No. _____

IN THE
Supreme Court of the United States

DONALD L. BLANKENSHIP,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Carter G. Phillips
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8270
cphillips@sidley.com

Benjamin L. Hatch
Counsel of Record
Jonathan Y. Ellis
MCGUIREWOODS LLP
888 16th St NW, Suite 500
Washington, DC 20006
(202) 857-1700
bhatch@mcguirewoods.com
jellis@mcguirewoods.com

Caroline Schmidt Burton
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-7651
cburton@mcguirewoods.com

QUESTION PRESENTED

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

RELATED PROCEEDINGS

This case arises from and relates to these proceedings:

United States District Court (S.D.W.Va.):

- *United States of America v. Blankenship*, No. 5:14-cr-00244-1 (S.D.W.Va.) (Dec. 7, 2021)

- *Blankenship v. United States of America*, No. 5:18-cv-00591 (S.D.W.Va.) (Dec. 7, 2021)

United States Court of Appeals (4th Cir.):

- *United States v. Blankenship*, No. 20-6330, 19 F.4th 685 (4th Cir. 2021)

- *United States v. Blankenship*, No. 16-4193 (4th Cir.)

- *In re: Donald L. Blankenship*, No. 15-1533 (4th Cir.)

- *In re: The Wall Street Journal*, No. 15-1179 (4th Cir.)

Supreme Court of the United States:

- *Donald L. Blankenship v. United States*, No. 16-1413 (U.S.), petition for a writ of certiorari denied Oct. 10, 2017.

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INTRODUCTION

This case involves an issue of fundamental importance to the criminal justice system on which the circuit courts of appeals and state highest courts are starkly and intractably split. In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that the Fifth Amendment requires the prosecutor to disclose exculpatory evidence to the defense. In *Banks v. Dretke*, 540 U.S. 668, 696 (2004), this Court rejected the notion that a defendant must independently seek suppressed exculpatory evidence in the government's possession.

The prosecutors in this case flagrantly violated that constitutional guarantee. Indeed, it is admitted and uncontested that in the high-profile prosecution of petitioner Don Blankenship, former Chairman and CEO of Massey Energy Corporation, the government suppressed significant exculpatory evidence. Petitioner made repeated and vigorous attempts to obtain exculpatory evidence and the government repeatedly responded to petitioner and the district court that it had fully complied with its *Brady* obligations. In fact, the government suppressed *61* witness interview reports, and it is uncontested that at least *five* of these witness interview reports contained favorable evidence for the defense from five different witnesses.

The Department of Justice's Office of Professional Responsibility launched an internal investigation and found that the prosecutors committed "professional misconduct," "recklessly violated discovery obligations," exhibited "poor judgment," and per-

formed their duties in a "deficient" manner. The Assistant United States Attorney who led the prosecution later admitted that the U.S. Attorney intentionally decided post-indictment to stop providing the defense with witness interview reports.

At trial the jury deliberated for two weeks, received two *Allen* charges, and ultimately acquitted petitioner on all felony counts and convicted him of only one misdemeanor count.[1] It was only after Blankenship had served his one-year term of imprisonment and the lead prosecutor left the government (the U.S. Attorney departed three weeks after conviction to run for governor) that the new government attorneys produced voluminous, previously suppressed materials to the defense.

After receiving this evidence in connection with petitioner's timely 2255 motion, the magistrate judge concluded that the prosecution had violated *Brady* and

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[1] Though convicted only on a misdemeanor offense, and despite having no criminal history, the district court imposed the maximum sentence on Blankenship both with respect to imprisonment and a fine. Blankenship continues to suffer the collateral effects of that conviction. He has *erroneously* been labeled a "felon" guilty of "manslaughter" in the national media while running for political office. *E.g.*, Ben Wolfgang, *WV's Morrisey Sends Jenkins Cease-and-Desist Letter Over 'Fake Campaign Ads*,' Wash. Times, May 3, 2018 (describing Blankenship as a "felon"); *Outnumbered* (Fox News television broadcast April 25, 2018) (claiming Blankenship "went to jail for manslaughter"). He continues to bear the stigma of a criminal conviction, which burdens and inhibits his opportunities for employment. And he has paid a $250,000 fine that would be returned in the event his conviction is overturned.

that petitioner's misdemeanor conviction must be overturned. *The Department of Justice did not object to the magistrate judge's report and recommendation*. Nevertheless, the district court *sua sponte* reviewed the matter and denied petitioner's 2255 motion based on Fourth Circuit precedent that requires petitioner to exercise "reasonable diligence" to find suppressed witness information on his own.

On appeal, the Fourth Circuit denied petitioner's *Brady* claim on the ground that Blankenship should have engaged in "self-help" to locate the suppressed evidence. Thus, the Fourth Circuit excused outrageous prosecutorial misconduct in suppressing exculpatory evidence that calls into question the jury's verdict on the theory that the defendant *should* have been able to find the exculpatory evidence that the government intentionally suppressed. *United States v. Blankenship*, 19 F.4th 685, 695 (4th Cir. 2021).

