BENCH MEMORANDUM

AMERICAN BAR ASSOCIATION
LAW STUDENT DIVISION

NATIONAL APPELLATE ADVOCACY COMPETITION

No. 19-2323

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2019

Jackson Anthony, Petitioner,

v.

United States of America, Respondent

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

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2023-24 Law Week and Liberty Bell Moot Court Competition

I. READER'S NOTE

This bench memo provides only an overview of the issues raised by the 2019–2020 competition problem. This memo does not intend to and does not provide an exhaustive treatment of all issues the competition problem raises. Student-competitors should be rewarded, rather than penalized, for competently addressing issues other than the ones discussed in this memo, if those issues are fairly raised by the Record. Characterizations and conclusions of Record facts appear here..

II. INTRODUCTION

The problem addresses two questions about the government's duty, under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose material, exculpatory evidence to a criminal defendant. Petitioner Jackson Anthony pleaded guilty to assault on a federal officer under 18 U.S.C. § 1111. Several months after the court sentenced Anthony consistent with this plea agreement, Anthony learned that the government possessed surveillance footage, which it had obtained from a bank in the area where the alleged assault occurred, that would have corroborated his defense if he had gone to trial. Anthony's attorney never requested surveillance footage from this bank before Anthony entered his plea. It is undisputed that the surveillance footage is material, exculpatory evidence.

This problem considers (1) whether the due process principles outlined in *Brady* require the government to disclose exculpatory evidence before entering a plea agreement with a criminal defendant; and (2) whether, to establish a violation of *Brady*, a criminal defendant must show that he could not have, with reasonable diligence, obtained the evidence from a source other than the government.

III. FACTS

One evening Anthony was having drinks with two friends, Terrance Smith and Christopher Doe, on a patio behind a local bar in Carson City, Carson. The group had come to the bar from a protest against immigration raids in the area. After the three had been drinking for several hours, two uniformed agents from Immigration and Customs Enforcement walked into the courtyard area behind the

patio where the three were drinking. It is undisputed that the agents were carrying out official business not related to any of the three. It is also undisputed that eventually, a conflict ensured and led to the arrest of Anthony, Smith, and Doe. However, there are disputes about how the conflict started and about Anthony's role in the conflict.

The agents claim that the group of three, including Anthony, started the conflict by shouting insults and threats at the agents. The agents also report that the group threw three glass bottles at the agents, causing minor injuries. The agents claim that, after the bottles were thrown, they drew their weapons, diffused the situation, and then arrested Anthony, Smith, and Doe. It is undisputed that three shattered beer bottles were found in the courtyard after the incident.

After they were arrested, Smith and Doe each gave recorded statements to law enforcement, and their stories matched. They both explained that, at the time the agents arrived, they were sitting at the table with their backs to the courtyard, facing Anthony, who was sitting across the table. At some point, Smith and Doe heard someone else at the bar yell "immigration." Hearing this, they stood up and turned around, leaving their backs toward the table (and toward where Anthony had been sitting on the other side of the table). Smith and Doe both acknowledged that, upon seeing the agents, they started repeating chants from the day's protest. They denied, however, that they yelled any insults or threats at the agents. According to Smith and Doe, the agents became enraged after hearing the protest chants, pulled out their weapons, and charged the table. The recorded statements of both Doe and Smith noted that the two had been standing next to each other and that neither had thrown a beer bottle at the agents, though they acknowledged that Smith had been so startled by the charging agents that he dropped one beer bottle, which partially shattered before rolling in the direction of the agents.

After his arrest, Anthony consistently maintained that he was not even at the table at the time of the conflict. He said that, when someone yelled, "immigration," he was already headed to the bar to buy another round of drinks. He reported that he was just arriving back at the table when the agents approached with weapons drawn. Smith and Doe neither corroborated nor directly contradicted Anthony's story. Smith and Doe said they thought Anthony was still at the table when they heard someone yell "immigration." However, they acknowledged that, once they turned around to face the courtyard, they could no longer see Anthony, who would have been behind them at that point.

After his arrest, Anthony was charged under 18 U.S.C. § 1111, which makes it a federal offense to forcibly assault, resist, oppose, impede, intimidate, or interfere with any federal officer while engaged in or on account of the performance of official duties. Smith and Doe quickly reached plea deals. Anthony hired an

attorney and continued maintaining his innocence.

