No. 14-1535

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

BRIEF OF *AMICUS CURIAE* CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF *AMICUS CURIAE* [1]

This brief is submitted on behalf of the California Attorneys for Criminal Justice ("CACJ") as *amicus curiae* in support of the Petitioner in *Georgiou v. United States*, No. 14-1535.

CACJ is a non-profit corporation founded in 1972. It has over 1,700 dues-paying members, primarily criminal defense lawyers. A principal purpose of CACJ, as set forth in its bylaws, is to defend the rights of individuals guaranteed by the United States Constitution. CACJ members believe that the circuit court's opinion below reflects an ongoing diminution of the Constitutional guarantee of due process. The prosecutorial responsibilities recognized by *Brady v. Maryland*, 373 U.S. 83 (1962), and its progeny are essential to securing fair trials for thousands of criminal defendants across the country. The position taken by the court below—which permits a prosecutor to withhold clearly exculpatory evidence if a court concludes that a diligent defendant could have discovered it from other sources—is inconsistent with this Court's cases and dramatically increases the risk of unfair trials. Courts across the country are divided on whether such a "due diligence" exception excuses failure to disclose *Brady* material. This Court should grant the petition and hold that such an exception is inconsistent with the Constitution.

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[1] Counsel of record for all parties received timely notice of CACJ's intent to present this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel has made any monetary contribution to the preparation or submission of this brief.

CACJ members have observed with alarm a spate of high-profile violations of *Brady*'s disclosure obligations in recent years. These episodes are simply the most visible examples of due process violations that CACJ members encounter with far too much frequency. CACJ therefore has particular interest in the Court's consideration of *Brady*'s disclosure obligations.

CACJ has appeared in this Court as *amicus curiae* on several occasions and offers its expertise in the instant case to provide practical context related to the need for simple and unambiguous *Brady* disclosure rules.

STATEMENT

For more than half a century, this Court's application of its holding in *Brady v. Maryland*, 373 U.S. 83 (1963), has sought to put into practice the principle that the Government's interest in criminal prosecutions "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). By obligating prosecutors to disclose evidence favorable to the accused, *Brady* and its progeny further the goal of "establishing procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth.'" *United States v. Leon*, 468 U.S. 897, 900-01 (1984) (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)).

Despite the goal of fostering fair trials in which all material evidence is presented to the jury, courts across this country have read an exception into *Brady* that is designed to excuse potentially unfair trials and even to condone bad-faith prosecutorial conduct. The petition in this matter challenges that "due diligence" exception, which excuses a *Brady* violation—and thereby would authorize guilty verdicts by juries deprived of exculpatory evidence—where a court concludes that

the evidence in question would have been discovered by a diligent defendant.

The "due diligence" exception adopted by the Third Circuit in this case, and by other circuits and state courts around the country, should be rejected because it undermines the animating principle of *Brady* and imposes on prosecutors and courts the unavoidably speculative analysis of whether a particular piece of evidence would be meaningfully "available" to a diligent defendant. The exception also invites prosecutorial mischief, as complex rules that rest on speculative inquiries are far more vulnerable to mistakes, or abuse, than clear and simple commands. The exception also imposes onerous and inefficient limitations on counsel to indigent defendants, who often do not have resources to conduct fulsome investigations. Given such resource constraints, and the fact that the evidence that falls within the exception is by definition already in the prosecution's possession, there is no justification to add to the burdens imposed on underfunded defense counsel.

Recent experience in California and elsewhere demonstrates that, even in the absence of a "due diligence" loophole, *Brady* violations—and thus unfair trials—are far too common. The justice system as a whole benefits from clear rules of conduct, rigorously enforced.

The force of this argument is supported, as discussed in greater detail below, by the work of the California Commission on the Fair Administration of Justice (the "Commission"). The Commission, which published its Final Report in 2008, focused its attention on California's criminal courts and proposed a slate of reforms. The Commission concluded that prosecutorial misconduct in general, and *Brady* obligations in particular, were in need of attention. The Commission's diligent work

reflects that courts owe *greater* attention to *Brady* violations—not that courts should permit erosion of the platform for challenging a prosecutor's failure to comply with *Brady*. CACJ therefore asks this Court to grant certiorari in order to set a uniform rule that a defendant's alleged lack of diligence is irrelevant to the prosecution's obligation to disclose *Brady* material.

