No. 14-1535

In the Supreme Court of the United States

GEORGE GEORGIOU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government suppressed evidence, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), when it did not produce the publicly available guilty-plea transcript of a cooperating witness and a bail report on the witness prepared by, and in the possession of, federal pretrial services, rather than the prosecution team.

2. Whether the court of appeals erred in its alternative holdings that the information in those documents, relating to the witness's treatment for depression and anxiety, was not favorable to petitioner and was not material under *Brady* because it was insignificant in relation to the evidence of petitioner's guilt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 777 F.3d 125. The opinion and order of the district court denying petitioner's motion for a new trial and motion for reconsideration (Pet. App. 40a-57a) are unreported. The opinion and order of the district court denying petitioner's motion for reconsideration and motion to compel the disclosure of evidence (Pet. App. 58a-119a, 120a) are not published in the Federal Supplement but are available at 2011 WL 6150596 and 2011 WL 6153629, respectively.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 2015. A petition for rehearing was denied on February 25, 2015 (Pet. App. 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, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371; four counts of securities fraud, in violation of 15 U.S.C. 78j(b)(2006) and 15 U.S.C. 78ff; and four counts of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 7a-8a. He was sentenced to 300 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The district court ordered petitioner to pay restitution in the amount of $55,832,398. Pet. App. 2a. The court of appeals affirmed. *Id.* at 1a-39a.

1. Between 2004 and 2008, petitioner participated in a stock fraud scheme that resulted in more than $55 million in losses. Pet. App. 3a. Petitioner employed various fraudulent tactics to artificially inflate the market for four publicly traded stocks (the Target Stocks). *Ibid.* To perpetuate the scheme, petitioner and his co-conspirators traded the Target Stocks between various brokerage accounts in order to inflate the stock price, to conceal their ownership interest, and to create the false impression that there was an active market for each of the Target Stocks. *Id.* at 3a-4a. Petitioner and his co-conspirators either sold their shares at artificially inflated prices or petitioner used the inflated shares as collateral to fraudulently obtain multi-million dollar loans from two brokerage firms. *Id.* at 4a-7a. When petitioner failed to repay the loans, and his pledged collateral proved worthless, the

brokerage firms suffered severe losses, and one firm was forced to liquidate its business entirely. *Id.* at 4a & n.3, 6a-7a.

Unbeknownst to petitioner, in mid-2007, co-conspirator Kevin Waltzer started cooperating with the Federal Bureau of Investigation (FBI).[1] Through Waltzer's cooperation, the FBI was able to monitor emails, phone calls, and wire transfers in which petitioner directed Waltzer to engage in transactions designed to artificially increase the price of the Target Stocks. Gov't C.A. Br. 9-10.

The FBI also had an undercover agent known as "Charlie." Gov't C.A. Br. 7. Petitioner believed Charlie to be a businessman with connections to corrupt brokers who could purchase and hold stock in client accounts in return for a kickback. *Ibid.* Petitioner suggested to Charlie various ways to elude law enforcement, including operating in other people's names and using encrypted communications. *Id.* at 7-8. Petitioner repeatedly asked Charlie if he was a "cop," suggested use of a "dummy company" to send money to Charlie, and even suggested meeting in a hot tub to limit the risk that Charlie could surreptitiously record the conversation. *Id.* at 9; Pet. C.A. App. 209a, 285a, 298a. At one point, petitioner offered to pay Charlie a 25% kickback to purchase millions of dollars of shares in one of the Target Stocks, and then to sell the stock following the issuance of a false press release. Gov't C.A. Br. 8. Shortly before petitioner's arrest, petitioner wired a $5000 kickback to Charlie as payment for conducting a smaller "test transaction"

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[1] The court of appeals incorrectly stated that Waltzer's cooperation began earlier. Pet. App. 4a; but see Gov't C.A. Br. 9-10; Indictment 2-3.

meant to determine whether the multi-million dollar transaction would work. Pet. App. 6a; see Gov't C.A. Br. 8. Six days after the wire transfer, federal agents arrested petitioner. Pet. App. 6a.

