No. 18-

IN THE

Supreme Court of the United States

COREY YATES,
Petitioner,
v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, to establish a violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), a defendant must show that he did not know of the evidence suppressed by the government and could not have obtained it with reasonable diligence.

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INTRODUCTION

Corey Yates respectfully petitions for a writ of certiorari to review the judgment in this case of the District of Columbia Court of Appeals.

OPINIONS BELOW

The decision of the District of Columbia Court of Appeals (App. 1a-46a) is reported at 167 A.3d 1191. The court's order denying rehearing and rehearing en banc (App. 77a-78a) is unreported, as is the trial court's order denying a new trial (App. 71a-75a).

JURISDICTION

The District of Columbia Court of Appeals entered judgment on August 24, 2017. The court denied a timely petition for rehearing on May 18, 2018. On August 6, 2018, the Chief Justice extended the time to file a petition for writ of certiorari to October 1, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a), (b).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall … deprive any person of life, liberty, or property, without due process of law."

STATEMENT

Three weeks after petitioner Corey Yates was convicted on an accessory-after-the-fact charge, the prosecution disclosed exculpatory evidence: a witness's grand-jury testimony that she overheard Yates encouraging the principal to turn himself in to the police. This evidence powerfully reinforced Yates's core defense to the accessory charge at trial—namely, that any actions he took after the murder were not taken with the intent to hinder or prevent the principal's arrest, as required for conviction. Yates sought a new trial on the ground that the government's suppression of this exculpatory evidence violated his due-process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The District of Columbia Court of Appeals rejected Yates's *Brady* claim because Yates "d[id] not claim to have been unaware" that the witness was present during the episode in which Yates urged the principal to turn himself in. App. 25a. That fact was dispositive because, in the court's view, "the government is not obliged under

Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *Id.* That holding conflicts with decisions of several federal courts of appeals and state high courts, contravenes this Court's precedent, and undermines the purposes of the *Brady* doctrine.

A. Yates's Prosecution And The Suppressed Evidence

This case arises from the 2010 shooting death of Darrel Hendy in Washington, D.C. Yates was indicted along with co-defendants Chamontae Walker and Meeko Carraway on charges of conspiracy and first-degree murder while armed. App. 1a-2a. Yates and Walker were also charged as accessories after the fact. *Id.*

Carraway, who fired the fatal shots, pleaded guilty to a reduced charge of second-degree murder while armed. App. 1a. Yates went to trial, and the jury found him not guilty of both conspiracy to commit murder and first-degree murder while armed. App. 2a. The jury convicted Yates, however, of second-degree murder while armed and accessory after the fact. *Id.*[1]

The prosecution's evidence against Yates in support of the accessory-after-the-fact charge focused on an episode in which Yates, in the week following the shooting, allegedly accompanied Carraway and Walker to North Carolina. App. 9a-10a. Yates's principal de-

[1] Walker went to trial with Yates and was convicted of first-degree murder while armed; conspiracy to commit murder; accessory after the fact; and a misdemeanor charge of assaulting, resisting, or interfering with a police officer. App. 2a. The court of appeals resolved Walker's and Yates's appeals together. App. 46a. It is undersigned counsel's understanding that Walker timely filed a petition for a writ of certiorari and that a corrected version of that petition is due by October 29, 2018.

fense to that charge was that any assistance he gave Carraway after the shooting, including the alleged trip to North Carolina, was not offered for the purpose of hindering or preventing Carraway's arrest, trial, or punishment—as required for conviction under *Jones* v. *United States*, 716 A.2d 160, 163 (D.C. 1998)—but instead was aimed at persuading Carraway to turn himself in and preventing retaliation by the victim's associates. To support that defense, Yates introduced evidence that he had identified Carraway as the shooter in an interview with police and that he had consulted an attorney to learn what assistance an attorney could provide if a person were interested in turning himself in. App. 9a-10a. Yates also introduced evidence that, to the extent he assisted Carraway in traveling to North Carolina, he did so to help avoid retaliation—not to prevent Carraway's arrest. App. 10a, 16a.