That holding deepens a broad, acknowledged split among federal courts of appeals and state high courts that warrants this Court's review. The First, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits, joined by the highest courts in California, Connecticut, Florida, Georgia, Indiana, Iowa, Louisiana, Mississippi, Nevada, North Dakota, Pennsylvania, South Dakota, Utah, Vermont, Washington and West Virginia impose a due diligence requirement on defendants advancing a *Brady* claim. In contrast, the Second, Third, Sixth, Ninth, Tenth and D.C. Circuits, joined by the highest courts in Colorado, Maryland, Massachusetts, Michigan, Montana, Ohio, South Carolina, and Wisconsin reject such a duty. The holding below also conflicts with this Court's precedent that a

Brady violation "turns on events or circumstances external to the defense." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). In fact, the Fourth Circuit's holding reflects the very rule—that a "prosecutor may hide, defendant must seek"—that this Court rejected in *Banks* as inconsistent with the constitutional guarantee of due process. *Id.*

This Court should grant certiorari to reverse the error that denied petitioner his fundamental right to due process and to resolve the divergent views of the lower courts as to the proper application of the *Brady* doctrine.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is reported at 19 F.4th 685. App. 1. The opinion of the District Court is unreported and available at 2020 WL 247313. App. 22. The opinion of the magistrate judge is unreported. App. 67.

JURISDICTION

The Fourth Circuit Court of Appeals entered judgment on December 12, 2021. The court denied a timely petition for rehearing en banc on February 4, 2022. App. 139. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that:

> No person shall be … deprived of life, liberty, or property, without due process of law[.]

U.S. Const., amend. V.

STATEMENT

I. The Trial Court Proceedings.

A 2010 explosion at the Upper Big Branch ("UBB") coal mine in Montcoal, West Virginia resulted in the tragic death of 29 miners. The U.S. Attorney for the Southern District of West Virginia faced mounting political pressure to hold someone accountable for the tragedy. After more than four years (and following petitioner's release of a documentary exploring the cause of the disaster and placing blame on the government), the U.S. Attorney settled on petitioner. He was charged with conspiracy to willfully violate safety regulations at UBB—one of dozens of mines that Massey owned and operated and a facility that petitioner never visited during the relevant period. The indictment alleged Blankenship conspired to violate standards promulgated by the Mine Safety and Health Administration ("MSHA") (misdemeanor), made a false statement to the Securities and Exchange Commission (felony), and made a false statement in connection with the purchase of securities (felony).

During a 36-day jury trial, the government cast petitioner as a tycoon who cared more about profits than the health and safety of the miners who worked for him. Prosecutors insisted that petitioner created and sustained a culture in which "safety violations were acceptable so long as the mine was producing

coal." App. 79. The government sought to convince the jury that petitioner was aware through regular reports that the mine was receiving a high number of citations and that he could have reduced citations by budgeting for more miners and lower coal production targets, yet he failed to do so in order to increase profits.

The jury deliberated for nearly two weeks and twice told the court it could not reach a verdict, resulting in *Allen* charges. Ultimately the jury acquitted Blankenship of the two felony counts charged. He was found guilty of one misdemeanor charge of conspiring to violate regulations promulgated by MSHA. Despite petitioner having no criminal history, the district court sentenced him to the statutory maximum sentence of 12 months' imprisonment and the statutory maximum fine of $250,000. Petitioner both served his sentence and paid the fine.

II. The Section 2255 Motion.

a. The Suppressed Evidence and OPR Investigation.

Throughout discovery and at trial, petitioner's counsel asserted his right to *Brady* material and filed several motions demanding the same. *See* Motion to Enforce The Government's *Brady* Obligations (Feb. 6, 2015) (ECF No. 111); Motion to Compel the Government to Identify in its Production *Brady* and Rule 16(a)(1) Material (Apr. 28, 2015) (ECF No. 245); Motion to Compel Production of Witness Interview Notes and Records of Attorney Proffers Containing *Brady* Information (May 6, 2015) (ECF No. 248); Motion to

Compel Compliance with *Brady* Order and for Other Appropriate Relief (July 8, 2015) (ECF No. 283); and Motion to Compel Compliance with Subpoena, for Production of *Brady*, Rule 16, and Jencks Material, and for Evidentiary Hearing (Nov. 6, 2015) (ECF No. 481).

The government repeatedly misrepresented that it had complied with its discovery obligations, including its *Brady* obligations. *See, e.g.,* United States' Response to Defendant's Motion No. 19, Motion to Enforce the Government's *Brady* Obligations at 2 (Feb. 20, 2015) (ECF No. 133) ("Defendant's belief notwithstanding, all discoverable evidence, including all *Brady* material known to the United States, has been provided to Defendant"); United States' Response to Defendant's Motion to Compel Production of Witness Interview Notes and Records of Attorney Proffers Containing *Brady* Information at 1–2 (May 14, 2015) (ECF No. 251) (claiming that the government was "aware of its ongoing *Brady* obligations" and "is in compliance with its discovery obligations"); United States' Combined Motion for Production of Reciprocal Discovery and Response to Defendant's Motion to Compel Compliance with *Brady* Order at 8 (July 14, 2015) (ECF No. 284) ("[S]ince the United States has complied with the *Brady* Order with respect to the substance of those interviews, there is no reason to revisit that ruling.").

