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

BRIEF FOR THE RESPONDENT

ORAL ARGUMENT REQUESTED

2023-24 Law Week and Liberty Bell Moot Court Competition

ATTORNEYS FOR RESPONDENT

STATEMENT OF THE ISSUES

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.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Thirteenth Circuit entered final judgment in favor of the Respondent, United States of America. (R. at 2). Petitioner, Jackson Anthony, then filed a timely petition for writ of certiorari, which was granted. (R. at 16). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2016).

STANDARD OF REVIEW

An appellate court reviews a district court's denial of a 28 U.S.C. § 2255 *de novo*. See *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 and uphold the factual findings of the district court unless they are clearly erroneous."). The *de novo* standard requires the appellate court to review the legal questions anew and independently, without regard to the trial court's conclusions. *See United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003).

STATEMENT OF THE FACTS

After a day of protesting recent government actions Petitioner along with his two friends, Terrance Smith and Christopher Doe, decided to get drinks at Sunset Bar located in Carson City, Carson. (R. at 2). The trio sat down at a table in the bar's patio area while still wearing their protest t-shirts and carrying their protest signs. (R. at 3). Petitioner sat facing the courtyard while Smith and Doe sat with their backs towards the courtyard. (R. at 3). The trio sat and drank for several hours, with each member taking turns to get more alcoholic drinks at the bar. (R. at 3).

Around 8:30 p.m., two uniformed agents from Immigration and Customs Enforcement walked into the courtyard area where the trio were sitting. (R. at 3). The agents were on duty and were carrying out official business. (R. at 3). A conflict ensued between the trio and the Agents,

which ultimately resulted in the arrest of Petitioner, Smith, and Doe. (R. at 3). The details of the conflict are disputed, however. (R. at 3).

According to the agents, the following incident ensued. While walking through the courtyard area, Petitioner, along with Smith and Doe, stood up at their table and started shouting insults and threats at the agents. (R. at 3). Initially ignoring the likely intoxicated men, the three agents continued walking until three beer bottles were thrown at them from the direction of Petitioner's table—striking one agent and causing injuries. (R. at 3). The two agents diffused the situation and subsequently arrested Petitioner, Smith, and Doe. (R. at 3). It is undisputed that three shattered beer bottles were found in the courtyard after the incident. (R. at 3).

After their arrests, Smith and Doe gave statements explain what had happened. While at the table, they heard someone in the courtyard say "immigration," so they stood up and looked, leaving their backs towards the table—and where Petitioner had been sitting. (R. at 3). Although Smith and Doe deny yelling insults or threats at the two agents, they do admit to repeating chats from the day's protest at the agents. (R. at 3).

Smith and Doe claim—after drinking for several hours—that the two agents became enraged and pulled out their weapons and charged the table. (R. at 3). Smith and Doe both claim to have not thrown any beer bottles towards the two agents. (R. at 3).

Petitioner, in contrast, claims to have not been present at the table upon the arrival of the two agents. (R. at 3). Further, Petitioner states to have been walking towards the bar to purchase more drinks when the agents arrived on the scene. (R. at 3). Accordingly, he did not become involved with the agents until after arriving back from the bar. (R. at 3). Petitioner attempted to explain to the agents that he was not at the table when any threats were made or beer bottles were thrown, but ultimately the arresting agent claimed otherwise. (R. at 3–4).

Contradicting Petitioner's story, Smith and Doe said they thought Petitioner had still been at or around the table when they stood up after hearing "immigration." (R. at 4). Although neither can say with certainty Petitioner's location once both had stood up. (R. at 3). Moreover, Smith and Doe both deny throwing beer bottles, so if one had been thrown from their table, it must have been thrown by Petitioner. (R. at 4).

Witnesses at the bar confirmed that beer bottles had been thrown at the agents. (R. at 4). Although most witnesses were unable to identify who had thrown the bottles or where Petitioner was at the time, one witness, Mark Davis, who had been sitting only a few tables away, gave a statement indicating that he had seen three men at the table at the time of the confrontation. (R. at 4). Further, one of those men from Davis' statement matched Petitioner's description. (R. at 4).

After his arrest, Anthony was 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. (R. at 4).

