UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15519

In the Matter of

Timbervest, LLC,

Joel Barth Shapiro,
Walter William Anthony Boden, III,
Donald David Zell, Jr.,
and Gordon Jones II,

Respondents.

REPLY IN FURTHER SUPPORT OF RESPONDENTS' MOTION TO COMPEL PRODUCTION OF *BRADY* MATERIAL

The Respondents file this reply in order to address several points in the Division of Enforcement's opposition to Respondents' Motion to Compel Production of *Brady* Material.

Initially, as to the two Division emails dated June 5 and 8, 2012 containing statements made by Edward Schwartz (the "Schwartz notes"), the Division argues that those are within the record before the Commission. Assuming that to be the case, Respondents maintain that those emails clearly contain *Brady* material and Respondents are entitled to their production for use not only in this action but in other actions such as the AT&T proceeding. The Division goes on to claim that its notes, including the Schwartz notes, are not verbatim statements. The Division's claim, however, is contradicted by the Schwartz notes themselves, which contain direct quotes of Schwartz's statements. The fact that the emails contain the Division's attorney's comments regarding areas for further inquiry does not make the verbatim Schwartz statements attorney

work product. Respondents do not seek to compel production of those attorney comments—rather, they seek the verbatim statements made by Schwartz.[1]

As to the Woodall notes, Respondents have reason to believe that those notes also contain *Brady* material based on an earlier conversation with Woodall's counsel about what Woodall said in an interview with the Division's staff. Based on that earlier conversation with Woodall's counsel, Respondents believe that the Division's Woodall notes, like the Schwartz notes, are discoverable.

The Division goes on to argue that Respondents cannot demonstrate a compelling need for attorney work product and cites to cases relating to the attorney work product doctrine. Those attorney work product cases, however, are inapplicable to Respondents' claim that these materials may contain *Brady* material. *See* SEC Rule of Practice 230(b). The Division argues that Respondents are not entitled to a fishing expedition. But the Respondents' request is not a fishing expedition because there is evidence of the Division's failure to comprehend its *Brady* obligations by refusing to produce the Schwartz notes, which contain *Brady* material.

In its prior filings with the Commission, the Division argued that there was no *Brady* violation as to the Division's emails regarding their interviews with Schwartz because "the record demonstrates that the Respondents already possessed all of the material information contained in the June 2012 Notes." Division of Enforcement's Consolidated Response to Respondents' Appeals to the Commission, dated December 1, 2014, at 30. The Division cited to several district court cases in support of its argument that "the protections of *Brady* do not require the

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[1] These notes not only contain *Brady* material, but should also be produced pursuant to Rule 231(a). Rule 231(a) allows a Respondent to seek production of "any statement of any person called . . . that pertains to his or her direct testimony and that would be required pursuant to the Jencks Act, 18 U.S.C. 3500." "Statement", as defined by the Jencks Act includes any recording of "a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement." 18 U.S.C. 3500(e).

government to provide potentially exculpatory information that is *already known to the defendant*." *Id.* at 30 (emphasis in original). Respondents have disagreed that the underlying statements are in their possession, but aside from that fact, the Commission's rules do not allow for the Division to refuse to produce exculpatory material. Rule 230 explicitly sets forth that "Nothing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), *documents that contain material exculpatory evidence*." Rule 230(b)(2) (emphasis added).

The Division's position that it withhold *Brady* material based on its own determination that the information is or may already be available to Respondents through other sources is contrary to the proscriptions of *Brady* and is simply a recipe for *Brady* violations. As argued by an esteemed group of former prosecutors as *amici curiae* in a recent filing with the Supreme Court in *Georgiou v. United States*, No.14-1535 (July 2015) (attached hereto as Exhibit 1), "proper administration of justice requires that prosecutors always err on the side of disclosure." Exhibit 1 at 9. In *Georgiou*, prosecutors did not disclose information regarding the drug use of a key government witness. *Id.* at 5. The government conceded that the information was in its possession but that it was not obliged to provide the information to Georgiou because it had been available to Georgiou. *Id.* This esteemed group of Amici argued that *Brady* does not recognize an exception for lack of due diligence by the defense. For the same reasons, the Division's argument that the Schwartz notes are not *Brady* material because Schwartz's exculpatory statements were in Respondents' possession through other sources should be rejected.

