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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BRIEF FOR PETITIONER

2023-24 Law Week and Liberty Bell Moot Court Competition

ATTORNEYS FOR PETITIONER

ISSUES PRESENTED FOR REVIEW

I. Under the *Brady* doctrine, is the Government entirely excused from its obligation to disclose material exculpatory evidence in its possession during plea negotiations?

II. Under the *Brady* doctrine, can the prosecution withhold material exculpatory evidence from the defendant because the defendant could have found the evidence through the exercise of reasonable diligence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

United States Supreme Court Cases

United States Courts of Appeals Cases

Federal Statutes

Secondary Materials

STATEMENT OF JURISDICTION

The United States District Court for the District of Carson had original jurisdiction over this action under 28 U.S.C. § 1331 and 28 U.S.C § 2255. The United States Court of Appeals for the Thirteenth Circuit had appellate jurisdiction to review the district court's judgment under 28 U.S.C. § 1291. The Supreme Court of the United States has certiorari jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) based on its grant of Petitioners' petition for writ of certiorari, which was filed on August 21, 2019 and granted on November 1, 2019.

STATEMENT OF FACTS

One day during the summer, Jackson Anthony and two friends, Terrance Smith and Christopher Doe, attended a protest of immigration raids in Carson City, Carson. Record at 2–3. After the protest ended, Anthony, Smith, and Doe had drinks on the courtyard patio behind Sunset Bar, which is in Sunset Plaza in Carson City. R. at 2. Anthony sat facing the courtyard, while Smith and Doe sat with their backs to the courtyard. R. at 3.

Around 8:30 p.m., two uniformed, on-duty agents from Immigration and Customs Enforcement (ICE) entered the courtyard area. *Id.* At that time, Anthony had left the table to purchase another drink at the bar.[1] *Id.* The agents and Anthony's companions dispute what happened next. *Id.* The agents claim that the men yelled insults and threw beer bottles at them, which prompted the agents to arrest the men. *Id.* Smith and Doe, on the other hand, claim that they merely began repeating the chants from the earlier protest, which enraged the agents who then drew their weapons and charged the table. *Id.* Smith was so startled by the agents' actions that he dropped a beer bottle. *Id.* It was at the moment of arrest that Anthony returned to the table. *Id.* He attempted to explain to the agents that he had been at the bar, but the agents arrested him anyway.

[1] The Government and ICE agents dispute this fact and maintain that Anthony was present at the table. R. at 3.

R. at 3–4.

Neither Smith nor Doe were able to say for sure whether Anthony had been at the table at the time of the confrontation because both had stood up and turned their backs to where Anthony had been sitting. R. at 4. Law enforcement interviews of witnesses in the area confirmed that there had been shouting and that beer bottles had gone in the direction of the agents, but most were unable to identify who had been involved in the confrontation. *Id.* Only one witness stated that three men had been at the table during the confrontation, but that witness had moved to the back of the bar area and could not precisely identify any of the men. *Id.*

Anthony, Smith, and Doe were charged under 18 U.S.C. § 111, 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. *Id.* Smith and Doe quickly reached plea deals, but Anthony, maintaining his innocence, hired an attorney. *Id.*

While Anthony was being held pretrial, he had a discussion with another detainee that Anthony knew only as "Joe." *Id.* Joe informed Anthony that the bank that abuts the courtyard in Sunset Plaza may have had surveillance video of the confrontation. *Id.* Anthony, hoping a tape would corroborate his story, told this to his attorney, who sent an investigator to check. *Id.* The investigator, however, was unable to obtain any surveillance tape because the bank was closed at the time of his visit. R. at 5.

A grand jury indicted Anthony under 18 U.S.C. § 111. *Id.* Because he knew of no evidence to corroborate Anthony's innocence, and likely because of the high penalties associated with the crime,[2] Anthony's attorney advised Anthony to take a plea agreement. *Id.* Anthony pleaded guilty,

[2] Anthony potentially faced up to 20 years in prison because the agents had been injured during the confrontation. R. at 3; 18 U.S.C. § 111(b) ("Whoever, in the commission of [a violation] . . . inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.").

was sentenced to two years in federal prison, and is currently incarcerated. *Id.* Anthony has maintained his innocence throughout this time. *Id.*

In reality, the prosecution had in its possession at the time of the plea agreement the very surveillance tape that would tend to corroborate Anthony's story. R. at 6. Six months after Anthony's sentencing, his attorney learned of the existence of the videotape from the plaintiff's counsel in an unrelated civil-rights lawsuit against one of the ICE agents, and obtained the tape from the bank. R. at 5. The surveillance video provided a limited view of Sunset Plaza at the time of the incident involving Anthony. *Id.* It did, however, show the agents walk into Sunset Plaza from the right side of the screen, stop abruptly, become animated, draw their weapons, and move off the screen toward the left—the direction of the table at which Anthony, Smith, and Doe had been seated. *Id.* As the agents left the screen, the video showed Anthony appearing on the screen from the top right, where the bar was located, and walking toward the bottom left, where the table was located. *Id.* Anthony could be seen carrying a single beer bottle in his hand and taking a drink from it as he walked across the screen. *Id.* The Government had this tape in its possession at the time it accepted Anthony's guilty plea. R. at 6.

STATEMENT OF THE CASE

After reviewing the footage, Anthony filed a motion under 28 U.S.C. § 2255, which authorizes collateral attacks of federal court sentences "imposed in violation of the Constitution or laws of the United States." Record at 5; 28 U.S.C. § 2255(a). Anthony asked the district court to vacate his guilty plea and sentence because the Government had suppressed the video surveillance in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). R. at 5–6. The Government conceded that (1) it was aware of and had obtained the surveillance footage before accepting Anthony's guilty plea and (2) the footage was material and exculpatory. R. at 6. However, the Government argued

that its *Brady* obligation to disclose exculpatory evidence did not apply during plea negotiations, and that, even if it did, because Anthony or his attorney could have obtained the footage through the exercise of reasonable diligence, the Government was under no obligation to disclose the footage. *Id.*

The district court agreed with both of the Government's arguments and denied Anthony's § 2255 motion. *Id.* Anthony appealed to the Thirteenth Circuit Court of Appeals, which affirmed the district court on both grounds. *See Anthony v. United States*, No. 19-CR-2023 (13th Cir. June 17, 2019). Anthony petitioned this Court for review on August 21, 2019, and this Court granted that petition on November 1, 2019. *See* R. at 16.

