No. 14-1535

IN THE

Supreme Court of the United States

GEORGE GEORGIOU,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

In the decision below, the Third Circuit agreed with the First, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits that courts may deny a claim under *Brady* v. *Maryland*, 373 U.S. 83 (1963), where the defendant could have obtained the information by exercising due diligence. Four other circuits (the Second, Sixth, Ninth and District of Columbia Circuits), as well as the Michigan Supreme Court, reject a due diligence rule. The government argues that even those courts that reject a due diligence rule would nonetheless find no *Brady* violation when the documents at issue are publicly available. That is entirely beside the point, because this case does *not involve* publicly available documents.

In any event, those circuits that reject the due diligence rule have not carved out an exception for publicly available documents. Accordingly, this case squarely implicates a deep split of authority over whether there should be a due diligence requirement. And as numerous *amici*—including a bipartisan group of former federal prosecutors and former senior Justice Department and government officials—point out, the decision below was flat wrong to embrace such a rule. This case is an ideal vehicle to examine whether there should be a due diligence exception to *Brady*.

The government also disputes whether the court of appeals erred in its analysis of the remaining *Brady* factors, favorability and materiality. The Third Circuit's opinion reveals, however, that it conflated those two factors, and committed other legal errors when determining materiality. This Court should grant certiorari on both questions presented.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION IMPLICATES A DEEP CIRCUIT SPLIT.

1.a. The government contends (at 15) that "no court has found a *Brady* violation in a case involving publicly available records." That is beside the point, because this case does not involve publicly available records.

There are two documents at issue here: (1) Waltzer's bail report and (2) Waltzer's guilty-plea transcript. The government does not even argue that the bail report was publicly available; indeed, it acknowledges (at 5) that the bail report was marked "CONFIDENTIAL" and "FOR COURTROOM USE ONLY."

Contrary to the government's suggestion, the transcript of Waltzer's guilty-plea hearing was also not publicly available before or during Georgiou's trial. Although the hearing occurred in January 2009, the district court kept the transcript under seal until March 2010. *See* Order, No. 2:08-cr-552 (E.D. Pa. March 25, 2010), ECF No. 46 (ordering that the transcript of the hearing on January 28, 2009, shall be unsealed and "made available to defense counsel"). By then, Georgiou's trial had already concluded. Opp. 5-6.

Thus, neither the bail report nor the guilty-plea transcript was publicly available at the time of Georgiou's trial. Even if courts agreed on a *Brady* exception for publicly available documents, this case would not fall within that exception.

b. In any event, courts rejecting a due diligence rule have not embraced an exception to *Brady* for publicly available documents.

The Tenth Circuit, in *Banks* v. *Reynolds*, rejected a due diligence requirement, noting that a prosecutor's *Brady* obligation "stands independent of the defendant's knowledge." 54 F.3d 1508, 1517 (10th Cir. 1995). Whether defense counsel "'knew or should have known'" that the prosecutors had previously charged two other suspects for the same murder "is irrelevant to whether the prosecution had an obligation to disclose the information." *Id*. The Tenth Circuit did not indicate that its holding was limited to cases where the information was not publicly available, not least because some of the information likely *was* publicly available. *Id*. at 1511 (listing among the undisclosed evidence "the prior arrests of [the other suspects]," "the fact that [another suspect] had been bound over for the [] murder on a finding of probable cause, or [his] guilty plea" on another charge). Indeed, the court did not identify which pieces of *Brady* material were or were not publicly available, demonstrating that the Tenth Circuit did not view that as a particularly relevant factor.

