1] "App." refers to the Appendix.

place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building. . . .

Title 18 U.S.C. § 113 (2011):

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(1) Assault with intent to commit murder, by imprisonment for not more than twenty years.

(2) Assault with intent to commit any felony, except murder or a felony under chapter 109A, by a fine under this title or imprisonment for not more than ten years, or both.

(3) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by a fine under this title or imprisonment for not more than ten years, or both.

(4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than six months, or both.

(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.

(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

(7) Assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 5 years, or both..

STATEMENT OF THE CASE

In 2015, a federal grand jury in the Central District of California returned an indictment charging petitioner with three counts of violating 18 U.S.C. § 113 for an assault that occurred more than four years earlier at the United States Penitentiary ("USP") in Victorville, California. Each of the charges required the government to prove that the assault was committed "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 113(a).

At trial, the evidence only established that the assault occurred at USP Victorville; no other evidence was introduced to show that it occurred within the special maritime and territorial jurisdiction of the United States. App. 4. The jury returned guilty verdicts on all three counts, and the district court imposed a total sentence of 30 years on petitioner. App. 15-16. Petitioner challenged his convictions and sentence on appeal, contending, among other things, that the government presented insufficient evidence that the assault occurred in the special maritime and territorial jurisdiction of the United States. App. 40-43. In response to petitioner's opening brief, the government filed a motion to take judicial notice, which attached several documents regarding the land near USP Victorville. App. 4, 40. Petitioner objected to the request for judicial notice and further argued that, in any event, the documents submitted by the government did not prove the jurisdictional element. App. 16.

The Ninth Circuit issued a divided decision, with Judge Ikuta dissenting. App. 39-43. The majority held: "We do not need to address Redmond's sufficiency of the evidence claim . . . because we can and do take judicial notice that the United States Penitentiary USP at Victorville ('USP Victorville') is within the special maritime and territorial jurisdiction of the United States." App. 40. The majority explained: "The government provided evidence from sources whose accuracy cannot reasonably be questioned establishing that California conveyed and the United States accepted 1,912 acres of land in 1944. In 1999, the United States retroceded the land to California, except for 933.89 acres, over which it specifically retained jurisdiction to build USP Victorville. Therefore, the United States has special maritime and territorial jurisdiction over USP Victorville as required by 18 U.S.C. § 7 and 40 U.S.C. § 3112." App. 40-41.

Judge Ikuta dissented on the jurisdictional question. App. 43. She explained that the documents submitted by the government on appeal included a 1944 letter from the United States War Department to the Governor of California accepting jurisdiction over land acquired for military purposes, but the "other documents presented by the United States . . . fail to establish that the land underlying USP Victorville was part of this general acceptance of jurisdiction." *Id.* She therefore concluded: "[W]e lack authority to take judicial notice that USP Victorville is within the special territorial and maritime jurisdiction of the United

States. *See* Fed. R. Evid. 201(b)(2). Because the government has failed to satisfy the jurisdictional element of the offense of conviction, I would vacate the conviction." *Id.*

After this Court denied a petition for a writ of *certiorari*, *see Redmond v. United States*, 140 S. Ct. 150 (2019), petitioner filed a timely § 2255 motion. Among other things, he contended that the government violated *Brady* by failing to produce the documentary evidence regarding jurisdiction before trial and that he received ineffective assistance of counsel when his trial attorney failed to investigate and challenge the jurisdictional element. App. 17. The district court denied the motion in a lengthy order but granted a COA, App. 37-38, noting that the motion "certainly raises interesting constitutional issues." App. 33.

As to the *Brady* claim, the district court held that petitioner demonstrated that the documentary evidence submitted by the government on appeal was favorable to him and that the government had it in its possession and failed to disclose it. App. 25-26. Much like Judge Ikuta found that the documents were insufficient to prove jurisdiction, the district court reasoned that the documents created "doubt upon the claim that the transfer of jurisdiction from California to the United States was legally effectuated." *Id.* The district court explained that the documents stated that there was no information that the Governor of California filed the United States' acceptance of jurisdiction with the appropriate county

recorder, as is legally required; furthermore, there were handwritten notations equating certain Victorville properties with "George A.F. Base," and "[t]hese handwritten notations are undated and unsigned, making it difficult to determine when they were added to the list and whether they were added by a person authorized to do so." App. 25.[2]