ARGUMENT

I. *Brady*'s Disclosure Requirements Are Essential to Due Process and the Promise of Fair Trials

In the fifty years since this Court decided *Brady*, the obligations recognized in that case have come to shape the practice of criminal law in the United States. This Court's opinions have repeatedly recognized that the underlying due process interest in fair trials for the accused must trump the adversarial litigation interests of prosecutors. As *Brady* itself recognized, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87. And this Court has emphasized that given the risk that suppression of evidence could lead to an unjust conviction, the only permissible disclosure rule is one that "resolve[s] doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Such a presumption in favor of disclosure "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles v. Whitley*, 514 U.S. 419, 440 (1995).

The "due diligence" rule applied by the Third Circuit in this case undermines these goals. The opinion below excused the prosecution's failure to produce two documents—a guilty plea transcript and a bail report—even though those documents contained impeachment evidence regarding the prosecution's primary witness. *See* Pet. App. 25a. As a result the jury was never presented with evidence that the witness had been diagnosed with bipolar disorder and was taking medication for that disorder at some point during his cooperation with the government. *See* Pet. at 28-29.

The due diligence exception has no place in the *Brady* analysis, and in fact operates only to undermine the promise of fair trials. As applied by the Third Circuit and other courts, the exception affects the outcome of the *Brady* analysis only when the defendant has established the failure to disclose evidence that has a reasonable probability of affecting the outcome of a case. That is, it preserves a conviction precisely, and only, when there is substantial doubt that the defendant was "convicted on the basis of all the evidence which exposes the truth." *United States v. Leon*, 468 U.S. 897, 900-01 (1984) (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)).

Such an exception should be rejected. CACJ urges this Court to grant the writ and reverse the judgment of the court below. In doing so, CACJ also urges the Court to acknowledge that creating exceptions to the *Brady* rule that encourage speculation rather than adherence to clear standards will undermine the integrity of criminal justice system.

II. Post-Conviction Procedural Rules May Require Due Diligence, but *Brady*'s Substantive Protections Do Not

This Court has never held, or even suggested in dicta, that a prosecutor is excused from disclosing *Brady* material if the defendant could have obtained equivalent information through the exercise of due diligence. Instead, this Court has only addressed diligence as a procedural pre-requisite in the post-conviction process. But the *procedural* requirements of post-conviction practice are distinct from the *substantive* requirements of a *Brady* claim. CACJ submits that courts have—perhaps inadvertently—transplanted the procedural diligence requirement into the substantive requirements of *Brady*. But this Court has maintained that two analyses remain distinct. *See Banks v. Dretke*, 540 U.S. 668, 691 (2004). This Court should intervene and prevent *Brady*'s distinct protections from dissolving further.

As it relates to preservation of a post-conviction claim, the role of a petitioner's due diligence is well established. For example, in California "[a] petitioner will be expected to demonstrate due diligence in pursuing potential claims. If a petitioner had reason to suspect that a basis for habeas corpus relief was available, but did nothing to promptly confirm those suspicions, that failure must be justified." *In re Clark*, 5 Cal. 4th 750, 775 (1993). Similarly, in federal post-conviction proceedings, the statute of limitations runs from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4).

Commentators have observed the gradual—and apparently unconscious—importation of a due diligence exception from the post-conviction procedural setting

to the substantive *Brady* analysis. *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138 (2012). Courts have now intermingled the two doctrines, and to damaging effect. For example, in *Barnes v. Thompson*, 58 F.3d 971 (4th Cir. 1995), the Fourth Circuit considered whether a habeas petitioner had procedurally defaulted his *Brady* claim. The court, in considering the challenged state court opinion, looked to the appropriate post-conviction requirements and explained that "the governing question for the state court was whether [the petitioner] could have obtained the information through 'reasonable and diligent investigation.'" *Id*. at 975 (quoting *McCleskey v. Zant*, 499 U.S. 467 (1991)). Yet Barnes, in support of this assertion, cited *United States v. Wilson*, 901 F.2d 378 (4th Cir. 1990), which had nothing to do with procedural default. Instead, *Wilson* addressed the substance of a *Brady* claim, holding that "the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources." *Id*. at 380.