In *United States* v. *Payne*, the Second Circuit also rejected an argument that the defendant should have obtained an affidavit by the main prosecution witness. 63 F.3d 1200, 1205 (2d Cir. 1995). The court disagreed that "the government's duty to produce the [the witness's] affidavit was eliminated by that document's availability in a public court file." *Id*. at 1209. Although the defendant knew that the witness pleaded not guilty, the defendant "had no apparent reason to believe that [the witness] had filed an affi-

davit containing sworn denials of her involvement" in the criminal events to which she had testified, and thus no reason to pursue her sentencing records on his own.[1] *Id*. The same reasoning applies here: Georgiou had no reason to know that Waltzer admitted to mental illness in his criminal proceedings, and thus no reason to uncover the records independently. *See id.* (rejecting the argument that the defendant was required to "seek out" information in order to retain *Brady* protections); *Lewis* v. *Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2nd Cir. 2015) (noting that this Court "has never required a defendant to exercise due diligence to obtain *Brady* material," and holding that the state court "imposed just such" a requirement).

The Sixth Circuit likewise rejected the due diligence rule in *United States* v. *Tavera*, 719 F.3d 705, (6th Cir. 2013). The court cited this Court's precedent as a "rebuke[] * * * for relying on such a due diligence requirement to undermine the *Brady* rule." *Id*. at 708, 711-712 (citing *Banks* v. *Dretke*, 540 U.S. 668, 711 (2004)). The "clear holding in *Banks*," the

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[1]The court also noted that the prosecution included in its *Brady* disclosures other publicly available court documents relating to the witness, inducing the defendant to "reasonably assume that the court files did not include other undisclosed exculpatory and impeachment documents pertaining to" that witness. 63 F.3d at 1209. Here as well, the prosecutors provided Georgiou's defense with extensive documents relating to Waltzer. *See* Br. for Appellee United States of America, *United States* v. *Georgiou*, 2013 WL 6709192, at *31 n.8 (representing that "the government obtained all derogatory information about Waltzer that was available and shared that avalanche of impeaching information with the defense").

court noted, should have ended the practice of "avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule." *Id*. at 712. Accordingly, the court concluded that the prosecutor violated *Brady* by failing to disclose information that defendant "had no reason to know about." *Id.* at 712 n.4 (quoting *Bell* v. *Bell*, 512 F.3d 223, 235 (6th Cir. 2008)); *id*. at 710-714.[2]

Similarly, the Ninth Circuit declined to apply a due diligence rule in *Amado* v. *Gonzalez*, 758 F.3d 1119 (9th Cir. 2014). The court found a *Brady* violation in the prosecution's failure to disclose information about the main witness's criminal background even though it was available to the defendant's attorney. *Id*. at 1130 (describing the district court's holding that "Amado's trial counsel had had an opportunity to speak with [the witness], but had failed to do so"). The court of appeals refused even to address whether the evidence "conceivably could have been discovered." *Id*. at 1136-1137. "No *Brady* case discusses such a [due diligence] requirement, and none should be imposed."[3] *Id*. at 1137 (citing *Banks*).

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[2]The court's brief reference to *Bell* does not support the government's contention that the due diligence rule still applies to public records in the Sixth Circuit. Although *Bell* applied a due diligence rule to reject a *Brady* claim based on public records, the defendant knew that the witness might be lying in hopes the government would dismiss pending charges against the witness, and thus knew that the sentencing records contained information needed to make that argument. 512 F.3d at 228-229, 235.

[3]The Second and Ninth Circuits noted that if defendant knew or should have known about the evidence but failed to pursue

The D.C. Circuit also rejected a due diligence requirement. *In re Sealed Case*, 185 F.3d 887 (D.C. Cir. 1999). The government argues (at 17) the court found "inapplicable," but did not "overrul[e]," circuit precedent rejecting the due diligence rule. But the government can identify no text in the opinion to support its view. *See* 185 F.3d at 897. No other D.C. Circuit case has applied the rule that the government finds in *Sealed Case* in the intervening sixteen years. In fact, a district court in that circuit recently relied on *Sealed Case* to reject a due diligence claim. *United States* v. *Nelson*, 979 F. Supp. 2d 123, 133 (D.D.C. 2013) ("[I]n the D.C. Circuit, the prosecution bears the burden of disclosing any exculpatory evidence in its possession, and it is no response to a *Brady* claim that defense counsel could have learned of the evidence through reasonable pre-trial preparation." (quoting *Sealed Case*,185 F.3d at 896-897)).

