BLANKENSHIP v. UNITED STATES

No. 21-1428

SUPREME COURT OF THE UNITED STATES

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DONALD L. BLANKENSHIP, Petitioner, v. UNITED STATES OF AMERICA, Respondent.

Type: Amicus Brief

Prior History: On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

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Title

BRIEF *AMICUS CURIAE* FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

Text

CORPORATE DISCLOSURE STATEMENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public [*3] defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The issue presented in this case is one of nationwide importance. Whether the government's failure to comply with *Brady v. Maryland, 373 U.S. 83 (1963)*, is excused in the absence of a showing of diligence by the defense has evenly divided the courts of appeal that hear criminal cases--which have all passed judgment on this question. Half these courts of appeal and the highest courts of several states have held that the government has obligations under *Brady* to disclose evidence exculpatory to the defense, regardless of whether the defendant could have obtained that evidence through her own due diligence. The remaining courts of appeal, by contrast, [*4] have, like the lower courts in this case, adopted the position advanced by the government and held that a defendant cannot obtain relief under *Brady* absent a showing that the defendant exercised due diligence to attempt to obtain the evidence withheld by the government from some other source. The resolution of this circuit split is crucial to the administration of justice across the nation.

SUMMARY OF ARGUMENT

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[1] NACDL represents no parties in this matter. It has no pecuniary interest in its outcome. No party's counsel authored this brief in whole or in part. NACDL is being represented in this matter pro bono. No one contributed money to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

This case raises a question of fundamental importance to our criminal justice system. The circuits are split down the middle with respect to whether *Brady v. Maryland, 373 U.S. 83 (1963)*, and its progeny impose affirmative obligations on criminal defendants to seek out exculpatory evidence from other sources even when the government already possesses the evidence in question.

This dispute has created uncertainty about the scope of *Brady*'s protections and has imposed investigatory obligations on some criminal defendants while imposing no such obligations on others. And it raises fundamental questions about the nature of our criminal justice system and the Constitution more broadly. These questions deserve this Court's immediate attention.

Indeed, half the courts of appeals that [*5] hear criminal cases have adopted the government's position that it has no obligations under *Brady* to disclose material, exculpatory evidence in its possession if the defendant could have obtained that evidence elsewhere through her own "due diligence." *United States v. Blankenship, 19 F.4th 685, 694 (4th Cir. 2021)*.

This position, which the remaining courts of appeals have rejected, would impose affirmative obligations on criminal defendants to investigate--a principle that not only undermines this Court's precedents, but also defies common sense and ignores the realities of the criminal justice system that underride *Brady* and its progeny.

This Court should grant certiorari and restore *Brady*'s clear--and original--mandate: The government must disclose material, exculpatory evidence to the defense, regardless of the defendant's actions (or inaction). *See Brady, 373 U.S. at 87*. This rule, which promotes clarity without needless gamesmanship, is superior in every respect to the position taken by the government and adopted by the courts below.

Lastly, the need for this Court's intervention is all the more pressing after its recent decision in *Shinn v. Ramirez, 596 U.S. , 2022 WL 1611786 (May 23, 2022)*. The interplay between the due diligence [*6] exception and *Shinn* would deprive certain defendants of their *Brady* rights altogether. This Court should eliminate that foundational threat to the justice system by eliminating the due diligence exception once and for all.

ARGUMENT

I. THIS CASE RAISES FUNDAMENTAL QUESTIONS ABOUT OUR NATION'S LEGAL SYSTEM THAT HAVE EVENLY DIVIDED THE LOWER COURTS.

This case raises fundamental questions about our nation's criminal justice system that have evenly divided lower courts across the nation. Indeed, every court of appeals that hears criminal cases has spoken on this critical issue--and they are split down the middle.