The mischief does not end there. *Barnes*, despite being a case about procedural default, was later cited in a direct appeal case that presented only the substantive *Brady* issue. *See United States v. Beckford*, 211 F.3d 1266, at *12 (4th Cir. 2000) (unpublished opinion). Similarly, it has been cited by district courts considering *Brady* in conjunction with a motion to vacate the judgment, a context in which procedural default has no relevance. *See United States v. Guild*, No. 1:07cr404, 2008 WL 1901724, at *2 (E.D. Va. Apr. 25, 2008).

This intermingling of doctrines is particularly pernicious because this Court has recently held in the procedural default context—the natural home of due

diligence requirement—that even there a rule "declaring 'prosecutor may hide, defendant must seek', is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696. In that case, because "we presume that public officials have properly discharged their official duties," and in fact the Government had represented that it had complied with its duties, the Court reversed a finding of procedural default based on the petitioner's failure to diligently pursue potentially suppressed evidence. *Id*.

III. The "Due Diligence" Rule Relies on Inevitably Speculative Judgments as to Availability of Evidence

The Third Circuit's opinion in this case relied on the assumption that the undisclosed evidence "could have been accessed through his exercise of reasonable diligence." Pet. App. at 25a. Even if that assumption were warranted here, in many cases a prosecutor's determination whether evidence is reasonably accessible to defendants will require speculation regarding both the availability of evidence and the resources available to the defendant and his counsel. And more importantly, even when a defendant might have access to information via rumors or innuendo, a prosecutor might well have access to reliable, admissible documents with far more persuasive value. Due Process cannot condone withholding admissible, exculpatory evidence on the grounds that a defendant, through the exercise of due diligence, could have had access to inadmissible hearsay.

Under the logic of the due diligence exception as applied by many courts, the question is not simply whether the defendant would have had access to a particular *document*, but rather whether the defendant would have had independent access to *information* in

the prosecutor's possession. It therefore calls upon prosecutors to speculate not only as to specific documents, but also as to the availability of information from other sources, and whether such information would have been discoverable to a reasonably diligent defendant. Such epistemological judgments are utterly standardless and without basis in law. Courts should not impose them on prosecutors.

For example, in *Puertas v. Overton*, 168 Fed. App'x 689 (6th Cir. 2006), the habeas petitioner argued that the prosecution should have disclosed a state police report containing evidence concerning the criminal investigation that led to the petitioner's arrest.[2] *Id*. at 695. The police report was the result of a state investigation prompted by accusations of public corruption, and it contained evidence that undermined the credibility of a police informant, among other things. *Id*. at 693; *see also id*. at 705 (Moore, J., dissenting).

The Sixth Circuit rejected the claim. The panel majority conceded that the report contained impeachment material, but it held that the state could reasonably have concluded that the petitioner had access to "the substance of the report's contents or knew enough to have discovered that information based upon further inquiry." *Id*. at 695. This "access," in the Sixth Circuit's view, was established via a variety of newspaper reports that simply disclosed the *existence* of a

[2] While the Sixth Circuit subsequently abandoned the due diligence exception in light of this Court's opinion in *Banks v. Dretke*, 540 U.S. 668 (2004), *see* Pet. at 13, the analysis in *Puertas* illustrates the operation of the exception as applied in many other courts. *See, e.g., United States v. Sigillito*, 759 F.3d 913, 930 (8th Cir. 2014) (excusing failure to disclose a plea agreement because defendant could have cross-examined a witness regarding that agreement and obtained the same information).

police investigation into the officers. *Id*. Even though the court made no finding that petitioner could have obtained a copy of the report itself with the exercise of due diligence, the court speculated that because the petitioner and/or his counsel was on "inquiry notice" of the investigation, he therefore could have made an effort to obtain the contents of the police report via pre-trial depositions and other discovery, even though that effort likely would have been met with objections and well could have been futile.

