No. 05-244

In the Supreme Court of the United States

LEONARD A. PELULLO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the government sufficiently made allegedly exculpatory material available to petitioner under *Brady* v. *Maryland*, 373 U.S. 83 (1963), when the government provided petitioner with access to the material and the material consisted of petitioner's own documents, even though the government did not physically deliver the material to petitioner.

2. Whether the government's statements that the documents at issue did not contain material that the government had a duty to disclose under *Brady* resulted in a *Brady* violation when petitioner did not rely on those statements.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 399 F.3d 197. The order and opinion of the district court (Pet. App. 45a, 46a-87a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2005. A petition for rehearing was denied on March 24, 2005 (Pet. App. 88a-89a). On June 10, 2005, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including July 22, 2005. On July 8, 2005, Justice Souter further extended the time to August 19, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to embezzle funds belonging to an employee retirement plan and to launder the proceeds of that embezzlement, in violation of 18 U.S.C. 371; 11 counts of embezzlement, in violation of 18 U.S.C. 664; and 42 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1). He was sentenced to 210 months of imprisonment, to be followed by three years of supervised release. Gov't C.A. App. 3711-3713. The court of appeals affirmed petitioner's convictions and sentence in an unpublished opinion, 185 F.3d 863 (1999) (Table), and this Court denied a petition for a writ of certiorari, 528 U.S. 1096 (2000).

Petitioner subsequently moved for a new trial pursuant to Federal Rule of Criminal Procedure 33, arguing, *inter alia*, that the government had failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district court granted petitioner's motion. Pet. App. 58a-68a, 87a. The court of appeals reversed. *Id.* at 1a-44a.

1. In 1989, petitioner acquired control of Compton Press, Inc. and its retirement and thrift plans. Pet. App. 5a. Through a complex set of wire transfers, petitioner systematically diverted millions of dollars in assets from the benefit plans to himself. *Id.* at 5a-6a. Petitioner engineered three embezzlement schemes. First, petitioner withdrew more than $1.15 million from the benefit plans to further his acquisition of DWG Corp. and to pay for personal expenses. *Id.* at 6a. Second, petitioner withdrew money from the benefit plans to purchase Ambassador Travel. *Ibid.* Under the guise of securing

loans from the benefit plans, petitioner siphoned off $1.3 million, much of which filtered down to petitioner and his family. *Ibid.* Third, petitioner terminated an annuity contract that belonged to the Compton Press retirement plan and used the $1.4 million in proceeds to finance personal and business activities. *Ibid.*

2. A grand jury in the District of New Jersey returned a 54-count indictment against petitioner charging him with conspiring to embezzle approximately $4.176 million belonging to the benefit plans and laundering the proceeds of the embezzlement, in violation of 18 U.S.C. 371; 11 counts of embezzlement, in violation of 18 U.S.C. 664; and 42 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1). Gov't C.A. App. 3716-3731.

At the same time that the United States Attorney's office in the District of New Jersey was investigating petitioner' activities in connection with Compton Press, the United States Attorney's office in the Middle District of Florida was conducting an unrelated investigation of petitioner. Pet. App. 8a. As part of that investigation, agents of the Federal Bureau of Investigation (FBI) executed a search warrant for a 2400-square foot warehouse in Miami that housed business records of 25 of petitioner's companies. *Ibid.* Pursuant to the warrant, agents seized 904 boxes, 114 file cabinets, and 10 file cabinet drawers of corporate and financial records. *Ibid.* The documents were disorganized and often mislabeled. *Ibid.* As the district court later found, petitioner engaged in a "dizzying succession of wire transfers" generating "mountains of documents," and "[n]o one but [petitioner] could comprehend it all in its entirety. He alone, an obviously highly intelligent person, was able to keep track of it all and manipulate it to his advantage." *Id.* at 19a (citation and emphasis omitted).

