No. 14-

IN THE
Supreme Court of the United States

GEORGE GEORGIOU,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether prosecutors are permitted to withhold materials covered by *Brady* v. *Maryland*, 373 U.S. 83 (1963), when it is possible that the defendant may have been able to discover the materials through another source.

2. Whether a court of appeals may conclude that withheld evidence was not material, consistent with *Brady* and its progeny, without viewing the evidence cumulatively and in light of the entire record.

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George Georgiou respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's opinion is reported at 777 F.3d 125. Pet. App. 1a-39a. The District Court's memorandum and order denying Georgiou's motion for a new trial are unreported. *Id.* at 40a-57a.[1] The

[1] The District Court's November 9, 2010 memorandum and order were filed under seal, but are publicly available in the Third Circuit's record at 1 C.A. J.A. 50a-51a and 2 C.A. J.A. 52a-65a.

District Court's memorandum and order denying Georgiou's motion for reconsideration and motion to compel the disclosure of evidence are unreported but available at 2011 WL 6150596 and 2011 WL 6153629, respectively. Pet. App. 58a-120a.

JURISDICTION

The Third Circuit entered judgment on January 20, 2015. Pet. App. 1a. On February 25, 2015, the Third Circuit denied a timely petition for panel rehearing and rehearing en banc. *Id.* at 121a-122a. On May 4, 2015, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including June 25, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

INTRODUCTION

This petition concerns the continuing viability of this Court's landmark decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny. It raises two important questions about how *Brady* claims are analyzed by lower courts. The first question relates to who bears the burden to discover exculpatory and impeachment evidence; the second relates to the proper standard for analyzing whether withheld evidence was material to the defendant's case.

The first question is whether a criminal defendant may be required to seek out other sources for exculpatory and impeachment materials that are in the possession of the government. One might have thought that *Brady* itself, which speaks to the obli-

gations of prosecutors, answered this question. And indeed that was the law for half a century: courts charged the prosecution with the responsibility of disclosing to the defense any exculpatory evidence. Unfortunately, some courts of appeals—including the Third Circuit in this case—have eroded that due process protection by shifting the burden of discovering exculpatory or impeachment evidence to the defense.

This Court should grant certiorari to review this question for three reasons. *First*, nearly every court of appeals has addressed the question, and they are deeply divided. In this case, the Third Circuit held that impeachment evidence is not suppressed where the material was "accessible" to the defendant through other channels. Six federal courts of appeals have adopted a similar rule, while four circuits have rejected it. State courts are also divided. This Court should resolve this split of authority.

Second, the Third Circuit's decision is wrong. This Court has never endorsed a rule excusing *Brady* violations when the defendant could have gained access to the evidence from other sources. This Court should reiterate that *Brady*'s protections apply to all defendants, regardless of their diligence—or lack thereof—in seeking out exculpatory or impeachment information from other sources.

Third, this question presents a frequently recurring issue of national importance. When exculpatory or impeachment evidence is withheld, it can significantly impede a defendant's ability to mount a vigorous defense. And given the frequency of alleged *Brady* violations, this issue threatens to affect many defendants each year. *See* Walter Pavlo, *Govt Prose-*

cutors Are Stingy At Sharing Information, Just Ask George Georgiou, Forbes (Mar. 11, 2015). Finally, excusing prosecutorial misconduct and blaming defendants may undermine public confidence in the criminal justice system.

The second question is sufficiently related to the due diligence question that this Court should review it as well. It addresses how courts must review withheld evidence to determine if it would have been material to the defendant's case. In this case, the Third Circuit's conclusory decision on materiality is rife with errors: it conflated favorability and materiality, two separate components of the *Brady* analysis; it evaluated materiality with respect to each piece of evidence, rather than the cumulative effect of all the withheld evidence; and it relied on the quantum of remaining evidence instead of evaluating whether the undisclosed evidence could have affected the verdict. Viewed properly, the withheld evidence in this case was material to the defendant's case.

For these reasons, certiorari should be granted.

STATEMENT

George Georgiou is a venture capitalist who helps finance high-risk, start-up companies. In 2009, the U.S. Government charged Georgiou with securities fraud, wire fraud, and conspiracy to commit such fraud. *See* 15 U.S.C. §§ 78j(b), 78ff; 18 U.S.C. §§ 2, 371, 1343, 1349; Pet. App. 2a. The charges arose out of an alleged scheme to artificially inflate the prices of several stocks on the over-the-counter securities market. Indictment at 1-2, No. 2:09-cr-88 (E.D. Pa. Feb. 12, 2009), ECF No. 42. According to the indictment, Georgiou and his co-conspirators caused the stocks' prices to rise by engaging in manipulative

trading. *Id.* at 5-7. They then supposedly profited from their scheme by selling their shares at the inflated prices or using their shares as collateral to obtain large loans. *Id.* at 5.