Following a post-trial complaint concerning the government's compliance with *Brady* by petitioner to the Department of Justice, the Department's Office of Professional Responsibility ("OPR") initiated an investigation into the conduct of former United States Attorney R. Booth Goodwin II and former Assistant U.S. Attorney Steven Ruby. OPR concluded that they

"committed professional misconduct" by intentionally failing to disclose evidence to the defense. App. 146. OPR found that Goodwin and Ruby "recklessly violated" their "Department-mandated discovery obligations" requiring disclosure of exculpatory evidence. App. 145. OPR also found that the "process" Goodwin and Ruby used to determine which witness statements should be disclosed to the defense was "deficient" and therefore failed to comply with Department of Justice policy. Indeed it was so "haphazard and inadequate that it demonstrated a reckless disregard of the government's discovery obligations." App. 147, 315. In addition, the report found that Goodwin and Ruby's representations to the Court concerning their *Brady* obligations were "exceedingly careless" and failed to meet Department standards of conduct. App. 330.

It was only after OPR commenced its investigation—and after the departure of Goodwin and Ruby from the U.S. Attorney's Office—that the government began producing previously suppressed evidence to Blankenship. Goodwin refused to cooperate with the OPR investigation. Ruby gave an interview in which he told the government that much of the suppressed evidence was available to the petitioner from other sources. App. 239. The government followed up with a letter, identifying more than 100 exculpatory statements contained in the suppressed material and asking Ruby if this information was "known or available to the defense from other sources." App. 239–40. Ruby never responded to OPR. *Id.*

Over approximately 18 months post-trial and sentencing, the government produced more than 1,000 pages of documents that it was obliged to provide and

petitioner was constitutionally entitled to receive previously. The suppressed material included 61 witness statements taken by the government. App. 144, 332. In addition, the government belatedly (months after petitioner had completed serving his sentence) turned over dozens of emails and other documents reflecting MSHA's deeply rooted, personal animosity towards petitioner and the agency's own uncertainty regarding whether Massey's conduct violated safety laws.[2]

The 61 suppressed witness statements included five memoranda describing witness interviews with former or current Massey employees, including high-ranking personnel at Massey with responsibility for safety and budgeting.[3] The witness statements—given by Mark Clemens, Steve Sears, Sabrina Duba, Charlie Bearse, and Stephanie Ojeda—contained evidence favorable to Blankenship. They were, as OPR put it, "inconsistent with the government's factual ba-

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[2] The MSHA documents also showed that the agency likely destroyed scores of additional documents that petitioner should have received under *Brady*.

[3] The witness statements, also called "memoranda of interview" ("MOIs") are detailed notes reflecting lengthy interviews between the witness and law enforcement agents. All 61 suppressed witness statements—which totaled hundreds of pages—contained statements favorable to the defense. Many were with government witnesses and would have provided the defense with significant fodder for cross-examination. For purposes of petitioner's *Brady* argument as was litigated in the Fourth Circuit, petitioner focuses on the five memoranda identified (which together totaled 27 pages) given that they contained the most obviously exculpatory statements.

sis for alleging criminal conduct." App. 305. Statements from these witnesses directly undermined the government's theory that Blankenship elevated production over safety and contradicted the charge that he failed to budget sufficient funds to hire more safety personnel—perhaps the most important issue at trial.

All three decisions below—the magistrate judge's decision, the district court's, and the Fourth Circuit's—agreed that these suppressed witness interviews contained information favorable to the defense. *See* App. 119 (reviewing each of the five witness' testimony and finding that the statements of "Mr. Clemens, Mr. Sears, Ms. Duba, Mr. Bearse, and Ms. Ojeda were favorable" to Blankenship); *Blankenship v. United States*, No. 5:14-CR-00244, 2020 WL 247313, at *9 (S.D.W. Va. Jan. 15, 2020); App. 43 (finding that the information in the interview reports of Clemens, Sears, Duba, Bearse, and Ojeda "would have been favorable to the Movant [Blankenship]" because they "suggest that these witnesses could have testified that [Blankenship] did not push production over safety, that there were steps taken to insure safety, that [petitioner] took Ross's recommendations about safety seriously, and that staffing was not an issue as suggested by the United States."); *United States v. Blankenship*, 19 F.4th 685, 694 (4th Cir. 2021) (App. 16) ("This case … falls squarely under the principle that the *Brady* doctrine is not available where *the favorable information* is available to the defendant and lies in a source where a reasonable defendant would have looked.") (emphasis added).

Clemens was Massey's chief of production, sales, and budgeting. The suppressed memorandum

shows that he told the FBI "there was pressure at Massey to run coal, but not enough pressure to overlook safety." App. 376. Likewise, Sears, who oversaw Massey Coal Sales told agents that "Massey's primary focus was safety." App. 411. "Blankenship started a safety program for individuals and pushed safety more than any other CEO in the industry," according to Sears' suppressed witness statement, "people [at Massey] have been fired because of safety," i.e., for failure to uphold safety standards. *Id.*

Bearse, president of a Massey resource group, "explained [to the government] that if there was something wrong at the mine, you were expected to stop, fix the problem and then move on." App. 367. "There were not discussions that violations were OK, but there were discussions about trying to get better." App. 368. Bearse also told the government that full compliance was unattainable: "You can go to any mine and find safety violations." *Id.* Finally, Bearse confirmed that he had been reprimanded over a violation for operating without sufficient air flow in a section and that he had feared being disciplined over compliance failures. App. 369.

Duba, a Massey senior accountant who ran the budgeting process for the mines, also provided several exculpatory statements. In particular, Duba told the government that "Blankenship would tell them to go back and make sure the [production] figures used were not too aggressive." App. 382. This statement contradicted the government's theory that petitioner relentlessly pushed production. And the memorandum shows that Duba would have testified that petitioner directed her to identify the people responsible for

safety and compliance violations and to root out any "repeat offenders." App. 387.