The FBI moved the documents to Jacksonville, Florida, retained 160 boxes and 36 file cabinets of records that were pertinent to the Florida investigation, and returned 75,000 pounds of other documents to petitioner. Pet. App. 8a. The federal prosecutor in Florida sent petitioner's lawyers a partial index of all of the warehouse documents and offered to provide them access to the documents for inspection and copying. *Id.* at 8a-9a.

In 1993, the Department of Labor (DOL) agents involved in the New Jersey investigation traveled to Jacksonville. Pet. App. 9a. After conferring with Florida agents and conducting a cursory review, the DOL agents identified six boxes of the warehouse documents that were relevant to the New Jersey investigation. *Ibid.* The government subsequently provided those documents to petitioner. *Id.* at 12a, 53a.

In a hearing in December 1994, petitioner, proceeding pro se, acknowledged that he knew that the government possessed the documents seized from his Miami warehouse and that some of those documents related to Compton Press and the benefit plans. Pet. App. 10a. Petitioner requested that all the warehouse documents be made available for his inspection, and he represented that he would travel to Jacksonville to review them. *Ibid.* Although the government had previously stated that it was unaware of any *Brady* information, petitioner explained that he needed to review the documents to identify those pertinent to the defense case. *Ibid.* The government assured the district court that it would make available to petitioner all the warehouse documents, with the possible exception of those relevant only to the Florida investigation that the prosecutors in that case were not yet prepared to disclose. *Id.* at 10a-11a.

The district court ordered the prosecutor to identify for petitioner those warehouse documents that it would voluntarily disclose so that petitioner could seek the court's intervention if necessary to obtain the remaining materials. Pet. App. 11a. In response to that order, the prosecutor assured the court that it had previously disclosed all *Brady* material of which it was aware, and would disclose additional *Brady* material as it learned of its existence. *Id.* at 12a.

Two months later, petitioner asked the federal prosecutor in the Middle District of Florida to release documents relevant to the New Jersey case. Pet. App. 12a. In response, the New Jersey prosecutor informed him that the six boxes that had been disclosed "represent all of the documents obtained through the Florida search and seizure, which we believe may be relevant to the case pending in the District of New Jersey." *Ibid.* (emphasis omitted). Nonetheless, the prosecutor told petitioner to make arrangements with the federal authorities in the Middle District of Florida if he wished to inspect or copy other documents from the search. *Ibid.* Soon thereafter, the Florida federal prosecutor offered to have the documents copied at petitioner's expense. *Ibid.* She asked petitioner's standby counsel to notify her of the arrangements that petitioner wished to make. *Ibid.* Petitioner neither complained that he did not have the funds to copy the documents nor requested money from the court for that purpose. *Id.* at 23a n.15.

In March 1995, petitioner informed the court that, notwithstanding the government's position that the six boxes contained all relevant documents from the warehouse, he wished to determine what was relevant to his case and what he would need to defend himself. Pet. App. 12a. He then asked for a continuance of several

months to obtain the documents and review them. *Ibid.* The prosecutor again informed the court and petitioner that arrangements for reviewing the documents could be made with the prosecutor in Florida. *Id.* at 13a. The district court urged petitioner to have his stand-by attorney review the warehouse documents if petitioner was unable to review them himself. *Ibid.* Petitioner later assured the district court that his standby counsel was "coordinating the efforts to obtain the documents." *Ibid.* (citation omitted).

At petitioner's request, the district court delayed the trial date several times. Pet. App. 13a. By December 1995, petitioner no longer wished to proceed pro se, and his standby counsel was elevated to full counsel. *Ibid.* That counsel then requested another continuance to review the large number of relevant documents, including the warehouse documents. *Ibid.* Counsel asserted that he had a responsibility to review those documents. *Id.* at 14a. In opposing the continuance, the prosecutor noted that his team had reviewed approximately 100 boxes in the warehouse and had brought to New Jersey six boxes that it considered important enough to move. *Ibid.* He nonetheless informed the court that it was very difficult for him to predict exactly what defense counsel would need. *Ibid.* The district court granted the request for a four-month continuance so that counsel could review the documents. *Id.* at 14a-15a.