Each of the charges required the Government to prove beyond a reasonable doubt that Georgiou acted with criminal intent. For the jury to convict Georgiou of securities fraud, for example, the Government had to prove that he "acted wil[l]fully, knowingly and with the intent to defraud." Tr. of Jury Trial, Day 13 (Feb. 12, 2010), at 28, No. 2:09-cr-88 (E.D. Pa. Mar. 29, 2010), ECF No. 183. To obtain a conviction on the wire fraud charges, the Government had to establish the same "intent to defraud." *Id.* at 35-36. And with respect to the conspiracy charge, the Government had to prove that Georgiou "joined the conspiracy knowing of its objectives and intending to help further or achieve those objectives." *Id.* at 20-21.

Trial began in January 2010. The Government's star witness was Kevin Waltzer, an alleged co-conspirator. Waltzer was the only witness who could provide what the Government described as "an insider[']s view into this stock ring by one of its participants." Tr. of Jury Trial, Day 1 (Jan. 25, 2010), at 7, No. 2:09-cr-88 (E.D. Pa. Mar. 29, 2010), ECF No. 171. And during the trial, Waltzer testified directly to Georgiou's mens rea, telling the jury that Georgiou "basically" admitted to him that Georgiou "kn[ew] that the public is going to get fleeced." Tr. of Jury Trial, Day 3 (Jan. 27, 2010), at 138-139, No. 2:09-cr-88 (E.D. Pa. Mar. 29, 2010), ECF No. 173. Based on Waltzer's testimony, a jury convicted Georgiou of all charges. Pet. App. 7a-8a.

Following trial, Georgiou obtained critical material from Waltzer's own criminal proceedings. Waltzer himself had been charged with wire fraud and other federal crimes. Pet. App. 4a n.4. And in early 2009—more than a year before the start of Georgiou's trial—a pretrial services officer prepared a report regarding whether Waltzer should be released on bail. Pet. App. 81a. The bail report addressed, among other things, Waltzer's mental health history. *Id.* at 22a. The report stated that Waltzer had "been diagnosed in the past with Anxiety Disorder, Panic Disorder and Substance Abuse Disorder." *Id.* at 24a. And it noted that he had been taking Paxil for the last ten years for his anxiety. *Id.* at 84a. Georgiou obtained a copy of this bail report for the first time after the end of his trial.

Georgiou also obtained, for the first time following his trial, a copy of the transcript of Waltzer's arraignment and guilty plea hearing. During that hearing, in the presence of an assistant U.S. attorney, Waltzer acknowledged "see[ing] a psychiatrist, psychologist or mental health provider * * * in connection with depression and anxiety." Tr. of Arraignment & Guilty Plea at 7, No. 2:08-cr-552 (E.D. Pa. Aug. 26, 2010), ECF No. 63. Waltzer acknowledged taking "Paxil, 30 milligrams per day, for combination of depression and anxiety."[2] *Id.*; *see also*

[2] Georgiou's defense team obtained two additional key pieces of evidence from Waltzer's sentencing which occurred approximately a month after Georgiou's trial concluded: first, a report by Dr. Luciano Lizzi, who had treated Waltzer for years and concluded that he suffered from, among other things, bipolar disorder and substance abuse problems. Pet. App. 60a-61a. Second, the defense learned that Waltzer

Pet. App. 24a.[3] The judge acknowledged the bail report and noted that Waltzer would be subject to ongoing mental health and/or substance abuse treatment in the period leading up to his testimony in Georgiou's case. *See* Tr. of Arraignment & Guilty Plea at 39, No. 2:08-cr-552 (E.D. Pa. Apr. 1, 2010), ECF No. 47 (recounting the recommendation from pretrial services that Waltzer "be subject to drug treatment or testing if Pretrial Services deems that necessary, same with mental health treatment").

The Government had failed to disclose either the bail report or the plea transcript prior to Georgiou's trial, even though Georgiou had requested "any and

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admitted that he was a drug addict, abused cocaine, and suffered from bipolar disorder during the conspiracy. Tr. of Sentencing at 4, 6, 13, No. 2:08-cr-552 (E.D. Pa. Aug. 26, 2010), ECF No. 55. Because Waltzer's sentencing occurred after Georgiou's trial, Georgiou does not contend that the Government possessed either of these documents prior to Georgiou's trial, but if Georgiou had known of the bail report and plea transcript, defense counsel likely would have further investigated these matters.

[3] Psychotropic drugs like Paxil—*i.e.*, drugs affecting the mental state—can cause memory loss, among other side effects. *See, e.g.*, Food & Drug Admin., Paxil (Paroxetine Hydrochloride) Prescribing Information at 17 (noting that Paxil can cause "difficulty concentrating, memory impairment, [and] confusion"), *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2014/020031s071,020710s035lbl.pdf; Jeroen Schmitt, *Non-Serotonergic Pharmacological Profiles and Associated Cognitive Effects of Serotonin Reuptake Inhibitors*, Journal of Psychopharmacology (2001) (reporting results of a study investigating the causes of Paxil's negative effects on long-term memory).

all evidence" that "a government witness or prospective government witness * * * is or was suffering from any mental disability or emotional disturbance." Letter from Defense Counsel to U.S. Attorney's Office at 5 (Mar. 25, 2009), No. 2:09-cr-88 (E.D. Pa. Jan. 14, 2010), ECF No. 104-1. Georgiou had also requested any "[i]nformation concerning Mr. Waltzer's * * * current or past psychiatric treatment or counseling." Letter from Defense Counsel to U.S. Attorney's Office at 11 (June 2, 2009), No. 2:09-cr-88 (E.D. Pa. June 2, 2009), ECF No. 104-1.