More than three weeks after the jury returned its verdict, the prosecution disclosed to Yates for the first time a description of the non-public grand jury testimony of "W-10," who was Carraway's mother. App. 23a, 61a. Consistent with Yates's defense, W-10 told the grand jury that she overheard Yates urging Carraway to surrender to the police on the day that Carraway did so. App. 23a-24a & n.44. The prosecution explained that it "'came across'" that evidence during a review of its files after trial and disclosed it "'in an abundance of caution,'" acknowledging that Yates might have relied on it to "'demonstrate his lack of intent to help Carraway evade arrest.'" App. 23a n.43.

Yates moved for a new trial, arguing that the prosecution's failure to disclose the non-public evidence of W-10's grand jury testimony violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). App. 24a. The trial court rejected the claim, reasoning that

> the question is the reasonable diligence here. You said you didn't know, but the question is: With reasonable diligence, should you have known?

App. 63a. The trial court concluded that the "question … on whether reasonable diligence would have found that statement" foreclosed the *Brady* claim. App. 73a.[2]

B. The Court Of Appeals' Decision

Yates raised the *Brady* claim concerning W-10's testimony on appeal, arguing that the withheld evidence was material and exculpatory because it would have reinforced his core defense that his actions after the murder were not intended to hinder or prevent Carraway's arrest, and that the prosecution failed to timely disclose the evidence as required under *Brady*. App. 24a. The District of Columbia Court of Appeals rejected the *Brady* claim and affirmed the accessory conviction. App. 23a-25a.

The court found it "well-settled" that "'*Brady* only requires disclosure of information unknown to the defendant,'" and that the prosecution is therefore "'not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.'" App. 25a (quoting *United States* v. *Derr*, 990 F.2d 1330, 1335 (D.C. Cir.

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[2] The trial court further concluded that there was no reasonable probability the evidence, if disclosed, would have changed the outcome of the trial. App. 24a, 73a. Yates challenged that holding on appeal, arguing that the evidence would have lent strong support to his defense based on lack of intent and would have bolstered the credibility of his other evidence. Brief for Appellant 39-40, *Yates* v. *United States*, No. 12-CF-1985 (D.C. July 25, 2013). The court of appeals found it "unnecessary" to consider that issue and did not address it. App. 25a.

1993), and *United States* v. *Staruski*, 729 F.2d 256, 262 (3d Cir. 1984)). Applying that standard, the court observed that Yates "[did] not claim to have been unaware that W-10 was present and heard him urge Carraway to surrender, nor [did] he claim to have been unable to secure W-10's testimony to that effect at trial." App. 25a. Because "Yates's ignorance of the government's possession of W-10's grand jury testimony did not prevent him from presenting the same exculpatory information from the same witness at trial," the court found no *Brady* violation. *Id.*

Yates sought rehearing on the *Brady* issue, but the court of appeals denied rehearing and rehearing en banc. App. 78a.

REASONS FOR GRANTING THE PETITION

The decision below implicates a deep and growing conflict among federal and state courts regarding a critical issue under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny. In particular, courts are divided as to whether a criminal defendant's knowledge of material, exculpatory evidence withheld by the prosecution, or his ability to acquire it himself through reasonable diligence, forecloses a claim under *Brady*. This is an important and recurring issue that warrants this Court's review because it bears directly on the fundamental elements and purposes of the *Brady* doctrine and may be dispositive of due-process claims in hundreds of state and federal prosecutions.

I. FEDERAL AND STATE COURTS ARE DEEPLY DIVIDED AS TO WHETHER *BRADY* REQUIRES A SHOWING THAT THE DEFENDANT DID NOT KNOW OF AND COULD NOT REASONABLY HAVE OBTAINED THE WITHHELD EVIDENCE

The D.C. Court of Appeals held here that "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." App. 25a. But as that court previously recognized, the question whether that rule is "consistent with *Brady* and its progeny" is an "unresolved and complicated one" on which "state and federal courts are split." *Biles* v. *United States*, 101 A.3d 1012, 1023 n.10 (D.C. 2014).