Finally, *People* v. *Chenault*, 845 N.W.2d 731 (Mich. 2014), left no doubt that the Michigan Supreme Court views the due diligence rule as improper under any circumstances. The government argues (at 17) that the court left the rule intact for publicly availa-

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it, the evidence would not be suppressed. *Lewis,* 790 F.3d at 121; *Amado*, 758 F.3d at 1136-1137 (observing that there can be no *Brady* violation where defense counsel already knows the information or is provided with "explicit notice" that it exists). But that was not a result of the due diligence rule, and it applied only to "facts already within the defendant's purview, not those that may be unearthed." *Lewis*, 790 F.3d at 121; *see also Amado*, 758 F.3d at 1136-1137 (noting that counsel is not obliged to "enlarge" his investigation to uncover the documents).

ble documents because there was no claim that the videotaped statements at issue were "in the public domain." But in the portion of the opinion the government relies upon, the court merely noted that suppression was conceded because the videotapes were never provided to the defense. 845 N.W.2d at 739 & n.8. Nor does the court's acknowledgement that information cannot be suppressed where the defendant already knew it undermine its rejection of the due diligence rule. *Id*. at 736 n.4, 737 (noting that such cases did not "provide[] sufficient explanation for adding a diligence requirement"). The court's sweeping holding leaves no doubt that there is no place for such a rule: "We disagree with the prosecution's suggestion that the diligence requirement is consistent with or implied by United States Supreme Court precedent. Nor do we conclude that a diligence requirement is consistent with the *Brady* doctrine generally." *Id*. at 737.

In sum, these cases rejecting the due diligence rule cannot be reconciled with the decision below and the decisions of the First, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits applying the due diligence rule. *See* Pet. 11-16. The government is wrong that the split collapses upon consideration of whether the information was publicly available.

2. Decisions rejecting the due diligence rule are consistent with this Court's precedent. While it is true that *Brady* did not focus on the prosecutor's good faith or bad faith, Opp. 11, nor did it focus on the defendant's conduct. *See Strickler* v. *Greene*, 527 U.S. 263, 281-282 (1999) (listing *Brady* factors as turning on the content of the evidence and the conduct of the prosecutor). There is no basis in *Brady*

for a theory that defendant can somehow waive his *Brady* protections by failing to exercise due diligence. *See id*. And recent cases affirm this principle. *See, e.g*., *United States* v. *Bagley*, 473 U.S. 667, 682-683 (1985) (rejecting "a different standard of materiality" depending on the specificity of defendant's request); *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995) (noting that "a defendant's failure to request favorable evidence d[oes] not leave the Government free of all obligation"). *See generally* Br. of *Amici Curiae* Former Federal Prosecutors and Former Senior Justice Department and Government Officials 7-9 (recounting this Court's emphasis on the fairness of the proceedings rather than the defendant's conduct). This Court's review is needed to rein in the systemic problem of *Brady* violations and restore public faith in the criminal justice system. *See generally* Br. of the Center on the Administration of Criminal Law as *Amicus Curiae*.

3. The government advances an alternative argument why its failure to disclose Waltzer's bail report was not a *Brady* violation. The government argues (at 11) that the prosecution "neither possessed the [bail] report nor was aware of its contents." But in rejecting Georgiou's *Brady* claims, the Third Circuit did not rely on, or even mention, this argument. *See* Pet. App. 24a-25a (relying on the due diligence rule). The government recognizes as much. *See* Opp. 8 ("[T]he court held that the government had not suppressed either document because each was accessible to petitioner 'through his exercise of reasonable diligence.'"). Accordingly, the government's alternative argument is no ground for denying certiorari.