Indeed, the record is replete with defense requests for statements by Waltzer and evidence affecting his credibility. Georgiou had requested "[a]ll relevant statements * * * made by any person who is a witness * * * which was given or made * * * in connection with an investigation or proceeding other than this case" and "[a]ny and all written or oral statements or utterances * * * made to the prosecution * * * which otherwise reflect upon the credibility, competency, bias or motive of government witnesses." Letter from Defense Counsel to U.S. Attorney's Office at 4 (Mar. 25, 2009). The defense team had also asked for "[a]ll information concerning Mr. Waltzer's custody status and specifically negotiations concerning his status on release under the Bail Reform Act." Letter from Defense Counsel to U.S. Attorney's Office at 11 (June 2, 2009).

Georgiou moved for a new trial, arguing that the evidence was material to his defense and that the Government's suppression of it violated *Brady*. *See* Mem. of Law in Support of George Georgiou's Mot. for a New Trial Pursuant to Rule 33 of the FRCP and *Brady* v. *Maryland*, No. 2:09-cr-88 (E.D. Pa. Sept. 20, 2010), ECF No. 208; Mot. To Compel Disclosure of

Evidence at 5-6, No. 2:09-cr-88 (E.D. Pa. Apr. 15, 2011), ECF No. 245. In response, the Government conceded that the bail report had been "available for the government's inspection." Pet. App. 82a. The Government also admitted that the information from the plea hearing had been "in its possession." *Id.* at 47a.

The District Court nevertheless denied Georgiou's post-trial motions, concluding that there was no *Brady* violation. *Id.* at 48a, 84a-85a. The court ordered Georgiou to serve 300 months in prison and pay over $55 million in restitution. *Id.* at 8a.

The Third Circuit affirmed. The court acknowledged that "[u]nder *Brady*, the Government is required, upon request, to produce evidence favorable to an accused," but held that the Government has no such obligation where the evidence is accessible to the defendant. *Id.* at 21a, 24a-25a (internal quotation marks and brackets omitted). According to the court, Georgiou could have obtained both the bail report and the plea transcript with reasonable diligence before his trial. *Id.* at 25a.

In rejecting Georgiou's *Brady* claim, the Third Circuit also concluded that the "evidence concerning Waltzer's mental health is neither favorable to [the defense] nor material." *Id.* The court opined that the mental health evidence was "not clearly relevant" to Waltzer's credibility. *Id.* It noted that "all agreed" at the time of his plea hearing that "he was competent to plead guilty." *Id.* at 26a. And it pointed to the "strength of the evidence against [Georgiou]." *Id*.

The Third Circuit denied rehearing en banc, and this petition followed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER *BRADY* IMPOSES A DUE DILIGENCE REQUIREMENT.

The Third Circuit's rejection of Georgiou's *Brady* claim raises the important question whether courts may graft onto *Brady* a requirement that the defendant must prove that he could not have discovered the suppressed evidence through his own efforts. This burden is in addition to the three components of a successful *Brady* claim: "The evidence at issue must be favorable to the defendant, 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." *Strickler* v. *Greene*, 527 U.S. 263, 281-82 (1999).

Under the Third Circuit's due diligence rule, evidence is deemed not suppressed if the defendant knew of, or with reasonable diligence could have discovered, the exculpatory or impeaching evidence. Pet. App. 25a (citing *United States* v. *Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991)). In other words, prosecutors were free to withhold Waltzer's bail report and the minutes that explained Waltzer's history of mental illness and treatment simply because that information was also "accessible" to Georgiou. *Id.* at 24a-25a. Relying on the Eighth Circuit's reasoning in *United States* v. *Jones*, 34 F.3d 596 (8th Cir. 1994), the panel concluded that Georgiou "'was in a position of parity with the government as far as access to this material,' * * * and thus, 'the transcript [] was as available to [the defendant] as it was to the

Government.'" Pet. App. 25a (citations omitted). Because Georgiou knew that Waltzer was "the main witness against him" and had pleaded guilty, the Third Circuit concluded that Georgiou could have obtained a copy of the plea transcript with "minimal" diligence. *Id*. For the same reasons, the panel held that the bail report "was not hidden from" Georgiou, and thus that neither piece of evidence was suppressed. *Id*.

The Third Circuit's ruling conflicts with other courts of appeals, state courts of last resort, and the principles underlying *Brady* and its progeny. Because the constitutional guarantee of a fair trial should not vary based on where a defendant is prosecuted, this Court should grant review to resolve this important question.