SUMMARY OF THE ARGUMENT

The Framers, characteristically prescient, recognized long ago that "arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." The Federalist No. 84 (Alexander Hamilton). They were familiar with overzealous governments' use of the criminal process to indiscriminately deprive people of their rights, and recognized that infringing on the rights of even the most despicable criminal among us undermines individual liberties for everyone. The Framers crafted the Due Process Clause of the Fifth Amendment to ensure that even those who have committed crimes have the right to a fair trial before they can be deprived of their life, liberty, or property. The *Brady* doctrine, which ensures a prosecutor cannot hide exculpatory evidence from a criminal defendant, is one of the essential protections of due process. Ignoring that doctrine during the plea-bargaining stage or simply because the defendant could have found the evidence himself, intolerably deprives the defendant of due process. Such practices are violations of *Brady* and the Due Process Clause of the Constitution and therefore cannot stand.

The Court of Appeals for the Thirteenth Circuit erred when it affirmed the district court's denial of Anthony's § 2255 motion that was based on the prosecution's *Brady* violations. First, the prosecution argued that it was under no obligation to disclose exculpatory evidence in its possession during the plea-bargaining stage. This is inconsistent with the very animating principle of the *Brady* doctrine: due process. The Due Process Clause itself guarantees due process of law before the Government can deprive one of his liberty—it makes no distinction between liberty deprived by plea agreement and liberty deprived as a result of a trial. Further, allowing different standards for what process is due between trials and pleas severely undermines confidence in the justice of pleas. This Court has already clarified that, to satisfy due process, a guilty plea must be voluntary, knowing, and intelligent. When the prosecution possesses exculpatory evidence that it withholds from the defendant, the resulting plea is none of these. Moreover, this Court's decision in *Ruiz* merely carved out a narrow exception to the *Brady* disclosure requirement for *impeachment* evidence during plea negotiations. The Court was careful to limit its opinion to impeachment evidence, and its rationale does not extend to exculpatory evidence. The prosecution's suppression of the exculpatory video surveillance tape during the plea-bargaining stage violated *Brady* and denied Anthony his constitutional due process protections.

In addition, the Thirteenth Circuit erred because there is no reasonable-diligence requirement to trigger the prosecution's *Brady* obligations. The Government asks this Court to excuse it from its duty to disclose evidence when the evidence could have been found by the defendant on his own. But this Court has never attached such conditions to *Brady* obligations. In fact, the very opposite is true. The prosecution's *Brady* obligations are not contingent upon any request by the defendant, any bad intent by the prosecutor, or even the prosecutor's actual knowledge of the existence of the evidence. It would be inconsistent, then, to condition *Brady* on

the defendant's efforts to discover evidence. Moreover, this Court has already foreclosed the possibility of a reasonable-diligence rule in its *Banks* opinion. That opinion, while in the habeas posture, made clear that when analyzing the substantive requirements of a *Brady* claim, courts should deem irrelevant any information regarding the defendant's exercise of diligence. And last, a reasonable-diligence rule is bad policy—it would promote gamesmanship and loophole exploitation by prosecutors, with no consonant gains in efficiency or any other legitimate justifications. The exculpatory evidence at issue in a *Brady* case is already in the Government's possession. To allow the prosecutor to withhold that evidence simply because he believes the defendant could find it himself entirely contradicts the spirit of *Brady* and due process itself.

For these reasons, this Court should reverse and remand.

STANDARD OF REVIEW

To prevail under § 2255, a defendant must demonstrate the existence of an error of constitutional magnitude that had a substantial and injurious effect or influence on the guilty plea or jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The government's suppression of evidence favorable to the accused violates due process when the evidence is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) A claim of a *Brady* violation is cognizable in a motion under 28 U.S.C. § 2255. *See United States v. Bagley*, 473 U.S. 667, 671–72 (1985).

Whether the prosecution has a duty to disclose evidence under *Brady* is a pure question of law. *See Bagley*, 473 U.S. at 675. Pure questions of law are reviewed by this Court de novo. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014); *see also Hamblen v. United States*, 591 F.3d 471, 473 (6th Cir. 2009) ("In reviewing the denial of a 28 U.S.C. § 2255 motion, we apply a de novo standard of review to the legal issues.").

ARGUMENT

The criminal prosecutor occupies a unique place in American jurisprudence. Not only does the prosecutor have the entire community as her client, but her interest in a criminal case "is not that [she] shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Therefore, the American prosecutor plays a "special role" in that she must "search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). To that end, the prosecutor steps outside her purely adversarial role to fulfill the requirements of the *Brady* doctrine. This Court's landmark decision of *Brady v. Maryland*, from which the *Brady* doctrine gets its name, established that "suppression by the prosecution of evidence favorable to an accused" violates a defendant's right to due process. 373 U.S. 83, 87 (1963). In this limited function, then, due process "requir[es] the prosecutor to assist the defense in making its case." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985).

The *Brady* doctrine requires the prosecution to disclose all material favorable evidence to the defendant. This disclosure provides the defendant the opportunity to be fairly apprised of the case against him and to effectively refute the accusations therein. This purpose is thwarted, however, if the prosecution is entirely excused from this obligation during plea negotiations. Just as the defendant must know the prosecution's evidence during trial to meaningfully defend himself, he must also know the prosecution's evidence during plea negotiations to effectively understand his bargaining position. Due process is no less implicated during plea bargaining than it is during trial.

In addition, the prosecution cannot avoid its *Brady* obligations merely because a piece of evidence could have been obtained by the defense through reasonable diligence. Such a rule would contradict an express purpose of the *Brady* doctrine: to even the playing field between the prosecution and defense. It is the favorable nature of the evidence itself, not any bad intent on the

prosecution's part, that make *Brady* disclosures necessary. Allowing a prosecutor to withhold material exculpatory evidence, under any conditions, contradicts the direct language and the spirit of *Brady*. Such a rule would promote gamesmanship and permit prosecutors to seek out loopholes in order to avoid their constitutional obligations. In a system where prosecutors are expected to pursue truth and justice more than a mere conviction, this cannot stand.