Several federal courts of appeals follow the approach the D.C. Court of Appeals took here, agreeing that there is no *Brady* violation where the prosecution withholds material, exculpatory evidence that the defendant either knew of or could have obtained with reasonable diligence. The First Circuit, for example, has held that "[e]vidence is not suppressed" within the meaning of *Brady* "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) (en banc) (quotation marks omitted). The Fourth Circuit similarly holds that "when exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *United States* v. *Parker*, 790 F.3d 550, 561-562 (4th Cir. 2015) (quotation marks omitted); *see id.* ("a *Brady* violation has not occurred if the defense is aware, or should have been aware, of impeachment evidence in time to use it in a reasonable and effective

manner at trial"). At least four other federal circuits appear to adhere to that rule. *See United States* v. *Roy*, 781 F.3d 416, 421 (8th Cir. 2015) ("[t]he government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels" (quotation marks omitted)); *United States* v. *Brown*, 650 F.3d 581, 588 (5th Cir. 2011) ("evidence is not suppressed if the defendant knows or should know of the essential facts that would enable him to take advantage of it" (quotation marks omitted)); *Ferguson* v. *Secretary for Dep't of Corr.*, 580 F.3d 1183, 1205 (11th Cir. 2009) ("to prevail on a *Brady* claim, [defendant] must establish" that he "did not possess the evidence and could not have obtained it with reasonable diligence" (quotation marks omitted)); *Carvajal* v. *Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008) ("[e]vidence is 'suppressed'" where it "was not otherwise available to the defendant through the exercise of reasonable diligence"; "[s]uppression does not occur when the defendant could have discovered it himself through 'reasonable diligence'").

Many state courts have also taken the same approach. As the Supreme Court of Pennsylvania put the rule, "[t]here is no *Brady* violation when the appellant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from non-governmental sources." *Commonwealth* v. *Paddy*, 15 A.3d 431, 451 (Pa. 2011). The North Dakota Supreme Court has similarly held that "the *Brady* rule does not apply to evidence the defendant could have obtained with reasonable diligence." *State* v. *Kardor*, 867 N.W.2d 686, 688 (N.D. 2015); *see also Lofton* v. *State*, 248 So. 3d 798, 810 (Miss. 2018); *State* v. *Green*, 225 So. 3d 1033, 1037 (La. 2017); *Propst* v. *State*, 788 S.E.2d 484, 493 (Ga. 2016);

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); *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. *Youngblood*, 650 S.E.2d 119, 130 n.21 (W. Va. 2007); *State* v. *Bisner*, 37 P.3d 1073, 1082-1083 (Utah 2001); *Cornell* v. *State*, 430 N.W.2d 384, 385 (Iowa 1988).

In contrast to those decisions, several courts have held to the contrary that a defendant's knowledge of the suppressed evidence, or his ability to obtain it through reasonably diligent efforts, do not by themselves defeat a *Brady* claim. For example, in *Banks* v. *Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995), the government argued that the prosecution's failure to disclose exculpatory information did not violate *Brady* because defense counsel independently knew or should have known of it. The Tenth Circuit rejected this argument, holding that "[t]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge." *Id.* Rather, "the fact that defense counsel 'knew or should have known' about the [exculpatory] information … is irrelevant to whether the prosecution had an obligation to disclose [it]." *Id.*; *see also, e.g.*, *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999) (while defendant's actual knowledge or possession of evidence may be relevant to materiality, "whether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information").

The Ninth Circuit rejected the same argument by the government in *United States* v. *Howell*, 231 F.3d 615, 625 (9th Cir. 2000), holding that "[t]he availability of particular statements through the defendant himself

does not negate the government's duty to disclose." *Id.*[3] As the Ninth Circuit explained, "[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." *Id.* Therefore, "[t]he prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence." *Amado* v. *Gonzalez*, 758 F.3d 1119, 1135 (9th Cir. 2014); *see id.* 1136-1137 (rejecting state court's decision that a defendant bringing a *Brady* claim must "establish 'an inability to discover and produce the evidence at trial, with the exercise of due diligence'" as contrary to clearly established federal law).