A. Federal And State Courts Are Deeply Divided Over The Question Presented.

1. The federal courts of appeals are divided over whether prosecutors are permitted to withhold materials covered by *Brady* when it is possible that the defendant may have been able to discover the materials through another source. The Third Circuit is aligned with the First, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits in recognizing a "due diligence" exception to *Brady*. In the Fourth Circuit, for example, defendants must demonstrate that the evidence was "known to the government but not the defendant" and did not "lie in a source where a reasonable defendant would have looked." *United States* v. *Catone*, 769 F.3d 866, 872 (4th Cir. 2014) (internal quotation marks omitted) (holding information contained in Department of Labor files available on request not *Brady* material). *See also,*

e.g., *United States* v. *Cruz-Feliciano,* 786 F.3d 78, 87 (1st Cir. 2015) ("*Brady* does not require the government to turn over information which, with any reasonable diligence, the defendant can obtain himself." (internal quotation marks omitted)); *United States* v. *Bernard*, 762 F.3d 467, 480 (5th Cir. 2014) ("A petitioner's *Brady* claim fails if the suppressed evidence was discoverable through reasonable due diligence." (internal quotation marks omitted)); *Petty* v. *City of Chicago*, 754 F.3d 416, 423 (7th Cir. 2014) ("To establish that evidence was suppressed, a plaintiff must demonstrate that: (1) the state failed to disclose known evidence before it was too late for [a defendant] to make use of the evidence; and (2) the evidence was not otherwise available to [a defendant] through the exercise of reasonable diligence." (internal quotation marks omitted)); *United States* v. *Sigillito*, 759 F.3d 913, 929 (8th Cir. 2014) ("One of the limits of *Brady* is that it does not cover information available from other sources * * * ." (internal quotation marks omitted)); *Wright* v. *Sec'y, Fla. Dep't of Corr.*, 761 F.3d 1256, 1278 (11th Cir. 2014) (no *Brady* violation where "the defendant has equal access to the evidence").

On the other side of the split are those circuits that reject the due diligence rule: the Second, Sixth, Ninth, and District of Columbia Circuits. These courts of appeals place the *Brady* duty on prosecutors alone, not on defendants. The diligence or negligence of the defendant in attempting to locate *Brady* material from other sources does not alter the scope of the prosecutor's duty. The Second Circuit, for example, recently rejected arguments that defendants are required to "exercise 'due diligence' to obtain exculpatory evidence" as "contraven[ing]

clearly established federal law as determined by the Supreme Court in *Brady* and its progeny." *Lewis* v. *Conn. Comm'r of Corr.*, __ F.3d __, 2015 WL 3823868, at *4 (2d Cir. June 22, 2015), *superseding and amending* 768 F.3d 176 (2015). The court of appeals explained that the Supreme Court has never placed such a burden on defendants, and the Connecticut habeas court was not free to limit *Brady* in this way.[4] *Id.* at *9.

The Sixth Circuit recently changed course, interpreting this Court's reversal in *Banks* v. *Dretke,* 540 U.S. 668 (2004), as a "rebuke[]" "for relying on such a due diligence requirement to undermine the *Brady* rule." *United States* v. *Tavera*, 719 F.3d 705, 711 (6th Cir. 2013). The Sixth Circuit held that *Banks* "should have ended [the] practice" of "avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule."[5] *Id.* at 712. Instead, the Sixth Circuit has emphasized that "*Brady* requires the State to turn over *all* material

[4] The Second Circuit distinguished cases where *Brady* evidence was deemed not suppressed because the "defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *Lewis*, 2015 WL 3823868, at *9 (quoting *DiSimone* v. *Phillips*, 461 F.3d 181, 197 (2d Cir. 2006)). Those cases, the court explained, are not implicated by its rejection of the due diligence rule because they "speak to facts already within the defendant's purview, not those that might be unearthed." *Id*.

[5] Prior to *Tavera*, the Sixth Circuit applied a harsh version of the due diligence rule, denying *Brady* protections to any material "not wholly within the control of the prosecution." *Coe* v. *Bell*, 161 F.3d 320, 344 (6th Cir. 1998).

exculpatory and impeachment evidence to the defense," not "*some* evidence, on the assumption that defense counsel will find the cookie from a trail of crumbs." *Barton* v. *Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 468 (6th Cir. 2015) (granting conditional habeas writ due to *Brady* error).

The Ninth Circuit agrees that the due diligence requirement is unconstitutional. In *Amado* v. *Gonzalez*, it granted habeas relief to a defendant whose *Brady* claim was denied under the due diligence rule. 758 F.3d 1119, 1137 (9th Cir. 2014) (holding that the California Court of Appeal's "requirement of due diligence was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" (quoting 28 U.S.C. § 2254(d))). Examining this Court's *Brady* jurisprudence, the Ninth Circuit concluded that defense counsel is entitled to "rely on the prosecutor's obligation to produce that which *Brady* and *Giglio* require him to produce" whether or not defense "counsel could have found the information himself." *Id.* at 1136-37.

Finally, the District of Columbia Circuit rejected the government's argument that it "did not breach a disclosure obligation" when the undisclosed "information was otherwise available through 'reasonable pre-trial preparation by the defense.'" *In re Sealed Case No. 99-3096 (*Brady *Obligations)*, 185 F.3d 887, 896 (D.C. Cir. 1999) (quoting *Xydas* v. *United States*, 445 F.2d 660, 668 (D.C. Cir. 1971)). The court of appeals reasoned that "the appropriate way for defense counsel to obtain [*Brady*] information was to make a *Brady* request of the prosecutor." *Id.* at 897 (citing *United States* v. *Iverson*, 648 F.2d 737, 739 (D.C. Cir. 1981) (holding that "the primary obligation

for the disclosure of matters which are essentially in the prosecutorial domain lies with the government")).