Smith and Doe both quickly reached plea deals, but Petitioner hired an attorney and maintained his innocence. (R. at 4). Petitioner's attorney, in turn, employed an investigator. (R. at 4). The investigator contacted several potential witnesses, but none of these witnesses could corroborate Petitioner's story that he had been away from the table and at the bar at the time of the alleged assault. (R. at 4). The investigator spoke to Davis, who stuck to the story he had given law enforcement, which placed Anthony at the table at the time the confrontation with the agents started. (R. at 4).

While awaiting his trial, Petitioner learned that video footage might exist of the courtyard from a bank that abuts it. (R. at 4). Petitioner called his attorney and asked if he had tried to obtain surveillance footage of the courtyard. (R. at 4). Petitioner's attorney responded in the negative,

telling Petitioner that been to the area and had not been able to collect any surveillance footage. (R. at 4). Despite knowing that footage might exist from the bank, Petitioner did not ask whether the investigator had checked with the bank. (R. at 4). Moreover, Petitioner failed to mention that the bank might have video footage to his attorney whatsoever. (R. at 4–5).

Independent of any conversation with Petitioner or his attorney, the investigator considered asking the bank for video footage. (*See* R. at 5). Ultimately, however, he did not because the bank was closed when he arrived, and he determined that any camera on the bank would be unlikely to capture the area where the three men had been sitting that evening. (R. at 5). He never returned to the bank to follow-up on the existence of video footage. (R. at 5).

A grand jury returned an indictment charging Petitioner with assault under 18 U.S.C. § 111. (R. at 5). Unable to find any evidence to corroborate Petitioner's story, Petitioner's attorney encouraged him to consider a plea deal. (R. at 5). Petitioner followed the advice of his attorney and agreed to plead guilty. (R. at 5). He was sentenced to two years in federal prison, and he is currently incarcerated. (R. at 5).

Six months after Petitioner was sentenced, surveillance footage, captured by the bank, showing portions of the Sunset Plaza incident was produced in discovery in an unrelated civil-rights lawsuit against one of the federal agents. (R. at 5). Petitioner's attorney learned of the existence of this videotape from the plaintiff's counsel in the civil rights case. (R. at 5). Petitioner's attorney then went to the bank and requested and received a copy of the tape. (R. at 5).

This surveillance footage provided only a limited view of Sunset Plaza, and it did not actually show Smith or Doe or the table where they had been seated. (R. at 5). It did not show who had actually thrown the beer bottles. (R. at 5). Nor did it show Petitioner leaving the table or walking over to the bar area. (R. at 5).

However, the surveillance footage did show the agents walking into the Sunset Plaza courtyard area in front of the Sunset Bar, entering from the right side of the screen, and then stopping abruptly. (R. at 5). It showed the agents becoming animated and then drawing their weapons as they moved off the screen toward the left, in the direction of the table where Smith, Doe, and Petitioner had been sitting. (R. at 5). At the same time that the agents were leaving the screen, the video also showed Anthony appearing on the screen from the top right—which was the direction of the bar—and walking toward the bottom left—which was the direction of the table. (R. at 5). Despite stating that the three men took turns going up to the bar to buy more drinks, Anthony was seen carrying a *single* beer bottle in his hand and could be seen taking a drink from the bottle as he walked through the screen. (R. at 3; R. at 5).

After reviewing this footage, Petitioner's attorney filed a motion under 28 U.S.C. § 2255, asking the district court to vacate Petitioner's guilty plea and sentence. (R. at 5). The motion asserted that the government had suppressed the surveillance footage, which was material and exculpatory. (R. at 5). The motion further asserted that suppression of the surveillance footage violated Anthony's due process rights and rendered his guilty plea involuntary. (R. at 5).

STATEMENT OF THE CASE

This is an appeal from the United States Court of Appeals for the Thirteenth Circuit's ruling affirming the district court's decision to deny Petitioner's 28 U.S.C. § 2255 motion. (R. at 10). The Supreme Court of the United States granted certiorari. (R. at 16).

Petitioner filed a lawsuit against the government of the United States of America. (R. at 2). Mr. Anthony brought suit under 28 U.S.C. § 2255 to vacate his guilty plea and sentence for assault on a federal agent under 18 U.S.C. § 111. (R. at 2). The district court denied Petitioner's claim. (R. at 3.) The United States Court of Appeals for the Thirteenth Circuit affirmed the district court's ruling. (R. at 3.)