The Division also argues that the Commission should deem Respondents' argument for the production of the Division's other witness interview notes waived because they claim it was

not raised in their petition for review. In Timbervest's Appeal to the Commission, Respondents argued that the Division failed to produce any *Brady* material to the Respondents and therefore did not limit this *Brady* claim. *See* Timbervest's Appeal to the Commission at 25-26 ("The Division failed to disclose a *single* piece of exculpatory evidence pursuant to its obligations under Rule 230(b)(2) and *Brady*.") The fact that Respondents' briefing focused on the Division's Schwartz and Woodall notes is only because Respondents were aware of what the Schwartz notes contained and were also aware of what the Woodall notes may contain because of a prior conversation with Woodall's counsel and therefore could substantively challenge the Division's blanket assertion that their notes contain no *Brady*.

Finally, it bears noting that in arguing that the SEC's administrative process is fair, the Division's Director took the position that there are "extensive procedural protections to respondents including that the Division has "affirmative obligations to disclose material, exculpatory information and Jencks Act obligations to turn over statements of our witnesses." Andrew Ceresney, "Remarks to the American Bar Association's Business Law Section Fall Meeting, Nov. 21, 2014. These "procedural protections", however, are hollow if they are based purely on the representations of the Division. The fact that the Schwartz notes contain *Brady* material and the fact that no *Brady* material was produced in an investigation that took 3 years calls into question the Division's assertions that they are not in possession of any *Brady* material.

This 10th day of August, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing upon counsel of record in this matter by causing same to be delivered to the following as indicated below.

Via Facsimile (202) 772-9324
and Overnight Delivery

Secretary Brent J. Fields
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This 10th day of August, 2015.

George Kostolampros

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 AMICI CURIAE FORMER FEDERAL PROSECUTORS AND FORMER SENIOR JUSTICE DEPARTMENT AND GOVERNMENT OFFICIALS MICHAEL B. MUKASEY, STUART M. GERSON, PETER D. KEISLER, GREGORY B. CRAIG, DONALD B. AYER, JAMIE GORELICK, LARRY D. THOMPSON, GARY G. GRINDLER, WALTER DELLINGER, CHRISTOPHER WRAY, RITA M. GLAVIN, JOHN S. GORDON, SCOTT R. LASSAR, JOSEPH P. RUSSONIELLO, DAVID W. SHAPIRO, MICHAEL J. SHEPARD, MARY PATRICE BROWN, SIGAL MANDELKER, BOYD M. JOHNSON III, AND SHARON COHEN LEVIN IN SUPPORT OF PETITIONER

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF THE AMICI CURIAE[1]

Amici are former federal prosecutors and senior Justice Department and government officials who have dedicated many years of service to the criminal justice system and have a continuing interest in preserving the fair and effective administration of criminal trials.[2] As such, amici understand the duty of prosecutors "to seek justice within the bounds of the law, not merely to convict." *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-1.2(c) (4th ed. 2015). Amici write to emphasize that fundamental to vindicating this responsibility is making timely disclosure of all material and favorable evidence to the defense.

As the Supreme Court recognized in *Brady* v. *Maryland*, the failure to disclose favorable evidence "violates due process ... irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963); *see also United States* v. *Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."). While this affirmative duty is above and beyond the demands of the "pure adversary model," *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985), it is grounded in an understanding of the prosecutor's "'special role ... in the search for truth in criminal trial,'" *Banks* v. *Dretke*, 540 U.S. 668, 696 (2004). From their years of combined experience, amici appreciate

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[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief are on file with the Clerk. A list of amici is submitted as Appendix A to this brief

[2] The full list of amici appears in the Appendix.

the challenging judgment calls prosecutors face on a daily basis, but they also deeply believe that fundamental fairness and public confidence in our justice system relies on prosecutors taking their disclosure obligations seriously and fulfilling this duty capaciously.

Amici do not believe that Supreme Court precedent recognizes an exception to the *Brady* rule for lack of diligence by the defense and are concerned that the decisions of several federal circuits, including the Third Circuit, have undermined *Brady* by shifting focus away from the prosecutor's affirmative obligation to disclose. We submit this brief to emphasize that the introduction of an antecedent "due diligence" inquiry focused on the defendant is inconsistent not only with Supreme Court precedent but also principles codified in the codes of ethical conduct for prosecutors.