2. State courts of last resort are also divided. Many states have adopted a due diligence rule that mirrors the Third Circuit's. Connecticut, for example, applies the rule that evidence is not considered to have been suppressed when it was " 'as available to the defendant as it was to the state, or could have been discovered through reasonably diligent research.' " *State* v. *Giovanni P.*, 110 A.3d 442, 457 (Conn. App. Ct. 2015) (quoting *State* v. *Simms*, 518 A.2d 35 (Conn. 1986)). The Georgia Supreme Court agrees. *Freeman* v. *State*, 672 S.E.2d 644, 647 (Ga. 2009) (requiring the defendant to demonstrate that, in addition to the traditional *Brady* factors of suppression, favorability and materiality, he "did not possess the evidence and could not obtain it himself with reasonable diligence").

The Michigan Supreme Court, on the other hand, recently issued an express rejection of the due diligence requirement as a departure from *Brady*. *See People* v. *Chenault*, 845 N.W.2d 731 (Mich. 2014). There, the court reversed the state court of appeals, which had denied the defendant a new trial because his trial counsel had not exercised due diligence in obtaining videotapes of exculpatory interviews that cast doubt on the recollection of an eyewitness. *Chenault*, 845 N.W.2d at 734-35. Declining to follow the federal courts of appeals on which the intermediate state court had relied, the Michigan Supreme Court concluded that "[n]one of these cases * * * provides a sufficient explanation for adding a diligence requirement to the Supreme Court's three-factor *Brady* test." *Id.* at 736. *Chenault* reversed more than fifteen years of precedent in which Michi-

gan's lower courts applied a due diligence requirement under *People* v. *Lester*, 591 N.W.2d 267 (Mich. Ct. App. 1998).

Because the Third Circuit's decision reflects a clear split among the federal and state courts over whether *Brady*'s protections are conditioned on a defendant's ability to demonstrate that he exercised due diligence, this question warrants this Court's review.

B. The Third Circuit's Decision Is Wrong.

This Court should grant certiorari because the Third Circuit's decision undermines *Brady*'s animating principles. This Court has never adopted or endorsed a rule excusing *Brady* violations when the defendant could have gained access to the evidence from other sources. To the contrary, this Court's cases have repeatedly emphasized that a defendant's right to a fair trial depends on *Brady*'s disclosure requirements. *See, e.g.*, *Cone* v. *Bell*, 556 U.S. 449, 451 (2009) (describing *Brady*'s disclosure obligations as deriving from the constitutional right to a fair trial); *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995) (noting *Brady*'s role in ensuring that "justice shall be done"). The elements of a *Brady* violation—suppression, favorability to the defendant, and materiality—focus on the actions of the prosecutor and the content of the evidence. *See Strickler*, 527 U.S. at 281-82. None turns on the diligence of the defendant.

Indeed, this Court has moved away from imposing additional duties on defendants under *Brady*. In *United States* v. *Bagley*, 473 U.S. 667 (1985), for example, this Court rejected the argument that the prosecution's disclosure responsibilities are lightened when the defendant made no disclosure request.

And *Kyles* reaffirmed that "a defendant's failure to request favorable evidence d[oes] not leave the Government free of all obligation." 514 U.S. at 433. These cases show that this Court has carefully avoided placing conditions on the criminal defendant's right to *Brady* material.

Banks further confirms that this Court has placed *Brady*'s burdens squarely—and solely—on the prosecution. The question in that case was whether the defendant "should have asked to interview" witnesses who could have provided the exculpatory information the prosecution had failed to disclose. *Banks*, 540 U.S. at 688. This Court could not have rejected the state's burden-shifting arguments in stronger terms: "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 (internal quotation marks omitted).

Nor is it true that this Court's *Brady* jurisprudence suggests support for a due diligence rule. Some lower courts have pointed to language from this Court's decisions, but they have taken the language out of context. *See, e.g.*, *Mark* v. *Ault*, 498 F.3d 775, 787 n.4 (8th Cir. 2007). *United States* v. *Agurs*, for example, described *Brady* as applying to "the discovery, after trial of information which had been known to the prosecution but unknown to the defense." 427 U.S. 97, 103 (1976), *holding modified by Bagley*, 473 U.S. at 667. And *Kyles* picked up that language, explaining that "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more." *Kyles*, 514 U.S. at 437. Viewed in context, however, neither reference to evidence "un-

known to the defense" justifies the due diligence requirement. In both cases, the Court appears to have done no more than clarify that no *Brady* violation occurs where the suppressed evidence would add nothing to the case because the defense or the court already knew about it. *See Agurs*, 427 U.S. at 109 n.16 ("'This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel.'" (quoting *Giles* v. *Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring))).