Days before the trial was scheduled to begin, a new lawyer was substituted as petitioner's counsel. Pet. App. 15a. That attorney told the New Jersey prosecutor that he, or someone in his office, intended to travel to Florida to review the warehouse documents. *Id.* at 15a-16a, 26a. The prosecutor responded that the Florida prosecutor had assured him that there were no docu-

ments in Florida pertaining to Compton Press or to the charges against petitioner. *Id.* at 15a-16a. In response to a defense request that the government confirm that it had provided all materials subject to disclosure, the prosecutor enclosed additional documents and then stated that "the United States is not aware of any additional *Jencks*, [Jencks Act, 18 U.S.C. 3500], *Giglio* [v. *United States*, 405 U.S. 150 (1972)] or *Brady* material." *Id.* at 16a.

3. A jury found petitioner guilty on all counts and ordered forfeiture in the amount of $3,562,987. Pet. App. 2a. The court then sentenced petitioner to 210 months of imprisonment, to be served concurrently with his sentence imposed on separate racketeering and wire fraud convictions in the United States District Court for the Eastern District of Pennsylvania. *Ibid.*

4. Following petitioner's conviction, petitioner's counsel sought access to the warehouse documents in connection with the indictment against petitioner in Florida. Pet. App. 16a. The government agreed to provide access to the documents, and a paralegal who worked for petitioner went to Jacksonville to examine the documents. *Ibid.* That paralegal identified warehouse documents that were relevant to the New Jersey prosecution. *Ibid.*

Petitioner filed a motion for a new trial, alleging, *inter alia*, that the government had failed to produce exculpatory warehouse documents in violation of *Brady*. Pet. App. 2a, 17a. The district court granted petitioner's motion for a new trial. *Id.* at 46a-87a. The court rejected the government's argument that it had not suppressed the documents within the meaning of *Brady* because petitioner had knowledge of the documents and the government had made them available to petitioner

and his counsel. *Id.* at 59a-60a. The court concluded that the petitioner and his counsel reasonably relied on the government's representations that there were no relevant documents in the Florida warehouse. *Ibid.*[1]

5. The court of appeals reversed. Pet. App. 1a-44a. The court held that, in order to establish a *Brady* violation, a defendant must show that the government "suppressed" the evidence at issue, and that petitioner had failed to make that showing. *Id.* at 17a-18a. At the outset, the court noted that petitioner had created a massive number of documents and that the government therefore faced an enormous practical difficulty in discovering and revealing all potentially relevant information. *Id.* at 19a. The court then addressed three additional considerations.

First, the court emphasized that petitioner knew about the existence of the warehouse documents. Pet. App. 21a. As the court explained, they were petitioner's own documents, he was aware they were housed in Florida, and he had already viewed a massive number of documents from the warehouse, alerting him to what he could expect to find in the remainder of the documents. *Ibid.*

Second, the court found that the government repeatedly made the warehouse documents available to petitioner and his attorneys for inspection and copying. Pet. App. 23a. The court explained that, having made the documents available to petitioner and his counsel, the government did not have any additional duty under

[1] The district court also found that the government suppressed a second set of documents in violation of *Brady*. Pet. App. 49a-50a, 59a. The court of appeals held that the government did not have an obligation to disclose those documents, *id.* at 30a-35a, and that ruling is not at issue here.

Brady to "ferret out" defense-favorable information from those documents. *Ibid.*

Third, the court rejected as "fanciful" petitioner's claim that he had relied on the government's representation that the warehouse documents did not contain any relevant evidence. Pet. App. 26a. The court noted that, before 1996, petitioner insisted that only he could determine the relevance of the documents, and he had obtained a continuance in order to have stand-by counsel examine the documents. *Ibid.* While petitioner's second counsel stated in an affidavit that he had relied on the government's representation, the court found no genuine reliance because petitioner's second counsel could not have examined the documents in the brief period between the time he was appointed and the time of trial. *Id.* at 27a.