In adopting this approach, several courts have rejected their own prior decisions on the issue—including decisions that the court of appeals relied on in this case, App. 25a nn.46, 47—finding them inconsistent with this Court's more recent *Brady* decisions. For example, in *Dennis* v. *Secretary*, *Pennsylvania Department of Corrections*, 834 F.3d 263 (3d Cir. 2016) (en banc), the Third Circuit found a *Brady* violation based on the prosecution's failure to disclose a time-stamped receipt corroborating the defendant's alibi—a receipt the defendant's appellate counsel independently uncovered. The government argued that no *Brady* violation had occurred because appellate counsel's discovery of the receipt demonstrated that the evidence was available to the defendant with the exercise of due diligence. *Id.* at 291-292. Some prior Third Circuit decisions arguably supported that view, suggesting (like the court of ap-

[3] The Ninth Circuit ultimately concluded that no *Brady* violation had occurred because the exculpatory evidence was not material. *Howell*, 231 F.3d at 627.

peals held here) that "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *Id.* at 292 (quoting *Starusko*, 729 F.2d at 262). In *Dennis*, however, the en banc Third Circuit concluded that this Court's more recent precedent—including *Banks* v. *Dretke*, 540 U.S. 668 (2004), and *Strickler* v. *Greene*, 527 U.S. 263 (1999)—made clear that "the concept of 'due diligence' plays no role in the *Brady* analysis." 834 F.3d at 291. The Third Circuit therefore rejected any contrary suggestion in its earlier decisions and concluded that it is "[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 292.

Similarly, in *United States* v. *Tavera*, 719 F.3d 705 (6th Cir. 2013), the government argued that the defendant or his lawyer "should have exercised 'due diligence' and discovered" exculpatory statements given by the defendant's alleged co-conspirator "by asking [the co-conspirator] if he had talked to the prosecutor," *id.* at 711. Dismissing that contention, the Sixth Circuit acknowledged that "[p]rior to *Banks*, some courts, including the Sixth Circuit … were avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule." *Id.* at 712. But the court concluded that "the clear holding in *Banks* should have ended that practice." *Id.* The court therefore "follow[ed] the Supreme Court in *Brady*, *Strickler*, and the recent *Banks* case" by "declin[ing] to adopt the due diligence rule that the government proposes based on earlier, erroneous cases." *Id.*

In *Lewis* v. *Connecticut Commissioner of Correction*, 790 F.3d 109 (2d Cir. 2015), the Second Circuit

held that the state court's imposition of "an affirmative 'due diligence' requirement"—which had resulted in denial of the defendant's *Brady* claim because "the exculpatory evidence at issue was available by due diligence to the defense"—"plainly violated clearly established federal law under *Brady* and its progeny." *Id.* at 121-122 (quotation marks omitted). The court acknowledged its own prior cases holding that "'[e]vidence 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,'" *id.* at 121 (quoting *DiSimone* v. *Phillips*, 461 F.3d 181, 197 (2d Cir. 2006)). But the court explained that this requirement "speaks to facts already within the defendant's purview" based on the defendant's actual knowledge, not "those that might be unearthed" through an exercise of due diligence. *Id.*

Finally, in *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887 (D.C. Cir. 1999), the D.C. Circuit rejected the "government's argument that it did not breach a disclosure obligation" with respect to information that was "otherwise available through 'reasonable pre-trial preparation by the defense.'" *Id.* at 896 (quotation marks omitted). Dismissing the government's contention that the defendant "should have subpoenaed the involved officers themselves" to obtain police agreements with a confidential informant, the court emphasized that "the prosecutor is responsible" for disclosing favorable evidence known to the police; the "appropriate way for defense counsel to obtain such information was to make a *Brady* request, just as she did." *Id.* at 897 (quoting *Strickler*, 527 U.S. at 275 n.12). Before *In re Sealed Case*, the D.C. Circuit had held that "*Brady* provides no refuge to defendants who have knowledge of the government's possession of possibly

exculpatory information, but sit on their hands until after a guilty verdict is returned." *Derr*, 990 F.2d at 1335. Following *In re Sealed Case*, however, "in the D.C. Circuit, the prosecution bears the burden of disclosing any exculpatory evidence in its possession, and it is no response to a *Brady* claim that defense counsel could have learned of the evidence through 'reasonable pre-trial preparation.'" *United States* v. *Nelson*, 979 F. Supp. 2d 123, 133 (D.D.C. 2013); *see id.* ("*Brady* does not excuse the government's disclosure obligation where reasonable investigation and due diligence by the defense could also lead to discovering exculpatory evidence.").