C. The Question Presented Is A Frequently Recurring Issue Of National Importance.

1. The question presented has serious consequences for individual defendants insofar as the due diligence rule deprives defendants of key exculpatory evidence. This case is merely the tip of the iceberg. In *Amado*, for example, the prosecution failed to turn over the probation report on its key witness in a gang-related attack. 758 F.3d at 1127. That report, which defense counsel did not obtain until after trial, revealed that the witness was a member of a rival gang, and at the time he testified, was serving probation for a robbery conviction. *Id.* at 1127-28. Had defense counsel known these facts, he could have impeached the witness, pointing out that his membership in a rival gang and his motivation to avoid violating the terms of his probation suggested that he was biased.

The suppressed evidence in *Tavera* was also a significant deprivation for the defendant's case. There, the defendant was sentenced to 186 months' imprisonment for participating in a conspiracy to distribute methamphetamine. *Tavera*, 719 F.3d at 707. The defense argued that Tavera did not know that there were drugs hidden under the construction materials he was transporting. After trial, Tavera learned that his co-defendant had told the government during earlier plea negotiations that "Tavera had no knowledge of the drug conspiracy"—corroboration that no doubt would have changed the course of the trial if the prosecution had timely disclosed it. *Id.*

Nor are these isolated incidents: The due diligence rule impacts dozens of criminal defendants each year. *See* Kathleen Ridolfi, *et al*., *Material Indifference*: *How Courts are Impeding Fair Disclosure In Criminal Cases* 30 (2014) (stating that, during a five-year period, federal courts applied a burden-shifting rule in approximately three percent of the more than 5,000 *Brady* cases reviewed).

2. The due diligence rule also threatens to undermine public confidence in the criminal justice system. This Court has admonished prosecutors that their interest is not in winning cases, but in doing justice. *See, e.g.*, *Berger* v. *United States*, 295 U.S. 78, 88 (1935). That "special status explains * * * the basis for the prosecution's broad duty of disclosure." *Strickler*, 527 U.S. at 281. Because the prosecutor plays a "special role * * * in the search for truth," a system that places *Brady* burdens firmly on prosecutors is more likely to be fair to criminal defendants who find themselves pitted against the power and resources of the government. *Id.*; *see also* Kate

Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 175 (2012) (rejecting the argument that "the defense is equal to the prosecution in power and resources" and thus can obtain *Brady* material as easily as the government). The due diligence rule runs counter to those ideals, shielding prosecutors from the consequences of their misconduct and making it more difficult to combat the "epidemic of *Brady* violations abroad in the land." *United States* v. *Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting). When courts excuse errors and willful abuses by blaming the defendant, "[t]hat casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Brady*, 373 U.S. at 88.

These consequences are particularly grave in light of recent scandals involving prosecutorial misconduct. In 2009, *Brady* violations captured national attention when a district court learned that prosecutors had failed to turn over key exculpatory evidence in the corruption prosecution of former Alaska Senator Ted Stevens. Judge Emmet G. Sullivan ultimately appointed a special counsel to investigate the Department of Justice's conduct in the case. In a scathing 514-page report, the special counsel concluded that "[t]he *Brady* disclosure in *Stevens* was not just incomplete"—it contained demonstrably false representations. Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009, at 503, *In re Special Proceedings*, No. 1:09-mc-198 (D.D.C. Mar. 15, 2012), ECF No. 84.

The violations in Stevens's case, alongside other high-profile prosecutions plagued by *Brady* errors,

undermine public confidence that prosecutors prioritize justice over convictions. *See* Editorial, *Justice After Senator Stevens*, N.Y. Times, Mar. 18, 2012. Inconsistent rules for criminal trials should not be tolerated when, as here, the rules impact both the individual's right to a fair trial and the broader goal of a trustworthy justice system. By granting certiorari, this Court has a unique opportunity to restore public faith in prosecutions.

In sum, the Third Circuit's due diligence rule cannot be squared with *Brady*'s fundamental premise that fairness and the public trust require that all convictions rest on a full airing of the evidence. This Court should grant certiorari to reverse the Third Circuit's departure from this Court's precedent.

II. THIS COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER THE THIRD CIRCUIT PROPERLY APPLIED *BRADY* WHEN IT HELD THAT THE SUPPRESSED EVIDENCE WAS NOT MATERIAL.

In addition to imposing a due diligence exception to *Brady*, the Third Circuit decided, in the alternative, that the withheld evidence was not material. The panel reached that conclusion, however, without any meaningful analysis or citation to the record, in an effort so half-hearted that it appears to be little more than an attempt to insulate its holding from Supreme Court review. This Court should grant certiorari on this question in order to clarify that courts of appeals must analyze the materiality aspect under *Brady* with the care reflected in this Court's *Brady* jurisprudence.