ARGUMENT

Petitioner contends (Pet. 9-20) that the government violated *Brady* by failing to deliver to petitioner all of the warehouse documents that were relevant to his defense. That contention is without merit. Based on the facts of this case, the court of appeals correctly determined that the government did not suppress those documents. That determination does not conflict with the decision of any other circuit or any decision of this Court. Further review is therefore not warranted.

1. In *Brady*, the Court held the "suppression by the prosecution of evidence favorable to an accused * * * violates due process where the evidence is material to guilt or punishment." 373 U.S. at 87. Thus, a critical element of a *Brady* claim is a showing that the government *suppressed* the evidence at issue. *Strickler* v.

Greene, 527 U.S. 263, 281-282 (1991). Petitioner failed to make that showing.

Three considerations support that conclusion. First, petitioner knew about the nature of the warehouse documents because they were his own documents. Pet. App. 21a-22a. Second, the government repeatedly made the warehouse documents available to petitioner and his attorneys for inspection and copying. *Id.* at 23a. And third, petitioner did not rely on the government's statements that the warehouse documents did not contain relevant evidence. *Id.* at 25a-27a. Instead, petitioner repeatedly stated that he or his counsel would examine those documents to determine their relevance to the defense. *Ibid.* In those circumstances, petitioner failed to show that there was any suppression of the documents by the prosecution.

2. Petitioner contends (Pet. 12-16) that the decision below conflicts with holdings from the Ninth, Tenth, and D.C. Circuits. But the cases from those circuits on which petitioner relies do not involve the confluence of the three considerations discussed above. And each of those circuits has reached a result consistent with the court below in circumstances that resemble more closely the circumstances here.

a. Petitioner relies (Pet. 12) on the Ninth Circuit's decision in *Gantt* v. *Roe*, 389 F.3d 908 (2004). In that case, the Ninth Circuit rejected the government's contention that it had no duty under *Brady* to disclose exculpatory information that it had uncovered in an investigation because the defendant could have uncovered the same information through a parallel investigation. The court reasoned that a defendant's failure to undertake an adequate investigation does not absolve the government of its *Brady* obligations. *Id.* at 913. The court also

emphasized that the defendant had relied on the government's representations that it was keeping the defense apprised of developments in the investigation. *Ibid.*

There is no conflict between *Gantt* and the decision below. In this case, the government did not seek to absolve itself of its *Brady* obligation by arguing that petitioner should have conducted a parallel investigation to find information he knew nothing about. Rather, the government affirmatively fulfilled its *Brady* obligation by extending to petitioner the opportunity to review petitioner's own documents. And while the defendant in *Gantt* relied on the government's representation that it would keep him apprised of developments in the investigation, petitioner did not rely on any representations by the government.

The Ninth Circuit's decision in *United States* v. *Shelton*, 588 F.2d 1242 (1978), cert. denied, 442 U.S. 909 (1979), involves circumstances that more closely resemble the circumstances here and demonstrates that the Ninth Circuit's approach accords with the approach of the court below. In that case, the defendant sought a report of an interview between the government and a bookkeeper who told investigators that he was not aware of any wrongdoing by the defendant. The government was unable to locate the report, but disclosed the bookkeeper's address to the defendant. The court held that the government had fulfilled its *Brady* obligations by supplying the defendant with the bookkeeper's address. The court explained that:

> First, Shelton knew exactly what benefit he hoped to secure from [the bookkeeper's] testimony and, therefore, had an incentive to seek him out. Second, the record supports the conclusion that [the bookkeeper] was available to the defense. * * * Under these

> circumstances, it is unreasonable to ask us to believe that the defense could not have contacted [the bookkeeper].

Id. at 1250.

Here, petitioner not only had an incentive to examine the documents at issue, he announced his intention to do so. And while the government in *Shelton* did no more than assist the defendant in locating a witness who possessed the relevant information, here the government made the very material at issue available to petitioner. Accordingly, under the analysis in *Shelton*, there was no *Brady* violation here.