Anthony's attorney hired an investigator. The investigator contacted a number of potential witnesses, but none of these witnesses were able to corroborate Anthony's story that he had been away from the table at the time of the alleged assault.

While Anthony was being detained before trial, he discussed the events leading to his arrest with another pre-trial detainee. During this conversation, Anthony learned that a bank adjacent to the bar where Anthony had been arrested would likely have surveillance footage from the evening of Anthony's arrest. After this conversation, Anthony called his attorney and asked whether the attorney had tried to obtain surveillance footage of the courtyard. The attorney explained that his investigator had been to the area and had not been able to collect any surveillance footage. Anthony did not specifically ask his attorney whether the investigator had checked with the bank. It turns out that although the investigator had gone to the area to look for surveillance footage, the bank had been closed at the time and he had not returned to ask the bank for footage.

A grand jury returned an indictment charging Anthony with assault under 18 U.S.C. § 1111. Unable to find any evidence to corroborate Anthony's story, Anthony's attorney encouraged him to consider a plea deal. Anthony followed the advice of his attorney and agreed to plead guilty. He was sentenced to two years in federal prison.

Six months after Anthony was sentenced, surveillance footage, captured by the bank, showing portions of the incident leading to Anthony's arrest was produced in discovery in an unrelated civil rights lawsuit against one of the federal agents. Anthony's attorney learned of the existence of this videotape from the plaintiff's counsel in the civil rights case. The attorney then went to the bank and requested and received a copy of the footage.

This surveillance footage provided only a limited view of the area and it did not actually show Smith or Doe or the table where they had been seated. It did not show who had actually thrown the beer bottles. Nor did it show Anthony leaving the table or walking over to the bar area. However, the surveillance footage did corroborate Anthony's version of events enough to rise to the level of material, exculpatory evidence. Specifically, the surveillance footage showed Anthony walking in the direction of the table where the three had been sitting just after the agents approached the table, corroborating his story that he had been away from the table during the conflict and returned just after the agents did. This portion of the Record was drafted with the intent of creating a scenario in which the surveillance footage would be material and exculpatory under *Brady* but would probably not be enough

to support an independent claim of actual innocence.

After reviewing this footage, Anthony's attorney filed a motion under 28 U.S.C. § 2255, asking the district court to vacate Anthony's guilty plea and sentence. The motion asserted that the government had suppressed the surveillance footage, which was material and exculpatory. The motion further asserted that suppression of the surveillance footage violated Anthony's due process rights and rendered his guilty plea involuntary. Although the district court found that the surveillance footage was material and exculpatory, it nonetheless denied Anthony's motion for two reasons. First, the district court determined that Anthony's decision to plead guilty would defeat any potential *Brady* claim. Second, the district court also held that, even if Anthony's guilty plea did not defeat his *Brady* claim, the claim would fail because either Anthony or his attorney could have obtained the surveillance footage through the exercise or reasonable diligence by getting it directly from the bank.

Anthony appealed the denial of his § 2255 motion to the Court of Appeals for the Thirteenth Circuit, which affirmed. The United States Supreme Court granted certiorari.

IV. ISSUES PRESENTED

The United State Supreme Court has granted certiorari on the following two questions:

1. Whether due process principles outlined in *Brady v. Maryland*, 373 U.S. 83 (1963) require the government to disclose exculpatory evidence before entering a plea agreement with a criminal defendant.

2. Whether, to establish a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a criminal defendant must show that he could not have, with reasonable diligence, obtained the evidence.

V. ANALYSIS

The Fourteenth Amendment to the United States Constitution provides in relevant part that "No State shall ... deprive any person of life, liberty, or property, without due process of law." In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that a due process violation occurs when a prosecutor suppresses material evidence favorable to a criminal defendant. To establish a *Brady* violation, a defendant must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material to an issue at trial. *United States v. Walton*, 217 F.3d 443, 450 (7th Cir.2000). This problem

asks competitors to address two questions about the scope of the government's *Brady* obligations.

ISSUE I

The first issue asks competitors to address whether Anthony's guilty plea precludes him from making any *Brady* challenge to his conviction under 28 U.S.C. § 2255.

Federal courts have long been split about whether *Brady* requires disclosure of evidence before a criminal defendant pleads guilty. In 2002, the United Supreme Court provided a partial answer to this question. In *United States v. Ruiz*, the Court held that "the Constitution does not require the Government to disclose material *impeachment* evidence prior to entering a plea agreement with a criminal defendant." 536 U.S. 622, 633 (2002) (emphasis added). In *Ruiz*, the Court reasoned that such impeachment information was not "critical information of which the defendant must always be aware prior to pleading guilty." *Id*. at 630.