Finally, remarks by Ojeda, an in-house lawyer at Massey, were exculpatory. They undermined the government's theory that petitioner ignored the safety concerns raised by Bill Ross, a former Massey employee that the government portrayed as a whistleblower. Ojeda's statement shows that petitioner and other leaders at Massey were keen to hear what Ross had to say, viewed him as "legitimate," and discussed concerns he had with Massey's Hazard Elimination Committee. App. 397; 404–05.

b. The 2255 Petition and the Magistrate Judge's Ruling.

After the suppressed evidence surfaced and within one year of his conviction, petitioner moved under 28 U.S.C. § 2255 to vacate his conviction.[4] His petition was first reviewed by United States Magistrate Judge Omar J. Aboulhosn. In a 60-page opinion, Magistrate Judge Aboulhosn recommended that petitioner's motion to vacate be granted under *Brady*, because the suppressed evidence (including the five witness statements discussed above) favored the defense and could have affected the jury's decision, if it had been properly disclosed.

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[4] As the government has not disputed, the fact that Blankenship was no longer serving a custodial sentence at the time of the motion did not render the motion moot because Blankenship continues to suffer collateral consequences from the conviction, including the misdemeanor conviction itself and the payment of the $250,000 fine.

As for the five witness statements discussed above, Magistrate Judge Aboulhosn rejected the government's argument that Blankenship was "not entitled to [the] benefit of the *Brady* doctrine … because each w[as] available to [Blankenship] in a source where a reasonable defendant would have looked." App. 114 (citing *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990)). The Court distinguished a prior Fourth Circuit case (*Wilson*) endorsing that view because in Blankenship's case, the government had represented "to the Court and defense counsel that all material had been produced pursuant to the Court's discovery order." App. 115. The memoranda describing the interviews "were clearly under the control of the United States," Magistrate Judge Aboulhosn reasoned, "and there is no indication that the [memoranda] were available to defense counsel through other sources." *Id.* Accordingly, Magistrate Judge Aboulhosn recommended vacating petitioner's conviction.

c. The District Court's Opinion.

The government did not file any objections to the magistrate judge's recommendation. Nevertheless, the district court *sua sponte* reviewed it and declined to adopt it. With respect to the five memoranda, the court relied on the Fourth Circuit's decision in *Wilson* to deny petitioner's *Brady* claim because, in its view, the interview reports were located in a "source where a reasonable defendant would have looked." App. 44. The district court reasoned that petitioner should have "looked" for the witness statements contained in the government's own memoranda because "all but one of the witnesses were on [his] trial witness list, the

witnesses occupied positions that would make them both obvious and available sources of potential exculpatory information, [Blankenship] had knowledge of the witnesses and … this case was … vigorously contested by the defense counsel." App. 45. The court concluded that "a defendant cannot rely on the government's failure to disclose the material if it is otherwise available to the defendant or is in a place where a reasonably diligent defendant would have looked." App. 46.

The district court also distinguished the memoranda from their contents, noting that it is the "substance of the MOIs that is really at issue for purposes of *Brady*, not the MOI documents." App. 47. In the court's view, the substance of the memos—the underlying statements made by the witnesses—"was clearly available" to Blankenship because he could have interviewed the witnesses himself. *Id.*

d. The Fourth Circuit's Opinion.

The Fourth Circuit affirmed. Like the district court, the court of appeals placed the burden on petitioner to find the favorable evidence suppressed by the government. The Fourth Circuit acknowledged that the material in the memos likely would have been "helpful" to Blankenship's defense. App. 13. But the court observed that the five witnesses interviewed "held high positions in Massey and, from those positions, interacted closely with Blankenship." App. 14. "Blankenship knew what he had told them and asked them to do," the Fourth Circuit reasoned, "and undoubtedly he also had a sense of their views about the company's approach to safety." *Id.* Indeed, "he listed

four of the five individuals as potential witnesses to testify on his behalf . . . surely knowing how they might help his case." *Id.* Thus, the Fourth Circuit denied petitioner's *Brady* claim because, in the court's view, he could have found the suppressed evidence himself. *See* App. 16.

The Fourth Circuit relied on its prior holding in *Wilson*—that a "defendant is not entitled to the benefit of the *Brady* doctrine" if "the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked." 901 F.2d at 381. And it distinguished this Court's subsequent holding in *Banks v. Dretke*, 540 U.S. 668, 695–96 (2004)—that a criminal defendant need not "scavenge," for undisclosed *Brady* materials after "the prosecution represents that all such material has been disclosed." *Id.* at 695. According to the Fourth Circuit, petitioner did not need to "scavenge, guess, search, or seek. . . he had the evidence before him and undoubtedly was aware of it[.]" App. 16. The court observed that it was not holding that "the government's need to comply with its *Brady* obligations is … obviated by the defendant's lack of due diligence," but rather refusing to "ignore[] common sense." *Id.* According to the court, petitioner did not state a *Brady* claim with respect to the five undoubtedly withheld memoranda, each containing exculpatory information, because he did not exercise "the common-sense notion of self-help imputable to a defendant in preparing his case." App. 17.