Nevertheless, the district court rejected the *Brady* claim due to a lack of prejudice, reasoning that, if the documents had been produced, it would have decided the jurisdictional element itself adversely to petitioner and would have prohibited the defense from arguing the jurisdictional status of USP Victorville to the jury. App. 26-27. The district court, however, granted a COA as to the *Brady* claim. App. 37-38. The district court held that reasonable jurists could disagree with its conclusion that it was permissible to preclude the issue of USP Victorville's jurisdictional status from going to the jury and that there was a reasonable probability that a jury would have acquitted petitioner if the defense

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[2] The documents produced by the government reflect a conflict between the state and federal understandings of the transfer of land, which may explain why a transfer was never legally effectuated. The documents included a purported acceptance letter by the Secretary of War stating that the United States would accept "exclusive jurisdiction," but an opinion letter submitted by the government stated that California only wanted to create "partial jurisdiction," in which California would maintain "the right of taxation and the service of civil and criminal process." Thus, there never appeared to be a meeting of the minds, which may explain why an official acceptance of jurisdiction with the county recorder cannot be found.

and undisclosed documents had been presented. *Id.*

In petitioner's second appeal, the Ninth Circuit rejected his *Brady* claim but did not adopt the district court's analysis. The Ninth Circuit instead held that the undisclosed jurisdictional documents had been "publicly filed" in another unpublished case several years earlier, *see United States v. Inoue*, 2010 WL 11537485 (C.D. Cal. Aug. 11, 2010), thereby giving defense counsel "enough information" to "ascertain" the *Brady* material "on his own," and thus "there was no suppression by the government." App. 7 (citing *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991)).[3]

ARGUMENT

I. The lower courts are divided on whether a defendant must demonstrate diligence in trying to obtain undisclosed exculpatory evidence from sources other than the government to establish a *Brady* violation, and this case is an ideal vehicle to resolve the conflict.

A. The circuits are deeply divided on the important *Brady* question

In *Banks v. Dretke*, 540 U.S. 668 (2004), this Court rejected a State's argument that the petitioner had defaulted a *Brady* claim because he did not exercise "appropriate diligence," explaining that its "decisions lend no support to

[3] The Ninth Circuit continues to struggle with the question of whether USP Victorville is within the special maritime and territorial jurisdiction of the United States, and two petitions currently before this Court challenge the Ninth Circuit's jurisdictional analysis but do not raise a *Brady* violation. *See White v. United States*, No. 22-6587; *Banks v. United States*, No. 22-6600.

the notion that defendants must scavenge for hints of undisclosed *Brady* material" and a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 695-96.

Despite *Banks*, the circuits remain split on whether a *Brady* claim requires a defendant to show that he acted with diligence in seeking the exculpatory evidence. *See Fontenot v. Crow*, 4 F.4th 982, 1065-66 (10th Cir. 2021) ("many of our sister circuits deem evidence 'suppressed' under *Brady* only if 'the evidence was not otherwise available to the defendant through the exercise of reasonable diligence' . . . [b]ut that is not the law in this circuit"); *State v. Wayerski*, 922 N.W. 2d 468, 480 (Wisc. 2019) ("Federal courts are currently divided as to whether a defendant's ability to acquire favorable, material evidence through 'reasonable diligence' or 'due diligence' forecloses a *Brady* claim.") (footnotes omitted); *see also* Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and Brady in the Balance*, 28 Geo. J. Legal Ethics 1, 10 (2015) (describing "split among circuit courts"); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 153 (2012) (discussing "divergence among courts").

Unlike the decision below, the Third, Sixth, and Tenth Circuits have definitively stated that a defendant need not satisfy a due-diligence requirement to establish a *Brady* violation. An *en banc* panel of the Third Circuit has explained

that "[t]he imposition of an affirmative due diligence requirement on defense counsel would erode the prosecutor's obligation under, and the basis for, *Brady* itself." *Dennis v. Sec'y Pennsylvania Dep't of Corr.*, 834 F.3d 263, 290 (3d Cir. 2016) (*en banc*). The Third Circuit relied on *Banks* and stated that "the concept of 'due diligence' plays no role in the *Brady* analysis" and "[o]nly when the government is aware that the defense counsel already has the material in its possession should it be held to not have 'suppressed' it in not turning it over to the defense." *Id.* at 291-92. Even when information can be found in a "public document" that "arguably could have been discovered by defense counsel" that "cannot absolve the prosecutor of her responsibility to provide that record to defense counsel." *Id.* at 292.