There are three elements to a claim of a *Brady* violation: (1) "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) the "evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "prejudice must have ensued." *Strickler,* 527 U.S. at 281–82. Prejudice ensues when the evidence would have been "material" to the defendant's case. *Id.* at 282. The Government here has conceded that the surveillance video is both material and exculpatory, Record at 6, satisfying the first and third elements of Jackson Anthony's *Brady* claim. Therefore, the only disputed element is whether the Government "suppressed" the evidence within the meaning of *Brady*. Since it is undisputed that the Government did not share the tape, *id.*, the question is solely whether the Government had a duty to disclose it.

This Court should reverse the Thirteenth Circuit Court of Appeals and hold that: (I) the prosecution's *Brady* obligation to disclose material exculpatory evidence extends to plea negotiations as well as trial; and (II) the prosecution's *Brady* obligations apply to evidence that could be obtained through a defendant's reasonable diligence.

I. THE PROSECUTION'S *BRADY* OBLIGATION TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE EXTENDS TO PLEA NEGOTIATIONS AS WELL AS TRIAL.

While the Government does have the extraordinary power to deprive people of their liberty, the Constitution ensures that it may not use that power "without due process of law." U.S. Const. amend. V. The Government can deprive a defendant of his liberty either through a trial or a plea

agreement, so due process guarantees attach during both processes. Because *Brady* is animated by due process concerns, prosecutors' *Brady* obligations to disclose exculpatory evidence are implicated before a plea agreement as much as before a trial. And while a defendant may waive his right to exculpatory evidence through a plea agreement, such a waiver must be voluntary, knowing, and intelligent. The prosecution's suppression of exculpatory evidence during the plea-bargaining process hamstrings a defendant's ability to knowingly and intelligently enter the plea. Lastly, while this Court has seen fit to somewhat limit a defendant's *Brady* rights in its holding in *United States v. Ruiz*, 536 U.S. 622 (2002), that holding was limited only to impeachment evidence. The Government's obligation to disclose *material exculpatory* evidence remains unaffected and absolute.

This Court should therefore reverse the Thirteenth Circuit's holding that *Brady* is entirely inapplicable during plea negotiations because: (A) the fundamental fairness protections of the Due Process Clause apply equally to any deprivation of liberty, whether by trial or by plea agreement; (B) a defendant can only "knowingly and intelligently" waive his constitutional rights after the prosecution has disclosed material exculpatory evidence; and (C) this Court's holding in *Ruiz* is limited to impeachment evidence and its rationale does not extend to exculpatory evidence.

A. The fundamental fairness protections of the Due Process Clause, including those afforded by *Brady*, apply equally to any deprivation of liberty, whether by trial or by plea agreement.

The *Brady* doctrine is animated by concerns for a criminal defendant's due process rights. A criminal defendant has not been afforded due process when the prosecutor suppresses material exculpatory evidence. *Brady*, 373 U.S. at 87. Because the Due Process Clause makes no distinction between deprivations of liberty secured through plea or trial, and because plea agreements, like trials, are expected to produce just results, the *Brady* obligation to disclose exculpatory evidence must apply during plea negotiations.

1. *The Due Process Clause protects fundamental fairness during plea negotiations.*

The Due Process Clause makes no distinction between deprivations of liberty procured through trial and those that are the result of a plea bargain. *See* U.S. Const. amend. V. This is because a defendant who pleads guilty is just as deprived of his liberty as a defendant who is found guilty after trial. *See United States v. Broce*, 488 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.").

If anything, the protections of the Due Process Clause should apply *more forcefully* during the plea-negotiation process because the prosecution is not subject to the same oversight it would be at trial. For example, during plea negotiations, there is no jury of the defendant's peers to interpret the evidence, there is no judge ruling on objections to the admissibility of the evidence presented, and there is no judge instructing the parties on the law governing the case. Prosecutors have wide latitude during plea negotiations to characterize the evidence, law, and the case as a whole in a way favorable to the prosecution without fear of immediate correction by a factfinder or superior legal authority.

The protections of the Due Process Clause, including *Brady*, must apply to those whose liberty is deprived through trial and those whose liberty is deprived through a plea agreement equally. Rather than create an arbitrary distinction between these two processes, the Clause "was intended to guarantee procedural standards . . . to protect, *at all times*, people charged with or suspected of crime by those holding positions of power and authority." *Chambers v. Florida*, 309 U.S. 227, 236 (1940) (emphasis added).

2. *Allowing prosecutors to withhold exculpatory evidence during plea negotiations undermines confidence in plea agreements.*

Part of the reason plea agreements are such an integral part of our criminal justice system is that we trust that the results are just. "Prosecutors have a special duty to seek justice, not merely to convict." *Connick v. Thompson*, 563 U.S. 51, 65 (2011) (cleaned up). This duty to seek justice is present during plea negotiations just as forcefully as during trial. Therefore, we consider plea agreements "just" because we are confident that they were reached through the pursuit of truth, not only a conviction.

However, "[plea bargaining] is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial." *Brady v. United States*, 397 U.S. 742, 758 (1970). One of those "great precautions" taken must be to require prosecutors to turn over exculpatory evidence. To wholesale excuse prosecutors from *Brady* obligations during plea negotiations would undermine the confidence placed in plea agreements, and make their results far less trustworthy than those obtained through trial. About 97% of all criminal cases are resolved by plea agreement. James M. Grossman, *Getting* Brady *Right: Why Extending* Brady v. Maryland*'s Trial Right to Plea Negotiations Better Protects a Defendant's Constitutional Rights in the Modern Legal Era*, 2016 B.Y.U.L. Rev. 1525, 1534 (2016). When a tool is so vital to and commonplace in our criminal system, we cannot allow it to be exempt from the crucial due process protection of *Brady*. Such an exemption would fundamentally pollute the results of all plea bargains.