Six circuits, including the lower court here, have held that *Brady v. Maryland, 373 U.S. 83 (1963)*, imposes affirmative obligations on criminal defendants to independently search for exculpatory evidence that the government already possesses. *See United States v. Blankenship, 19 F.4th 685, 693 (4th Cir. 2021)* ("[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." (quoting *United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990)*); *see also Guidry v. Lumpkin, 2 F.4th 472, 487 (5th Cir. 2021), cert. denied, 142 S. Ct. 1212 [*7] (2022)* ("A *Brady* claim fails if the suppressed evidence was discoverable through reasonable due diligence." (citation omitted)); *Camm v. Faith, 937 F.3d 1096, 1108 (7th Cir. 2019)* ("Evidence is suppressed for *Brady* purposes only if . . . the evidence was not otherwise available to the defendant through the exercise of reasonable diligence." (citation omitted)); *United States v. Anwar, 880 F.3d 958, 969 (8th Cir. 2018)* ("The government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels.") (citation omitted)); *United States v. Therrien, 847 F.3d 9, 16 (1st Cir. 2017)* ("[E]vidence is not suppressed if the defendant either knew, or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." (citation omitted)); *United States v. Stein, 846 F.3d 1135, 1146 (11th Cir. 2017)* ("[T]he government is not obliged under *Brady* to furnish a defendant with information which . . . with any reasonable diligence, he can obtain himself." (citation omitted)).

The remaining circuits, by contrast, have held that criminal defendants have no affirmative obligation to search for evidence in the government's possession. *See Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 291 (3d Cir. 2016)* (en banc) ("[T]he concept of 'due diligence' [*8] plays no role in the *Brady* analysis."); *Lewis v. Conn. Comm'r of Corr., 790 F.3d 109, 121 (2d Cir. 2015)* (*Brady* "imposes no duty upon a defendant . . . to take affirmative steps to seek out and uncover [exculpatory] information in the possession of the prosecution in order to prevail"); *United States v. Tavera, 719 F.3d 705, 712 (6th Cir. 2013)* (criminal defendants "do[] not lose the benefit of Brady when the[ir] lawyer fails to 'detect' the favorable information"); *United States v. Howell, 231 F.3d 615, 625 (9th Cir. 2000)* ("The availability of particular statements through the defendant himself does not negate the government's duty to disclose."); *In re Sealed Case No. 99-3096 (Brady Obligations), 185 F.3d 887, 897 (D.C. Cir. 1999)* (rejecting government's argument that it breached no "disclosure obligation" for information that was "otherwise available through 'reasonable pre-trial preparation by the defense'" (citation omitted)); *Banks v. Reynolds, 54 F.3d 1508, 1517* (10th Cir. 1995) ("[T]he fact that defense counsel 'knew or

should have known' about the [exculpatory] information . . . is irrelevant to whether the prosecution had an obligation to disclose [it].").

The ramifications of this disagreement are enormous. Criminal defendants in half this nation's federal circuits face obligations that their counterparts in [*9] the other half of the country do not. Those obligations--for the defendants subject to them--have never been considered by this Court and they escape easy definition. That leaves hundreds (if not thousands) of criminal defendants in a state of uncertainty about the scope of their *Brady* protections and the nature of their own obligations during the pivotal process of criminal discovery. And the dispute--which questions whether criminal defendants have affirmative obligations to investigate their own case--implicates bedrock principles of this nation's criminal justice system and the constitutional framework behind them.

Put simply, the lower courts have spoken--they are evenly divided--and the dispute carries enormous consequences, both practical and theoretical, for the nation's legal system writ large. These questions demand the Court's immediate attention.

II. THE GOVERNMENT'S POSITION CONTRADICTS THIS COURT'S PRECEDENTS.

This Court should intervene to protect its *Brady* jurisprudence from the fundamental and novel threat a due diligence exception poses. As discussed *supra*, Section I, the government claims that *Brady v. Maryland, 373 U.S. 83 (1963)*, and its progeny impose standalone investigatory [*10] obligations on the *defense*, notwithstanding the government's immense advantages over any defendant's ability to investigate a criminal case, the government's burden of proof, and the defendant's absolute right to adduce no evidence at all. This Court should reinforce its precedents and reject that argument.

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 punishment." *Id. at 87*. This Court later clarified that the government violates *Brady* whenever "[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice . . . ensued." *Strickler v. Greene, 527 U.S. 263, 281-82 (1999)*. Prejudice, this Court has held, "ensue[s]" when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley, 473 U.S. 667, 682 (1985)*; *see also Strickler, 527 U.S. at 282* (explaining that materiality and prejudice derive from the same concept). In framing the [*11] prejudice standard, this Court unequivocally posed the issue as whether there was, in fact, prejudice from the government's failure to disclose exculpatory information to the defense, not whether the defendant *could* have prevented that prejudice (through their own diligence or otherwise).

As this Court has explained, Brady's mandate--that the government disclose to the defense all material, exculpatory evidence in its possession--is essential to the "avoidance of an unfair trial to the accused." *Brady, 373 U.S. at 87*. This need for governmental disclosure stems from two key features of our criminal justice system.