State high courts have likewise held that a defendant's knowledge of or access to the suppressed evidence does not preclude a *Brady* claim. In *People* v. *Chenault*, 845 N.W.2d 731 (Mich. 2014), for example, the Michigan Supreme Court held that a defendant need not show that he "did not possess the evidence nor could he have obtained it himself with any reasonable diligence" in order to prevail under *Brady*, *id.* at 736. Although the Michigan Supreme Court had previously applied a reasonable-diligence requirement, the court overruled that precedent in *Chenault*, concluding that a due-diligence requirement "is not doctrinally supported" and "undermines the purpose of *Brady*." *Id.* at 738. Such a requirement, the court explained, is not "consistent with or implied by United States Supreme Court precedent." *Id.* at 737.

Similarly, although Montana courts previously "considered a fourth factor" for *Brady* claims—*i.e.*, "whether the evidence could have been obtained by the defendant with reasonable diligence"—the Montana Supreme Court "abandoned the diligence factor" in *State* v. *Reinert*, 419 P.3d 662, 665 n.1 (Mont. 2018), con-

cluding in light of evolving case law that "the diligence factor was inconsistent with federal law and unsound public policy." *State* v. *Ilk*, 422 P.3d 1219, 1226 (Mont. 2018). The Colorado Supreme Court has likewise criticized the diligence requirement, concluding that this Court "has at least twice rejected arguments similar to the … assertion" that "where evidence is otherwise available through reasonable diligence by the defendant, that evidence is not suppressed under *Brady*." *People* v. *Bueno*, 409 P.3d 320, 328 (Colo. 2018) (discussing *Strickler*, 527 U.S. at 283-285, and *Banks*, 540 U.S. at 695-696); *see also Tempest* v. *State*, 141 A.3d 677, 696 & n.12 (R.I. 2016) (Suttell, C.J., concurring in the judgment and dissenting in part) (emphasizing, where government had waived any diligence argument, that the Rhode Island Supreme Court had "never articulated a 'due diligence' requirement on the part of a defendant who claims a *Brady* violation" since a 2000 decision and that "[f]ollowing *Banks*, several courts have expressly declined to adopt a due diligence requirement"); *Archer* v. *State*, 934 So. 2d 1187, 1203 (Fla. 2006) (per curiam) ("The postconviction court is in error to the extent that the court's order is read to mean that [the defendant] had to demonstrate 'due diligence' in obtaining favorable evidence possessed by the State …. [T]here is no 'due diligence' requirement in the *Brady* test.").[4]

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[4] Like some other jurisdictions, the Florida Supreme Court's decisions have been somewhat inconsistent. In contrast to *Archer*, the court in *Bogle* v. *State*, 213 So. 3d 833 (Fla. 2017) (per curiam), applied a reasonable-diligence requirement to reject a *Brady* claim where there was no evidence counsel had attempted to obtain the evidence. *Id.* at 844 (citing *Peede* v. *State*, 955 So. 2d 480, 497 (Fla. 2007) (per curiam)). *But see Pittman* v. *State*, 90 So. 3d 794, 820 (Fla. 2011) (Pariente, J., concurring in result) (criticizing majority for failing to correct trial court order that appeared to impose a due-diligence requirement, which was a "serious misstatement" of

In short, this issue has frequently recurred, and there is an established and growing conflict among the federal and state courts as to the question presented. The split has intensified in recent years as many courts have abandoned their own prior decisions that followed the court of appeals' approach here, recognizing them to be irreconcilable with *Banks* and other *Brady* decisions. If the court of appeals here had done the same, it would likely have concluded that the grand jury testimony of W-10—which would have added significant weight to the credibility of Yates's defense to the accessory charge—was in fact suppressed by the prosecution in violation of *Brady*.