SUMMARY OF THE ARGUMENT

The court of appeals correctly held that: (1) having pleaded guilty, Petitioner cannot challenge his conviction under *Brady* based on the government's non-disclosure of the surveillance footage; and (2) because Petitioner could have, with reasonable diligence, obtained the surveillance footage, the government did not suppress that footage within the meaning of *Brady*.

In *Brady v. Maryland*, this Court held that a due process violation occurs when a prosecutor suppresses material evidence favorable to a criminal defendant. Since *Brady*, however, this Court has held that exculpatory and impeachment evidence are indistinguishable. Further, this Court held that the Constitution does *not* mandate the government to disclose material *impeachment evidence* prior to entering a plea agreement with a criminal defendant. It follows, then, that the Constitution does *not* mandate the government to disclose material *exculpatory evidence* prior to entering a plea agreement with a criminal defendant as well. Thus, Respondent was not mandated to disclose exculpatory evidence during plea agreement negotiations before trial.

Additionally, this Court has repeatedly characterized *Brady* as a *trial right*. Today, Petitioner attempts to expand this right into a pretrial right. Petitioner's attempt is unfounded based on this Court's precedent. Furthermore, criminal defendants have always been able to waive certain Constitutionally protected rights, such as a right to a jury trial, during plea agreements for a lesser punishment. *Brady* is no different. If criminal defendants are no longer able to waive their right to a *Brady* claim, then they will have fewer assets with which to bargain with during plea agreements.

Moreover, even if Petitioner did not waive his right to a *Brady* claim, he should still be barred from raising it because he or his counsel could have discovered the exculpatory evidence through "reasonable diligence" during pretrial discovery. A "reasonable diligence" requirement is appropriate when determining if the exculpatory evidence was suppressed. To hold so otherwise

would reward inept or idle conduct of the defendant as a sentence could be vacated due to the defense's failure to seek evidence.

Further, a reasonable diligence requirement helps ensure the continuation of the adversarial nature of the criminal justice system. A system that best ensures that fairness and justice are carried out. Lastly, a reasonable diligence requirement would not be in contention with recent decisions of this Court.

Thus, this Court should ***affirm*** the decision of the circuit court.

ARGUMENT

I. Because Petitioner's case never reached a trial, the Thirteenth Circuit correctly concluded that Petitioner's *Brady* claim is improper

A. APPLYING THIS COURT'S JURISPRUDENCE, EXCULPATORY EVIDENCE AND IMPEACHMENT EVIDENCE ARE TREATED THE SAME FOR PURPOSES OF PRETRIAL PLEA NEGOTIATIONS.

In *Brady v. Maryland*, this Court held that a due process violation occurs when a prosecutor suppresses material evidence favorable to a criminal defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). 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). Further, in *United States v. Ruiz*, this 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." *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (emphasis added). This Court, however, "did not explicitly address whether the withholding of exculpatory evidence during the pretrial plea bargaining process would violate a defendant's constitutional rights." *Alvarez v. City of Brownsville*, 904 F.3d 382, 392 (5th Cir. 2018). As several circuits have held, the answer to this question is "no," because impeachment and exculpatory evidence are to be treated the same.

In *United States v. Bagley*, this Court explained that "[i]mpeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985). This Court then stated that it explicitly "rejected any such distinction between impeachment evidence and exculpatory evidence." *Id.*

In harmonizing the holdings of *Bagley* and *Ruiz*, the Second Circuit noted that this Court "has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial and the reasoning

underlying *Ruiz* could support a similar ruling for a prosecutor's obligations prior to a guilty plea." *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010); see also *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009) (Rejecting the argument that *Ruiz* distinguished exculpatory and impeachment evidence and that exculpatory evidence must be turned over before entry of a plea).

The Second Circuit's interpretation is clear when looking at the plain language of *Bagley* and *Ruiz*. *Bagley* held that exculpatory evidence and impeachment evidence share no distinction under a *Brady* claim. *Ruiz* held that the Constitution does *not* require the government to disclose material impeachment evidence prior to a plea agreement. Therefore, when looking at the two cases congruently, it follows logically that the government is *not* required to disclose material exculpatory evidence prior to a plea agreement as well. To hold otherwise would put *Bagley* and *Ruiz* in direct conflict with each other.