Here, the prosecution has conceded that the surveillance tape was both material and exculpatory, and that it had the tape in its possession at the time of Anthony's plea. R. at 6. The result of Anthony's plea agreement, then, is deeply questionable. There is a distinct probability that Anthony pleaded guilty or accepted a higher sentence due to his lack of knowledge of the tape

and its contents. *See Brady*, 373 U.S. at 87 (holding that a *Brady* violation can occur when the suppressed evidence is relevant to *either guilt or punishment*). Notwithstanding the Government's second argument, had Anthony chosen to go to trial, the prosecution would undoubtedly have been obligated to turn over this exculpatory piece of evidence. This significant disparity in results demonstrates that the slackened standard the Government advocates in plea negotiations would deny the defendant rights guaranteed to him by the Due Process Clause and *Brady*.

B. A defendant can only "intelligently and knowingly" waive his constitutional rights after the prosecution has disclosed material exculpatory evidence.

This Court has held that, because a guilty plea constitutes a waiver of constitutional rights, it must not only be "voluntary," but also be done "knowing[ly], intelligent[ly]," and "with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. U.S.*, 397 U.S. at 748; *see also Florida v. Nixon*, 543 U.S. 175, 187 (2004) (recognizing that a guilty plea constitutes a waiver of constitutional rights, including the rights to a jury trial, against self-incrimination, and to confront one's accuser). Intrinsic in making an "intelligent and knowing" waiver of rights is an accurate evaluation of the precise rights being waived and their value. Because "a guilty plea is a grave and solemn act to be accepted only with care and discernment," *Brady v. U.S.*, 397 U.S. at 748, a defendant must at least be entitled to evaluate his bargaining position based on the material exculpatory evidence the prosecution already possesses.

At its most basic, a plea agreement is analogous to a contract. *Puckett v. U.S.*, 556 US 129, 137 (2009) ("Although the analogy may not hold in all respects, plea bargains are essentially contracts."). The consideration that the defendant furnishes is his constitutional rights, while the prosecution promises to pursue a punishment that is somewhat less than the maximum that could be obtained through trial. *See id.* A fundamental principle of contract law is that one party cannot induce the other into a contract through misrepresentation, and the same is true of plea agreements.

Brady v. U.S., 397 U.S. at 755 ("A plea of guilty . . . must stand unless induced by . . . misrepresentation."). A plea agreement is not valid if the defendant "could not have understood the terms of the bargain" due to misrepresentation by the prosecution. *Bradshaw v. Stumpf*, 545 U.S. 175, 186 (2005).

By withholding exculpatory evidence from the defendant, the prosecutor misrepresents the strength of his case and prevents the defendant from truly understanding each party's bargaining position. The Government's position—that it can withhold crucial exculpatory information in its possession from the defendant during plea negotiations—is an admission that the Government wants the defendant to put all his cards on the table while the Government simultaneously refuses to reveal its own hand. The Government knows exactly what the defendant is giving up—his constitutional rights—and knows the exact value of the case for which it will forego trial. However, the Government wants the defendant to enter the plea agreement ignorant of the consideration he is getting in return because he cannot accurately assess the strength of the Government's case without access to exculpatory evidence. While some risk is inherent in plea bargaining, this intentional disparity in information results in a plea bargain can hardly be called "knowing" or "intelligent."

C. This Court's holding in *Ruiz* is limited to impeachment evidence and its rationale does not extend to exculpatory evidence.

This Court's holding in *United States v. Ruiz* is limited to impeachment evidence and is not relevant when, as here, the evidence at issue is exculpatory. 536 U.S. 622 (2002). In *Ruiz*, the Ninth Circuit had held that the Constitution prohibits the Government from requiring defendants to waive their right to impeachment information in a "fast track" plea agreement. *Id.* at 626. This Court disagreed. *Id.* at 633. The explicit holding in *Ruiz*, however, was only that "the Constitution

does not require the Government to disclose material *impeachment* evidence prior to entering a plea agreement with a criminal defendant." *Id.* (emphasis added).

Thus, *Ruiz* stands only for a narrow exception to *Brady* for impeachment evidence during plea negotiations; for *exculpatory* evidence, the default of *Brady* and the requirements of the Due Process Clause call for disclosure during plea bargaining. *See United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence, however, *as well as exculpatory evidence,* falls within the *Brady* rule.") (emphasis added); *United States v. Agurs*, 427 U.S. 97, 108 (1976) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

Ruiz did not specifically address whether prosecutors must disclose *exculpatory* evidence pretrial, but its rationale makes clear that such disclosure is required. The considerations that excuse impeachment evidence from *Brady* disclosure pretrial are not implicated when the evidence is exculpatory.

1. *The* Ruiz *holding is limited to impeachment evidence only.*

Ruiz deals only and explicitly with impeachment evidence. It stands for a narrow exception to the Government's *Brady* duty to disclose when the evidence at issue is impeachment evidence in the pretrial phase. This is apparent from the Court's choice of language in *Ruiz*—the Court was always careful to limit its pronouncements to impeachment evidence only. For example, in the first sentence of its opinion, the Court stated the question it was called to answer: "whether the Fifth and Sixth Amendments require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose '*impeachment* information . . . .'" *Id.* at 625 (emphasis added). Before explaining its rationale, the Court again specified: "We must decide whether the Constitution requires that preguilty plea disclosure of *impeachment* information." *Id.* at 629 (emphasis added). And last, in its final announcement of the judgment, the Court stated that

"the Constitution does not require the Government to disclose material *impeachment* evidence prior to entering a plea agreement with a criminal defendant." *Id.* at 633 (emphasis added).

One may be tempted to dismiss all this limiting language as simply indicating the question to which the Court was confined—the disputed provision in the plea agreement at issue concerned disclosure of impeachment evidence so that was all the Court could address. But, in the last paragraph of the opinion, the Court addressed another, uncontested portion of the plea agreement. It noted that the agreement also required Ruiz to "waive her right to receive information the Government has regarding any 'affirmative defense' she raises at trial." *Id.* This portion of the "fast track" plea deal was not contested by Ruiz, nor had the Ninth Circuit addressed it. *See United States v. Ruiz*, 241 F.3d 1157, 1166 (9th Cir. 2001), rev'd, 536 U.S. 622 (2002). Yet the Court went out of its way to indicate that such a provision would pass constitutional muster. *Ruiz*, 536 U.S. at 633. Clearly, the *Ruiz* Court did not feel particularly confined in its opinion, and, if it had so desired, could have extended its holding to exculpatory evidence. It did not, and the opinion stands for only the limited pretrial-impeachment-evidence exception to *Brady*.