The Sixth Circuit has also relied on *Banks* to reject a diligence requirement: "The *Banks* case makes it clear that the client does not lose the benefit of *Brady* when [his] lawyer fails to 'detect' the favorable information." *United States v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013). "The Supreme Court's rejection of the idea that the 'prisoner still has the burden to discover the evidence' is based in part on the fact that the prosecution has the advantage of a large staff of investigators, prosecutors and grand jurors, as well as new technology . . . . That is one of the reasons that these investigators must assist the defendant who normally lacks this assistance and may wrongfully lose his liberty for years if the information they

uncover remains undisclosed. The superior prosecutorial investigatory apparatus must turn over exculpatory information." *Id.*

Even before *Banks*, the Tenth Circuit held that whether defense counsel "should have known" about the *Brady* information "is irrelevant to whether the prosecution had an obligation to disclose the information." *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). The Tenth Circuit has since found that *Banks* confirmed the correctness of its view that due diligence has "no bearing" on whether the exculpatory evidence was "suppressed by the state," although that factor can be considered in determining whether the withheld evidence was material as opposed to cumulative. *Fontenot*, 4 F.4th at 1066.

On the other hand, the Fifth, Seventh, Eighth, and Eleventh Circuits have held that a "*Brady* claim fails if the suppressed evidence was discoverable through reasonable due diligence." *Guidry v. Lumpkin*, 2 F.4th 472, 487 (5th Cir. 2021); *see Camm v. Faith*, 937 F.3d 1096, 1108 (7th Cir. 2019); *United States v. Stein*, 846 F.3d 1135, 1146 (11th Cir. 2017); *United States v. Jones*, 160 F.3d 473, 479-80 (8th Cir. 1998). These circuits generally adopted this rule before *Banks* and have since continued to adhere to it without any discussion of this Court's precedent. *See, e.g.*, *United States v. Anwar*, 880 F.3d 958, 969 (8th Cir. 2018). Not only have these circuits failed to address this Court's *Brady* precedent, but their due-diligence rule appears to have its origin in the non-constitutional

standard for new-trial motions based on newly discovered evidence. *See, e.g.*, *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir. 1996) (citing *United States v. Hedgeman*, 564 F.2d 763, 767-68 (7th Cir. 1977)). Indeed, none appear to provide "a sufficient explanation" for adding the requirement other than citing themselves back and forth. *People v. Chenault*, 845 N.W. 2d 731, 736-37 (Mich. 2014).

Still other circuits have been less than clear in their approach or have attempted to reach a middle ground. In the D.C. Circuit, an opinion written by then-Judge Garland appeared to reject a due-diligence requirement, although it also acknowledged earlier contrary precedent within the circuit. *See In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 896 (D.C. Cir. 1999) (noting the government's reliance on *Xydas v. United States*, 445 F.2d 660, 668 (D.C. Cir. 1971)). Meanwhile, the Second Circuit has rejected a general due-diligence requirement, explaining that "[t]he Supreme Court has never required a defendant to exercise due diligence to obtain *Brady* material[,]" but at the same time stated that due diligence does not apply to facts for which the defendant was "reasonably unaware[,]" which seems somewhat contradictory. *Lewis v. Connecticut Commissioner of Correction*, 790 F.3d 109, 121 (2d Cir. 2015). Attempting to chart a middle territory in *Blakenship*, the Fourth Circuit stated that due diligence is not required to establish a *Brady* claim, but a defendant also "should not be allowed to turn a willfully blind eye to available evidence and thus

set up a *Brady* claim for a new trial." *Blakenship*, 19 F.4th at 694-95.