B. PETITIONER CANNOT RAISE A *BRADY* CLAIM FOR EVENTS OCCURRING BEFORE A TRIAL BECAUSE *BRADY* IS A TRIAL RIGHT ONLY.

1. Prior decisions by this Court have affirmatively stated *Brady* to be a trial right

Additionally, Petitioner's *Brady* claim is inappropriately asserted because a *Brady* claim is a trial right, not a pretrial right. As a result of Petitioner accepting a plea agreement before his trial occurred, Petitioner waived certain rights granted to him that are exclusively trial rights. The right to assert a *Brady* claim is one such trial right. Therefore, Petitioner is barred from asserting a *Brady* claim now.

This Court has repeatedly characterized *Brady* as a trial right. Petitioner's arguments to the contrary, go directly against language put forward by this Court. In U*nited States v. Agurs*, for example, this Court observed that "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." U*nited States v. Agurs*, 427 U.S. 97, 108 (1976). *See also, e.g.*, *Ruiz*, 536 U.S.

at 628 (describing *Brady* as "a right that the Constitution provides as part of its basic 'fair trial' guarantee"); *United States v. Bagley*, 473 U.S. 667, 675 (1985) ("The *Brady* rule is based on the requirement of due process. . . . [A prosecutor must] disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("[U]nder *Brady* . . . the prosecution has the 'duty under the due process clause to insure that "criminal trials are fair" by disclosing evidence favorable to the defendant upon request.'") (citation omitted).

2. A majority of circuits have reaffirmed this Court's classification of *Brady* as a trial right

Several circuits have since decided cases applying this Court's clear characterization that *Brady* is a trial right. In explaining its decision that a *Brady* right is a trial right, the First Circuit explained that "[t]he animating principle of *Brady* is the avoidance of an unfair trial. It is, therefore, universally acknowledged that the right memorialized in *Brady* is a trial right." *United States v. Mathur*, 624 F.3d 498, 506–07 (1st Cir. 2010) (internal citation omitted); *see also United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010) ("[t]he *Brady* right . . . is a trial right" that "exists to preserve the fairness of a trial verdict and to minimize the chance that an innocent person would be found guilty."); *United States v. Almendares*, 397 F.3d 653, 664 (8th Cir. 2005) ("Under the rule in our circuit *Brady* does not require pretrial disclosure, and due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial.").

Likewise, the Fifth Circuit also interpreted that the purpose of *Brady* is "protecting the integrity of trials," and in situations "where no trial is to occur, there may be no constitutional violation." *Matthew v. Johnson*, 201 F.3d 353, 361 (5th Cir. 2000); see also *United States v. Kaplan*, 554 F.2d 577, 579 (3d Cir. 1977) (the "rule of *Brady v. Maryland* is founded on the constitutional requirement of a fair trial . . . It is not a rule of discovery."). In reaching this

conclusion, the Fifth Circuit looked to this Court's discussion in *United States vs. Bagley* when this Court noted that:

> [U]nless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. . . . But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's *right to a fair trial*.

Bagley, 473 U.S. at 675–76 (emphasis added) (quoting *United States v. Agurs*, 427 U.S. 97, 108 (1976)).

Thus, "[b]ecause a *Brady* violation is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt, it follows that the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation." *Matthew*, 201 F.3d at 361–62.

3. The minority of circuits failing to hold *Brady* as a trial right fail to acknowledge the purpose of plea agreements is to avoid a trial

Petitioner will likely point this Court to arguments put forward by other circuits, specifically the Seventh, Ninth, and Tenth, of a possible distinction noted by this Court in *Ruiz* between impeachment and exculpatory evidence in the guilty plea context. See *McCann v. Mangialardi*, 337 F.3d 782 (7th Cir. 2003) (holding that Ruiz "strongly suggests" that the government is required to disclose material exculpatory information prior to a guilty plea.); *Smith v. Baldwin*, 510 F.3d 1127 (9th Cir. 2007) (illustrating how the Ninth Circuit considers preplea disclosure claims without explicitly distinguishing impeachment and exculpatory evidence); *United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005) (holding that *Ruiz* indicated that "impeachment evidence differs from exculpatory evidence" because it is not critical information of which a defendant must be aware before he pleads guilty). One district court has also joined these circuits. See *United States v. Nelson*, 979 F. Supp. 2d 123, 130 (D.D.C. 2013). As a result,

these courts have held that prosecutors are required under *Brady* to turn over exculpatory evidence during the pretrial phase.