More generally, the Ninth Circuit has held that "[s]ince suppression by the Government is a necessary element of a *Brady* claim, if the means of obtaining the exculpatory evidence has been provided to the defense, the *Brady* claim fails." *United States* v. *Dupuy*, 760 F.2d 1492, 1501 n.5 (1985). Because the government made the documents at issue available to petitioner, that principle is directly applicable here.[2]

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[2] The other Ninth Circuit cases cited by petitioner (Pet. 12-13) are inapposite here. In *Benn* v. *Lambert*, 283 F.3d 1040, 1060-1062 (9th Cir.), cert. denied, 537 U.S. 942 (2002), the government informed the defendant that its experts had reached a conclusion that was consistent with the government's theory, when the experts' conclusion undercut the government's theory. In *United States* v. *Howell*, 231 F.3d 615, 624-625 (9th Cir. 2000), cert. denied, 534 U.S. 831 (2001), the government failed to correct an erroneous report that incriminating evidence had been recovered from the defendant's traveling companion, rather than the defendant, and the defendant based his defense on that erroneous report. And in *United States* v. *Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986), the government alerted the defendant to the existence of certain tapes, but told defense counsel that the tapes would be of no value. None of those cases involved the combination of the three circumstances involved here.

b. Petitioner's reliance (Pet. 13-14) on the Tenth Circuit's decision in *Banks* v. *Reynolds*, 54 F.3d 1508 (1995), is also misplaced. In that case, the government argued that it had no obligation to turn over information that it had arrested two other persons for the crime with which the defendant was charged, that witnesses had identified one of those persons as being at the scene of the crime, and that the other person had allegedly confessed to the crime. *Id.* at 1510-1511. The court rejected that argument, holding that "[i]n this case, the fact that defense counsel 'knew or should have known' about the * * * information * * * is irrelevant to whether the prosecution had an obligation to disclose the information." *Id.* at 1517 (citation omitted). That case stands only for the proposition that the government may not affirmatively withhold evidence based on an argument that the defendant should have known about it. The court did not address the question whether the government satisfies its *Brady* obligations when it affirmatively extends access to the relevant material to the defendant, but does not physically deliver it to him.

The Tenth Circuit addressed that question in *United States* v. *Wolf*, 839 F.2d 1387, cert. denied, 488 U.S. 923 (1988), and reached a conclusion that is fully consistent with the decision below. In that case, the government did not physically deliver tissue samples to the defendant. But the government gave the defendant a report that listed tissue samples as having been collected during the coroner's examination and asked the defendant to contact the coroner for any physical evidence needed for trial. In those circumstances, the Tenth Circuit held that the government had not suppressed the tissue samples in violation of *Brady*. The court explained that "[i]f the means of obtaining the exculpatory evidence has

been provided to the defense, * * * a *Brady* claim fails, even if the prosecution does not physically deliver the evidence requested." *Id.* at 1391.[3]

c. The D.C. Circuit decisions upon which petitioner relies (Pet. 14-15) are also inapposite here. In *In re Sealed Case No. 99-3096* (*Brady Obligations*), 185 F.3d 887 (D.C. Cir. 1999), the government argued that it had no duty to disclose a witness's cooperation agreements with local police because the defendant could have learned of those agreements by issuing a subpoena to the officers involved. The court rejected that argument on the ground that the officers were members of the prosecution team, and the appropriate way for defense counsel to obtain information from the prosecution team is to make a *Brady* request. *Id.* at 897. In *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966), the court held that the government had a duty to disclose an exculpatory statement from a bank officer, regardless of whether a diligent defense counsel could have discovered the same information himself. Neither of those decisions suggests that the government fails to satisfy *Brady* when, as here, it affirmatively makes the material at issue available to the defense and the material at issue consists of the defendant's own documents.

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[3] The other Tenth Circuit decisions cited by petitioner (Pet. 14) did not address the question presented here. In *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999), cert. denied, 529 U.S. 1029 (2000), the court held that the defendant's independent knowledge of evidence that the government withheld demonstrated the absence of prejudice. In *Smith* v. *Secretary of New Mexico Department of Corrections*, 50 F.3d 801, 833 (10th Cir.), cert. denied, 516 U.S. 905 (1995), the court held that an open file policy was insufficient to satisfy the government's *Brady* obligation to disclose the existence of certain clothes when the defendant had no idea that the clothes existed.