First, the government occupies a "special status" 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." *Strickler, 527 U.S. at 281* (quoting *Berger v. United States, 295 U.S. 78, 88 (1935)*).

Second, the government enjoys "inherent information-gathering advantages"--including its vast resources, subpoena power, and ability to search persons and places, among others--that the defense simply cannot match. *Wardius v. Oregon, 412 U.S. 470, 475 n.9 (1973)*; *see also Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 290 (3d Cir. 2016)* [*12] ("The emphasis in the United States Supreme Court's *Brady* jurisprudence on fairness in criminal trials reflects Brady's concern with the government's unquestionable advantage in criminal proceedings . . . .").

The government nevertheless argues that *Brady* and its progeny impose obligations on the defense to obtain material, exculpatory information in the possession of the government from sources other than the government. This strikes at the heart of Brady's promise: Under the government's theory, *Brady* ceases to be a prophylactic measure for compelling governmental disclosure, but becomes a rule about the proper balance of investigatory duties between prosecutors and defendants. This transforms the government's disclosure obligations into conditional duties that vanish whenever the defense fails to uphold its side of Brady's purported bargain by fulfilling a condition precedent to the receipt of its benefits. *Cf. United States v. Wilson, 901 F.2d 378, 381* (4th Cir. 1990) (describing defendants who fail to discharge their purported due diligence obligations as "not entitled to the benefit of the *Brady* doctrine").

And this theory shifts Brady's inquiry onto the defendant's conduct in [*13] a way this Court has never done before. Indeed, this Court has never imposed *any* investigatory obligations on criminal defendants at all. To the contrary, this Court has consistently affirmed--if not expanded--the government's disclosure obligations without suggesting those duties are reciprocal in any way. *See, e.g., Kyles v. Whitley, 514 U.S. 419, 433-34, 437 (1995)* (government's *Brady* obligations extend to evidence "known only to police investigators and not to the prosecutor" because prosecutors have an absolute "duty to learn" evidence favorable to the defense); *Bagley, 473 U.S. at 676 (1985)* (government's *Brady* obligations extend to impeachment evidence); *United States v. Agurs, 427 U.S. 97, 106-07 (1976)* (government's *Brady* obligations apply even when there has been no request by the defendant). Indeed, in *Banks v. Dretke, 540 U.S. 668 (2004)*, this Court

confirmed that its precedents "lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id. at 695*.

This Court based these decisions on the nature of the government's role in the criminal justice system. *See, e.g.*, *Bagley, 473 U.S. at 675 n.6* (*Brady* "represents a [*14] limited departure from the pure adversary model" because "the prosecutor's role transcends that an of adversary"); *Brady, 373 U.S. at 88* (prosecutors must not become the "architect of a proceeding that does not comport with standards of justice"). It is the "special status" of prosecutors in seeking rightful convictions--and all the power that accompanies that mission--that "explains . . . the basis for the prosecution's broad duty of disclosure." *Strickler, 527 U.S. at 281*. In other words, *Brady* and its progeny sought to level the playing field by imposing unilateral obligations on the government as the dominant player. Consistent with that objective, this Court has never held, explicitly or implicitly, that the government's disclosure obligations are dependent on any level of diligence by the defendant. The government's effort to engraft such a precondition on its duty to transcend adversarial litigation and comport with constitutional standards is inconsistent with the principles animating this Court's *Brady* precedents.

Put simply, *Brady* and its progeny impose no obligations on criminal defendants, and their protections apply regardless of what the defense does (or [*15] fails to do). This Court should reject the government's invitation to rewrite its clear--and consistent--mandate.

III. EXCUSING THE GOVERNMENT FROM ITS OBLIGATIONS BY IMPOSING OBLIGATIONS ON THE DEFENSE DEFIES COMMON SENSE.

The government's position also defies common sense. Criminal defendants should not need to reinvent the wheel when the government already has material, exculpatory evidence in its possession. All the due diligence exception has done is spawn confusion and gamesmanship. Even the lower courts that apply the due diligence exception struggle to explain why the exception should exist. Brady's original mandate, clear and fair as it is, should be reinstated by this Court as the uniform law in all circuits.

A. Given the realities of the criminal justice system, imposing investigatory obligations on criminal defendants makes no sense.