2. a. A federal grand jury charged petitioner with one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371; four counts of securities fraud, in violation of 15 U.S.C. 78j(b)(2006) and 15 U.S.C. 78ff; and four counts of wire fraud, in violation of 18 U.S.C. 1343. Indictment 1-43.

b. On January 28, 2009, Waltzer appeared for a hearing to plead guilty to a three-count information charging him with a mail fraud, wire fraud, and money laundering. Pet. C.A. App. 4243a, 4253a. In response to questioning from the district court, Waltzer stated that, in the year-and-a-half preceding the plea hearing, he had not taken any narcotic drugs, nor had he taken any prescription medication which "affects how [he] think[s]." *Id.* at 4249a. Waltzer stated, however, that he had seen a mental health provider "[i]n connection with some of the criminal activities that brought [him] here today and also in connection with depression and anxiety." *Ibid.* Waltzer indicated to the court that he took 30 milligrams per day of Paxil for his depression and anxiety. *Ibid.* Waltzer assured the court that his head had always been clear and that he had understood discussions with his attorney. *Id.* at 4250a. Neither Waltzer's attorney nor government counsel expressed any reservations about Waltzer's competency. *Ibid.* The court found "not an iota of doubt" that Waltzer was competent, and accepted his guilty plea.[2] *Id.* at 4355a.

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[2] During the January 28, 2009, hearing, a question about a possible conflict of interest with the district court judge arose, so the

Federal pretrial services—an arm of the United States Probation Office—prepared a bail report in connection with Waltzer's guilty plea. Pet. C.A. App. 4120a-4123a. Marked with "CONFIDENTIAL" at the top, the bail report stated in capital letters that it is "FOR COURTROOM USE ONLY"; that it must be returned to the pretrial services officer immediately after the hearing; and that it "MUST NOT BE TAKEN OUT OF COURTROOM." *Id.* at 4120a. The government did not review the contents of the bail report because the government did not seek to have Waltzer detained given his ongoing cooperation against petitioner. Pet. App. 82a-83a.

The bail report provided background information about Waltzer, his family, his finances and employment history, and his health. Pet. C.A. App. 4120a-4122a. In a section entitled "Mental Health/Substance Abuse," the report noted that Waltzer had been previously diagnosed with an anxiety and panic disorder and a substance abuse disorder. *Id.* at 4122a. The report also indicated that Waltzer was "currently under the care of his primary care physician for his anxiety and is prescribed Paxil, which he has been taking for the last [ten] years." *Ibid.*

c. During a three-week trial in January and February 2010, the jury heard extensive evidence of petitioner's stock fraud scheme, including "recordings of [petitioner] discussing fraudulent activities, emails between [petitioner] and co-conspirators regarding manipulative trades, voluminous records of the trades

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court recessed the hearing until February 17, 2009, to allow parties to address that question. Pet. C.A. App. 4267a-4270a. With that issue resolved, the district court accepted Waltzer's guilty plea on that February date. *Id.* at 4355a.

themselves, bank accounts and wire transfers." Pet. App. 27a; see *id.* at 40a. The jury convicted petitioner on all counts. *Id.* at 7a-8a.

d. After trial, petitioner filed numerous post-trial motions seeking a new trial. See, *e.g.*, D. Ct. Doc. 164 (Feb. 26, 2010); D. Ct. Doc. 208 (Sept. 20, 2010); D. Ct. Doc. 213 (Sept. 29, 2010); D. Ct. Doc. 242 (Apr. 1, 2011).[3] Among the various grounds petitioner raised in support of his motion was the claim that the government violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose information about Waltzer's mental health found in the transcript of Waltzer's guilty-plea hearing and in the bail report prepared by pretrial services at the time of the plea. The district court rejected those claims. Pet. App. 40a-57a. It reasoned that the government's failure to disclose the guilty-plea transcript did not constitute a *Brady* violation because petitioner "with just minimal due diligence * * * could have obtained a copy of the guilty plea transcript because he certainly was aware that