II. CORRECTING THE COURT OF APPEALS' ERRONEOUS APPROACH TO THIS RECURRING QUESTION IS NECESSARY TO PRESERVING THE PURPOSES OF THE *BRADY* DOCTRINE

A. The Court Of Appeals' Approach Undermines The Goals Of *Brady* And Its Progeny

Brady established not only a valuable discovery tool to ensure fairness to defendants in particular cases, but also a bulwark to enhance the integrity of and public faith in the criminal-justice system. As this Court explained in *Brady*, "[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." 373 U.S. at 87. *Brady* serves to "justify trust in the prosecutor as 'the repre-

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Brady); *Occhicone* v. *State*, 768 So. 2d 1037, 1042 (Fla. 2000) (per curiam) (although a defendant's actual knowledge or possession of evidence can defeat a *Brady* claim, "the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the *Brady* test").

sentative … of a sovereignty … whose interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995) (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)). Given *Brady*'s significance, this Court has repeatedly reinforced the doctrine to ensure that it continues to promote those important purposes. *See, e.g.*, *Giglio* v. *United States*, 405 U.S. 150, 154-155 (1972) (extending *Brady* to disclosures bearing on witness credibility); *United States* v. *Agurs*, 427 U.S. 97, 106-107 (1976) (holding that disclosure is required even absent a specific request from the defendant); *United States* v. *Bagley*, 473 U.S. 667, 676 (1985) (extending *Brady* to disclosure of impeachment evidence); *Banks*, 540 U.S. at 675-676 ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."); *Cone* v. *Bell*, 556 U.S. 449, 469 (2009) (habeas review of petitioner's Brady claim was not procedurally barred); *Smith* v. *Cain*, 565 U.S. 73, 75 (2012) (reversing denial of post-conviction relief based on *Brady* claim); *Turner* v. *United States*, 137 S. Ct. 1885, 1894 (2017) (considering materiality of evidence under *Brady*).

The decision below, in contrast, undermines those purposes and contravenes this Court's precedent, under which it is the "duty" of the prosecutor—not the defense—"to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437. The Court explained in *Kyles* that the "prosecution, which alone can know what is undisclosed, must be assigned the … responsibility to gauge the likely net effect of all such evidence and make disclosure" when the point of materiality is reached. *Id.* at 437. The Court assigned

that responsibility to the prosecution precisely to favor disclosure to the defendant, noting that "naturally, … a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. … This is as it should be." *Id.* at 439 (citing *Agurs*, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.")). The prosecutor's decision to disclose thus does not depend on the prosecutor's assessment of whether the defendant might have other knowledge of or access to evidence in the hands of the prosecution or government investigators. In *Strickler*, the Court accordingly described "three components of a true *Brady* violation: The 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." 527 U.S. at 281-282. The Court did not include any fourth element regarding the defendant's knowledge or diligence. *See, e.g.*, *Chenault*, 845 N.W.2d at 738-739 (rejecting a "four-factor" test incorporating a due-diligence rule in favor of the three-element *Brady* test "articulated by the Supreme Court in *Strickler*, no less and no more").

Indeed, this Court has already cast serious doubt on the approach taken by the court of appeals in this case. In *Banks*, a habeas petitioner alleged that the prosecution had failed to disclose exculpatory evidence, including that the government had extensively coached one government witness and that another was a paid informant. 540 U.S. at 683-686. The government argued that the petitioner had not established "cause" for failing to raise these arguments in state court because the defendant could have uncovered this evidence himself through "appropriate diligence." *Id.* at 695. Con-

sistent with that argument, the court of appeals had held in denying relief that the defendant "should have … attempted to locate [a witness] and question him; similarly, he should have asked to interview" another witness who could have furnished the exculpatory evidence the prosecutor did not disclose. *Id.* at 688. But this Court rejected those arguments, stating that its decisions "lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material." *Id.* at 696-697. To the contrary, the Court emphasized that "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.*

Although that holding arose in the context of a "cause" argument in a habeas case, *Banks* made clear that its analysis of the "cause" issue related directly to the merits of the *Brady* claim, explaining that when a petitioner seeks to assert such a claim in a federal habeas petition, the "cause" inquiry "[c]orrespond[s]" to the "second *Brady* component (evidence suppressed by the State)." 540 U.S. at 691; *see id.* ("if Banks succeeds in demonstrating 'cause and prejudice,' he will at the same time succeed in establishing the elements of his [*Brady*] claim").