INTRODUCTION

Petitioner George Georgiou's case presents a straightforward question about the appropriateness of conditioning *Brady* disclosures on a defendant's exercise of due diligence. According to the government, Georgiou and his co-conspirators engaged in a scheme that inflated the prices of four securities through various trading strategies and then fraudulently used those manipulated securities as collateral to obtain large loans. Pet. App. 3a-7a. The prosecution relied on the testimony of Kevin Waltzer, Georgiou's former business partner and alleged co-conspirator. Pet. App. 4a, 41a. Waltzer's testimony corroborated certain physical evidence collected by the government, Pet. App. 51a, and undergirded the government's contention that Georgiou acted "wilfully" and had the "intent to defraud," Tr. 28 (Feb. 12, 2010); *see also* Tr. 7 (Jan. 25, 2010).

Recognizing the importance of Waltzer's testimony, Georgiou made a pre-trial request that the government turn over any *Brady* information that would "reflect upon the credibility, competency, bias or motive of government witnesses," including with respect to any mental health problems or substance abuse issues Waltzer might have had. Letter from Defense Counsel to U.S. Attorney 4, 5 (Mar. 25, 2009). The government provided limited information regarding Waltzer's drug use responsive to this request. Pet. App. 22a-23a. Georgiou's counsel thereafter focused their effort to impeach Waltzer's credibility on his plea agreement with the government. Pet. App. 51a-53a. On February 12, 2010, Georgiou was convicted of one count of conspiracy, four counts of securities fraud, and four counts of wire fraud. Pet. App. 40a-41a.

Yet the government had been aware from Waltzer's own criminal proceedings that he had an extensive history of substance abuse and mental health problems, and possessed two pieces of evidence at issue on appeal that it failed to disclose: A Bail Report provided to the government a year before Georgiou's trial by pretrial services, Pet. App. 81a (the "Bail Report"), and the transcript of Waltzer's arraignment and guilty plea hearing, Pet. App. 22a (the "Minutes"). Both documents contained specific information about the timeline of Waltzer's mental health and substance abuse issues, as well as the medication and treatment he was receiving in the period leading up to his testimony. This information might have informed Georgiou's defense strategy and advanced his efforts to undermine Waltzer's credibility. *See United States* v. *Van Meerbeke*, 548 F.2d 415, 419 (2d Cir. 1976) (noting the relevance of drug use to witness impeachment); *United States* v. *Lindstrom*, 698 F.2d 1154, 1163 (11th Cir.

1983) (noting relevance of psychiatric history); *see also* *Giglio* v. *United States*, 405 U.S. 150, 154-155 (1972) (recognizing importance of witness credibility).

Georgiou learned about the suppressed information only after his trial ended, when Waltzer requested leniency for himself at a sentencing hearing. Georgiou immediately moved for a new trial on the grounds that the evidence was material to his defense and the government's suppression of it violated *Brady*. Pet. App. 59a–60a. The government conceded that the relevant information had been "'available,'" Pet. App. 82a (the Bail Report), or "in its possession," Pet. App. 48a (the Minutes), but it argued that it was not obliged to disclose the evidence because it had been "available to Georgiou," Pet. App. 48a. The district court denied Georgiou's post-trial motions, holding that there could be no *Brady* violation where the suppressed evidence could have been "'obtain[ed] [by the defendant] from other sources by exercising reasonable diligence.'" *Id.* (quoting *United States* v. *Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991)).

The Third Circuit affirmed the conviction. The court held that the evidence had not been suppressed because Georgiou failed to exercise "reasonable diligence" in seeking evidence of Waltzer's mental health history. Pet. App. 24a–25a. In particular, the court reasoned that the Bail Report and the Minutes, as public records, were equally available to Georgiou and the prosecution. Pet. App. 25a.[3]

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[3] The court also found that the information would not have been material, in light of the other evidence introduced at trial. Pet. App. 25a-26a. Amici do not address these holdings and do not take a position with respect to them.

By adopting this circumscribed view of a prosecutor's obligations under *Brady*, the Third Circuit has joined a growing list of courts departing in this way from Supreme Court precedent and the fundamental principles that undergird the *Brady* doctrine. Where prosecutors are aware of this sort of information, they should disclose it to the defense, and their obligations to the truth-seeking process and principles of fairness are not discharged on the theory that the defendant could seek it out for himself. Such an approach contributes to a harmful notion that the criminal justice system is a game, and that victory rather than justice is a prosecutor's goal. Amici respectfully request that this Court grant review to correct this misunderstanding and to provide uniform guidance to the courts of appeals on this important issue.