In cases that more closely parallel the circumstances here, the D.C. Circuit has reached results consonant with the decision below. For example, in *United States* v. *Derr*, 990 F.2d 1330 (D. C. Cir. 1993), the government failed to disclose physical evidence obtained during an arrest. The court rejected the defendant's *Brady* claim on the ground that the defendant knew about the arrests and therefore of the possibility that the government had relevant physical evidence. The court explained that "*Brady* provides no refuge to defendants who have knowledge of the government's possession of possibly exculpatory information, but sit on their hands until after a guilty verdict is returned." *Id.* at 1335.

Similarly in *United States* v. *Bolden*, 514 F.2d 1301 (D.C. Cir. 1975), the government failed to disclose that it had seized blank bullets from the defendant after his arrest. The court rejected the defendant's *Brady* claim on the ground that the evidence was available to defense counsel in the government's property office where defense counsel had examined other evidence. *Id.* at 1312.

3. a. Petitioner further contends (Pet. 16-19) that the decision of the court of appeals creates a conflict with other circuits on the scope of a defendant's obligation of diligence under *Brady*. In particular, petitioner contends (Pet. 16-18) that the decision below conflicts with *McCambridge* v. *Hall*, 303 F.3d 24 (1st Cir. 2002) (en banc), and *Freeman* v. *Georgia*, 599 F.2d 65 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). According to petitioner, those decisions hold that the government necessarily violates *Brady* when it makes a misleading statement about exculpatory information. Petitioner's understanding of those decisions is mistaken.

In *McCambridge*, the en banc majority did not address that question. Instead, it assumed arguendo that

the government should have disclosed the information at issue, and concluded that there was no prejudice from the failure to disclose. 303 F.3d at 37. Petitioner's discussion of the case (Pet. 17) is drawn entirely from the dissent, and even the dissent did not suggest that a misstatement by the government about the nature of the material at issue would result in a *Brady* violation in circumstances like those presented here. 303 F.3d at 48 (noting that "[t]his was not a case where the defense simply refused to look for evidence it knew existed").

In *Freeman*, a police officer deliberately concealed from the defense an eyewitness who possessed exculpatory information. The Fifth Circuit rejected the government's argument that its concealment of the witness did not violate due process because the defendant failed to look for the witness. The court reasoned that the government had misled the defendant into believing that the witness would give unfavorable testimony, and the defendant could not have located the witness in any event. 599 F.2d at 71-72. Nothing in *Freeman* suggests that the government violates *Brady* when it affirmatively makes the material at issue available to the defendant, that material consists of the defendant's own records, and the defendant has not relied on the government's statements about the relevance of the material.

b. Nor is petitioner assisted (Pet. 18-19) by *United States* v. *Payne*, 63 F.3d 1200 (2d Cir. 1995), cert. denied, 516 U.S. 1165 (1996), or *United States* v. *Ellis*, 121 F.3d 908 (4th Cir. 1997), cert. denied, 522 U.S. 1068 (1998). In *Payne*, the court rejected the government's argument that its failure to turn over an exculpatory document did not violate *Brady* because the defendant could have found the affidavit in a public file. The court explained that the defendant's counsel was not aware of

any facts that would have required him to discover the affidavit. 63 F.3d at 1209. The court added that the government had provided the defendant with other similar documents and defense counsel could reasonably assume that court files did not include other exculpatory material. *Ibid.*

This case is different in every relevant respect. The government did not expect petitioner to search for unspecified documents contained in a public file; it extended petitioner the opportunity to review the specific documents at issue. Nor was petitioner unaware of the possible relevance of the material at issue; they were his own documents. And while the government supplied petitioner with some documents from the warehouse, petitioner did not assume that other exculpatory information did not exist. To the contrary, he repeatedly insisted that only he could determine that.