By extending *Brady* to a pretrial right, however, these circuits cast aside the purpose of plea agreements. As Judge Ho of the Fifth Circuit noted, the "entire purpose of plea bargains, of course, is to avoid the need for trial altogether," therefore, "[e]xtending *Brady* to the plea bargaining phase . . . contradicts the established understanding of *Brady* as a trial right." *Alvarez*, 904 F.3d at 399 (Ho, J., concurring). Indeed, at least one member of this Court has explicitly stated as such: "The principle supporting *Brady* was 'avoidance of an unfair trial to the accused.' That concern is not implicated at the plea stage." *Ruiz*, 536 U.S. at 634 (Thomas, J., concurring) (citation omitted).

As is made evident from this Court's language in *Ruiz*, and from the First, Second, Fourth, and Fifth Circuits' analyses of *Ruiz*, *Brady* stands for the right to a *fair trial*. It does not extend to create any obligations in the pretrial setting. Petitioner will likely claim the opposite, that *Ruiz* stands for the notion that impeachment evidence and exculpatory evidence are treated differently, and *Brady* applies to exculpatory evidence in a pretrial setting.

C. LEGITIMATIZING PETITIONER'S ARGUMENT WILL LIKELY LEAD TO UNINTENDED CONSEQUENCES ON THE CRIMINAL JUSTICE SYSTEM AS A WHOLE

1. Current federal guidelines already accomplish much of what Petitioner is seeking while maintaining the flexibility federal prosecutors need

Starting in 2006, the United States, realizing that it can be difficult for prosecutors to accurately address the materiality of evidence before a trial, has instructed its prosecutors to read the requirements of *Brady* broadly and to err on the side of caution regarding disclosure. United States Attorneys' Manual (USAM) § 9-5.001(B)(1). This policy instructs prosecutors to disclose information beyond the "material" to guilt standard as articulated by this Court in *Kyles* and

Strickler. See *Strickler v. Greene*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). This policy further instructs prosecutors to (1) err on the side of disclosing exculpatory and impeaching evidence; (2) to disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime; and (3) requires disclosure of exculpatory information "reasonably promptly after it is discovered." USAM § 9-5.001(B), (C), (D)(1).

2. Transforming *Brady* into pretrial right would hamper the ability of prosecutors to effectively and fairly prosecute the accused

If Petitioner's theory of *Brady* and its potential application in the pretrial stage is legitimatized by this Court, then unforeseen consequences will likely occur: most notably, the diminishment of rights afforded to the accused under the Constitution.

First, transforming *Brady* into a pretrial right would greatly hamper the quick resolution of criminal cases through guilty pleas. *See Santobello v. New York*, 404 U.S. 257, 260 (1971) (plea bargaining is "an essential component of the administration of justice"). Such pleas "usually rest . . . on a defendant's profession of guilt in open court and are indispensable in the operation of the modern criminal justice system." *United States v. Dominguez Benitez*, 542 U.S. 74, 82–83 (2004).

Situations will arise in which it is clear that a defendant wishes to plead, however, he government would have to search the files of all members of the prosecution team for potentially exculpatory material and assess whether the material it uncovers, either individually or collectively, would be reasonably likely to lead the defendant to reject a plea and go to trial. This burden would be significant. Moreover, in a situation where Petitioner's theory prevails, defendants engaged in plea negotiations could reasonably be expected to raise more disputes

regarding disclosure by the government. Thus, lengthening the plea process and ultimately reducing the number of pleas.

3. Transforming *Brady* into a pretrial right would remove an important bargaining chip the criminally accused possess when negotiating plea agreements

Second, by allowing the accused to waive certain rights, it allows them greater opportunity to maximize the value of those rights. For instance, the accused can often exchange it for something else that is even more valuable. As this Court once stated:

> When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, *to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.*

Adams v. United States ex rel. McCann, 317 U.S. 269, 280 (1942) (emphasis added).