REASONS FOR GRANTING THE PETITION

I. PROSECUTORS ARE DUTY-BOUND TO DISCLOSE ALL *BRADY* MATERIALS REGARDLESS OF DEFENDANTS' EXERCISE OF DUE DILIGENCE

Brady v. *Maryland* requires prosecutors to disclose all evidence that is "favorable to an accused" and "material either to guilt or to punishment." 373 U.S. 83, 87 (1963). Underlying this unequivocal demand is the recognition that prosecutors are subject to heightened ethical obligations by virtue of their office. *Berger* v. *United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."). As representatives of the sovereign, prosecutors operate outside the "pure adversary model." *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985).

Their responsibility is not to win at all costs but rather to "ensure that a miscarriage of justice does not occur." *Id.* at 675. Crucial to that effort is "disclos[ing] evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Id.*

The Third Circuit has diminished this constitutional and ethical requirement by introducing a rule that excuses a prosecutor from fulfilling her obligation if the defendant could have but did not find the favorable evidence himself. Rather than ask whether the prosecution has withheld from the defendant evidence that, "if made available, would tend to exculpate him or reduce the penalty," *Brady*, 373 U.S. at 87-88, the Third Circuit asks whether the defendant could have obtained the evidence "from other sources by exercising reasonable diligence," *United States* v. *Perdomo*, 929 F.2d 967, 973 (1991). Such a rule is tantamount to saying that a "'prosecutor may hide, defendant must seek,'" which this Court in *Banks* v. *Dretke* made clear "is not tenable in a system constitutionally bound to accord defendants due process." 540 U.S. 668, 696 (2004); *see also Cone* v. *Bell*, 556 U.S. 449, 469-470 (2009). It is also at odds with standards of prosecutorial conduct.

A. *Brady* And Its Progeny Require Prosecutors To Disclose Exculpatory Evidence Without Regard To Defendants' Diligence

Unlike the Third Circuit's due diligence rule, the Court's *Brady* jurisprudence has been founded on the prosecutor's obligation to seek justice—what this Court has called the "special role played by the American prosecutor" in the search for truth, *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999)—and therefore focuses on the favorable effect of the evidence, not the conduct of the defendant, or, indeed, of the prosecutor, *Brady*, 373 U.S.

at 87 (suppression of favorable evidence 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").

Thus, in *United States* v. *Agurs*, 427 U.S. 97, 110 (1976), the Court held that a prosecutor is required to disclose certain favorable evidence "even without a specific request" from the defense. The Court reasoned that "obviously exculpatory" evidence must be disclosed as a matter of "elementary fairness," and that prosecutors must be faithful to their duty that "'justice shall be done.'" *Id.* at 107, 110, 111. The Court did not suggest that a defendant's lack of diligence in failing to make a request would excuse this duty. In *Bagley*, the Court furthermore rejected the notion that the standard for materiality somehow depends on the nature of a defendant's request. 473 U.S. at 683. Instead, the Court held that materiality is determined by the extent to which withheld information "undermines confidence in the outcome of the trial." *Id.* at 678.

Thus even when there are lapses in the adversarial process, the prosecutor should take affirmative steps to safeguard the fairness of the proceedings. In derogation of that duty, the Third Circuit's due diligence rule wrongly "declar[es] 'prosecutor may hide, defendant must seek.'" *Banks*, 540 U.S. at 696. We agree with a recent decision of the Sixth Circuit that the principles announced in Supreme Court's decision in *Banks* "reject[s] [the due diligence] requirement in no uncertain terms." *United States* v. *Tavera*, 719 F.3d 705, 711 (6th Cir. 2013)[4]; *see also Milke* v. *Ryan*, 711 F.3d 998, 106-107

[4] We note that prior to this decision, the rule in the Sixth Circuit was that "there is no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take ad-

(9th Cir. 2013) (state court decision that "focused on the discoverability of the evidence and the specificity of the claim" was contrary to clearly established federal law).

Indeed, proper administration of justice requires that prosecutors always err on the side of disclosure. Rather than grudgingly withhold arguably favorable evidence based on lack of a request, availability from other sources, or arguable non-materiality, the Court expects that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995); *accord Agurs*, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."). As the *Kyles* Court acknowledged, "[s]uch disclosure will serve to justify trust in the prosecutor as the 'representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" 514 U.S. at 439 (quoting *Berger*, 295 U.S. at 88). The Third Circuit's rule instead encourages prosecutors merely to ask whether the evidence "could have been accessed through [the defendant's] exercise of reasonable diligence," and if so, withhold it. Pet. App. 25a.