REASONS FOR GRANTING THE PETITION

The decision below implicates a broad and acknowledged conflict among federal and state courts regarding whether in order to prevail on a *Brady* claim, a defendant must demonstrate that he could not have learned the exculpatory, suppressed information via other means. The circuit courts of appeals are split down the middle with every circuit that hears criminal cases having taken a position. This is an important and recurring issue in criminal law that warrants this Court's review because it bears directly on the fundamental elements and purposes of the *Brady* doctrine and may be dispositive of due process claims in hundreds of federal and state prosecutions. Petitioner's case presents an ideal vehicle for resolving this important question because the Fourth Circuit squarely and exclusively relied on the requirement that a defendant take reasonable steps to locate the suppressed evidence to deny petitioner's claim.

I. The Lower Courts Are Intractably Divided on Whether Due Process Requires a Defendant to Demonstrate Due Diligence In Trying to Obtain the Suppressed Evidence from Sources other than the Government.

Lower courts are intractably split on whether a *Brady* claim requires a defendant to show that he or she acted with diligence to seek the suppressed evidence. *See Fontenot v. Crow*, 4 F.4th 982, 1065–66 (10th Cir. 2021) ("many of our sister circuits deem evidence 'suppressed' under *Brady* only if 'the evidence was not otherwise available to the defendant through the exercise of reasonable diligence' … [b]ut that is not

the law in this circuit"); *see also* Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and Brady in the Balance*, 28 Geo. J. Legal Ethics 1, 10 (2015) (describing "split among circuit courts" concerning application of a due diligence rule); 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" concerning application of "due diligence" rule in *Brady* analysis). The government has acknowledged this split in prior filings. *See Corey D. Yates v. United States*, Nos. 18-410 and 18-6336, Brief of United States in Opposition to Certiorari at 9 ("federal courts of appeals and state courts of last resort may disagree" on whether "reasonable diligence" is required).

a. The Federal Circuit Courts are Divided.

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

available from other sources.") (internal quotation marks omitted).

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

In contrast, the six other Circuits have rejected the requirement that a defendant exercise "due diligence" to make out a *Brady* claim. *See Banks v. Reyn-*

[5] Some courts frame the due-diligence requirement as part of the *Brady* requirement that evidence be suppressed, *see, e.g.*, *United States v. Therrien*, 847 F.3d 9, 16 (1st Cir. 2017), while other courts consider the due-diligence requirement to be part of the prejudice analysis, *e.g., United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990), or as a freestanding, additional element of a *Brady* claim, *e.g., United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir. 1989). But all of these circuits listed above apply the requirement somewhere in the *Brady* analysis.

olds, 54 F.3d 1508, 1517 (10th Cir. 1995) ("[T]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge … the fact that defense counsel 'knew or should have known' about the [exculpatory] information … is irrelevant to whether the prosecution had an obligation to disclose [it]."); *In re Sealed Case* No. 99-3096 (*Brady Obligations*), 185 F.3d 887, 896 (D.C. Cir. 1999) (rejecting the "government's appellate argument that it did not breach a disclosure obligation" for information that was "otherwise available through 'reasonable pre-trial preparation by the defense.'"); *United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000) ("The availability of particular statements through the defendant himself does not negate the government's duty to disclose.").

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

In *Tavera*, the government withheld exculpatory statements about the defendant that a co-conspirator made to prosecutors and federal agents in the

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

The Third Circuit went en banc to reach the same conclusion. *See Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 291–92 (3d Cir. 2016) (en banc). In *Dennis*, a three-judge panel affirmed the denial of a *Brady* claim—which involved the prosecution's failure to disclose a time-stamped receipt corroborating the defendant's alibi—because the defendant could have obtained it with "reasonable diligence," noting that the defendant's appellate counsel had indeed located the receipt during his post-conviction investigation. *See Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 777 F.3d 642, 654 (3d Cir. 2015), *opinion vacated on reh'g en banc*, 834 F.3d 263 (3d Cir. 2016).

The en banc Third Circuit vacated that holding, noting that the Supreme Court's conclusion in *Banks* made clear that "the concept of 'due diligence' plays no role in the *Brady* analysis." 834 F.3d at 291. The Third Circuit rejected prior cases imposing such a due diligence requirement on the ground that such holdings were "an unwarranted dilution of *Brady*'s clear mandate." *Id.* at 293. The Third Circuit also noted that the "only" time the government is relieved of its

obligation to turn exculpatory evidence over to the defense is when the government "is aware that the defense counsel already has the material in its possession[.]" *Id.* at 292. Requiring proof of a defendant and his counsel's actions would undermine *Brady* by adding "a fourth prong to the inquiry, contrary to the Supreme Court's directive that we are not to do so." *Id.* at 293.

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

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

uncover such information in the possession of the prosecution in order to prevail under *Brady*." *Id.*

b. State Courts are Divided.

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

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

(N.D. 2015); *Commonwealth v. Roney*, 79 A.3d 595, 608 (Pa. 2013); *People v. Williams*, 315 P.3d 1, 44 (Cal. 2013); *State v. 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. Skakel*, 888 A.2d 985, 1033 (Conn. 2006); *Rippo v. State*, 946 P.2d 1017, 1028 (Nev. 1997).