[3] In addition to the specific claim raised in the petition for a writ of certiorari, these post-trial filings accused the prosecutors of gross misconduct, suborning perjury, withholding more than 20 categories of evidence, and at one point, alleged that the prosecutors surreptitiously drugged Waltzer so that he would be presentable on the stand. See Pet. App. 66a-69a, 114a-116a. The district court found each of these grounds to be entirely without merit, and the district judge (a veteran of then-24 years on the federal bench) wrote that, in lodging the most serious of these claims, "[petitioner's] counsel * * * crossed over the line of zealous representation" by making "reckless" and "unfounded" allegations against the prosecutors. *Id.* at 96a-97a, 108a; see *id*. at 78a (claim that government withheld electronic evidence without basis); *id.* at 93a-95a (no basis in the record for claim that Waltzer was using drugs before and during trial); *id.* at 107a-108a (no evidence of prosecutorial misconduct).

the main witness against him had pled guilty." *Id.* at 48a-49a. But, even if the government had failed to disclose the guilty-plea transcript, the court concluded, the mental health information was not material because the "[g]overnment's evidence against [petitioner] included voluminous recordings, emails, financial records and other evidence that overwhelmingly demonstrated that [petitioner] had committed the crimes charged." *Id.* at 53a.

Petitioner, moreover, "d[id] not argue that Waltzer was unable to accurately testify about events involving [petitioner] in 2008."[4] Pet. App. 51a. And, in any event, the district court determined that "Waltzer's version of the relevant events conforms with the staggering physical evidence in this case." *Id.* at 53a. In finding the mental health information immaterial, the court also considered that petitioner was afforded "ample opportunity" "to attack Waltzer," based on his prior cocaine use, and that petitioner's counsel "thoroughly cross-examined Waltzer on his history of deception and alleged bias for the [g]overnment." *Id.* at 52a-53a & n.6. The court therefore concluded that, "even if the jury had found Waltzer to be unreliable,

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[4] The district court noted that a subsequent psychiatric assessment prepared on Waltzer's behalf for purposes of sentencing, "never suggests that Waltzer suffered from a mental defect(s) that would have made it difficult for him to perceive reality or otherwise testify truthfully." Pet. App. 50a n.4.; see *id.* at 49a ("Mental illness is relevant only when it may reasonably cast doubt on the ability or willingness of a witness to tell the truth.") (quoting *United States* v. *George*, 532 F.3d 933, 936 (D.C. Cir.), cert. denied, 555 U.S. 1038 (2008)). The court further stated that it "observed Waltzer over the course of three days of testimony" and that he "appeared sharp and alert." *Id.* at 97a n.23.

[petitioner's] trial nevertheless resulted in a verdict worthy of confidence." *Id.* at 53a.

The district court similarly determined that the government was not required under *Brady* to disclose the contents of the bail report to petitioner. Pet. App. 83a-85a. The court found that the government did not possess the bail report because it had not received a copy of the report from pretrial services, had not reviewed the report, and was not aware of its contents. *Id.* at 83a. The court therefore found that "the [g]overnment did not 'suppress' this material from the defense under the first part of the *Brady* test." *Ibid.* But even assuming that the government either reviewed or constructively possessed the bail report, the court concluded that the report did not satisfy the favorability and materiality prongs of the *Brady* inquiry for the same reasons that the guilty-plea transcript did not. The court observed that the bail report did not characterize the anxiety disorder from which Waltzer suffered as severe, and the report did not indicate that these disorders would affect his ability to recall the past or testify truthfully. *Id.* at 84a-85a.

3. The court of appeals affirmed. Pet. App. 1a-39a. As relevant here, the court concluded that the nondisclosure of Waltzer's guilty-plea transcript and bail report did not implicate any of *Brady*'s three prongs. *Id.* at 21a-28a. First, the court held that the government had not suppressed either document because each was accessible to petitioner "through his exercise of reasonable diligence." *Id.* at 25a. Petitioner was "in a position of parity with the government as far as access to this material." *Ibid.* (quoting *United States* v. *Jones*, 34 F.3d 596, 600 (8th Cir. 1994), cert. denied, 514 U.S. 1067 (1995)). Second, the court determined

that the mental health evidence in those documents was not favorable to petitioner because it "neither undermines Waltzer's reliability nor calls into question his 'ability to perceive, remember and narrate perceptions accurately,' and thus is not 'clearly relevant to his credibility.'" *Ibid.* (quoting *Wilson* v. *Beard*, 589 F.3d 651, 666 (3d Cir. 2009)) (citation and internal quotation marks omitted). Finally, the court concluded that information about Waltzer's mental health was not material in light of the strength of the other evidence against petitioner. *Id.* at 26a; see *id.* at 27a-28a (evidence is not material under *Brady* "because when considered 'relative to the other evidence mustered by the state,' the allegedly suppressed evidence is insignificant") (quoting *Johnson* v. *Folino*, 705 F.3d 117, 129 (3d Cir.) (citation and internal quotation marks omitted), cert. denied, 134 S. Ct. 61 (2013)).