Many courts have accordingly recognized that the approach taken by the court of appeals in this case cannot be squared with *Banks*. In *Dennis*, for example, the en banc Third Circuit concluded that, after *Banks*, "it is clear that there is no additional prong to *Brady* and no 'hide and seek' exception depending on defense counsel's knowledge or diligence." 834 F.3d at 293. In *Tavera*, the Sixth Circuit similarly recognized that "the clear holding in *Banks* should have ended [the] practice" of "avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule." 719

F.3d at 712. The Michigan Supreme Court likewise reasoned in *Chenault* that *Banks* "underscored" that "when confronted with potential *Brady* evidence, the prosecution must always err on the side of disclosure." 845 N.W.2d at 738. The division among the state and federal courts thus calls directly into question the proper interpretation and application of this Court's *Brady* decisions.

B. The Court Of Appeals' Approach Is Likely To Produce Erroneous Results And Negative Practical Consequences In Numerous Cases

The D.C. Court of Appeals' holding that a *Brady* claim is precluded if the defendant knew of or reasonably could have obtained the evidence suppressed by the government is out of step with practical realities and encourages mistaken assumptions by courts and prosecutors.

As an initial matter, the holding ignores that a defendant's knowledge of or access to exculpatory evidence held by the government is often no substitute for the prosecution's disclosure of it. Courts and commentators have acknowledged that criminal defendants are sometimes limited in their ability to advocate for themselves. Even if they know or theoretically have access to certain evidence, they might not remember it precisely, might not understand its legal significance, and might not even provide it to their counsel. *See, e.g.*, *Howell*, 231 F.3d at 625 ("[E]ven defendants who cooperate with counsel cannot always remember all of the relevant facts or realize the legal importance of certain occurrences."); *Nelson*, 979 F. Supp. 2d at 132 (granting *Brady* claim where the "evidence suggests that [the defendant] did not recall [a] specific [exculpatory] e-mail … or, more importantly, know that it was missing

from the discovery packet that the government disclosed to his counsel"); Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 169 (2012) ("It is hardly a novel proposition that defendants often cannot or do not accurately report facts relevant to their case.").

Moreover, the rule applied by the court here imposes a difficult burden on the defendant to prove a negative by establishing his or her lack of knowledge of or access to the withheld evidence, with the result that courts may casually infer those facts on little basis. Here, for example, the court of appeals relied on the finding that "Yates does not claim to have been unaware that W-10 was present and heard him urge Carraway to surrender." App. 25a. The decision thus proceeds on the theory that—unless Yates had presented concrete evidence to the contrary—it was to be assumed that Yates remembered urging Carraway to turn himself in and that he both knew of and remembered W-10 overhearing this conversation.

The court of appeals' approach also reflects an unsound assumption that "*knowledge* of a fact and substantive *evidence* of that fact are of equal value to the accused." Weisburd, 60 UCLA L. Rev. at 166 (emphasis added). Here, the court of appeals implicitly equated Yates's presumed memory of W-10's presence when he urged Carraway to turn himself in with knowledge of the specific evidence suppressed by the government—*i.e.*, evidence regarding W-10's testimony before the grand jury. But W-10's grand jury testimony would have buttressed Yates's defense in ways that Yates's mere knowledge of W-10's presence—even assuming he recalled it and was aware she overheard him—would not. For example, it would have confirmed

what W-10 could testify to if called as a defense witness, or else served as valuable insurance in potentially impeaching any contrary trial testimony of W-10. *Cf. Strickler*, 527 U.S. at 285 (knowledge that witness "had had multiple interviews with the police" does not "mean[] … that they would have known [of] records pertaining to those interviews"); *Puertas* v. *Overton*, 168 F. App'x 689, 705 (6th Cir. 2006) ("Independent knowledge of some of the information that happened to be contained in the Report is not the equivalent, for *Brady* purposes, of knowledge that a Report was issued and that certain claims could be substantiated by the Report."); *United States* v. *Severdija*, 790 F.2d 1556, 1559-1560 (11th Cir. 1986) ("Granted, Severdija was in all likelihood aware of the statement he had made to [the crewmember]. The evidence at issue, however, is not Severdija's statement; rather, [the crewmember's] recordation of those statements," without which "Severdija would have been at the mercy of [the crewmember's] memory, had he known [the crewmember's] name and called him as a witness").