Several other state high courts have made clear that anything akin to a "due diligence" requirement has no place in the *Brady* analysis. Most recently, the Supreme Court of Ohio "repudiated the imposition of any due-diligence requirement on defendants in *Brady* cases." *State v. Bethel*, ---N.E.3d.---, 2022 WL 838337, at *4 (Ohio Mar. 22, 2022). The court noted that since this Court's decision in *Banks*, "multiple federal circuit courts and other state supreme courts have" reached the same conclusion. *Id.* (collecting cases). Similarly, in 2019, the Supreme Court of Wisconsin recognized that "[f]ederal courts are currently divided as to whether a defendant's ability to acquire . . . evidence through 'reasonable diligence' or 'due diligence' forecloses a *Brady* claim." *State v. Wayerski*, 922 N.W.2d 468, 480 (Wisc. 2019). The Wisconsin court declined to adopt a diligence requirement "due to its lack of grounding in *Brady* or other United States Supreme Court precedent." *Id.* at 481.

The Colorado Supreme Court likewise rejected a due diligence requirement in 2018. *See People v. Bueno*, 409 P.3d 320, 328 (Colo. 2018) (rejecting argument that "defense" must "search for a needle in a haystack" when the government has represented that it

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

Four other states have reached this same conclusion. *State v. Durant*, 844 S.E.2d 49, 55 (S.C. 2020) ("Shifting the burden to defense counsel lessens the State's duty to disclose exculpatory evidence and has the risk of adding an additional element to *Brady*.") *cert. denied*, 141 S. Ct. 1423 (2021); *State v. Reinert*, 419 P.3d 662, 665 n.1 (Mont. 2018) ("We will [now] decide issues regarding the withholding of exculpatory evidence without reference to a reasonable diligence requirement."); *Commonwealth v. Tucceri*, 589 N.E.2d 1216, 1221–22 (Mass. 1992) ("As a general rule, the omissions of defense counsel… do not relieve the prosecution of its obligation to disclose exculpatory evidence[.]"); *State v. Williams*, 392 Md. 194, 227, 896 A.2d 973, 992 (2006) (citing *Banks* to conclude that a "defendant's duty to investigate simply does not relieve the State of its duty to disclose exculpatory evidence under *Brady*").

This clear and broad disagreement among the courts of appeals and state high courts cries out for this Court's review. This issue frequently recurs, and

there is an established conflict among the federal and state courts as to the question presented. The split has intensified in recent years as many courts have abandoned their own prior decisions, recognizing them to be irreconcilable with *Banks* and other *Brady* decisions, while others have doubled down, rejecting claims that *Banks* requires a different approach. At this point, the split includes all circuit courts that hear criminal matters. The issue has fully percolated.

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

This Court should grant the petition and reverse the Fourth Circuit's judgment. The "self-help" rule endorsed by the Fourth Circuit is in conflict with this Court's decision in *Banks* and does serious violence to the fundamental protection of *Brady*. Here, the Fourth Circuit denied an otherwise meritorious *Brady* claim—predicated on admittedly suppressed exculpatory evidence that emerged only after the Department of Justice's Office of Professional Responsibility investigated the prosecutors in this case—on the ground that the defense *should* have been able to identify the witness information on its own. That possibility exists in almost every criminal case, but the mere knowledge that a witness may exist is no substitute for access to the exculpatory information in the government's possession.

a. The Fourth Circuit's Erroneous Holding Conflicts with this Court's Precedent.

The Fourth Circuit's holding conflicts with *Banks*. *Banks* reiterated that *Brady* has three "essential elements": (1) the "evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Banks*, 540 U.S. at 691 (citing *Strickler*, 527 U.S. at 281–82). In assessing the second element—whether evidence was "suppressed" by the government[6]—this Court flatly rejected the notion that the defense's actions were relevant: "[o]ur 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." *Banks*, 540 U.S. at 695.

This Court drew from its decision in *Strickler*, where the government argued that a defendant could not show evidence was suppressed under *Brady*

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[6] *Banks* involved review of a state habeas petition and the question before the Court was whether the defendant had shown "cause" under the Anti-Terrorism and Death Penalty Act (AEDPA) such that he could assert an argument in the federal habeas proceedings that had not been raised previously in the state court proceedings. The Court was clear that its interpretation of AEDPA's "cause" assessment for the *Brady* claim at issue was "parallel" to the second element of *Brady* (that evidence was suppressed), meaning if the defendant showed "cause" to satisfy AEDPA he will have "succeed[ed]" in establishing that evidence was suppressed. *Banks*, 540 U.S. at 691.

because "the factual basis for the assertion of a *Brady* claim was available to …. counsel" in the form of a careful review of witness testimony at trial and a public newspaper article published by the witness. *Strickler*, 527 U.S. at 284. This Court "found this contention insubstantial." *Banks*, 540 U.S. at 695. In particular, this Court focused on the fact that the government had represented that under its "open file" policy, it had shared all exculpatory evidence with the defense. *Strickler*, 527 U.S. at 284. Given those representations—which ultimately proved to be false—"it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld." *Id.* at 285. As a result, "defense counsel has no procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred." *Id.* at 286–87.

The Fourth Circuit's reasoning runs afoul of *Banks*. The court below acknowledged that the government's need to comply with "*Brady* obligations is not obviated by the defendant's lack of due diligence" because the constitutional right to exculpatory evidence cannot be "so burdened." *Blankenship*, 19 F.4th at 694. But it proceeded to do just that. The court focused on the fact that "each of these five witnesses [whose statements were contained in suppressed interview reports] held high positions in Massey" and "interacted closely with Blankenship, indeed engaging with him[.]" *Id.* at 693. And the court *assumed* that Blankenship "had a sense of their views about the company's approach to safety" and listed four of the five as potential witnesses, "surely knowing how they might help his case." *Id.* Because, according

to the Fourth Circuit, the suppressed evidence "was in Blankenship's own house and held by in-house witnesses close to him," he should have located it before trial through the exercise of "common-sense" "self-help." *Id.* at 695.