ARGUMENT

Petitioner contends (Pet. 10-21) that the court of appeals erred by finding that the government did not suppress a cooperating witness's mental health information because petitioner could have obtained a copy of the publicly available guilty-plea transcript and bail report containing such information with "minimal" or "reasonable" due diligence.[5] Petitioner claims (Pet. 11-16) that the court's decision conflicts with decisions from other federal and state courts that, he asserts,

[5] Three amicus briefs filed in support of petitioner press that argument as well, but they do not address the court of appeals' independent (and factbound) holding that the allegedly suppressed evidence is not material, nor do they contend that this Court's review is warranted on that issue. See, *e.g.*, Former Fed. Prosecutors et al. Amicus Br. 5 n.3.

have rejected a "due diligence" rule for evaluating claims that the government suppressed exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Petitioner also argues (Pet. 21-29) that the court of appeals erred by concluding that the mental health information in those documents was not material. The court of appeals' case-specific decision is correct, consistent with this Court's and other courts' application of *Brady* principles, and not worthy of review.

In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. A violation of *Brady* consists of three parts: "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." *Strickler* v. *Greene*, 527 U.S. 263, 281-282 (1999). In this case, the court of appeals correctly held that evidence of Waltzer's mental health history and treatment did not satisfy any of the three *Brady* prongs. The court of appeals' case-specific application of these *Brady* principles does not merit the Court's review.

1. Petitioner first contends (Pet. 10-21) that the government suppressed the bail report and guilty-plea transcript even though he could have obtained these materials with due diligence. That claim lacks merit and does not implicate a conflict warranting this Court's review. This Court has held that "the individual prosecutor has a duty to learn of any favorable

evidence known to the others acting on the government's behalf in the case, including the police," and to disclose such information to the defense. *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995). But the *Brady* disclosure requirement applies only to "matters which are essentially in the prosecutorial domain." *United States* v. *Iverson*, 648 F.2d 737, 739 (D.C. Cir. 1981) (per curiam). The government's *Brady* obligation, therefore, did not extend to the bail report because the government neither possessed the report nor was it aware of its contents. Pet. App. 82a-83a. The bail report was created by pretrial services, which operates not on behalf of the prosecution but as part of the United States Courts. See Pretrial Services Act of 1982, 18 U.S.C. 3152-3155. The government had no obligation to learn information from that document, see *Kyles*, 514 U.S. at 437, and in fact did not do so, Pet. App. 82a-83a.

In addition, because *Brady* is concerned with the fairness of the trial, not "the good faith or bad faith of the prosecution," 373 U.S. at 87, *Brady* is not violated when the government fails to provide a defendant with information that the defense could obtain from non-government sources through the exercise of reasonable diligence. See *United States* v. *Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991); see also *United States* v. *Bond*, 552 F.3d 1092, 1095 (9th Cir. 2009) ("[W]here the defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression.") (citation and internal quotation marks omitted). Accordingly, *Brady* was not violated by the government's failure to produce Waltzer's publicly available guilty-plea transcript: Petitioner was aware that Waltzer had pleaded guilty and could have

obtained the guilty-plea hearing transcript with "minimal due diligence." Pet. App. 48a-49a.

a. Petitioner contends (Pet. 16-18) that this Court should hold that *Brady*'s disclosure obligation applies even when the defendant could readily obtain the same information with the exercise of due diligence, but he appears to concede that this Court has never so held. That concession is correct. In *Strickler*, the Court addressed a *Brady* claim on federal habeas review, but noted that the decision "d[id] not reach, because it [wa]s not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them." 527 U.S. at 288 n.33. In *Banks* v. *Dretke*, 540 U.S. 668 (2004), the state prosecutor maintained an open-file discovery policy and affirmatively represented to the defendant that it had turned over all exculpatory material, but in fact did not disclose information about a paid informant and about rehearsal sessions with a prosecution witness. *Id.* at 675-678. On federal habeas review, the Court rejected the argument that a "defendant[] must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695. But the Court did not opine on a situation where the defendant was aware of relevant documents in the public record and knew how to obtain them. And *Brady*'s concern for the fairness of the trial, rather than the good faith or bad faith of the prosecutor, supports the conclusion that due process is not violated when the defendant could obtain the information with due diligence, or, as here, "minimal due diligence." Pet. App. 48a-49a.