Moreover, the power to waive certain rights often emboldens the accused with a significant bargaining chip in plea negotiations. Prosecutors do not have infinite time and resources to devote to every case. Thus, prosecutors have a natural incentive to offer plea deals with lower penalties than what the accused might receive from a trial. The opposite is also true, "giving prosecutors 'a reduced incentive to bargain' will accrue 'to the detriment of the many defendants for whom plea bargaining offers the only hope for ameliorating the consequences to them of a serious criminal charge.'" *Alvarez*, 904 F.3d at 401 (Ho, J., concurring) (quoting *Blackledge v. Perry*, 417 U.S. 21, 37 (1974) (Rehnquist, J., dissenting)). Indeed, "Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

These principles should also apply to *Brady*. A criminal defendant who waives his *Brady* rights relieves the prosecutorial team of burdens, making the potential waiving of *Brady* rights a considerable bargaining chip. Converting *Brady* into a requirement will remove this bargaining

chip entirely. If defendants have less to offer during plea negotiations, then prosecutors will likely be less willing to offer favorable deals or any deal at all. Either result leaves the criminally accused if a far worse position.

4. If the rights associated with *Brady* are to be changed, it is better suited for the legislative body to do so

Lastly, any reform that Petitioner argues for is better suited for the legislative body to address. As Judge Ho notes, if such reform is to be made, then "it must be accomplished through one of the mechanisms established by our Founders, such as Article V of the Constitution, or through the proper exercise of legislative powers vested in Congress and in the several states." *Alvarez*, 904 F.3d at 401–02) (Ho, J., concurring); *Cf. Brady*, 373 U.S. at 92 (separate opinion of White, J.) ("I would leave this task, at least for now, to the rulemaking or legislative process after full consideration by legislators, bench, and bar.").

II. Even if petitioner did not waive his *Brady* right, a *Brady* Claim is still unavailable because Petitioner or his counsel could have, with reasonable diligence, discovered the material, exculpatory information.

A. A DUE DILIGENCE REQUIREMENT WITHIN THE SUPPRESSION ELEMENT OF THE *BRADY* TEST IS AN APPROPRIATE METRIC UPON WHICH TO BASE IT

In *Brady*, this Court "emphasized that the fundamental principal at stake in the suppression of potentially exculpatory evidence is the 'avoidance of an unfair trial to the accused.'" *Walden v. City of Chi.*, 755 F. Supp. 2d 942, 963 (N.D. Ill. 2010) (quoting *Brady*, 373 U.S. at 87). Further, "[T]hree components or essential elements of a *Brady* prosecutorial misconduct claim: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; *that evidence must have been suppressed by the State, either willfully or inadvertently*; and prejudice must have ensued." *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (quotation removed) (citation removed) (emphasis added).

This Court, however, has left unanswered "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 discovered, how to obtain them." *Strickler v. Greene*, 527 U.S. 263, 288 n.33 (1999). In answering this question, a majority of circuits have condoned a "reasonable diligence" requirement within the suppression element: essentially, whether the criminal defendant could have, with reasonable diligence, discovered the evidence. Because this standard is the best way to go about investigating prosecutorial misconduct through a suppression claim, this Court should legitimize it.

1. As a majority of circuits have held, a reasonable diligence standard is an appropriate extension of prior precedent set by this Court

The evolution of requiring a criminal defendant to use due diligence is a natural extension of this Court's prior holdings. In *Kyles* and *Agurs*, this Court stated that prosecutors have a duty to disclose evidence that is "unknown to the defense." See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more."); *United States v. Agurs*, 427 U.S. 97, 103 (1976) ("The rule of *Brady v. Maryland*, 373 U.S. 83, arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense."). Interpreting these two cases, seven of the circuits have correctly "interpreted the words to mean that no *Brady* violation occurs if the defense knew or should have known about the evidence at the time of trial." Kathryn Brautigam, note, *Brady Violations and the Due Diligence Rule in Montana*, 78 MONT. L. REV. 313, 321 (2017) (quotation omitted).

The First Circuit, for example, has held that "[e]vidence is not suppressed" within the meaning of *Brady* "if the defendant either knew, or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." *Ellsworth v. Warden*, 333 F.3d 1,

6 (1st Cir. 2003) (en banc). Similarly, the Fourth Circuit held that "when exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *United States v. Parker*, 790 F.3d 550, 561–62 (4th Cir. 2015) (quotation marks omitted).