One Court of Appeals, the Seventh Circuit, has already correctly recognized that *Ruiz* only applies to impeachment evidence. *See McCann v. Mangialardi*, 337 F.3d 782 (7th Cir. 2003). That court addressed a "question not directly addressed by *Ruiz*: whether a criminal defendant's guilty plea can ever be 'voluntary' when the government possesses evidence that would exonerate the defendant of any criminal wrongdoing but fails to disclose such evidence during plea negotiations or before the entry of the plea." *Id.* at 787. The court believed that "*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence" and that it was "highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors" withheld exculpatory evidence during plea negotiations. *Id.* at 788. The Seventh

Circuit correctly observed that this Court had carefully tailored its decision in *Ruiz* to only apply to impeachment evidence.

2. *The rationale for the* Ruiz *holding does not extend to exculpatory evidence.*

Even if this Court's precise language in *Ruiz* did not make apparent that its holding only applies to impeachment evidence, the rationale behind the opinion does. The Court's holding is based on three main propositions, each of which are applicable exclusively to impeachment evidence.

First, the Court held that pretrial disclosure of impeachment information was not necessary under *Brady* because "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* ('knowing,' 'intelligent,' and 'sufficient[ly] aware')." *Ruiz*, 536 U.S. at 629. This was true because "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty." *Id.*

But exculpatory evidence is exactly that "critical information" to which the Court alluded. The Court consciously made this distinction, recognizing that some information—exculpatory evidence—*is* so critical that a defendant must be made aware of it before reaching a plea agreement. So, while "the Constitution does not require the prosecutor to share all useful information with the defendant," *id.*, at minimum it requires the prosecutor to share material exculpatory information in its possession. As discussed previously, in order for a plea deal to truly be voluntary, knowing, and intelligent within the meaning of *Brady*, the Government must make the defendant aware of material exculpatory evidence.

Next, the *Ruiz* Court found that "no legal authority embodied either in this Court's past cases or in cases from other circuits" supported requiring *Brady* disclosure of impeachment

evidence pretrial. *Id.* at 630. The Court observed that, generally, "varying forms of ignorance" by a defendant, such as misapprehension of likely penalties, failure to anticipate a change in the law, and misjudging the admissibility of a confession, do not invalidate a guilty plea. *Id.* And because "ignorance of grounds for impeachment of potential witnesses at a possible future trial" is difficult to distinguish from those other forms of ignorance, neither should preclude a plea agreement. *Id.* at 631.

But the types of ignorance to which the Court cited are easily distinguished from ignorance of material exculpatory evidence. The information to which the Court referred, like impeachment information, has value that cannot adequately be predicted before trial. Impeachment evidence is only valuable once the prosecution calls the associated witness, the witness gives testimony harmful to the defendant, the witness appears credible to a jury, the defendant is able to effectively impeach the witness, and the witness loses credibility. Exculpatory evidence, on the other hand, is always valuable. *See McCann*, 337 F.3d at 787 ("[E]xculpatory evidence . . . is entirely different [than impeachment evidence.]"). A defendant's knowledge of exculpatory evidence will undoubtedly affect his bargaining position and thought processes regarding going to trial or accepting a plea. The value of exculpatory evidence is intrinsic, and is much less affected than impeachment evidence by other variables, such as witness credibility.

Last, the *Ruiz* Court held that "due process considerations . . . argue against the existence of the 'right' [to disclosure of impeachment evidence pretrial]." 536 U.S. at 631. Any "constitutional benefit" of requiring such disclosure was "comparatively small" in relation to the potential that the requirement would "seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." *Id.* at 631–32. But a major reason this balance weighed in

the Government's favor in *Ruiz* was that the plea agreement at issue specifically stipulated that the "Government will provide 'any information establishing the factual innocence of the defendant,'" i.e., material exculpatory evidence. *Id.* at 631. Certainly, the balance would be far less in the Government's favor if this term were omitted, or if the Government wanted an exception from the obligation to provide material exculpatory information altogether, as it does here.

Therefore, the crucial distinction the Court makes in *Ruiz* is between the characters of impeachment and exculpatory evidence, not between the pretrial and trial stages. Nothing in *Ruiz*'s language or rationale indicates that it should be construed as a broad permission for prosecutors to ignore *Brady* obligations during pretrial plea negotiations. Instead, the Court carefully limited its language to impeachment evidence. Impeachment evidence, because of its unique characteristics, "may, or may not, help a particular defendant." *Id.* at 630. Exculpatory evidence is different. Because of its very nature, exculpatory evidence is unquestionably helpful to any defendant—so much so that a plea agreement reached without its disclosure cannot be said to be "voluntary, knowing, and intelligent." And here, the Government has conceded that the evidence at issue is both material and exculpatory. R. at 6. To excuse the Government's nondisclosure of material exculpatory evidence that it had in its possession at the time of the plea agreement would be tantamount to sanctioning the Government's willful evasion of the protections of the Due Process Clause.

II. THE PROSECUTION'S *BRADY* OBLIGATIONS APPLY TO EVIDENCE THAT COULD BE OBTAINED THROUGH A DEFENDANT'S REASONABLE DILIGENCE.

In *Brady*, this Court announced that any evidence possessed by the prosecution that is "favorable to the accused" and "material to either guilt or punishment" must be disclosed to the defendant. *Brady*, 373 U.S. at 87. It attached no further requirements to trigger the Government's *Brady* obligations. In this regard, *Brady* disclosure is unconditional. A reasonable-diligence rule—

allowing the prosecutor to withhold evidence from the defendant on the basis that the evidence could have been obtained through the defendant's reasonable diligence—contradicts *Brady*'s unconditional nature. This Court has already said as much in *Banks v. Dretke*, 540 U.S. 668 (2004). While that case came to the Court on a habeas procedural posture, its holding that a "lack of appropriate diligence" on the part of a defendant did not negate a *Brady* claim is equally applicable here. *Id.* at 695. Finally, this Court has long recognized that "[c]ourts, litigants, and juries properly anticipate that [the prosecutor's] obligations to refrain from improper methods to secure a conviction . . . will be faithfully observed." *Id.* at 696 (cleaned up). That anticipation—that prosecutors will refrain from gamesmanship—is not satisfied when the prosecutor withholds evidence from the defendant. A rule sanctioning such conduct is not tenable and serves no legitimate purpose in the criminal justice system.