In *Ellis*, the court rejected the government's argument that it was excused from turning over FBI 302 reports that contained exculpatory evidence because the defendant failed to exercise due diligence in requesting the documents. The court explained that the defendant had obtained a court order directing the government to produce all *Brady* material, the government turned over some FBI 302 reports, but not the reports at issue, and that the government assured the defendant that it had turned over all exculpatory information. 121 F.3d at 914.

This case is entirely different. *Ellis* concerned reports to which only the government had access; in this case, the government offered petitioner access to the documents at issue. In *Ellis*, the defendant had no reason to know about the other 302 reports. Here, petitioner had reason to know about the possible relevance

of the remaining warehouse documents. In *Ellis*, the defendant reasonably relied on the government's assurance that there were no other exculpatory 302 reports. Here, petitioner did not rely on the government's statements that there were no other relevant documents.

c. Petitioner's reliance (Pet. 19) on *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001), and *United States* v. *Kelly*, 35 F.3d 929 (4th Cir. 1994), is also misplaced. In *Leka*, the government failed to disclose the name of a police witness who possessed exculpatory information until the eve of trial. The court held that the government's disclosure was "too little, too late," because the defendant had no basis for knowing about the witness before it began pretrial preparations and a defendant does not have sufficient time for investigation once trial begins. 257 F.3d at 100. In *Kelly*, the court held that the government's failure to disclose exculpatory material could not be excused based on defendant's failure to find the information from an alternative source, because the defendant could not have found the information in time to use it at trial. 35 F.3d at 937. In this case, by contrast, petitioner had the opportunity to review the documents at issue 21 months before trial.

4. Finally, petitioner errs in contending (Pet. 20-28) that the decision below conflicts with *Strickler* v. *Green*, 527 U.S. 263 (1999), and *Banks* v. *Dretke*, 540 U.S. 668 (2004). In both *Strickler* and *Banks*, the prosecution represented that it had made all exculpatory information available through "open file" discovery, when, in fact, the relevant documents were not included. In both cases, the Court concluded that the defendant was entitled to rely on the representation that all *Brady* material has been disclosed without further efforts to obtain

the material. *Strickler*, 527 U.S. at 283 n.23; *Banks*, 540 U.S. at 693-694.

Here, in contrast, the government's "open files" contained the alleged *Brady* material, but petitioner never took advantage of the opportunity to review those files. Moreover, unlike the defendants in *Strickler* and *Banks*, petitioner did not rely on the government's representations about the nature of the documents. Indeed, the court of appeals characterized as "fanciful" petitioner's claim of reliance, because he sought and obtained continuances to review the documents after the government made the statements. Pet. App. 26a.[4]

As petitioner notes (Pet. 24), the court of appeals further distinguished *Strickler* and *Banks* on the ground that the government acted in good faith in this case. The court of appeals ultimately recognized, however, that the resolution of the question presented depended on whether the government had suppressed the evidence at issue, not on whether the government acted in good or bad faith. Pet. App. 17a. And for the reasons discussed, the court correctly determined that, on the facts of this case, the government did not suppress the

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[4] Petitioner challenges (Pet. 24-25 & n.8) the court of appeals' finding that there was no reliance, but that finding is amply supported by the record. See Pet. App. 25a-27a. Petitioner barely contests (Pet. 25 n.8) the court's finding that there was no reliance before petitioner convinced the district court to appoint a second trial counsel on the eve of trial. Instead, petitioner asserts (Pet. 24-25) that second trial counsel relied on the government's representations. But as the court of appeals explained, the district court appointed that counsel only on the condition that his appointment would not delay trial and there was no realistic possibility that the massive warehouse documents could have been examined during the two weeks that petitioner gave his second counsel to prepare for trial. Pet. App. 26a-27a. In any event, that fact-bound question does not warrant review.

evidence. Instead, it made the evidence available, satisfying its obligation under *Brady*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

KIRBY A. HELLER
Attorney

DECEMBER 2005