Finally, the Ninth Circuit's precedent itself reflects the split in authority and confusion throughout the country. On the one hand, some Ninth Circuit decisions have explicitly rejected a due-diligence requirement. *See Amado v. Gonzalez*, 758 F.3d 1119, 1136-37 (9th Cir. 2014); *United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000). On the other hand, several Ninth Circuit decisions, such as the one below, have embraced a standard that considers whether the defense had "enough information" to obtain the material on its own. *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991); *see Milke v. Ryan*, 711 F.3d 998, 1017-18 (9th Cir. 2013); *United States v. Bond*, 552 F.3d 1092, 1095-97 (9th Cir. 2009); *United States v. Bracy*, 67 F.3d 1421, 1428-29 (9th Cir. 1995); *United States v. Dupuy*, 760 F.2d 1492, 1501-02 (9th Cir. 1985). In the end, there is clearly conflict and confusion among the lower federal courts justifying review.

B. State courts are also divided

State high courts have also split on the same question. Most recently, the Supreme Court of Ohio "repudiated the imposition of any due-diligence requirement on defendants in *Brady* cases." *State v. Bethel*, 192 N.E. 3d 470, 477 (Ohio 2022). The State high courts in Wisconsin, Colorado, Michigan, South Carolina, Montana, and Maryland agree. *See Wayerski*, 922 N.W. 2d at 480; *People v. Bueno*, 409 P.3d 320, 328 (Colo. 2018); *Chenault*, 845 N.W. 2d at 738;

State v. Durant, 844 S.E. 2d 49, 55 (S.C. 2020); *State v. Reinert*, 419 P.3d 662, 665 n.1 (Mont. 2018); *State v. Williams*, 896 A.2d 973, 992 (Md. 2006). Like the federal courts of appeals that have rejected a due-diligence requirement, most of these courts have explained that the requirement is inconsistent with *Banks* and this Court's other *Brady* precedent. *See Bethel*, 192 N.E. 3d at 477; *Bueno*, 409 P.3d at 328; *Chenault*, 845 N.W. 2d at 738; *Williams*, 896 A.2d at 992.

On the other hand, several State high courts have imposed a due-diligence or reasonable-diligence requirement, but, like the federal courts of appeals that have done so, they have not attempted to harmonize that requirement with this Court's *Brady* precedent and instead have simply cross-cited lower-court opinions. *See, e.g.*, *Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021); *State v. Sosa-Hurtado*, 455 P.3d 63, 78 (Utah 2019); *State v. Green*, 225 So. 3d 1033, 1037 (La. 2017); *State v. Peterson*, 799 S.E. 2d 98, 106 (W. Va. 2017); *State v. Kardor*, 867 N.W. 2d 686, 688 (N.D. 2015); *Commonwealth v. Roney*, 79 A.3d 595, 608 (Pa. 2013); *People v. Williams*, 315 P.3d 1, 44 (Cal. 2013); *State v. Rooney*, 19 A.3d 92, 97 (Vt. 2011); *State v. Mullen*, 259 P.3d 158, 166 (Wash. 2011); *Aguilera v. State*, 807 N.W. 2d 249, 252-53 (Iowa 2011); *Erickson v. Weber*, 748 N.W. 2d 739, 745 (S.D. 2008); *Stephenson v. State*, 864 N.E. 2d 1022, 1057 (Ind. 2007); *State v. Shakel*, 888 A.2d 985, 1033 (Conn. 2006); *Rippo v. State*, 946 P.2d 1017, 1028 (Nev. 1997). In short, there is also a deep division in the State courts.

C. This case is an ideal vehicle to resolve the confusion, and the decision below chose the wrong side of the conflict

Unlike the petition denied earlier this term in *Blankenship* and other petitions that have been turned away in prior terms, this case squarely presents the diligence question. The district court found that the belatedly disclosed jurisdictional evidence was exculpatory and that a reasonable jury could have acquitted petitioner based on the undisclosed evidence if an attack on the jurisdictional element could be presented to the jury. App. 25-26, 37-38. Judge Ikuta actually found that the undisclosed jurisdictional evidence was not even sufficient to convict. App. 43. Although affirming the denial of § 2255 relief, the panel below acknowledged that the jurisdictional documents created doubt as to the transfer of jurisdiction, App. 4, and even explicitly stated "that there could well be merit to the claim that the transfer of jurisdiction from California to the federal government was not legally effectuated," App. 12, although it later removed that part of the opinion.