The government's "inherent information-gathering advantages" when prosecuting a case include not only "greater financial and staff resources," but also a litany of "tactical advantages" ranging from the power to compel cooperation, conduct searches of persons and places, issue third-party subpoenas, and leverage the general "respect [*16] for government authority" that induces voluntary cooperation. *Wardius v. Oregon, 412 U.S. 470, 475 n.9 (1973)* (quoting Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85

HARV. L. REV. 994, 1018-19 (1972)); *see also United States v. Tavera, 719 F.3d 705, 712 (6th Cir. 2013)* ("[T]he prosecution has the advantage of a large staff of investigators, prosecutors and grand jurors, as well as new technology such as wiretaps of cell phones.").

Given this reality, basic fairness dictates that when the government obtains material, exculpatory evidence through its broad powers, it should disclose that evidence to its weaker adversary. *See Wardius, 412 U.S. at 475 n.9* ("[I]f there is to be any imbalance in discovery rights, it should work in the defendant's favor."); *see also Tavera, 719 F.3d at 712* ("The superior prosecutorial investigatory apparatus must turn over exculpatory information" to "assist the defendant.").

By contrast, a due diligence exception forces defendants to attempt to reinvent the wheel for no principled reason. Even when the government has material, exculpatory evidence in its possession, the defense must make its own diligent efforts to obtain that very same information--notwithstanding the massive power the government [*17] brought to bear in obtaining that evidence. This does nothing but raise unnecessary hurdles for defendants on a field that already tilts heavily against them.

Shifting this investigatory burden to the defense is even more illogical when viewed within the broader criminal justice system. That system, by design, places the burden on the prosecution at virtually every stage of the process. Indeed, "[a] fundamental premise of our criminal law is that the prosecution has the burden of proving beyond a reasonable doubt that the accused committed the offense charged." *Nilva v. United States, 352 U.S. 385, 399 (1957)* (Black, J., dissenting); *see also Speiser v. Randall, 357 U.S. 513, 526 (1958)* ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt."). There is no reason to treat the discovery process--which largely determines whether the government can carry its ultimate burden at trial--differently. As this Court held in *Brady* and its progeny, the burden at that stage should rest squarely on the government.

B. *Brady*'s original mandate should not be replaced.

Brady's original mandate--that the government disclose [*18] all material, exculpatory evidence in its possession--is a superior alternative in every respect to creating a due diligence exception.

At the outset, few courts have articulated a cogent reason for why a due diligence exception should exist. *See, e.g., United States v. Wilson, 901 F.2d 378, 380 (4th Cir. 1990)* (quoting out-of-circuit cases without independent reasoning). Indeed, the lower court, relying on *Wilson*, purported to base the exception on "common sense" with no

explanation as to why "common sense" dictates the creation of such an exception. *United States v. Blankenship, 19 F.4th 685, 694 (4th Cir. 2021)*.

And courts that recognize a due diligence exception apply it in different ways. Some apply it to information that was, in the court's view, equally accessible to all parties, *see, e.g.*, *United States v. Stein, 846 F.3d 1135, 1146 (11th Cir. 2017)* (defense could--and did--access public document on government entity's website); *United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989)* (defense was in "as good a position as the prosecutor to learn more" about a co-conspirator's plea negotiations outside the jurisdiction); others, like the lower court here, apply the rule when it would have been "natural" for the defense to unearth the evidence in question in the ordinary course. *See, e.g.*, *Blankenship [*19] , 19 F.4th at 693* (information contained in government memoranda was "held by in-house witnesses close to [the defendant]" and "surely where he would first look"); *Wilson, 901 F.2d at 380-81* (it "would have been natural" for the defendant to "have interviewed" an alleged associate's "cohabitant girlfriend" who made statements the government withheld); *see also* *United States v. Sigillito, 759 F.3d 913, 930 (8th Cir. 2014)* (cooperator's presence at suppression hearing "should have indicated" to defendant "that a plea deal had been reached"). In *Guidry v. Lumpkin, 2 F.4th 472, 487 (5th Cir. 2021)*, the Fifth Circuit invoked the due diligence exception where the government provided the defense documents that included exculpatory information, but defense counsel did not review the documents in full and failed to find the exculpatory material. *Id. at 487*. It is not clear why the Fifth Circuit felt a need to rely on the due diligence exception since it found the government had not suppressed the exculpatory information, which would negate any purported *Brady* violation irrespective of the defendant's level of diligence. *Id.* ("[t]hat Guidry's trial attorneys say they never saw the . . . evidence does not mean the State suppressed it" given the government's [*20] "open file policy in this case"). In other words, there is no unifying logic behind when and how the due diligence exception is invoked.