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vantage of the information in question, or if the information was available to him from another source." *Carter* v. *Bell*, 218 F.3d 581, 601 (6th Cir. 2000). Splitting the difference, the dissenting judge in *Tavera* noted that the while the due diligence rule will in many cases "place an unfair burden on defendants to conduct their own investigations and relieve prosecutors of the disclosure obligations that *Brady* may have originally envisioned," he would continue to apply the older Sixth Circuit precedent until the en banc court revised course. 719 F.3d at 719 (Clay, J., dissenting). The Sixth Circuit cases make clear that confusion surrounding the due diligence rule is pervasive. It is crucial that prosecutors receive clear directives from this Court and the courts of appeals where fundamental fair trial rights are at stake.

B. Internal U.S. Department of Justice And State Prosecutorial Regulations Recognize A Prosecutor's Central Role In Ensuring a Fair Trial By Imposing Affirmative Disclosure Obligations

The legal profession sets a high bar for prosecutorial conduct, and relevant standards emphasize the prosecutor's affirmative obligation to disclose favorable evidence. Prosecutors are expected to make disclosures to the defense "at the earliest feasible opportunity *any* evidence which would tend to negate the guilt of the accused or mitigate the degree of punishment." N.J. Div. of Crim. Just. & N.J. County Prosecutors Ass'n, *The Prosecutor's Manual* 9, 18 (1979) (emphasis added); *accord ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-3.5(a) (4th ed.) ("all information"); *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-3.11(a) (3d ed. 1993) ("all evidence").[5] These standards unambiguously affirm the prosecutor's truth-seeking role. The National District Attorneys Association's National Prosecution Standards exhort the prosecutor to "cooperate with defense counsel in providing information and other assistance" "[i]n the spirit of seeking justice in all cases," Nat'l Dist. Att'ys Ass'n, *National Prosecution Standards* § 2-8 cmt. (3d ed. 2009), while guidelines from the District Attorneys Association of New York reminds prosecutors that when *Brady* obli-

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[5] *See also, e.g.*, Nat'l Dist. Att'ys Ass'n, *National Prosecution Standards* § 2-8.4 (3d ed. 2009) ("The prosecutor shall make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct."); Ass'n of Prosecuting Att'ys, *Statement of Principles* ("Prosecutors have a duty to disclose exculpatory information to an accused and their counsel independent of either a defense request or a court order.").

gation are unclear, "[d]isclosure, of course, will never be in error," Dist. Att'ys Ass'n of the State of N.Y., *"The Right Thing": Ethical Guidelines for Prosecutors* 15 (2012). The ABA's Criminal Justice Standards likewise direct prosecutors to actively seek truth, stating that it is improper to "refrain from investigation in order to avoid coming into possession of evidence that may weaken the prosecution's case, independent of whether disclosure to the defense may be required." *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-3.11 cmt. (3d ed.).

Prosecutors are bound to comply with these standards under their ethical obligations. The ABA's Model Rules of Professional Conduct impose special responsibilities on prosecutors. Model Rules of Prof'l Conduct R. 3.8; *see also* Model Code of Prof'l Responsibility DR 7-103(B) (1980). In particular, a prosecutor must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." ABA Model Rules of Prof'l Conduct R. 3.8(d). Furthermore, if a prosecutor learns of new evidence calling a conviction into question, the prosecutor must promptly disclose the information to the appropriate authorities or the defendant and take affirmative steps to ensure that an investigation is conducted. *Id.* R. 3.8(g). These provisions are widely followed in individual state ethical rules. *E.g.*, Ariz. Rules of Prof'l Conduct R. 3.8(d), (g); N.Y. Rules of Prof'l Conduct R. 3.8(d) & cmt. 6B, 6C, 6D; Tenn. Rules of Prof'l Conduct R. 3.8(d), (g); Wash. Rules of Prof'l Conduct R. 3.8(d), (g).