A. The Third Circuit Applied The Wrong Standard.

1. The Third Circuit's cursory discussion conflated two distinct prongs of the *Brady* analysis: materiality and favorability. The panel stated that the mental health evidence was neither favorable nor material, included three sentences addressing favorability,[6] and then tacked on a single perfunctory sentence addressing materiality: "Furthermore, evidence of Waltzer's mental illness was not material because, relative to the strength of the evidence against Appellant, there is not a 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' "

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[6] The Third Circuit's analysis of favorability is also baffling. That Waltzer believed his credibility was unaffected and that he was competent to plead guilty, Pet. App. 26a, have no bearing on the ability of defense counsel to impeach him based on his mental health history. *See, e.g., Bagley*, 473 U.S. at 676 (noting that impeachment evidence falls within *Brady*'s purview because, like exculpatory evidence, it is "favorable to an accused"). Moreover, had the evidence been disclosed, it would have led defense counsel to uncover Waltzer's bipolar diagnosis, which also could affect his credibility. *See, e.g., Freeman* v. *United States*, 284 F. Supp. 2d 217, 225 (D. Mass. 2003) (noting that evidence of the key witness's manic depression would have been material); *Gage* v. *Metro. Water Reclamation Dist. of Greater Chi.*, 365 F. Supp. 2d 919, 928 (N.D. Ill. 2005) (noting that a witness's bipolar diagnosis might be relevant because such persons can suffer from "an impaired ability to think clearly and memory difficulties"). Indeed, Waltzer viewed his bipolar diagnosis as so severe that he initially sought a reduced sentence based on his mental illness. *See* Tr. of Sentencing at 4, No. 2:08-cr-552 (E.D. Pa. Aug. 26, 2010), ECF No. 55.

Pet. App. 26a. This conclusion, simply parroting the legal standard, does not identify why the court thought so, or if it simply assumed so because of its conclusion that the evidence was not favorable.

Materiality and favorability are separate prongs of the *Brady* analysis and must be considered individually. In *Smith* v. *Cain*, this Court acknowledged the three separate components of a *Brady* violation and addressed each individually. 132 S. Ct. 627, 630 (2012) (noting that favorability and nondisclosure of evidence impeaching the key witness were not disputed and proceeding to address "the sole question" whether it was material). In *Banks* v. *Dretke*, this Court addressed individually the "three components or essential elements of a *Brady* prosecutorial misconduct claim." 540 U.S. at 691. Conflating favorability with materiality, as the Third Circuit did here, made it impossible for the panel to meaningfully consider whether the suppression of the mental health evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

2. The Third Circuit's materiality analysis focused on each individual piece of *Brady* evidence instead of the cumulative effect of all the undisclosed evidence. This Court has time and again emphasized that suppressed evidence must be "considered collectively, not item by item." *Kyles*, 514 U.S. at 436-37 & n.10 (distinguishing between individually reviewing the tendency and force of each piece of evidence, and "its cumulative effect for purposes of materiality at the end of the discussion"); *see also Agurs*, 427 U.S. at 112 (noting that *Brady* "omission[s] must be evaluated in the context of the entire record" in order to be

consistent with "the justice of finding of guilt"). True to this precept, courts of appeals review the materiality of undisclosed evidence by considering its significance in the context of all of the other evidence at trial. For example, in *Harris* v. *Lafler*, the Sixth Circuit considered whether evidence that the police made promises to the key witness was material for *Brady* purposes. 553 F.3d 1028, 1033-34 (6th Cir. 2009). The court exhaustively considered the effect of the nondisclosure, including factors such as the witness's role as the sole eyewitness; the tendency of other government evidence to support his account; defense counsel's attempts to impeach the witness without the undisclosed evidence; and how disclosure of the evidence would have cast the government's entire case in a different light. *Id*.

The Third Circuit made no similar inquiry here. As to the cumulative effect of the evidence, these three sentences constitute the entirety of the Third Circuit's materiality analysis:

> In light of the extensive evidence in the trial record, including recordings of Appellant discussing fraudulent activities, emails between Appellant and co-conspirators regarding manipulative trades, voluminous records of the trades themselves, bank accounts and wire transfers, Appellant's argument that the evidence of Waltzer's substance abuse and mental illness, or his meetings with the SEC, is material for our *Brady* analysis cannot stand. Waltzer's testimony is "strongly corroborated" by recordings of phone calls and meetings, and records of actual trades. [Citation omitted.] Thus, this evidence would "generally not [be] considered material for *Brady*

> purposes" because when considered " 'relative to the other evidence mustered by the state,' " the allegedly suppressed evidence is insignificant. [Citation omitted.]

Pet. App. 27a-28a. This paragraph, simply listing types of evidence, is not consistent with the weighing of the evidence that the materiality analysis requires.[7] The Third Circuit failed to specifically cite a single piece of evidence that "strongly corroborates" Waltzer's testimony. Moreover, the Third Circuit failed to consider the supposedly corroborating evidence in any context. For example, much of the documentary evidence the court referred to—"recordings of phone calls and meetings, and records of actual trades," Pet. App. 28a—carried weight for the jury precisely because Waltzer testified about it. Over more than two days of direct testimony, Waltzer explained the evidence and detailed how the calls and trades were indicative of fraud and fraudulent intent. *See generally* Tr. of Jury Trial, Day 2 (Jan. 26, 2010), Day 3 (Jan. 27, 2010), and Day 4 (Jan. 28, 2010), No. 2:09-cr-88 (E.D. Pa. Mar. 29, 2010), ECF Nos. 172, 173, and 174. Similarly, other explanatory evidence, such as the testimony of SEC

[7] In addition, the Third Circuit failed to acknowledge other evidence in reviewing the cumulative effect of the Government's nondisclosure. For example, reports from Waltzer's court-mandated counseling sessions leading up to Georgiou's trial suggest that Waltzer continued to struggle with substance abuse and mental health problems. *See, e.g.*, Pet. App. 67a-68a (describing Waltzer's ongoing issues with anxiety and stress, "self-medicating with alcohol and cocaine," and becoming aware that "his life has become unmanageable due to alcohol and drugs").

analyst Daniel Koster, who summarized the trade data, also may have relied on Waltzer. *See* Pet. App. 111a-113a. Without the explanatory testimony, the bare evidence of trades and communications may not have supported an inference of criminal intent.