The *only* basis for the Ninth Circuit's decision was that defense counsel could have obtained the jurisdictional materials through his own diligence.[4] That

[4] The Ninth Circuit was evidently troubled by the district court's differing rationale that it would have prohibited the jurisdictional defense from going to the jury, and rightly so. *See United States v. Gaudin*, 515 U.S. 506 (1995); *see also Torres v. Lynch*, 578 U.S. 452, 467 (2016).

is, the Ninth Circuit held that the undisclosed jurisdictional documents had been "publicly filed" in another unpublished, district-court case several years earlier, *see United States v. Inoue*, 2010 WL 11537485 (C.D. Cal. Aug. 11, 2010), providing defense counsel with "enough information" to "ascertain" the material "on his own," and accordingly "there was no suppression by the government" for *Brady* purposes. App. 7. The diligence question is therefore squarely presented. Unlike *Blakenship*, for example, the Ninth Circuit did not additionally reject the claim based on other requirements needed to establish a *Brady* violation, such as materiality.

One of the points raised by the Solicitor General in opposing other somewhat similar petitions is that the defendants themselves (as opposed to their attorneys) actually knew about the undisclosed information. *See* Yates Opposition at 12-13. There is some conflict among the lower courts as to whether that forecloses a *Brady* claim, *see Howell*, 231 F.3d at 625, but, in any event, that is not at issue here. Petitioner himself obviously did not know about the undisclosed jurisdictional documents. Nobody has even suggested that petitioner's attorney actually knew about the documents; the district court explained that the attorney apparently missed the jurisdictional issue due to "inattention rather than strategy." App. 22. The only basis for the Ninth Circuit's ruling is that the attorney *could* have theoretically discovered the evidence on his own.

In other cases, the Solicitor General has attempted to downplay the conflict in the lower courts by contending that the diligence dispute has boiled down to the particular circumstances of each case, and it has argued that even the lower courts rejecting a due-diligence test do not always apply that rule, contending that the Sixth Circuit requires diligence for public documents. *See* Yates Opposition at 21-22 (citing *Tavera*, 719 F.3d at 712 n.4). But the Third Circuit's *en banc* opinion in *Dennis* specifically stated that even when information can be found in a "public document" that "arguably could have been discovered by defense counsel" that "cannot absolve the prosecutor of her responsibility to provide that record to defense counsel." *Dennis*, 834 F.3d at 292; *see Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 294 (3d Cir. 2021). Thus, there is even conflict in the lower courts in the context of public documents. In any event, the fact that this case involves purportedly public documents makes it a fine vehicle for review because it allows this Court to consider initially whether diligence is a factor at all in the *Brady* analysis, including in the public-document context, and, if it is a factor, what level of diligence applies, as discussed in the second question.

Finally, this Court should also grant review because the decision below was wrong. As discussed above, this Court has already rejected a State's argument that a petitioner did not exercise "appropriate diligence" in the *Brady* context, explaining that its "decisions lend no support to the notion that defendants must

scavenge for hints of undisclosed *Brady* material" because a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 695-96. This Court has also "embraced" the "well-worn adage that 'two wrongs do not make a right[,]'" *Gray v. Mississippi*, 481 U.S. 648, 664 (1987), and that is really what the Ninth Circuit's decision amounted to here. The government did not disclose exculpatory evidence in its possession, but the Ninth Circuit concluded that there was no problem because petitioner's attorney mistakenly failed to uncover the evidence. Such an analysis is far removed from "the *Brady* rule's 'overriding concern . . . with the justice of the finding of guilt,'" and with its lofty aspiration "that the Government's 'interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017) (citations omitted). And even if there is some type of diligence requirement, the decision below was incorrect, as it imposed far too high of a hurdle to establish a *Brady* violation, as discussed below.

II. If defense diligence is part of the *Brady* inquiry, this Court should adopt the deliberate-indifference standard articulated by the Fourth Circuit in *Blankenship* rather than a reasonable-diligence or due-diligence standard articulated by other lower courts.

While petitioner submits that defense diligence should not be a part of the *Brady* inquiry, even those lower courts adopting a diligence test have articulated

different standards. While most of those courts formulate the standard as "due diligence" or "reasonable diligence" or "reasonable due diligence," *see, e.g.*, *Guidry*, 2 F.4th at 487; *see Camm*, 937 F.3d at 1108, the Ninth Circuit below simply declared that defense counsel had "enough information" to ascertain the material on his own. App. 7. The Ninth Circuit's "enough information" standard is vague, and its exacting view of diligence in this case is unprecedented.