Allowing this rule to stand thus imposes an evidentiary burden on the defendant that is unwarranted under *Brady* and may be insurmountable for many defendants. *Cf. Government of V.I.* v. *Martinez*, 780 F.2d 302, 309 (3d Cir. 1985) ("The assumption that a defendant has access to his own confession or statement overlooks both the possibility that a defendant may not have total recall of what he said to the police[.]"). At minimum, the rule necessitates wasteful collateral litigation about what a defendant knew or reasonably could have obtained—litigation that could be avoided if the prosecution simply followed a practice of consistently disclosing exculpatory evidence without regard to

speculation about the defendant's knowledge of it or ability to obtain it through reasonable diligence.

Finally, the decision below does not take into account the disparity in investigative resources between the defense and the prosecution. As this Court has explained, the government's "inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." *Wardius* v. *Oregon*, 412 U.S. 470, 475 n.9 (1973). "Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages," including the power to "compel people ... to cooperate," to "force third persons to cooperate through the use of grand juries," and to rely on "respect for government authority [to] cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant." *Id.* (quotation marks omitted).

The Sixth Circuit relied on that asymmetry in support of its decision in *Tavera*, stating that "the prosecution has the advantage of a large staff of investigators, prosecutors and grand jurors, as well as new technology such as wiretaps of cell phones." 719 F.3d at 712. 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." *Id.* The Third Circuit in *Dennis* similarly recognized that a diligence requirement contravenes this core theme of this Court's precedent:

> The emphasis in the United States Supreme Court's *Brady* jurisprudence on fairness in criminal trials reflects *Brady's* concern with

> the government's unquestionable advantage in criminal proceedings, which the Court has explicitly recognized. … Requiring an undefined quantum of diligence on the part of defense counsel … would dilute *Brady's* equalizing impact on prosecutorial advantage by shifting the burden to satisfy the claim onto defense counsel.

834 F.3d at 290. The holding below in this case ignores *Brady*'s equalizing purpose and invites prosecutors to withhold information based on speculation that evidence at the government's fingertips might be available with reasonable diligence to a defendant and defense counsel with vastly inferior resources.

The Court should therefore grant review to bring the federal and state courts into alignment with one another and with the policies underlying *Brady* and its progeny. Doing so would have a significant impact across numerous cases. *Brady* claims arise in high numbers, with hundreds of convictions having been reversed due to violations of *Brady*'s requirements, *see* Gershman, *Reflections on* Brady *v.* Maryland, 47 S. Tex. L. Rev. 685, 686 (2006)—a conservative estimate given that *Brady* violations do not always yield published opinions and that "many *Brady* violations are not uncovered until years after the event, if they are ever uncovered," *Thompson* v. *Connick*, 578 F.3d 293, 313 & n.1 (5th Cir. 2009) (en banc) (opinion of Prado, J.), *rev'd on other grounds*, 563 U.S. 51 (2011). Moreover, the specific question whether a defendant must prove that he did not know of the material suppressed by the prosecution and could not have obtained it with reasonable diligence is itself a frequently recurring issue for the courts and subject of debate within the bar. *See* Weisburd, 60 UCLA L. Rev. at 138, 153-157 (examining

"the routine—but problematic—practice of courts forgiving prosecutors for failing to disclose *Brady* evidence if the defendant or his lawyer knew or with due diligence could have known about the evidence" and collecting cases); Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and* Brady *in the Balance*, 28 Geo. J. Legal Ethics 1, 4 (2015) (arguing that courts should abandon the "'knew or should have known' rule and its flawed distinction between knowledge and access"); 6 LaFave et al., *Criminal Procedure* § 24.3(b) (4th ed. Supp. Dec. 2017) (noting "troublesome issue[s] under the due diligence concept" and that "[s]ome decisions have rejected the due diligence concept entirely in applying *Brady*" and collecting cases). The Court's review is necessary to ensure that *Brady* claims will be correctly resolved and that the *Brady* doctrine continues to ensure fairness and integrity in the administration of justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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