In 2010, the Department of Justice reaffirmed its commitment to *Brady*. *Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010), *available at* http://www.justice.gov/dag/memorandum-department-

prosecutors.[6] To ensure the Department's continued "pursuit of justice," the *Guidance for Prosecutors* articulated a general obligation of making broad and early disclosure. *Id.* It emphasized that "[p]roviding broad and early discovery often promotes the truth-seeking mission of the Department and ... provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error." *Id.* step 3.A. To make clear that prosecutors have an affirmative obligation to discover *Brady* material, the memo set forth the steps that prosecutors must take before making any disclosures: Prosecutors must seek information from "all members of the prosecution team" (*id.* step 1.A); ensure that several key areas—including investigative agency files and records of witness's "[k]nown substance abuse or mental health issues"—are reviewed (*id.* step 1.B); and take ultimate responsibility for disclosure determinations during the review process, regardless of who conducted the first-level review (*id.* step 2).

These broad discovery obligations are also reflected in the U.S. Attorneys' Manual's disclosure policy, which seeks "to ensure timely disclosure of an appropriate scope of exculpatory and impeachment infor-

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[6] The guidance was developed by a cross-component Department of Justice Working Group convened in the wake of certain high profile failures to disclose information favorable to the defense. *Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group* (Jan. 4, 2010), *available at* http://www.justice.gov/dag/memorandum-department-prosecutors-0. Together with the related directive discussed below in footnote 7, it was issued on behalf of the Department of Justice by one of the authors of this brief when he was serving as the Deputy Attorney General.

mation so as to ensure that trials are fair" and uphold the government's obligation "to seek a just result in every case." U.S. Attorneys' Manual § 9-5.001.A. Among other requirements, the policy calls for disclosure of certain information below the constitutional threshold of "materiality," explaining that "a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, ... make the difference between guilt and innocence." *Id.* § 9-5.001.C; *see also id.* § 9-5.001.C.3 (exculpatory information should be disclosed regardless of admissibility). Prosecutors are also required to disclose "substantial evidence that directly negates the guilt of a subject of the investigation" to the grand jury before seeking an indictment. *Id.* § 9-11.233. Additionally, the policy mandates that all federal criminal prosecutors receive official training on *Brady* in their first year and complete two hours of training on disclosure obligations annually. *Id.* § 9-5.001.E.[7]

Notably, none of the federal guidance even remotely suggests that prosecutors may withhold information that defendants could discover with due diligence. Instead, it makes clear that prosecutors themselves must

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[7] Since 2010, individual U.S. Attorneys' Offices and Main Justice litigating components have been required to establish a discovery policy binding prosecutors in that office. *Requirement for Office Discovery Policies in Criminal Matters* (Jan. 4, 2010), *available at* http://www.justice.gov/dag/memorandum-heads-department-litigating-components-handling-criminal-matters-all-united-states. Even before this directive, 90% of U.S. Attorneys' Offices maintained standardized discovery policies. *Id.*; *see also* Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxviii (2015) (discussing internal *Brady* policies from the Eastern District of New York and the Northern District of California).

act diligently to seek exculpatory and impeachment information from all members of the prosecution team. *Guidance for Prosecutors*, Step 1.A, B; U.S. Attorneys' Manual § 9-5.001.B.2. Indeed, the U.S. Attorneys' Manual encourages prosecutors' offices "to cooperate with and assist law enforcement agencies in providing education and training to agency personnel," to ensure that all members of the investigative team—not just the prosecutors—understand their affirmative obligations. U.S. Attorneys' Manual § 9-5.001.F.

So far as the authors are aware, no state has codified a due diligence exception to *Brady*; instead, most have exceeded federal disclosure requirements, establishing liberal criminal discovery regimes that require broad disclosure of potentially favorable information. *See generally* Fed. Jud. Ctr., Brady v. Maryland *Material in the United States District Courts: Rules, Orders, and Policies*, App. E (2007); Lee, *Criminal Discovery: What Truth Do We Seek*, 4 U.D.C. L. Rev. 7, 22-23 & n.98 (1998). Massachusetts, for example, mandates automatic disclosure of nine categories of information, including "[a]ny facts of an exculpatory nature" and "statements of persons the Commonwealth intends to call as witnesses." Mass. R. Crim. P. 14(a)(1)(A)(iii), Reporter's Note (a)(1)(A)(vii) (2004). North Carolina goes even further, requiring the prosecution to make available "the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation" upon motion of the defendant. N.C. Gen. Stat. § 15A-903(a)(1).

In tandem with these broad disclosure rules, states and localities have employed various approaches to ensure compliance. Some states require prosecutors to certify that, after conducting "a reasonable inquiry," all relevant information has been disclosed. *E.g.*, Fla. R.