If defense diligence plays any part in the *Brady* inquiry, it should be considered under the standard articulated by the Fourth Circuit in *Blakenship*. Rather than a reasonable-diligence or due-diligence test, the Fourth Circuit established a deliberate-indifference standard, stating that a defendant "should not be allowed to turn a willfully blind eye to available evidence and thus set up a *Brady* claim for a new trial." *Blakenship*, 19 F.4th at 694-95.

This Court has already applied a deliberate-indifference standard in the *Brady* context, explaining that "'[d]eliberate indifference' is a stringent standard of fault, requiring proof that [an] actor disregarded a known or obvious consequence of his action." *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (test for establishing when a prosecutor's office can be held liable for failure to train on *Brady*). The Court should likewise apply such a standard if diligence is to be considered in the *Brady* inquiry. Unlike deliberate indifference, under a reasonable-diligence test, the Fifth Amendment *Brady* inquiry will often collapse

into a Sixth Amendment ineffective assistance of counsel analysis. *See Strickland v. Washington*, 466 U.S. 668 (1984). The two rights, however, are distinct, serve different interests, and should employ different standards.

Although this Court could remand to the Ninth Circuit to reconsider the *Brady* claim under a deliberate-indifference standard, it is clear that the standard was not met. The Ninth Circuit agreed with the government's argument that defense counsel theoretically could have found the *Brady* information on his own by presumably discovering *Inoue*, an *unpublished* and procedurally unrelated case litigated several years earlier, on Westlaw and then accessing its docket. App. 7. This reasoning does not establish deliberate-indifference or even unreasonable diligence if the Court were to adopt that more prosecution-oriented test.

The first flaw with the government's argument is that it comes from the perspective of a federal prosecutor who is afforded ample resources, including *free* legal research databases (at least to the individual prosecutor). It may come as a surprise to many government attorneys, but Westlaw is very expensive, and not all private attorneys have it. This type of defense disadvantage is why a diligence requirement has been rejected. *See Tavera*, 719 F.3d at 712 ("[T]he prosecution has the advantage of a large staff of investigators, prosecutors and grand jurors, as well as new technology . . . . The superior prosecutorial investigatory apparatus must turn over exculpatory information.").

The Ninth Circuit also failed to explain how defense counsel should have discovered the unpublished, district-court opinion in *Inoue* even assuming he could afford and had Westlaw. The Ninth Circuit apparently assumed that counsel would have used the "All Federal" database to conduct a search, although many attorneys would instead opt for the "Federal Courts of Appeals" and "United States Supreme Court" databases, which give results for potentially controlling authority. And even if counsel had Westlaw and searched the "All Federal" database, he then would have had to nail the search so that *Inoue* would have popped up in a reasonable number of cases. The bottom line is that it is a much easier task to find *Inoue* when reverse engineering the project with knowledge that *Inoue* exists.

Even if counsel had actually found *Inoue* on Westlaw, the Ninth Circuit also never explained why he would have looked for the underlying documents calling the acceptance of jurisdiction into question. The only mention of the documents comes buried in a footnote stating: "Although Defendant does not raise the argument directly, to the extent Defendant argues that the Government has not proven the United States accepted jurisdiction over the land containing USP Victorville in the manner required by the Act, the Court finds that Exhibit A to the Government's Opposition satisfies the requirements of the Act." *Inoue*, 2010 WL 11537485, at *4 n.4. This short footnote suggests that the underlying documents

were satisfactory, so much so that it did not even appear to the court that the defendant made any contrary argument.

In the end, courts have rejected a due-diligence requirement precisely because "[s]ubjective speculation as to defense counsel's knowledge or access may be inaccurate, and it breathes uncertainty into an area that should be certain and sure." *Dennis*, 834 F.3d at 293. That is what the government convinced the Ninth Circuit to do here, and the view that such speculation is part of the *Brady* inquiry should be corrected by this Court. At the very least, a deliberate-indifference standard would reduce the amount of speculation and uncertainty.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

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Respectfully submitted,

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