Indeed, the Second, Fifth, Seventh, Eighth, and Eleventh Circuits have all come to a similar conclusion to varying degrees. See *United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002) ("The *Brady* rule does not apply to evidence not in the possession of the government that a defendant would have been able to discover himself through reasonable diligence."); *United States v. Deavault*, 190 F.3d 926, 929 (8th Cir. 1999) ("Evidence is not suppressed if the defendant has access to the evidence prior to trial by the exercise of reasonable diligence."); *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988) (finding no *Brady* violation when the defendant "knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence."); *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986) (stating "the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources.").

The logic behind this requirement makes sense. For example, in *United States v. Tadros*, a criminal defendant was found guilty of mail and wire fraud. *United States v. Tadros*, 310 F.3d 999, 1000 (7th Cir. 2002). At issue on appeal was the government's nondisclosure of tape recordings of telephone conversations between the defendant and his insurance company, which he was allegedly defrauding. *Id.* at 1005. The criminal defendant brought a *Brady* claim against the government for failing to turn over the audiotapes. *Id.* The Seventh Circuit disagreed. *Id.* In its opinion, the court stated that the "government did not obtain any of these recordings for itself and did not have the duty to gather the tapes and tender them to the defendant." *Id.* Further, that "*Brady* prohibits suppression of evidence, it does not require the government to act as a private investigator

and valet for the defendant, gathering evidence and delivering it to opposing counsel." *Id.* Lastly, the court highlighted how the criminal defendant "offered no explanation for failing to procure the tapes himself and has never argued that he was somehow unable to obtain those recordings on his own." *Id.*

The case at hand is strikingly similar. In *Tadros*, the criminal defendant was put on notice of the possibility of exculpatory evidence during the pretrial period when the government "tendered to [defendant] a letter from a Prudential employee to the Federal Bureau of Investigation which disclosed, among other things, that Prudential had begun recording conversations with its insureds in late 1995." *Id.* Similarly, Petitioner was put on notice of the possible existence of video footage when he was told that the bank had surveillance cameras, the footage from which could be retrieved even after as long as seven months from its creation. (R. at 4). Further, like the defendant in *Tadros*, Petitioner made no diligent effort to seek out the video. Petitioner never made *specific* mention of the possibility of the video footage from the bank to his attorney while speaking to him on the phone. (R. at 4). Further, the government never had sole possession of the video footage, as is evident by Petitioner's attorney going directly to the bank and obtaining a copy six months after Petitioner's conviction. (R. at 5).

As the Seventh Circuit surmised, it would be irrational to validate a criminal defendant's *Brady* claim for suppression of evidence when the evidence was clearly available, likely just a phone call away. It would be different if the prosecution acted in good faith and purposely misled, withheld, or destroyed exculpatory evidence. On the contrary, it would hard harm the government's ability to prosecute efficiently if a sentence could be vacated due to a criminal defendant's sheer ineptitude in seeking evidence. As such, this Court should validate the holdings of the majority of circuits, and give credence to the reasonable diligence requirement.

B. PETITIONER'S EXPANSIVE THEORY OF THE OBLIGATIONS UNDER *BRADY* IS IN DIRECT CONFLICT WITH THE ADVERSARIAL NATURE OF THE CRIMINAL JUSTICE SYSTEM

The rationale behind this "reasonable diligence" requirement is to ensure the balance of the criminal justice system. As the Fourth Circuit explained, being "[a]ware of the existence of potentially exculpatory information, a defendant cannot sit idly by in the hopes that the prosecution will discover and disclose that information and, when the prosecution does not do so, seize upon the prosecution's conduct as grounds for habeas relief." *Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir. 1994). Moreover, the Fourth Circuit's interpretation is consistent with the purpose of the *Brady* rule "not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675.

If Petitioner's theory prevails, then prosecutors will, in essence, become the criminal defendant's private investigator. This will, in turn, erode the foundation of the adversarial process that this country's criminal justice system is founded upon. Both sides' discovery process will benefit the criminal defendant, while the prosecution will only be able to rely on itself. Indeed, "[s]uch a development would transform the nature of the prosecutorial office. Instead of preparing his case as an adversary—selecting and emphasizing helpful facts while deliberately passing by those less advantageous—the prosecutor would instead resemble the neutral magistrate in the inquisitorial system." Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1144 (1982).