3. The Third Circuit misapplied this Court's precedent in another respect when it summarized the evidence and then stated that the withheld evidence was not material because, viewed relative to the other evidence against Georgiou, it was "insignificant." Pet. App. 28a. The panel apparently concluded that the nondisclosure was not material because there would have been sufficient evidence to convict even if the evidence had been disclosed. *Id*. But this Court emphasized in *Kyles* the "clear" rule that materiality is *not* a sufficiency-of-the-evidence test. A defendant "need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." 514 U.S. at 434-35 & n.8. In *United States* v. *Smith*, the District of Columbia Circuit expressly rejected, as an improper sufficiency-of-the-evidence test, the Government's argument that the withheld impeachment evidence was not material because it was "merely corroborative." 77 F.3d 511, 514 (D.C. Cir. 1996). The proper inquiry, the court held, was to consider not the *amount* of additional evidence, but "whether the undisclosed information could have substantially affected the efforts of defense counsel to impeach the witness, thereby calling into question the fairness of the ultimate verdict." *Id*. The panel's failure to discuss *any* of this Court's precedent in its summary review of whether the undisclosed evidence was material

further suggests that it simply relied on the quantum of other evidence against Georgiou.

In sum, the Third Circuit's conclusory and erroneous treatment of Georgiou's *Brady* claims fails to heed this Court's command that courts reviewing alleged *Brady* violations consider whether there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the trial would have been different. *Bagley*, 473 U.S. at 684.

B. Viewed Properly, The Undisclosed Evidence Was Material.

Had the court conducted a meaningful analysis, it would have concluded that the evidence was material. Courts of appeals that faithfully apply this Court's precedent review materiality questions in painstaking detail, undertaking a detailed review of the evidence presented at trial and carefully considering how the undisclosed evidence might have affected the result had it been disclosed. Had the Third Circuit engaged in the proper analysis, it would have concluded that the *Brady* evidence was material.

Waltzer was the centerpiece of the Government's case: he explained recorded calls and other communications between him and Georgiou that, in his view, showed that Georgiou knew his conduct was illegal and intended to engage in fraud. Waltzer testified that he made trades, at Georgiou's direction, to manipulate stock prices. While other Government witnesses testified about the trades and related financial activity, none of them could speak directly to Georgiou's intent. As the Government acknowledged, Waltzer was the only "insider" to testify, and

thus his assertions with respect to Georgiou's intent would have carried particular weight with the jury.

The evidence about Waltzer's mental health supported the conclusion that Waltzer had longstanding mental health problems and had been under psychiatric treatment for some time. Contrary to the Third Circuit's characterization, Waltzer's mental health issues were not merely garden-variety depression and anxiety: Waltzer had been diagnosed with bipolar disorder and was medicated for it at some point during his cooperation with the Government's investigation of Georgiou, both factors that could have affected his ability to testify truthfully or to perceive and remember events.[8]

As a key witness in the Government's case against Georgiou, Waltzer's credibility was crucial. Had the jury known that Waltzer suffered from nontrivial mental health problems during the period in which he was cooperating with the Government or testifying at Georgiou's trial, it likely would have discounted, at least in part, his credibility as a key witness. *See, e.g.*, *United States* v. *Price*, 566 F.3d 900, 914 (9th Cir. 2009) (noting that "[i]mpeachment evidence

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[8] Indeed, Waltzer's testimony reflects numerous instances of difficulty remembering. *See, e.g.*, Tr. of Jury Trial, Day 5 (Jan. 29, 2010), at 70, No. 2:09-cr-88 (E.D. Pa. Mar. 29, 2010), ECF No. 175 (responding "I don't remember that period" when asked whether Georgiou was difficult to reach during 2006); *id*. at 36 (admitting that he could not remember whether he had instructions not to record certain subjects during April, May, or July of 2008); *id*. at 51-53 (refusing to answer questions about his testimony on the day prior without exhibits to refresh his recollection because otherwise he would be "guessing").

is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case"). Because Waltzer's testimony was the only "insider" evidence of Georgiou's criminal intent, evidence discounting his credibility may well have been "determinative of [Georgiou's] guilt or innocence," *Bagley*, 473 U.S. at 677, and thus the nondisclosure undermines confidence in the verdict. In addition, Georgiou's counsel could have altered the defense strategy in other ways if he had known about Waltzer's problems. This Court should grant review to clarify the importance of considering materiality cumulatively and in the context of the entire record.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2015