Contrary to the Fourth Circuit's assertion that *Banks* "in no way" governs Blankenship's claim, *Banks* in fact involved parallel facts. As in *Banks*, the government here suppressed exculpatory information from the defense. *Compare Blankenship*, 19 F.4th at 692 (describing the memoranda as "suppressed"), *with Banks*, 540 U.S. at 693 (stating that government "knew of but kept back" the key evidence). The suppressed evidence was similar—crucial information from witnesses that would have supported the defense. *Compare Blankenship* 19 F.4th at 693 (describing the memoranda as containing favorable statements about the "employees' overall perception of the company's commitment to safety"), *with Banks*, 540 U.S. at 694 (describing suppressed evidence that key witness had "misrepresented his dealings with police" and "denied taking money from or being promised anything by police officers"). And in both cases, the government represented that it had complied with its discovery obligations, including having produced exculpatory evidence. *Compare Blankenship*, 19 F.4th at 690 (acknowledging that "the government had responded to [Blankenship's] earlier requests by stating that it had complied with its discovery obligations. But … the United States Attorney's Office … then concluded that its earlier production of documents had not complied with DOJ policies governing discovery"), *with Banks*, 540 U.S. at 693 ("the State asserted, on

the eve of trial, that it would disclose all *Brady* material… Banks cannot be faulted for relying on that representation").

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

b. The Fourth Circuit's Rule Ignores the Reality of Criminal Proceedings.

The rule endorsed by the Fourth Circuit ignores the practical reality of criminal proceedings. This Court should grant certiorari to correct these errors.

First, such a rule assumes that knowledge of a witness's identity equates to access to that witness's information for the defense. The Fourth Circuit in effect assumed that these witnesses would be both (a) accessible to Blankenship and (b) would share with Blankenship the same information they shared with federal agents. *See Blankenship*, 19 F.4th at 694 ("He had the evidence before him and undoubtedly was aware of it."); *Blankenship*, 2020 WL 247313, at *11

(Blankenship "could have interviewed the five potential witnesses to obtain exculpatory statements").

That conclusion is unsupported in the record and unfounded in criminal practice. The government possesses various formal and informal coercive powers to elicit information from witnesses, including most notably the grand jury subpoena power. *See Wardius v. Oregon*, 412 U.S. 470, 475 n.9 (1973) (discussing the government's "inherent information-gathering 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"). By contrast, the defense possesses no formal or informal coercive power to elicit witness statements pretrial. Whether a witness will speak with the defense is entirely voluntary, and most witnesses do not volunteer to do so for various reasons. In short, the idea that the defense can learn what DOJ has learned by talking to the same witness assumes that a private individual shares DOJ's immense power and can threaten a witness with prosecution or compel statements with immunity. That defies reality.

Here, the Fourth Circuit and district court appeared to suggest that Blankenship had special access to the witnesses because he was the CEO of Massey and the witnesses at issue all worked for Massey. But this ignores that Blankenship was the *former* CEO of Massey at the time of this prosecution, having retired from the company years before. He had no employment relationship to the witnesses at the relevant

time. Furthermore, the five witnesses were all represented by counsel and Blankenship's defense counsel could not have contacted them directly. Moreover, most cautious counsel would likely have instructed their clients not to speak with Blankenship or his attorneys).

So, even if Blankenship knew of the *existence* of these five witnesses—only four of whom were on his witness list—that means nothing. It certainly does not establish that the witnesses would either voluntarily elect to speak with the defense or that the witnesses would have volunteered the same exculpatory information to the defense. *See Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001) ("[I]t is simply not true that a reasonably diligent defense counsel will always be able to extract all the favorable evidence a defense witness possesses. Sometimes, a defense witness may be uncooperative or reluctant. Or, the defense witness may have forgotten or inadvertently omitted some important piece of evidence previously related to the prosecution or law enforcement."). Meanwhile, the government had the exculpatory statements from the witnesses and *chose* to suppress them.

Second, the Fourth Circuit and district court failed to recognize the potential strategic importance of the witness statements contained in the government's memoranda to the defendant. Without doubt, the memoranda would have helped Blankenship because he could have potentially used the substance of the witnesses' statements to inform his defense. Moreover, the very existence of the memoranda could have affected critically important tactical decisions. The Fourth Circuit made much of the fact that four of

the five interviewed individuals were on Blankenship's witness list but he ultimately did not call them.[7] If Blankenship had the benefit of the memoranda, his decision about who he put on the stand might well have been different.

More specifically, the witness memoranda would have helped Blankenship because they indicate to defense counsel what the witness will likely say if called to the stand. In contrast, most defense counsel (or prosecutors) would never put a witness on the stand if they had no prior statements indicating what the witness would say. Weisburd, 60 UCLA L. Rev. at 166 (addressing the unsound assumption that "knowledge of a fact and substantive evidence of that fact are of equal value to the accused").