This Court should reverse the Thirteenth Circuit's holding that *Brady* obligations do not apply to evidence that could have been obtained by a defendant's reasonable diligence for the following reasons: (A) a reasonable-diligence requirement is inconsistent with the unconditional nature of *Brady* obligations; (B) this Court's rationale in *Banks v. Dretke* has already foreclosed the possibility of a reasonable-diligence requirement; and (C) a reasonable-diligence requirement impermissibly promotes gamesmanship by prosecutors without any legitimate justifications.

A. A reasonable-diligence requirement is inconsistent with the unconditional nature of *Brady* obligations.

After it originally established the Government's obligation to disclose evidence to a criminal defendant, this Court has repeatedly clarified that *Brady* obligations are unconditional. A defendant need not take any specific action to trigger the prosecution's duty to turn over evidence, and the duty remains even if the prosecutor himself is unaware of the evidence. That *Brady* obligations are not contingent upon any specific actions or knowledge belies the Government's

contention that *Brady* only attaches after the defendant exercises reasonable diligence to discover evidence.

1. Brady *obligations do not depend on the defendant's request for evidence or any other defendant action.*

This Court held specifically in *United States v. Agurs* that the Government's duty to disclose evidence is not contingent upon any action by the defendant. 427 U.S. 97 (1976). In *Brady* itself, this Court's language left some wondering whether defendants had to ask for specific information from the prosecution to trigger disclosure obligations. *See Brady*, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused *upon request* violates due process ") (emphasis added). But the *Agurs* Court clarified that no such requirement for the defendant to request information exists. The Court stated that, when the prosecution possesses exculpatory evidence, it has "notice of a duty to produce," and "that duty should equally arise even if no request is made." *Agurs*, 427 U.S. at 106. So, while *Brady* established that the Government must turn over evidence when the criminal defendant specifically requests it, *Agurs* established that the same duty exists when "there has been merely a general request for exculpatory matter" and even when "there has been no request at all." *Id.* The Government's obligations are the same whether there's been a specific request, a general request, or no request at all.

Such a rule ensuring that *Brady* obligations are not contingent upon any action by the defendant makes sense because "exculpatory information in the possession of the prosecutor may be unknown to defense counsel." *Id.* A "duty" that is only triggered when the defendant takes certain action—action the defendant may be unaware is warranted—can hardly be considered a duty at all. And if the prosecution possesses exculpatory evidence that may be beneficial to the defendant, the "potential harm to the defendant" of it being withheld is the same regardless of

whether the defendant requests it. *Id.* For *Brady* to be truly meaningful and provide the due process protection that this Court intended, the obligations it imposes cannot be conditional.

2. Brady *obligations do not depend on the prosecution's intent or actual knowledge.*

This Court has held that the prosecution has a duty to disclose material exculpatory evidence, even when it does not recognize the evidence as material or exculpatory. The Court has made clear that even an "inadvertent nondisclosure" by the prosecution may violate *Brady* because such a nondisclosure "has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler*, 527 U.S. at 288. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, *not the character of the prosecutor*." *Id.* (emphasis added) (quoting *Agurs*, 427 U.S. at 110); *see also Brady*, 373 U.S. at 87 (holding that *Brady* obligations apply "irrespective of the good faith or bad faith of the prosecution"). In this regard, a *Brady* "suppression" is akin to a strict-liability violation; no bad intent on the part of the prosecutor is required. The prosecutor's obligations to turn over exculpatory evidence are not conditioned on the prosecutor's state of mind.

Moreover, the prosecutor's *Brady* obligations attach regardless of his actual knowledge of the existence of exculpatory evidence, as long as some government actor is aware of the evidence. In *Kyles v. Whitley*, this Court held that prosecutors are responsible for the knowledge of the police with regard to *Brady* evidence. 514 U.S. 419, 437–38 (1995). The Court stated that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf," but even if the prosecutor fails to learn of this information, his "responsibility for failing to disclose [material exculpatory evidence] is inescapable." *Id.* Just as a prosecutor can violate *Brady* with no bad intention to do so, he can also violate *Brady* even when he himself is unaware of the evidence's existence. That is how crucial the *Brady* disclosure of

evidence is to the justice system. "[T]he constitutional duty [to disclose] is triggered by the potential impact of favorable but undisclosed evidence" and nothing else. *Id.* at 434. There are no additional conditions precedent to prompt *Brady* obligations.

3. Brady *obligations do not depend on whether the defendant could have obtained the evidence through reasonable diligence.*

Requiring the defendant to use reasonable diligence to discover evidence already in the prosecution's possession contradicts this Court's principle that *Brady* obligations are unconditional. This Court has already warned that prosecutors must make *Brady* disclosures lest "the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth." *Id.* at 439. Just as the prosecution has a duty to turn over exculpatory evidence regardless of whether the defendant requests it, the duty also exists regardless of whether the defendant exercises reasonable diligence to discover the evidence. And just as a prosecutor's *Brady* obligations are not conditioned on the prosecutor's state of mind or actual knowledge, "the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge." *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995).

Prosecutors have a duty to disclose all material exculpatory evidence. That duty is not conditioned on anything else. Simply put, "the fact that defense counsel 'knew or should have known' about [exculpatory evidence] is irrelevant to whether the prosecution had an obligation to disclose the information." *Id.* Here, the federal prosecutors have conceded that they possessed the surveillance tape, and that it is both material and exculpatory. R. at 6. That alone is enough to trigger *Brady* and Anthony need show nothing more. The prosecutor's suppression under these circumstances would belong in the Colosseum, not the courtroom, just as this Court warned in *Kyles.*

B. This Court has already foreclosed the possibility of a reasonable-diligence requirement in its *Banks v. Dretke* opinion.