Decisions of other courts of appeals have uniformly found no *Brady* violation, in analogous situations, where the documents in question were publicly available and where the defense was reasonably aware of the underlying event that gave rise to the document. See, *e.g.*, *Bell* v. *Bell*, 512 F.3d 223, 234-235 (6th Cir.) (en banc) (holding that sentencing records were equally available to the defendant and government and therefore not subject to *Brady*), cert. denied, 555 U.S. 822 (2008); *United States* v. *Infante*, 404 F.3d 376, 387 (5th Cir. 2005) (no suppression where psychiatric records of government's "star witness" were contained in public file and witness's charges were "closely related to the conspiracy with which the defendant is charged"); *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 892 (D.C. Cir. 1999) (*Sealed Case*) (noting that defendant's *Brady* claim was moot where a record thought to have been sealed was in fact publicly available); *Hoke* v. *Netherland*, 92 F.3d 1350, 1355 (4th Cir.) ("[W]here the 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.") (citation omitted), cert. denied, 519 U.S. 1048 (1996); *Westley* v. *Johnson*, 83 F.3d 714, 725-726 (5th Cir. 1996) (no *Brady* violation for failure to disclose inconsistent testimony in co-conspirator's trial because transcript of testimony was "readily available" and could have been obtained by defense "using reasonable diligence"), cert. denied, 519 U.S. 1094 (1997); *United States* v. *Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995) ("Documents that are part of public records are not deemed suppressed if defense counsel should know of them and fails to obtain them

because of lack of diligence in his own investigation."), cert. denied, 516 U.S. 1165 (1996); *Mills* v. *Singletary*, 63 F.3d 999, 1019 (11th Cir. 1995) (no *Brady* violation for failure to disclose witness's psychiatric records because records were available to defense upon request), cert. denied, 517 U.S. 1214 (1996); *United States* v. *Williams*, 902 F.2d 678, 681-682 (8th Cir. 1990) (no *Brady* violation for failure to disclose phone bill when defendant could have subpoenaed the telephone company and produced his own copy of the bill); *United States* v. *Wolf*, 839 F.2d 1387, 1391 (10th Cir.) (government has no obligation under *Brady* to produce exculpatory evidence "[i]f the means of obtaining the * * * evidence has been provided to the defense"), cert. denied, 488 U.S. 923 (1988).

In this case, petitioner and his counsel were aware that Waltzer had pleaded guilty. Pet. App. 49a. Indeed, the fact of Waltzer's guilty plea and of his potential bias for the government were prominent aspects of petitioner's cross-examination of Waltzer at trial. *Id.* at 52a-53a. Finding that the government did not suppress the guilty-plea transcript in these circumstances is consistent with the decisions above and with the underlying purpose of *Brady*: to safeguard the fairness of the trial against the prosecution's concealment of favorable evidence in the possession of the prosecution team, "but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976); see *Brady*, 373 U.S. at 88 (noting concern with the prosecutor as "an architect of a proceeding that does not comport with standards of justice").

b. Petitioner contends (Pet. 11-16) that this Court's review is warranted because, in his view, the courts of appeals and state high courts have articulated diver-

gent standards for determining when and if a defendant is required to exercise due diligence to discover exculpatory or impeaching evidence. To the extent that certain courts of appeals have applied a due diligence rule in some contexts but not in others, any such intra-circuit conflict should be resolved by each of those courts, and does not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). And whatever disagreement exists among the courts of appeals concerning the contours of due diligence doctrine generally, this case does not present such disagreement, because no court has found a *Brady* violation in a case involving publicly available court records, analogous to this case.