Furthermore, witness statements can assist in the presentation of a witness' testimony. That is because they contain prior statements that provide critical value for either rehabilitation or impeachment (depending on what the witnesses' trial testimony turned out to be). *See* FED. R. EVID. 801(d)(1)(B) (prior consistent statements); FED. R. EVID. 613(b) (prior inconsistent statements). Prior statements made to federal agents are especially probative given the threat of Section 1001 penalties, as courts and juries routinely find such statements particularly credible. *See, e.g.*, *United States v. Slatten*, No. 1:14-CR-107-RCL, 2020 WL 4530729, at *6 (D.D.C. Aug. 6, 2020) ("Although

[7] The Fourth Circuit's analysis also ignores the fact that witness lists are almost always broadly inclusive to avoid waiver issues that may arise if a potential witness is needed at trial but was not initially designated.

that testimony was not given under oath …, it was still made under the threat of prosecution for false statements under 18 U.S.C. § 1001."). Without these materials, Blankenship was deprived of the opportunity to make a fully informed decision about whether to call the witnesses at trial. No amount of due diligence could have obtained the strategic value of the memoranda to Blankenship at trial.

c. The Fourth Circuit's Approach Undermines Brady's Purpose.

Brady is based on the fundamentally American precept that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair." *Brady*, 373 U.S. at 87. The key to *Brady*'s promise is that it limits prosecutorial conduct, not to punish the government, but to ensure that criminal defendants' rights are protected. *See id.* (explaining that *Brady* is necessary for due process "not [as] punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused") (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)); *see also Strickler*, 527 U.S. at 281 (emphasizing that "the basis for the prosecution's broad duty of disclosure" is due to his "special status" in the American legal system) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935))). Put differently, *Brady*'s "mandate and its progeny are entirely focused on *prosecutorial disclosure*, not defense counsel's diligence." *Dennis*, 834 F.3d at 290.

Thus, this Court has consistently defined the contours of *Brady* by addressing conduct of the prosecutor, not the defendant or defense counsel. *Cf. Banks*, 540 U.S. at 695–96 (counsel has no "procedural

obligation" to protect his client's *Brady* rights, based on "mere suspicion" of prosecutorial misconduct). For instance, *Giglio* requires *prosecutors* to disclose evidence bearing on witness credibility. *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("It is the responsibility of the prosecutor" to disclose evidence "affecting credibility" of witnesses.). *Bagley* ensured *prosecutors* turn over impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). And in *United States v. Agurs*, 427 U.S. 97 (1976), this Court clarified that prosecutors are bound by disclosure obligations regardless of specific requests from defendants or their counsel. *Id.* at 107 ("[P]rosecutor's duty …[applies equally to] cases in which there has been merely a general request for exculpatory matter and cases … in which there has been no request at all").

The "due diligence" or "self-help" rule flips this principle on its head and impermissibly "shifts the burden of disclosure from the government to the defendant." Weisburd, 60 UCLA L. Rev. at 142. It also introduces a highly speculative element to the *Brady* analysis: whether the defendant *could have* located the information independently. As happened here, that element invites courts to assume what might have happened, rather than analyzing what actually happened, i.e., if favorable evidence was suppressed. This element, which this Court has never embraced, necessarily weakens the *Brady* standard and makes *Brady* claims more difficult for lower courts to administer. It also invites prosecutors, who must in the first instance decide what material to produce to the defense, to withhold favorable information if the prosecutor believes the defendant could possibly have a route to identifying the information independently.

Brady protects a fundamental due-process right; the decision below invites prosecutorial gamesmanship.

III. This Case Is an Ideal Vehicle For Considering The Question Presented.

This case is an ideal vehicle for resolving the conflict among the lower courts with respect to whether a "due diligence" or "self-help" burden may be imposed on a defendant's *Brady* claim. This issue was the central argument presented to the Fourth Circuit, and the Fourth Circuit directly addressed it in a published, precedential opinion. Finally, the Fourth Circuit rested its decision on the legal requirement of "self-help" and not on any factual distinctions unique to this case.

The question presented is determinative of the outcome of this case. Blankenship would prevail on his *Brady* claim if not for this "self-help" burden imposed by the Fourth Circuit. There is no dispute here—as both the government and lower courts concluded—that the pertinent materials were suppressed. And there is no dispute here—as both the government and lower courts concluded—that the suppressed evidence is favorable to the defense. This case was evidently a close case for the jury, which deliberated for two weeks, was given two *Allen* charges, and ultimately acquitted on all felony charges and convicted only on a single misdemeanor. Indeed, the magistrate judge granted Blankenship's 2255 motion based on the *Brady* violations committed by the government and was only overturned because the District Court and Fourth Circuit grafted a "reasonable due diligence"

(district court) or "self-help" (Fourth Circuit) requirement onto the elements of a *Brady* claim. *See Blankenship*, 19 F.4th at 695 (denying *Brady* claim because Blankenship failed to show "common-sense notion of self-help imputable to a defendant in preparing his case").

CONCLUSION

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

Respectfully submitted,

Benjamin L. Hatch
Counsel of Record
Jonathan Y. Ellis
MCGUIREWOODS LLP
888 16th St NW, Suite 500
Washington, DC 20006
(202) 857-1700
bhatch@mcguirewoods.com
jellis@mcguirewoods.com

Caroline Schmidt Burton
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
(804) 775-7651
cburton@mcguirewoods.com

Carter G. Phillips
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8270
cphillips@sidley.com

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