Crim. P. 3.220(n)(3). Other states and localities have taken more affirmative steps: Texas, by statute, requires criminal prosecutors to regularly receive training on *Brady*, Tex. Gov't Code Ann. § 41.111, while the County of Los Angeles maintains a "Brady Compliance Unit" that collects and maintains potentially exculpatory impeachment information and advises prosecutors on *Brady* issues, Mem. from L.A. County Dist. Att'y Jackie Lacey to All Deputy District Attorneys (June 4, 2013).

Local professional associations have also joined the compliance effort. A study conducted by the Texas District and County Attorneys Association found that although *Brady* violations were rare in Texas, failures to disclose were a common feature in the most troubling cases of confirmed prosecutorial misconduct, seriously impairing "the search for truth in the criminal justice system." Tex. Dist. & County Att'ys Ass'n, *Setting the Record Straight on Prosecutorial Misconduct* 13-14 (2012). The Association observed that "closed-file" discovery policies were at the root of many past violations, and approvingly noted that the overwhelming majority of local jurisdictions had shifted towards expansive "open-file" policies. *Id.* 14-15. The New York State Bar Association has also recommended policy changes to enhance compliance, including that the "discovery statute should explicitly reject any 'materiality' limitation on '*Brady*' disclosure," that "[d]iscovery [s]hould [b]e [a]utomatic," and that training and disciplinary measures be implemented. N.Y. State Bar Ass'n, Task Force on Crim. Disc., *Final Report* 22, 50, 67 (2014).

II. THE DUE DILIGENCE RULE REPLACES A PROSECUTOR'S DUTY TO DISCLOSE PRIOR TO TRIAL WITH POST-CONVICTION LITIGATION ABOUT THE COMPETENCE OF DEFENSE COUNSEL, A TRADE THAT DISSERVES THE FAIR AND EFFICIENT ADMINISTRATION OF JUSTICE

There is a structural asymmetry between the prosecution and the defense. *United States* v. *Turkish*, 623 F.2d 769, 774 (2d Cir. 1980). In addition to having, frequently, a general superiority in resources and staff, the prosecution always has numerous "inherent information-gathering advantages": the ability to conduct the investigation while the facts are still fresh; the power to "'compel people, including the defendant, to cooperate'"; the right to "'search private areas and seize evidence'"; and the means to tap networks of informants and the "'vast amounts of information in government files.'" *Wardius* v. *Oregon*, 412 U.S. 470, 476, 477 n.9 (1973). The defense, by contrast, typically must rely on the protections of due process to offset those advantages—including, critically, the *Brady* rule. *Id.* at 480 (Douglas, J., concurring in the result) ("Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution.").[8] And this imbalance is particularly acute in the case of indigent defendants. *E.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) ("Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. ... Th[e]

[8] An innocent defendant may have particular difficulty in conducting an independent investigation, lacking knowledge of the key witnesses and essential facts of the case. *See* Hashimoto, *Toward Ethical Plea Bargaining*, 30 Cardozo L. Rev. 949, 951 (2008). In contrast, a guilty defendant may know exactly how to impeach a state's witness. *Id.*

noble ideal [that every defendant stands equal before the law] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

By excusing prosecutorial disclosure obligations where defense counsel might find favorable information through due diligence, circuits adopting the due diligence rule make ineffective-assistance-of-counsel claims, not the *Brady* disclosure obligation, the bulwark against miscarriages of justice in such circumstances. Such an approach disserves the interest of the defense, the prosecution, the courts, and the public. *Cf. Bagley*, 473 U.S. at 695 n.3 (Marshall, J., dissenting) ("Without a real guarantee of effective counsel, the relative abilities of the state and the defendant become even more skewed, and the need for a minimal guarantee of access to potentially favorable information becomes significantly greater."). On the merits, ineffective-assistance-of-counsel claims are difficult to establish, as defense counsel "is strongly presumed to have rendered adequate assistance." *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984). And many defendants fail to reach this point, having been entangled in the procedural thicket of post-conviction proceedings. *See, e.g., Edwards* v. *Carpenter*, 529 U.S. 446, 453 (2000) (holding that "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted"). Unlike a *Brady* claim, which can be brought in a motion for a new trial, an ineffective-assistance-of-counsel claim must often wait until after direct review is finished. *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1317 (2012).