The cases cited by petitioner (Pet. 11-15) are distinguishable and not in conflict with the decision of the court of appeals. For example, unlike in this case, where the guilty-plea transcript was a public document readily accessible to the defense, it was not until after the defendant's trial in *Lewis* v. *Connecticut Commissioner of Correction*, 790 F.3d 109 (2d Cir. 2015), that the defense learned, from a retired police officer who had assisted in the defendant's arrest, that the state prosecutor failed to disclose that its prime witness "repeatedly denied having any knowledge of the murders and only implicated [the defendant] after a police detective promised to let [the witness] go if he gave a statement in which he admitted to being the getaway driver and incriminated [the defendant] and another individual." *Id.* at 113; see *id.* at 113-115. In reviewing the defendant's habeas petition, the Second Circuit applied the same due diligence standard as the court of appeals here, recognizing that "[e]vidence is not 'suppressed' [under *Brady*] if the defendant either

knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *Id.* at 121 (citation omitted; brackets in original). While the Second Circuit declined to apply a due diligence requirement to circumstances when a defendant "was reasonably unaware of exculpatory information," *ibid.*, it did not relieve a defendant of a due diligence obligation with respect to publicly available information about a witness in the files of a court proceeding of which the defendant was well aware. See *Payne*, 63 F.3d at 1208.

Similarly, in *Amado* v. *Gonzalez*, 758 F.3d 1119, 1136-1137 (9th Cir. 2014), *United States* v. *Tavera*, 719 F.3d 705, 711-712 (6th Cir. 2013), and *Sealed Case*, 185 F.3d at 892-894, the courts of appeals held that the due diligence rule did not require the defense to attempt to interview trial witnesses to discover exculpatory information that was provided by the witnesses to police or prosecutors. Although *Tavera* and *Amado* narrowed the circumstances in which the due-diligence rule applies, neither case held that the government suppresses evidence under *Brady* when it does not provide publicly available information that the defense could have reasonably obtained. To the contrary, *Tavera* noted that the circuit had previously held that *Brady* did not apply to publicly available sentencing records, rather than "information known to investigating officers that defendants had no reason to know about," and it distinguished that situation, noting that "[t]he instant case is not a 'public records' case." *Tavera*, 719 F.3d at 712 n.4 (citing *Bell*, 512 F.3d at 235); see *Amado*, 758 F.3d at 1135, 1137 (distinguishing prior due diligence cases that required defense to obtain public information of which the

defense had been put on notice); *Sealed Case*, 185 F.3d at 896 (finding inapplicable, but not overruling, circuit precedent rejecting a *Brady* violation when the information was "otherwise available through reasonable pre-trial preparation by the defense") (citation and internal quotation marks omitted). Accordingly, none of those cases conflicts with the decision below.

Nor does a single state case on which petitioner relies create a conflict warranting this Court's review. In *People* v. *Chenault*, 845 N.W.2d 731 (2014), the Michigan Supreme Court rejected "a rule requiring a defendant to show that counsel performed an adequate investigation in discovering the alleged *Brady* material," but held that "evidence that the defense knew of favorable evidence, will reduce the likelihood that the defendant can establish that the evidence was suppressed for purposes of a *Brady* claim." *Id.* at 738. The Michigan Supreme Court had no occasion to determine whether *Brady* extends to public information because no claim was made that the videotaped witness interviews the prosecution failed to produce were in the public domain. *Id.* at 739 & n.8.

In sum, petitioner points to no decision among the federal courts of appeals or state's highest courts in conflict with the decision of the court of appeals. This case would not be an appropriate vehicle for resolution of that issue in any event, since petitioner could not prevail unless the Court also granted review and ruled for him on the favorability and materiality prongs. As discussed below, review of those fact-bound issues is not warranted.[6]

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[6] Petitioner's suggestion (Pet. 20) that the due diligence rule warrants review because of "recent scandals involving prosecutorial misconduct," is unfounded. This case involved no such miscon-

2. Petitioner also contends (Pet. 4, 21-29) the court of appeals misapplied the *Brady* materiality standard and that it conflated the favorability and materiality prongs of the *Brady* analysis. That is incorrect. The court of appeals applied the correct legal standard and correctly concluded that the mental health evidence was neither favorable nor material to the defense.

a. The court of appeals correctly recognized that *Brady* extends to information that could be used to impeach government witnesses. Pet. App. 21a; see *Giglio* v. *United States*, 405 U.S. 150, 154 (1972). Impeachment evidence is "favorable to an accused," because, "if disclosed and used effectively," such evidence may enable the defense to challenge the truthfulness and reliability of witnesses. *United States* v. *Bagley*, 473 U.S. 667, 676 (1985) (citation omitted).