Even if this Court's precedent regarding the unconditional nature of *Brady* obligations did not foreclose the possibility of a due-diligence requirement, this Court's opinion in *Banks v. Dretke* did. 540 U.S. 668 (2004). While the specific question of "the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them," was left open by this Court in *Strickler*, 527 U.S. at 288 n.33, it was answered for all intents and purposes in *Banks*.

1. *While* Banks *was decided in a habeas posture, its holding is equally applicable when analyzing the substantive elements of a* Brady *claim.*

The *Banks* decision came out of a habeas petition, but its holding is applicable to all claims of *Brady* violations. Banks was pursuing habeas relief under a federal statute that required him first to exhaust all state court remedies. *Banks*, 540 U.S. at 690. Banks had not raised a *Brady* claim in his state court direct appeal, so he could only do so in his federal court collateral attack if he could show cause for his earlier failure to raise the *Brady* claim. *Id.* at 690–91.

This Court explained that the second *Brady* component—that the evidence was suppressed by the State—parallels the habeas petitioner's requirement to show "cause" for his failure to raise the *Brady* claim in the state-court proceedings. *Id.* at 691 ("Corresponding to the second *Brady* component (evidence suppressed by the State), a petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence."). So, the Court stated, "if Banks succeeds in demonstrating "cause[”] . . . he will at the same time succeed in establishing the [suppression] element[] of his . . . *Brady* death penalty due process claim." *Id.* Therefore, it is clear that this Court intended for its precedent regarding the "cause" showing in the habeas posture to also apply when the defendant attempts to prove the substantive elements of a *Brady* violation.

2. *The* Banks *Court rejected a reasonable-diligence requirement.*

The Court went on to overtly reject any reasonable-diligence requirement. The prosecution in *Banks* argued that Banks could not show cause because of his "lack of appropriate diligence" in attempting to discover the withheld evidence. *Id.* at 695. By the State's logic, the Court observed, "'the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence.'" *Id.* at 696. This Court disagreed. Instead, the Court recognized 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.* Criminal defendants are entitled to presume that the prosecutor has "properly discharged [his] official duties" by turning over material exculpatory evidence. *Id.* Excusing the prosecution from the obligation to turn over evidence when it could have been found through the exercise of diligence would contravene this principle.

And the *Banks* holding is not as limited as the majority below represented. *See* R. at 9. While it is true that the prosecution in *Banks* had affirmatively represented to the defendant that it had "held nothing back," *see Banks*, 540 U.S. at 698, such a representation is not necessary to implicate the *Banks* holding. Nowhere did the Court limit its holding only to situations in which the prosecution actively lies to the defendant. Instead, the Court broadly stated that a rule that allows the prosecutor not only to lie, but also to "hide" or "conceal" would be unconstitutional. *Id.* at 696. One can certainly "hide" or "conceal" without affirmatively lying. While the prosecutor's misdeeds in *Banks* were particularly egregious, the Court's holding was not so limited as to only proscribe equally condemnable conduct. "Prosecutors' dishonest conduct *or unwarranted concealment* should attract no judicial approbation." *Id.* at 696 (emphasis added). A broad application is further evidenced by the original holding in *Brady*, which applied "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Therefore, regardless of

whether the prosecutor lies to the defendant, *Brady* and due process will not sanction his suppression of evidence based on a reasonable-diligence requirement.

The Sixth Circuit has correctly observed that the *Banks* holding foreclosed the possibility of a diligence requirement in *United States v. Tavera*, 719 F.3d 705 (6th Cir. 2013). The court there acknowledged that a few circuit courts, including the Sixth, had previously imposed a diligence requirement, "plac[ing] the burden of discovering exculpatory information on the defendant and releas[ing] the prosecutor from the duty of disclosure." *Id.* at 711. However, the court recognized that this Court in *Banks* had "rejected this requirement in no uncertain terms." *Id.* The court quoted extensively from *Banks* and finally held that the *Banks* clear holding should have put an end to any imposition of a reasonable-diligence requirement. At the very least, the Sixth Circuit's analysis demonstrates how such a rule is entirely inconsistent with this Court's logic in *Banks.*

Further, with the outlier exception of the Fourth Circuit (and now the Thirteenth), all of the Courts of Appeals that do impose a reasonable-diligence requirement first did so prior to this Court's decision in *Banks. See Ellsworth v. Warden*, 333 F.3d 1, 6 (1st Cir. 2003) ("Evidence is not suppressed if the defendant either knew, or should have known of the essential facts permitting him to take advantage of any exculpatory evidence.") (cleaned up); *United States v. LeRoy,* 687 F.2d 610, 618 (2d Cir. 1982) (same); *Boss v. Pierce,* 263 F.3d 734, 740 (7th Cir. 2001) ("Evidence is suppressed for *Brady* purposes only if . . . the evidence was not otherwise available to the defendant through the exercise of reasonable diligence."). This Court decided *Banks* in 2004. *See Banks,* 540 U.S. 668. If these Courts of Appeals were to directly confront the issue anew today, with the benefit of the *Banks* opinion, they would likely be bound to come to a different conclusion just as the Sixth Circuit did.

C. A reasonable-diligence requirement impermissibly promotes gamesmanship by prosecutors without any legitimate justifications.

A rule that excuses *Brady* disclosure of material exculpatory evidence simply because it could be found with the defendant's reasonable diligence would promote dishonesty and gamesmanship on the part of prosecutors—something this Court has repeatedly emphasized should be condemned wherever possible. While the criminal justice system is undoubtedly an adversarial one, the prosecutor does not have carte blanche authority to use whatever means necessary to achieve a conviction. Instead, this Court has underscored the importance of the "prosecutor as the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles*, 514 U.S. at 439 (cleaned up). To that end, the *Brady* doctrine itself represents a significant departure from the purely adversarial system. *See Bagley*, 473 U.S. at 675 n.6 ("[T]he *Brady* rule represents a limited departure from a pure adversary model."). This Court has recognized that the imbalance of power inherent in the criminal context makes prosecutorial integrity crucial to the reliability and trustworthiness of the system. A reasonable-diligence rule would critically contradict that very goal, and serves no legitimate truth-seeking or efficiency functions.