One case, *Levin v. Clark*, highlights the consequences of changing the adversarial model. In *Levin*, "the prosecutor did not disclose clearly helpful, but arguably tangential, evidence that he learned from a witness whom neither side called. The defense lawyer had interviewed the witness before trial but had not elicited the helpful point." *Id.* Ultimately, a majority of the circuit court found this to be a *Brady* violation. *Levin v. Clark*, 408 F.2d 1209, 1215 (D.C. Cir. 1967). In his

dissent, Chief Justice, then judge, Burger criticized the majority for creating a situation where the prosecutor must say: "Now look, Mr. Defense Counsel, we interviewed [the witness] and here is what he said to us . . . . We want to make sure he gives you the same information he gave us." *Id.* at 1217 (Burger, J., dissenting).

Scenarios such as the one Chief Justice Burger describe do not align with the American criminal justice system. As the Fifth Circuit remarked: "Truth, justice, and the American way do not . . . require the Government to discover and develop the defendant's entire defense." *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980); see also *United States v. Kopituk*, 690 F.2d 1289, 1340 (11th Cir. 1982) (Agreeing with the Fifth Circuit's conclusion in *Brown*).

Furthermore, a criminal defendant can always raise an ineffective assistance of counsel claim on appeal or in postconviction proceedings, if the defense counsel is not diligent enough. See *Tice v. Wilson*, 425 F. Supp. 2d 676, 696 (W.D. Pa. 2006) (finding no *Brady* violation because defense counsel exemplified a lack of diligence by failing to review the defendant's own records and, furthermore, that the defendant's "ineffective assistance claim [was] premised upon the assertion that trial counsel could easily have obtained those records had he attempted to do so."); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 429 n.215 (1984) (discussing how counsel's failure to be diligent may be grounds for an ineffective assistance of counsel claim).

Undeniably the facts in the record demonstrate that Petitioner could have raised this claim. Petitioner told his counsel of the possibility of a videotape, but counsel did not follow through completely. (*See* R. at 4). Moreover, the private investigator hired by Petitioner's counsel simply failed to follow through with talking to the bank about the possibility of a videotape. (R. at 5). Not because Respondent suppressed the knowledge of a videotape, but likely because the private

investigator was lazy. (*See* R. at 5). Thus, the Court does not need to morph *Brady* into a claim that it does not fit, because an appropriate claim already existed for Petitioner. Notwithstanding the fact that Petitioner chose not to pursue it.

C. THIS COURT'S DECISION IN *BANKS V. DRETKE* DOES NOT CHANGE THIS ANALYSIS

In response to the reasonable diligence requirement, Petitioner will likely argue that it conflicts with recent decisions made by this Court—specifically, *Banks v. Dretke*. The Court, however, should reject such an argument.

In *Banks*, the government called a key witness who was a paid witness. *Banks v. Dretke*, 540 U.S. 668, 669 (2004). The government, however, did not disclose this information as it argued that it was the defense's duty to make a disclosure motion requesting information about whether government witnesses were paid informants. *Id.* Despite being in sole possession of exculpatory evidence, the government, as this Court wrote, had represented that it had "held nothing back" in its discovery responses. *Id.* at 698. In rejecting the government's argument, this Court stated that "[i]t was not incumbent on Banks" to independently seek the information after the government had represented that it was being forthcoming to discovery motions. *Id.* Further explaining 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.

Nevertheless, any attempt to link *Banks* and the present case would be too weak to be sufficient. First, unlike in *Banks*, the information in question here was not in the sole possession of the government. The video tape was always in the possession of the bank, the government never held onto it exclusively. Second, unlike the federal prosecutors in *Banks*, none of the government's conduct could have led Petitioner to believe that everything in its files had been disclosed. At no point did Respondent "hide" the evidence from Petitioner. The evidence was always out in the open, for both sides to discover.

Consequently, *Banks* and the present action stand for two distinct scenarios. *Banks* is only applicable when the prosecutors purposely "hide" evidence from the criminal defendant, which clearly did not happen to Petitioner. Therefore, this Court should reject any arguments analogizing this case to *Banks*.

CONCLUSION

For the foregoing reasons, Respondent United States of America respectfully requests this Honorable Court to ***affirm*** the decision of the United States Court of Appeals for the Thirteenth Circuit affirming the district court's decision to deny Petitioner's motion under 28 U.S.C. § 2255.

Dated: January 12, 2020

Respectfully submitted,

TEAM 751
ATTORNEYS FOR RESPONDENT