Petitioner does not ask this Court to review the lower courts' adverse finding on the favorability prong. Petitioner does nonetheless suggest (Pet. 22 n.6) that the court of appeals' favorability decision was

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duct: As described above, the government diligently complied with its *Brady* obligations in this case and produced "boxes of impeachment evidence" regarding Waltzer, allowing defense counsel's vigorous attack on Waltzer at trial. Pet. App. 28a-29a. And petitioner also wrongly characterizes (Pet. 18-21) this case as the "tip of the iceberg," of how the "due diligence rule deprives defendants of key exculpatory evidence." As noted by the amici curiae Former Federal Prosecutors and Former Senior Justice Department and Government Officials (Amicus Br. 11-13), the Department of Justice has acted diligently to assure that its prosecutors provide discovery in criminal cases beyond that required by *Brady*, in line with the highest ethical standards. The success of the Department's ongoing efforts is evident in the fact that, out of the hundreds of thousands of prosecutions undertaken by the Department in recent years, instances of misconduct are extraordinarily rare.

"baffling," because, he speculates that disclosure of Waltzer's depression and anxiety would have also "uncover[ed] Waltzer's bipolar diagnosis"—a condition that was only first mentioned, well after petitioner's trial, in a psychiatric report submitted in connection with Waltzer's sentencing. See Pet. App. 42a-43a, 103a-104a; see also Gov't C.A. Br. 37-38 (noting that each time Waltzer was asked about his mental health before petitioner's trial, Waltzer identified only anxiety and depression). In any event, the district court considered Waltzer's bipolar diagnosis and found that that diagnosis, in combination with "the other alleged 'new evidence' regarding Waltzer's mental health" were not "necessarily 'favorable to the defense.'" Pet. App. 103a; see *id.* at 50a-53a & n.5 (noting that the psychiatrist opined that Waltzer did not "experience[] impairment in memory, perception, or communication").

That court of appeals' decision to uphold that determination was correct because the evidence of Waltzer's mental health history and treatment did not impeach Waltzer's credibility. The information from the guilty-plea transcript only generally indicated that Waltzer had been seeing a mental health provider and taking a medication for depression and anxiety. Pet. C.A. App. 4249a. The bail report similarly noted that Waltzer had been diagnosed with an anxiety and panic disorder in the indeterminate past; that he was then under the care of his primary care physician for anxiety; and that he had been taking a medication for depression for the past ten years. *Id.* at 4122a. None of that information suggested that Waltzer's mental health condition "was severe and would in any way affect his ability to recall the past and to truthfully

and accurately testify on behalf of the [g]overnment in its case against [petitioner.]" Pet. App. 84a. Under these circumstances, such routine mental health concerns have limited-to-no impeachment value. See *United States* v. *Jimenez*, 256 F.3d 330, 343-344 (5th Cir. 2001), cert. denied, 543 U.S. 1140 (2002); *United States* v. *Smith*, 77 F.3d 511, 516 (D.C. Cir. 1996); see also *United States* v. *Hargrove*, 382 Fed. Appx. 765, 776 (10th Cir. 2010) (unpublished opinion) ("We have not discovered a single case in which a witness'[s] credibility was called into question on account of an anxiety disorder."), cert. denied, 562 U.S. 1290 (2011); *United States* v. *Levy*, 207 Fed. Appx. 833, 836 (9th Cir. 2006) (unpublished opinion) (witness's depression "only slightly weakens the reliability of his testimony" because no evidence showed "that the testimony of depressed persons is more likely to be dishonest or unreliable"), cert. denied, 549 U.S. 1357 (2007).