Issue 1 asks competitors to address the issue that the *Ruiz* Court explicitly declined to answer—whether the same rule that applies to impeachment evidence also applies to exculpatory evidence. This question continues to divide lower courts.

Interpretation of Ruiz

In addressing Issue 1, competitors should address how to interpret *Ruiz* and whether there is a constitutional distinction between impeachment evidence and exculpatory evidence.

Competitors representing the government may emphasize that, before *Ruiz*, courts treated exculpatory and impeachment evidence as constitutionally indistinguishable. The competitors may emphasize that the United States Supreme Court had, in addressing other *Brady* questions, rejected any "distinction between impeachment evidence and exculpatory evidence." *United States v. Bagley*, 473 U.S. 667, 676 (1985). They may also rely on the reasoning of several lower courts, which have held that—in light of prior case law treating impeachment evidence and exculpatory evidence as equivalent—*Ruiz* suggests that *Brady* does not require disclosure of exculpatory evidence before a criminal defendant pleads guilty. *See, e.g.*, *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010). These competitors may emphasize that the First, Second, Fourth, and Fifth Circuits have all suggested that the rationale for the rule announced in *Ruiz* extends to material, exculpatory evidence as well as impeachment evidence. *See, e.g.*, *United States v. Mathur*, 624 F.3d 498, 507 (1st Cir. 2010); *Friedman*, 618 F.3d at 154; *United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010); *Alvarez v. City of Brownsville*, 904

F.3d 382, 392 (5th Cir. 2018) (en banc).

By contrast, competitors representing Anthony may argue that *Ruiz* itself appears to draw a distinction between impeachment evidence and exculpatory evidence. In support of this argument, they may rely on portions of *Ruiz* that discuss the nature of impeachment evidence and its relative unimportance at the plea stage. The *Ruiz* Court noted that impeachment evidence was unlikely to be "critical information of which the defendant must always be aware prior to pleading guilty." *Ruiz*, 536 U.S. at 630. Competitors may argue that, on the other hand, *exculpatory* evidence is precisely the kind of critical information that a criminal defendant would need to know in order to make an informed, voluntary decision about how to plead. These competitors may also point to lower court decisions that have—in contrast to those discussed above—interpreted *Ruiz* to draw a distinction between impeachment evidence and exculpatory evidence. For example, the Seventh Circuit has held that *Ruiz* "strongly suggests" that the government is required to disclose material exculpatory information prior to a guilty plea. *See, e.g., McCann v. Mangialardi*, 337 F.3d 782 (7th Cir. 2003). The Ninth and Tenth Circuit have also indicated that *Ruiz* recognizes a constitutional difference between impeachment evidence and exculpatory evidence at the plea stage. *See, e.g., Smith v. Baldwin,* 510 F.3d 1127, 1148 (9th Cir. 2007) (citing a case predating *Ruiz* for the proposition that the defendant could still assert a viable Brady claim as evidence that was material and exculpatory despite pleading guilty.); *United States v. Ohiri,* 133 F. App'x 555, 562 (10th Cir. 2005).

Whether Brady *is grounded in the right to a fair trial or has some independent basis*

A second question that competitors arguing Issue 1 may address is whether the due process right recognized in *Brady* is inherently grounded in the right to a fair *trial* or whether it has some other grounding that allows it to apply more broadly.

Competitors representing the government may argue that *Brady* is grounded in the right to a fair trial, not any independent right to obtain information. These competitors may rely on Justice Thomas's concurrence in *Ruiz* in which he observed, "The principle supporting *Brady* was 'avoidance of an unfair trial to the accused.' That concern is not implicated at the plea stage." 536 U.S. at 634 (Thomas, J., concurring**).** These competitors may also point to lower court decisions holding that the *Brady* right is a trial right, which does not apply at the plea stage. *United States v. Mathur*, 624 F.3d 498, 506–07 (1st Cir. 2010).

Competitors representing Anthony may challenge the characterization of the *Brady* right as solely a trial right. They may point to the many ways that the due process clause has been interpreted to provide protections for a criminal defendant

outside of the trial itself. They may analogize to the right to effective assistance of counsel. Although this has sometimes been discussed as a trial right, it can provide a basis for challenging a guilty plea. *See, e.g., Hill v. Lockhart*, 474 U.S. 52, 56 (1985). Competitors may argue that the same logic should apply to a pre-plea *Brady* claim, arguing, just like ineffective assistance of counsel, a pre-plea *Brady* violation violates the defendant's due process rights because it deprives the defendant of a fair chance to make a reasonable calculation of his chances at trial.