If speculation as to the fruitfulness of "pre-trial depositions and other discovery" is sufficient to establish the "availability" of evidence in an undisclosed police report, and is therefore sufficient to excuse a *Brady* violation, the result will be that *Brady* violations, including intentional suppression of exculpatory evidence, will be excused. And on a practical level, such a rule invites a prosecutor to engage in the same speculation in seeking to determine whether to disclose plainly exculpatory evidence under *Brady*. The question of "availability" of evidence therefore becomes yet another opportunity for subjective analysis by prosecutors creating a corresponding risk of error—or temptation into gamesmanship.

The due diligence exception therefore further complicates the prosecutor's job, and in doing so heightens the risk of unfair trials. A clearer rule streamlines the analysis by focusing instead simply on exculpatory or impeaching nature of the evidence itself. The due diligence exception, by contrast, ignores the importance of the evidence and, therefore, the fairness of the trial. On the contrary, as noted above, the exception only has bite in situations where a court has concluded that the evidence *was* important—and thus had a reasonable

probability of affecting the outcome of a trial—and nevertheless decides to condone its suppression.

The due diligence exception also forces courts considering a *Brady* claim to make many of the same subjective judgments, with the additional complication of hindsight bias. Did the defendant have access to equivalent evidence? Would that evidence have been admissible? What financial resources were available to the defendant's counsel? Were those resources reasonably deployed in other directions? How similar was the available evidence to the undisclosed evidence? And the answers to these subjective questions could then be used to excuse a prosecutor who deliberately suppressed exculpatory evidence. Such a result is incompatible with Due Process.

IV. Courts Across the Country Are Struggling with Widespread *Brady* Abuses

There is no shortage of independent commentary noting the disturbing frequency of *Brady* violations. As stated by then-Chief Judge Kozinski, "[t]here is an epidemic of *Brady* violations abroad in the land." *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting). Given this widespread failure to preserve defendants' Due Process rights, there is no justification to adopt an escape hatch that would excuse even deliberately unfair trials. *Brady* violations are difficult to discover, and any additional hurdles to relief will further undermine a prosecutor's incentive to comply. "The prudence of the careful prosecutor should not . . . be discouraged." *Kyles*, 514 U.S. at 440.

Judge Kozinski recently elaborated on his *Olsen* dissent in an article in the Georgetown Law Journal's Annual Review of Criminal Procedure. *See* Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev.

Crim. Proc. (2015). Among other things, Judge Kozinski addressed this Court's command "that a prosecutor's duty is to do justice, not merely to obtain a conviction." *Id*. at viii. In connection with the prosecution's obligation to disclose exculpatory evidence to the defense, Judge Kozinski concludes that "there is reason to doubt that prosecutors comply with these obligations fully." *Id*. In particular, Judge Kozinski challenges the position—that "exculpatory evidence must be produced only if it is material." *Id*. This position, he explains, "puts prosecutors in the position of deciding whether tidbits that could be helpful to the defense are significant enough that a reviewing court will find it to be material, which runs contrary to the philosophy of the *Brady*/*Giglio* line of cases and increases the risk that highly exculpatory evidence will be suppressed." *Id*.

The due diligence exception simply compounds this problem. As noted above, it requires a prosecutor to not only assess the materiality of a piece of evidence, but *also* to speculate as to whether the defendant would have access to that evidence or some sort of rough equivalent. The better course—both for simplicity of application and preservation of Due Process—would be for courts to simply require prosecutors to open their files. Indeed, Judge Kozinski calls for just such a policy, noting that any system in which prosecutors are "in charge of deciding what evidence will be material to the defense" is unworkable because prosecutors "do not know all the potential avenues a defense lawyer may pursue, and because it's not in their hearts to look for ways to help the other side." Kozinski, 44 Geo. L.J. Ann. Rev. Crim. Proc. at xxvii. The due diligence exception simply grants more discretion to withhold evidence and is therefore even more unworkable than the system Judge Kozinski discusses.

Judge Kozinski also notes that "a non-trivial number of prosecutors—and sometimes entire prosecutorial offices—engage in misconduct that seriously undermines the fairness of criminal trials." *Id*. at xxii. And such misconduct is extremely difficult to detect "because so much of what prosecutors do is secret. If a prosecutor fails to disclose exculpatory evidence to the defense, who is to know? . . . There are distressingly many cases where such misconduct has been documented . . . ." *Id*. at xxiii.