By contrast, several circuits have developed a different--and far more coherent--rule that fully preserves Brady's mandate. In these circuits, *Brady* applies unless the "facts [are] already within the defendant's purview." *Lewis v. Conn. Comm'r of Corr., 790 F.3d 109, 121 (2d Cir. 2015)*. Put differently, "[o]nly when the government is aware that . . . defense counsel already has the material in its possession should it be held to not have 'suppressed' it in not turning it over to the defense." *Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 292 (3d Cir. 2016)* (en banc).

This rule--which simply applies Brady's original mandate by requiring prejudice as a result of the government's failure to disclose exculpatory information to the defense--is the better alternative. It releases defendants from their purported duty "to take affirmative steps to seek out and uncover" information in the "possession of the prosecution," *Lewis,*

790 F.3d at 121, while recognizing the lack of prejudice for defendants who actually *do* have the evidence in question but choose not to use it. And it rightly places the burden [*21] on the government--with all its inherent advantages--to assuage any doubts about the defendant's knowledge of the evidence before choosing to suppress information. *Cf. United States v. Agurs, 427 U.S. 97, 108 (1976)* ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

Following Brady's original approach also offers a litany of practical benefits that the imposition of a due diligence exception lacks. For one, it would replace the incoherent doctrine that half the circuits have adopted with clear and uniform guidance for both prosecutors and defendants alike. And it would supply predictable answers across the broad range of scenarios that currently implicate a purported due diligence exception.

Such a rule would also avoid the gamesmanship--on both sides--that festers under a due diligence exception. Take this case as an example. The government knew it possessed exculpatory evidence but withheld it purely to gain an advantage at trial. Of course, the government argues that even if the Petitioner did not, in fact, have this information, he *should* have had this information because he could have found that evidence on his own. The lower court's concern was that the [*22] Petitioner would have the ability to engage in similar gamesmanship and "turn a willfully blind eye to available evidence and thus set up a *Brady* claim for a new trial." *Blankenship, 19 F.4th at 694-95*. It was this concern that motivated the lower court to apply the due diligence exception. But under Brady's original mandate, the government would have needed either to confirm that Petitioner *actually* knew the information at issue, or to produce the relevant evidence. In either event, the government would have lost its ability to strategically suppress the evidence in question and the defense would have lost its ability to create an appellate issue by turning a blind eye to the evidence. Any possibility of gamesmanship--by either party--would have been completely extinguished.

Lastly, Brady's mandate without a due diligence exception accounts for the inherent imbalance in the criminal justice system in a way engrafting a due diligence exception onto it does not. Here, for instance, the government argued (and the lower court found) that Petitioner could have accessed the exculpatory evidence at issue merely because the information came from former high-ranking employees of [*23] his, some of whom he had named on his witness list. *Id. at 693*. But the validity of this assumption is hardly certain. As discussed *supra*, Section III.A, the government had the benefit of both formal and informal powers in inducing or compelling those witnesses to talk, whereas Petitioner did not. And even if Petitioner secured interviews with those witnesses based solely on their willingness voluntarily to cooperate with a criminal defendant, there is no guarantee they would have told him the same thing they had told federal agents. Restoring Brady's

original rule eliminates the need for this unguided speculation about what "diligent" defense counsel could--or should--have learned.

In sum, there is no good reason to apply a due diligence exception. Reiterating and restoring Brady's unequivocal mandate would resolve any problems a due diligence exception purports to solve, while eliminating the considerable costs it imposes on the criminal justice system. This Court should restore clarity and coherence under *Brady* before more harm is done.

IV. THIS COURT SHOULD INTERVENE BECAUSE MANY DEFENDANTS WOULD LOSE THEIR RIGHT TO EXCULPATORY EVIDENCE IF THE DUE DILIGENCE EXCEPTION [*24] CONTINUES AFTER THIS COURT'S DECISION IN *SHINN V. RAMIREZ*.

The need for this Court's intervention is all the more pressing after *Shinn v. Ramirez*, 596 U.S. -- __, *2022 WL 1611786 (May 23, 2022)*. *Shinn* fundamentally changed the impact of the due diligence exception by eliminating the only mechanism many defendants have for reversing the wrongful convictions it inevitably causes. This Court should prevent that unjust--and readily avoidable--result.