No error occurred, therefore, in the court of appeals' conclusion that the mental health information was not favorable to the defense, and that independent holding is fatal to petitioner's *Brady* claim.

b. No basis exists for petitioner's contention (Pet. 23-26) that the court of appeals applied the incorrect materiality standard by failing to consider "collectively" the undisclosed evidence. That claim is particularly unfounded considering that the only evidence at issue in the petition for a writ of certiorari is the mental health information discussed at Waltzer's plea and in the bail report. Nor did the court of appeals treat the materiality prong as a "sufficiency-of-the-evidence" test in contravention of *Kyles*, *supra*, as petitioner contends (Pet. 26-27).

i. Suppression of potential impeachment evidence "amounts to a constitutional violation only if it deprives the defendant of a fair trial." *Bagley*, 473 U.S. at 678 (opinion of Blackmun, J.). Thus, a "conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Ibid.*; see *Smith* v. *Cain*, 132 S. Ct. 627, 630 (2012) ("We have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict."). More specifically, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682.

To determine the materiality of impeachment evidence, its evidentiary strength and impact must be evaluated "collectively" in the context of the entire record. *Kyles*, 514 U.S. at 436; see *Agurs*, 427 U.S. at 112. Undisclosed impeachment evidence is not material where "the testimony of the witness is corroborated by other testimony," or where the material "merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *Payne*, 63 F.3d at 1210 (citation and internal quotation marks omitted); see *United States* v. *Mathur*, 624 F.3d 498, 505 (1st Cir. 2010) ("[T]he modest impeachment potential of this evidence is diminished by the extensive corroboration of [the witness's] direct testimony.").

ii. The court of appeals correctly applied this Court's precedent in affirming the district court's conclusion that no "reasonable probability" existed that "the result of the proceeding would have been differ-

ent" had the evidence of Waltzer's depression and anxiety disorder been disclosed to the defense. Pet. App. 26a (quoting *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.)).

During the three-week trial, the government presented voluminous evidence, much of it in the form of recordings of petitioner discussing the fraudulent scheme, petitioner's emails to co-conspirators about manipulative trades, as well as records of the trades and other bank documents. Pet. App. 27a-28a. This evidence, moreover, directly tracked and corroborated Waltzer's description of petitioner's fraudulent activities. *Id.* at 53a. Petitioner also extensively cross-examined Waltzer about his bias toward the government in light of his plea agreement, and he had ample opportunity to challenge Waltzer on his admitted past drug abuse. *Id.* at 51a-53a; see *id.* at 28a-29a ("[T]he [g]overnment produced boxes of impeachment evidence [to petitioner] concerning Waltzer, including records of Waltzer's numerous prior frauds, evidence of his plea and cooperation, trading and financial records, and prior statements to law enforcement.").

Impeachment of Waltzer on the basis of poor mental health would have also been inconsistent with petitioner's trial strategy, which sought to portray Waltzer as the mastermind of the securities fraud scheme who "fooled" petitioner into participation. Pet. C.A. App. 190a; see *id.* at 183a-190a (defense opening statement); *id.* at 788a-789a (cross-examination of Waltzer, seeking to portray him as a "very good liar" and a "good crook"); *id.* at 2860a-2868a (defense closing argument portraying Waltzer as a "conman" who used petitioner as his "mark" because Waltzer needed a target for his cooperation with the government).

Petitioner wrongly criticizes (Pet. 22-23) the court of appeals for "conflat[ing]" the materiality and favorability prongs of the *Brady* analysis. The strength of potential impeachment evidence is relevant to both prongs of the analysis. See *United States* v. *Avilés-Colón*, 536 F.3d 1, 19 (1st Cir.) ("We evaluate the strength of the impeachment evidence and the effect of its suppression in the context of the entire record to determine its materiality.") (citation omitted), cert. denied, 555 U.S. 1089 (2008). The limited impeachment value of Waltzer's mental health information thereby demonstrates both that it is neither favorable nor material to the defense. In any event, the court also addressed the favorability and materiality questions separately, concluding that the mental health evidence was not favorable because it did not tend to impeach Waltzer, Pet. App. 25a-26a, and was not material because even if it did tend to impeach him, it would not have affected the proceedings, *id.* at 26a.

The court of appeals therefore correctly concluded that the evidence of Waltzer's depression and anxiety disorder was not material. Pet. App. 26a (citing *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.). This factbound assessment by the court of appeals, echoing that of the district court, does not merit this Court's review. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (articulating "two courts" rule under which this Court refrains from reviewing factbound determinations when the district court and court of appeals agree on what conclusion the record requires).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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