The inevitable delay in seeking such relief means that by the time the claim is successful, a defendant may have served many years in prison on an unjust convic-

tion, and faded memories and lost evidence may prevent the defense (and the prosecution) from presenting a convincing case—in direct contravention of *Brady*'s truth-seeking imperative.[9] It can also require supplementary collateral proceedings, rather than insisting on fairness in the first instance. Such an approach wastes judicial resources with no discernible benefit.

Indeed, requiring disclosure even of information discoverable by the defense is not particularly burdensome. *Taylor* v. *Illinois*, 484 U.S. 400, 416 (1988) ("burden of [disclosure] in advance of trial adds little to the[] routine demands of trial preparation"). Broad disclosure has benefits for prosecutors and the court system by "foster[ing] a speedy resolution of many cases." *Guidance for Prosecutors*, step 3.A; *see also* Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. Rev. 228, 237 (1964) ("[E]xtensive pretrial inspection of government evidence ... not only has expedited trials, but in some cases has convinced the defense of the strength of the prosecution's case and thereby induced a plea of guilty."); *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-3.11 cmt. (3d ed.) ("[M]any experienced prosecutors have habitually disclosed most, if not all, of their evidence to defense counsel. This practice, it is believed, often leads to guilty pleas in cases that would otherwise be tried. A defense preview of a strong prosecution case, for example, frequently strengthens the posture of a defense lawyer who is trying to per-

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[9] *Kyles*, 514 U.S. 419, is emblematic of the delay that results when prosecutors fail to disclose favorable evidence at trial. The Court overturned the defendant's 1984 conviction on the basis of a series of *Brady* violations, but he was only released in 1998 after three subsequent retrials resulted in deadlocked juries. Coyle, *Tried and Tried Again*, 84 A.B.A. J. 38, 39 (Apr. 1998).

suade the defendant that a guilty plea is in the defendant's best interest. Voluntary disclosure also serves to open areas in which the parties can stipulate to undisputed or other facts for which a courtroom contest is a waste of time.").

* * *

As it is inscribed on the wall outside the Attorney General's rotunda in the Department of Justice, "[t]he United States wins its point whenever justice is done its citizens in the courts." Allowing a defendant's lack of diligence to justify a prosecutor's failure to disclose evidence favorable to the defendant loses sight of that fundamental maxim. This Court should grant review here to reaffirm it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

LIST OF AMICI CURIAE

Michael B. Mukasey—Attorney General (2007-2009); Chief District Judge, United States District Court for the Southern District of New York (1988-2006); District Judge, United States District Court for the Southern District of New York (1988-2000); Assistant United States Attorney for the Southern District of New York (1972-1976)

Stuart M. Gerson—Acting Attorney General (1993); Assistant Attorney General (1989-1993); Assistant United States Attorney for the District of Columbia (1972-1975)

Peter D. Keisler—Acting Attorney General (2007); Assistant Attorney General (2003-2007); Acting Associate Attorney General (2002-2003); Principal Deputy Associate Attorney General (2002)

Gregory B. Craig—White House Counsel (2009-2010); Assistant to the President and Special Counsel (1998-1999)

Donald B. Ayer—Deputy Attorney General (1989-1990); Principal Deputy Solicitor General (1986-1988); United States Attorney for the Eastern District of California (1981-1986); Assistant United States Attorney for the Northern District of California (1977-1979)

Jamie Gorelick—Deputy Attorney General (1994-1997); General Counsel of the Department of Defense (1993-1994)

Larry D. Thompson—Deputy Attorney General (2001-2003); United States Attorney for the Northern District of Georgia (1982-1986)

Gary G. Grindler—Acting Deputy Attorney General (2010-2011); Principal Associate Deputy Attorney General (1998-2000, 2009-2012); Deputy Assistant Attorney General (1995-1998)

Walter Dellinger—Acting Solicitor General (1996-1997); Assistant Attorney General and head of the Office of Legal Counsel (1993-1996)

Christopher Wray—Assistant Attorney General (2003-2005)

Rita M. Glavin—Acting Assistant Attorney General (2008-2009); Assistant United States Attorney for the Southern District of New York (2003-2010)

John S. Gordon—United States Attorney for the Central District of California (2001-2002); Assistant United States Attorney for the Central District of California (1984-2001)

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torney's Office, Eastern District of New York, (1989-1991); Assistant United States Attorney for the Eastern District of New York (1986-1992)

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Sharon Cohen Levin—Chief, Money Laundering and Asset Forfeiture Unit, United States Attorney's Office for the Southern District of New York (1996-2015)