In presenting this brief to the Court, CACJ is mindful of the inquiries and Final Report of the California Commission on the Fair Administration of Justice (the "Commission"), which was created by a California State Senate resolution. After consideration of wide-ranging evidence, including testimony from witnesses who have worked in California's criminal courts in various capacities, the Commission devoted an entire section of its 182-page report to addressing professional responsibility in the criminal courts. In doing so, the Commission referenced on-going research indicating that as of 2008, discovery had been withheld in 129 reported criminal cases, but reviewing courts found *Brady* error in only 16 of those cases. California Comm'n on the Fair Administration of Justice, Final Report at 70 n.2 (2008).

The Commission's Final Report recommended that judges more systematically report to the State Bar cases in which "the prosecutor is aware of exculpatory evidence and deliberately suppresses it." *Id*. at 77. While the Commission's Final Report has resonated in California, serious *Brady* violations continue—notwithstanding some greater efforts at disciplining errant prosecutors. A due diligence exception does not

encourage adherence to *Brady* and serves only to further undermine efforts to bolster *Brady* compliance.

A recent California case demonstrating the ongoing battle to prevent egregious *Brady* violations is the prosecution of Scott Dekraai in Orange County. The case illustrates that—even in the absence of a due diligence exception—the risk of unfair trials as a result of deliberate misconduct is very real. Allegations of prosecutorial misconduct there have ballooned into a fiasco resulting in the removal of the entire Orange County District Attorney's office from the case. Prosecutors in Dekraai's trial presented evidence via an informant that the defendant made incriminating statements, and Dekraai's counsel later argued that the prosecution had withheld important impeachment evidence related to that informant.

Superior Court Judge Thomas Goethals held two evidentiary hearings on the question. In the first, the District Attorney's staff "acknowledged that Brady violations, or 'errors,' may have occurred in a number of recent prosecutions, including this one, but point to several factors to mitigate their failures . . . ." *People v. Dekraai*, No. 12ZF0128, Ruling at 2 (Cal. Sup. Ct. Aug. 4, 2014). The court held that "[s]uch a cavalier attitude toward the constitutionally required Brady procedure is patently inappropriate and legally inadequate." *Id*. at 5. As to the specific allegations, the court concluded that

> working informants and targeted inmates were at times intentionally moved inside the Orange County Jail by jail staff, often at the request of outside law enforcement agencies, in the hope that inmates would make incriminating statements to those informants. *Such*

> *intentional movements were seldom, if ever, documented by any member of law enforcement*.

Id. (emphasis added). Moreover, the court found that "express or implied promises were made to both of the informants whose conduct is here at issue and from whom this court heard extensive testimony." *Id*.

On February 5, 2015, Judge Goethals held a supplementary evidentiary hearing regarding new evidence "suggesting that one or more of the law enforcement witnesses who testified during the initial phase of the hearing lied during that testimony." *People v. Dekraai*, No. 12ZF0128, Supplemental Ruling at 1 (Cal. Sup. Ct. Mar. 12, 2015). The court concluded that, contrary to its earlier finding that the intentional movements of informants were "seldom, if ever, documented," the Orange County Sheriff in fact maintained a database, known as "TRED," which contained "significant information about inmate cell movements and the reason for such transfers." *Id*. at 2. As a result of these serious *Brady* violations and the District Attorney's repeated failures to comply with discovery orders, the court concluded that "the District Attorney lacks the apparent ability to achieve compliance with his constitutional and statutory discovery obligations in this case." *Id*. at 7. Relying on this finding, Judge Goethals removed the entire District Attorney's office from the case and transferred prosecutorial responsibilities to California's Attorney General.

While *Dekraai* is undoubtedly a particularly dramatic example, the findings of the court show that *Brady* is by no means self-enforcing. In Orange County, a county with a population of more than three million people, law enforcement for years maintained a secret database that contained ample *Brady* material, and neither the defense bar nor the judiciary knew anything

about it. In light of the difficulty of uncovering such violations, and the vast damage that can be done by failures to disclose relevant evidence, courts must be vigilant that *Brady*'s promise is not abandoned. *Brady* and its progeny seek to encourage fair trials, and the due diligence exception does nothing but prevent them.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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