In jurisdictions that apply a due diligence exception, defendants have only one safety valve to uphold their *Brady* rights when counsel fails to find accessible evidence that would lead to their acquittal: A claim, after trial, that their lawyer was constitutionally ineffective. *See, e.g., United States v. Tavera, 719 F.3d 705, 712 (6th Cir. 2013)* (where a "lawyer los[es] the benefit of *Brady* by his failure to 'seek' [exculpatory evidence in the government's possession] . . . the lawyer most certainly then would have been guilty of ineffective assistance of counsel").

Shinn involved the question of whether those convicted in state court may, on federal habeas review, expand the reviewable record under *28 U.S.C. § 2254(e)(2)* to prove their trial counsel [*25] was constitutionally ineffective in failing to conduct an adequate investigation of the evidence. *Shinn, 2022 WL 1611786*, at *4-5. In *Shinn*, the usual path for catching this error--an ineffective assistance of trial counsel claim brought in postconviction proceedings--failed, because postconviction counsel themselves were constitutionally ineffective in failing to discover the evidence in question (and thus develop the record in support of the trial-level ineffectiveness claim). *Id.* That resulted in the claims becoming procedurally barred from federal habeas review. *Id.*

Federal habeas counsel (the defendants' first competent lawyers) finally obtained the evidence and sought to introduce it through the only vehicle still remaining--an evidentiary hearing under Section 2254(e)(2) to determine whether postconviction counsel's ineffectiveness could excuse the procedural bar (and thus allow the court to reach the

merits of the trial-level claim). *Shinn, 2022 WL 1611786*, at *4-5. Section 2254(e)(2), however, provides that federal habeas courts may not conduct such hearings unless a petitioner's claim "relies on" a new and retroactive "rule of constitutional law" or "a factual predicate that could not have [*26] been previously discovered through the exercise of due diligence." *28 U.S.C. § 2254(e)(2)(A)*. By their terms, the petitioners' claims satisfied neither statutory condition.

The lower courts nevertheless allowed the petitioners to admit the evidence--both to overcome the procedural default (by showing it was caused by postconviction counsel's ineffectiveness) and to prove the merits of the trial-level ineffectiveness claim. *Shinn, 2022 WL 1611786*, at *4-5. Both courts concluded that postconviction counsel's ineffectiveness established cause for the default. *Id.* And the only court that reached the merits overturned the petitioner's conviction based on the same off-the-record evidence. *Id.* at *5.

But this Court reversed. The Court held that the lower courts erred in allowing the defendants to introduce the newfound evidence precisely *because* the evidence could have been found earlier by competent counsel. *Id.* at *10 ("[A] federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy [Section] 2254(e)(2)'s stringent requirements.").

Under the due diligence exception, a defendant will be unable to assert the government's failure [*27] to produce the exculpatory evidence violated *Brady* because the defendant's ineffective counsel failed to exercise due diligence. And if a defendant's trial counsel failed to exercise due diligence in obtaining from other sources exculpatory evidence the government failed to produce, there *will be no evidence* of that ineffectiveness in the trial-court record. In *Shinn*, the Court thus held that ineffective assistance of counsel claims cannot be based on evidence outside the record, even evidence that is outside the record due to the ineffective assistance of counsel (at two consecutive proceedings). A defendant who is unable to assert the government's failure to produce the exculpatory evidence violated *Brady* because the defendant's ineffective counsel failed to exercise due diligence thus may be unable to assert ineffective assistance of counsel under *Shinn*. The result is the very outcome *Brady* sought to prevent: A defendant's wrongful conviction because she is unaware of exculpatory evidence the government possessed before trial.

The cure for this is simple. This Court should reject a due diligence exception that produces such twisted results. And it should do so now, [*28] before more defendants are denied the promise of *Brady*.

CONCLUSION

The government's position--that *Brady* and its progeny impose affirmative investigatory obligations on criminal defendants and that a defendant's failure to show that she has met those demands (whether or not, in some cases, the failure is the result of ineffective assistance of counsel) is fatal to her ability to obtain relief under *Brady*--contradicts this Court's precedents and defies common sense. This Court should grant certiorari to resolve a significant circuit split and restore the vitality of *Brady* and its progeny as a freestanding duty of the government not conditioned on any affirmative obligations of criminal defendants to investigate and independently obtain exculpatory information already in the government's possession.

Respectfully submitted,

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