1. *The imbalance of power inherent in the criminal context makes prosecutorial gamesmanship unacceptable.*

The prosecutor in a criminal case represents not a private client, but the entire community, which includes the defendant himself. Therefore, the prosecutor has the unique role in the American justice system of not only advocating a specific strategic position, but also zealously pursuing truth and justice. *See Strickler*, 527 U.S. at 281 (referencing "the special role played by the American prosecutor in the search for truth in criminal trials"). To that end, the types of gamesmanship that may be acceptable in the civil litigation context, where litigants are generally seen as adversarial equals, have absolutely no place in the criminal context. *See* Bennett L.

Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531, 532 (2007).

In the context of a criminal investigation and trial, the prosecution undoubtedly has an institutional advantage over the defendant. The prosecutor has the robust resources of the police force to investigate the defendant, can acquire "evidence from a broad variety of sources," and can "sift, evaluate, and test this information in private." *Id.* The defendant, on the other hand, has limited ability and resources to "uncover evidence advantageous to his case." *Id.* It is not uncommon for a prosecutor to investigate, compile, and develop an entire case against a criminal defendant before the defendant is even aware that he is suspected of a crime. This unequal playing field is what caused Justice Brennan to famously remark that the criminal process may be more of a "sporting event" than a quest for truth. *See* Hon. William J. Brennan, Jr., *Criminal Prosecution: Sporting Event or Quest For Truth?*, 1963 Wash. U. L.Q. 279 (1963).

The very purpose of *Brady* disclosure is meant to mitigate that imbalance. "The emphasis in [this] Court's *Brady* jurisprudence on fairness in criminal trials reflects *Brady*'s concern with the government's unquestionable advantage in criminal proceedings." *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 290 (3d Cir. 2016). *Brady* is meant to have an "equalizing impact" on the criminal process and to mitigate the "prosecutorial advantage" that is inherently present. *Id.* The *Brady* doctrine is the natural outgrowth of the concept that the prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger*, 295 U.S. at 88. Accordingly, there must be no tolerance for the prosecutor's use of gamesmanship to avoid his duties to seek truth and justice. Because of the systematic disparities between the prosecutor and defendant, imposing a diligence requirement on the defendant would "impair, rather than support, adversarial criminal proceedings," and exacerbate those very disparities. Leslie Kuhn Thayer,

Comment, *The Exclusive Control Requirement: Striking Another Blow to the* Brady *Doctrine*, 2011 Wis. L. Rev. 1027, 1043 (2011).

2. *A reasonable-diligence rule would promote gamesmanship by allowing prosecutors to be the deciders of what evidence could be discovered through reasonable diligence.*

A reasonable-diligence rule is exactly the sort of gamesmanship that directly contradicts this Court's repeated directive that prosecutors must seek truth and justice, not just a conviction. The rule would excuse prosecutors from disclosing material exculpatory information—which is the very type of information *Brady* itself addressed—based only on the idea that the defendant could have obtained the information himself. In practice, this would allow prosecutors to hold evidence in their hands that may exonerate the defendant and then choose to withhold it. That sort of blatant dishonesty is exactly what occurred here. The prosecution has conceded that it "was aware of and had obtained the surveillance footage before Anthony pleaded guilty," yet failed to turn it over. R. at 6. The prosecution has also conceded that the footage is material and exculpatory. *Id.* So, the Government is asking this Court for a rule that would allow them to suppress material that clearly falls within *Brady*, material that could possibly have been outcome-determinative, solely on the idea that Anthony could have obtained it himself.

This Court has previously pronounced that it is "appropriate for [a defendant] to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." *Banks*, 540 U.S. at 694. Withholding material exculpatory evidence and thus "declaring 'prosecutor may hide, defendant must seek,'" *id.* at 696, certainly falls within the ambit of "improper litigation conduct." It is not unreasonable that Anthony would expect that, if the prosecution had in its possession video surveillance that tended to exculpate him, such evidence

would be disclosed to him. Any other rule directly contradicts *Brady*'s goal of fostering just outcomes and public trust in the criminal justice system. *See Kyles*, 514 U.S. at 439.

3. *Requiring the prosecution to disclose all material exculpatory evidence does not impose a significant burden.*

Moreover, requiring the prosecution to disclose all the material exculpatory evidence in its possession would not impose a significant burden on the Government. The majority below contended that the absence of a reasonable-diligence requirement would place an "obligation on the State to investigate for the benefit of the defendant." R. at 9. But this is not accurate. The *Brady* doctrine has never required the prosecution to take affirmative steps to seek out or investigate evidence that may aid the defense. *Brady* only obligates the prosecution not to withhold material exculpatory evidence in its possession. *Brady*, 373 U.S. at 88. This obligation applies regardless of whether the defense could have found the evidence itself.

Further, ensuring that the prosecution always discloses all material exculpatory evidence would not greatly expand *Brady* claims because it would not affect situations in which the defendant is actually aware of or in possession of the evidence in question. Under those circumstances, while the prosecution would still be obligated to disclose the evidence because of its material and exculpatory nature, *id.* at 87–88, there would likely be no *Brady* violation if the prosecution failed to disclose it. This is because, in that situation, the defendant would be unable to show the last element of a *Brady* claim—that "prejudice must have ensued" because of the prosecution's suppression. *Strickler*, 527 U.S. at 282. A defendant who has evidence in his possession is not prejudiced by the prosecution's nondisclosure of the same evidence.

Here, however, the record shows at most that Anthony was aware of information that *should* have led him to discover the video footage, R. at 4, so, as discussed, all of the justifications

for requiring *Brady* disclosure apply. He was prejudiced by the Government's suppression of this material and exculpatory information.

CONCLUSION

The very purpose of the *Brady* doctrine is to protect the fundamental fairness of the criminal justice system by giving a defendant access to any material exculpatory evidence that the prosecution has in its possession. The Government's position—that it should be granted a wholesale exemption from disclosure during plea negotiations and if the defendant could obtain the evidence himself—contradicts this purpose. Therefore, this Court should reverse the decision of the court below and remand for further proceedings.