In any event, there can be no question that the government possessed the bail report. The prosecutor in Georgiou's case was present at Waltzer's guilty-plea hearing and had access to the report. *See, e.g.*, Pet. App. 82a (recounting the government's acknowledgement that the bail report "was available for the government's inspection"). Even if the prosecutor did not personally review the bail report, information possessed by "other branches of the federal government * * * is typically imputed to prosecutors of the case." *United States* v. *Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999). In addition, prosecutors are required to seek out *Brady* information in order to disclose it to the defense. *See Kyles*, 514 U.S. at 437 (explaining 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").

II. THE THIRD CIRCUIT'S REMAINING *BRADY* ANALYSIS IS ALSO FLAWED.

1. The government argues (at 23) that the court's conflation of materiality and favorability merely reflects that the "strength of potential impeachment evidence is relevant to both prongs of the analysis." In the government's view, evidence may be deemed not favorable under *Brady* because its "strength" is low. The government "confuses the weight of the evidence with its favorable tendency." *Kyles*, 514 U.S. at 451. Evidence is favorable if it is impeaching or exculpatory. *Banks*, 540 U.S. at 691. That is a distinct question from whether it is material, or whether 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. Here, even the government concedes that the evidence, which impugned the *only* government witness who could testify as an insider about Georgiou's *mens rea*, was exculpatory. *See* Opp. 23 (acknowledging that Waltzer's mental health information has "impeachment value," even if "limited").

2. With respect to materiality, the Third Circuit's cursory analysis falls far short of what this Court's cases require. *See United States* v. *Agurs*, 427 U.S. 97, 112 (1976) (requiring that the "omission" of evidence be "evaluated in the context of the entire record"). And in conducting that analysis, the court committed two other legal errors: It failed to assess the cumulative effect of the withheld evidence, and conducted what amounted to nothing more than a sufficiency-of-the-evidence analysis. Pet. 22-27; *see also Kyles*, 514 U.S. at 434-437 & nn.8, 10. When viewed under the proper legal standard, the undisclosed evidence was material. Pet. 27-29.

In response, the government contends (at 22) that "[i]mpeachment of Waltzer on the basis of poor mental health would have * * * been inconsistent with petitioner's trial strategy." That contention is flawed. Georgiou settled on his trial strategy without the mental health evidence, and had he known of it, he would have altered his strategy in any number of significant ways.[4] This is particularly true where,

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[4]Waltzer's mental health issues also could have been exculpatory as an independent explanation for Waltzer's conduct. Waltzer may have engaged in reckless trading behavior not because he was in a conspiracy with Georgiou, but because he was suffering from severe mental illness, such as bipolar disorder. *Cf., e.g.*, *Nelson*, 979 F. Supp. 2d at 131 (holding that evidence

as here, defense counsel made repeated, specific requests—after Waltzer's guilty-plea hearing—for information about his mental health. Pet. 7-8. As this Court has noted, "the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." *Bagley*, 473 U.S. at 682-683.

3. Finally, the government contends (at 17, 23) that the second question presented is "factbound." But as explained above, the Third Circuit committed a number of legal errors in its materiality analysis, and thus departed from this Court's precedents. Moreover, when one of the questions presented is independently worthy of certiorari, this Court "often grant[s] certiorari on attendant questions that * * * are sufficiently connected to the ultimate disposition of the case." *City & County of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., concurring in part and dissenting in part). That is what this Court should do here.

In any event, the Third Circuit's holding on materiality should not stand in the way of this Court's review of the due diligence question. Decisions denying *Brady* claims under the due diligence rule typically include alternative holdings. *See, e.g.*, *United States* v. *Catone*, 769 F.3d 866, 872 (4th Cir. 2014) (holding that the defendant could have obtained the

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was exculpatory because it would have provided an alternative explanation for his behavior).

information with diligence and that it was not material). A better vehicle is therefore highly unlikely to emerge. And the Third Circuit's alternative holding here would in no way affect—let alone preclude—this Court's full consideration of the due diligence question. Accordingly, this Court should not delay review of that question, which is central to the administration of criminal justice across the Nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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