Scope of waiver of due process rights as a result of a guilty plea

A third question that competitors may address is whether plead guilty operates as a waiver of the rights protected by *Brady*.

Some competitors representing the government may argue that the primary issue for the Court to address is whether Anthony waived any rights protected by *Brady* when he pleaded guilty. These competitors may argue that it is well-established that when pleading guilty, a criminal defendant waives many constitutional protections that would otherwise apply and that this extends to all rights "attendant to a fair trial," which includes rights under *Brady*. *See, e.g., Alvarez v. City of Brownsville*, 904 F.3d 382, 399 (5th Cir. 2018) (Ho, J., concurring). Competitors may discuss case law about other rights that are waived when a criminal defendant pleads guilty and may analogize the *Brady* right to those rights. The competitors may make arguments about the important interests served by finality of guilty pleas and that allowing *Brady* challenges to guilty pleas would undermine the significance of a defendant having openly admitted guilt in court.

In response to this waiver argument, competitors representing Anthony may argue that a *Brady* challenge at the plea stage is really a challenge to whether the plea was knowing and voluntary in the first place, which is a claim that cannot be waived. They may argue that a plea that is made without knowledge of material, exculpatory evidence cannot be a "knowing" plea.

Practical and systemic implications of whether Brady *applies at plea stage*

Competitors may also argue about the practical and systemic effects of adopting a particular view of whether *Brady* applies at the plea stage.

Competitors representing the government may argue about the systemic difficulties of opening up all guilty pleas to *Brady* challenges. They may also argue about the practical difficulties of assessing materiality at the plea stage with no trial record in which to ground the analysis. They may argue that, if *Brady* applies at the plea stage, trial courts will be put in the difficult situation of speculating, without a well-developed record, about whether the information withheld was

material to the defendant's decision to plead guilty Although here it is conceded that the surveillance footage would have been material and exculpatory if Anthony proceeded to trial, competitors may argue that the rule adopted in this case would presumably apply even when materiality presented a more difficult question.

Competitors representing Anthony may emphasize the oversized role that plea-bargaining plays in the criminal justice system and argue that, accordingly, due process requires disclosure of material, exculpatory evidence to ensure fairness of the plea-bargaining process. The competitors may argue that that requiring pre-plea disclosure of exculpatory evidence would help alleviate information disparities and promote fairness in the plea-bargaining process.

ISSUE II

The second issue asks whether Anthony's *Brady* challenge to his conviction under 28 U.S.C. § 2255 fails because he or his attorney could have, with reasonable diligence, obtained the surveillance footage directly from the bank.

Lower courts are divided on whether a successful *Brady* claim depends on a showing that that the material, exculpatory evidence was not otherwise reasonably available to the criminal defendant. Most courts have held that a criminal defendant has no *Brady* claim if the material, exculpatory evidence at issue was *actually known* to or possessed by the defendant. The question presented by Issue 2 is more divisive and asks competitors to analyze how a *Brady* claim is affected when the defendant *did not actually have* the material, exculpatory evidence but could have, with reasonable diligence, obtained the evidence.

Whether Brady*'s elements and animating principles contemplate a due diligence requirement*

One question that competitors may address is whether a due diligence requirement finds any support in the elements of *Brady* as defined by Supreme Court precedent and whether it is consistent with *Brady*'s animating principles.

Competitors representing Anthony may argue that a due diligence requirement finds no support in *Brady* itself or in any subsequent Supreme Court case law. They may also argue that a due diligence requirement is inconsistent with *Brady*'s animating principles. The competitors may rely on lower court authority holding that "[t]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge," and "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]." *Banks v.Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995).

Competitors representing the government may argue that a due diligence requirement is a natural implication of *Brady*'s requirement that the evidence was "suppressed." In support of this argument, competitors can rely on case law from several lower courts that have concluded 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); *United States v. Parker*, 790 F.3d 550, 561–62 (4th Cir. 2015) (quotation marks omitted); *United States v. Zuazo*, 243 F.3d 428, 431 (8th Cir. 2001). These competitors may argue that evidence "is suppressed for *Brady* purposes only if (1) the prosecution failed to disclose evidence that it or law enforcement was aware of before it was too late for the defendant to make use of the evidence, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence." *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001).

Whether a due diligence requirement is consistent with Banks v. Dretke*,* 540 U.S. 668 (2004)

Another question the competitors may address is how a due diligence requirement squares with Supreme Court's decision in *Banks v. Dretke,* 540 U.S. 668 (2004), which held that the government's duty to disclose material information does not depend on the defendant making a formal request for the information. In *Banks,* the government called a key witness but did not disclose the witness was a paid informant. The government subsequently argued that there had been no *Brady* violation based on its failure to disclose this information the defendant never made a disclosure motion requesting information about whether government witnesses were paid informants. However, the government had affirmatively represented to the defendant's attorney that it had "held nothing back" in its discovery responses. The *Banks* Court rejected the government's argument that its *Brady* duty depended on a formal motion from the defense, noting that "[i]t was not incumbent on Banks" to independently seek the information after the government had represented that it was being forthcoming. *Id.* at 698.

Competitors representing Anthony may argue that the principles announced in *Banks* are fundamentally inconsistent with a due diligence requirement. They may argue that, while the procedural posture was different, the core holding of *Banks*—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. at 696*—cannot be squared with a due diligence requirement. These competitors may point to the reasoning of the Sixth Circuit, which has concluded that *Banks* is inconsistent with a due diligence requirement. *See United States v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013) ("Prior to *Banks*, some courts, including the Sixth

Circuit, as our dissenting colleague argues, were avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due diligence rule. But the clear holding in *Banks* should have ended that practice.").

Competitors for the government may minimize the important of the Supreme Court's decision in *Banks*, emphasizing that *Banks* does not address the due diligence rule at all. These competitors may argue that *Banks* addresses only when a formal *Brady* motion is necessary to trigger a duty to disclose information that is in the government's exclusive possession. They may also argue that the logic of *Banks* applies only when the government has made an affirmative, inaccurate representation to the defense about what the information the government has, something that is not at issue here.

Tension between Brady *and adversarial nature of criminal-justice system*

Competitors may also argue about how to resolve tension between *Brady* disclosure duties and the fundamentally adversarial nature of the criminal-justice system and whether or not a due diligence requirement is an appropriate way to address this tension.

Competitors representing the government may attempt to emphasize the adversarial nature of the criminal-justice system and to argue that, unless properly constrained by a due diligence requirement, *Brady* duties would distort this system. They may emphasize that *Brady* does not provide any obligation on the State to investigate for the benefit of the defendant and that *Brady* does not relieve a defendant or defense counsel of the duty of reasonable diligence. They may argue that a due diligence requirement is the appropriate way to square the government's obligations under *Brady* with the fundamentally adversarial nature of the criminal justice system.

Competitors representing Anthony may argue that *Brady* is an intentional departure from the adversarial system and that generalizations about the adversarial nature of the system cannot be used to undermine the clear mandate of *Brady*. They may argue that the law recognizes that *Brady* is a necessary departure from a purely adversarial system. For example, In *United States v. Bagley*, the Court explained that "[b]y requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model" because the prosecutor has a responsibility to pursue justice, not just obtain a conviction. 473 U.S. 667, 675 n.6 (1985). These competitors may also argue that a broad conception of *Brady*, unlimited by a due diligence requirement, is necessary to correct for systemic disparities in the adversarial system. They may argue that a due diligence requirement is inconsistent with *Brady*'s recognition of the uneven playing field between the government and criminal defendants.

Practical implications of adopting or rejecting a due diligence requirement

Competitors may also argue about the practical implications of either adopting or rejecting a due diligence requirement.

Competitors for the government may argue that allowing criminal defendants to bring *Brady* claims for evidence that was either known to those defendants or that reasonably could have been obtained by those defendants would shift the burden of investigation from defendants to the government. They may also argue that a defendant can always raise a claim of ineffective assistance of counsel if defense counsel is not diligent in acting to obtain evidence. They may argue that here the fault should lie not with the government but with Anthony's counsel, who should have been more diligent about checking for surveillance footage.

Competitors for Anthony may argue that adoption of a due diligence rule gives the government another basis on which it can withhold evidence and that this is problematic because prosecutors cannot always accurately evaluate what evidence is sufficiently available through due diligence to justify nondisclosure. They may argue that this rule is likely to lead to under disclosure, and most instances of non-disclosure will never be identified as the evidence will never be discovered.