Nos. 18-410 and 18-6336

In the Supreme Court of the United States

COREY D. YATES, PETITIONER

v.

UNITED STATES OF AMERICA

CHAMONTAE WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether *Brady* v. *Maryland*, 373 U.S. 83 (1963), required the government to disclose the grand jury testimony of a witness recounting statements made by a defendant (or co-defendant) in the witness's presence that the defendant knew the witness had heard.

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OPINION BELOW

The opinion of the D.C. Court of Appeals (Pet. App. 1a-46a)[1] is reported at 167 A.3d 1191.

JURISDICTION

The judgment of the D.C. Court of Appeals was entered on August 24, 2017. A petition for rehearing was denied on May 18, 2018 (Pet. App. 77a-78a). On August 6, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 18-

[1] Citations to "Pet. App." refer to the appendix to the petition for a writ of certiorari filed by petitioner Corey Yates, No. 18-410.

410 (Yates) to and including October 1, 2018, and the petition was filed on that date. The petition for a writ of certiorari in No. 18-6336 (Walker) was filed on August 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

Following a jury trial in the Superior Court for the District of Columbia, petitioner Yates was convicted of second-degree murder while armed, in violation of D.C. Code §§ 22-2101, 22-4502 (LexisNexis 2010); and being an accessory after the fact to murder, in violation of D.C. Code §§ 22-1806, 22-2101 (LexisNexis 2010). Petitioner Walker was convicted of conspiracy to commit murder, in violation of D.C. Code § 22-1805a (LexisNexis 2010); first-degree murder while armed, in violation of D.C. Code §§ 22-2101, 22-4502 (LexisNexis 2010); assaulting a police officer, in violation of D.C. Code § 22-405(b) (LexisNexis 2010); and being an accessory after the fact to murder, in violation of D.C. Code §§ 22-1806, 22-2101 (LexisNexis 2010). Gov't C.A. Br. 1-2. The trial court sentenced Yates to 24 years of imprisonment and Walker to 40 years of imprisonment. *Id.* at 3. The court of appeals affirmed. Pet. App. 1a-46a.

1. On September 25, 2010, as Darrell Hendy was walking down a street in Washington, D.C., Meeko Carraway shot him from behind. Pet. App. 2a. Walker "had been feuding with Hendy and instigated the shooting." *Ibid.* Walker and Yates "were Carraway's accomplices" during the shooting and "after-the-fact accessories." *Ibid.*

On the morning of the shooting, Walker's girlfriend broke up with Walker after they had "a long and physically violent fight," leaving Walker upset and angry.

Pet. App. 2a. Walker solicited help from his friends Yates and Carraway to target Hendy. *Id.* at 3a. After Walker purchased a box of ammunition, he had a friend drive him, Yates, and Carraway to an apartment building at 800 Southern Avenue—the block where Hendy would later be killed. *Ibid.* On the ride, Yates sat next to the ammunition that Walker had purchased. *Ibid.* As they neared their destination, both Walker and Yates commented on seeing "the van"—"an apparent reference to Darrell Hendy's van, which subsequently was found in a parking lot at 800 Southern Avenue." *Ibid.* Yates said, "Let's suit up," and Walker, Yates, and Carraway got out of the car at 800 Southern Avenue. *Id.* at 4a. The men went into apartment 405, and Walker told Yates and Carraway, "you all I got, you all I got, somebody gonna die today." *Id.* at 5a.

Walker retrieved his gun from the apartment and gave it to Carraway, who loaded it with Walker's ammunition. Pet. App. 5a. The three men located Hendy sitting on the stoop of a nearby store and began "keeping watch." *Ibid.* After Hendy began walking toward his van, the three men followed him. *Id.* at 4a-5a. Carraway closed in on Hendy, told Yates and Walker to "watch this," and then shot Hendy multiple times from behind. *Id.* at 6a.[2]

The three men fled to apartment 405. Pet. App. 6a-7a. Walker "advised Carraway to cut his hair and helped him begin doing it." *Id.* at 7a. Yates and Walker left the apartment, but Carraway did not go with them.

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[2] In addition to witness accounts of the day's events, including Walker's extensive admissions, video footage from security cameras captured the three men stalking Hendy and running away. Pet. App. 6a. They did not, however, record the shooting itself. *Ibid.*

Ibid. Police searched the building in the immediate aftermath of the shooting and arrested Carraway in apartment 405, but they released him soon after because they "lacked sufficient evidence at that time to charge him for Hendy's shooting." *Ibid.* An officer found Walker in another apartment "straddling the balcony as if he was going to jump off or climb down." *Ibid.* As the officer tried to handcuff Walker, Walker "grabbed for the officer's service pistol," but he was eventually restrained. *Ibid.* Walker also was not charged with any crimes related to the Hendy murder at that time; he was released two days later. *Ibid.*

Two days after the shooting, the police brought Yates in for questioning. Pet. App. 7a n.6. Yates identified Carraway as the shooter. *Id.* at 8a n.6. Knowing Carraway's arrest was imminent, Walker and Yates aided Carraway in evading arrest by helping him "hide out" at unoccupied property belonging to Yates's family in Seaboard, North Carolina. *Id.* at 7a-8a & n.6. Yates and Walker were seen with Carraway at the property on September 29, 2010 (four days after the shooting). *Id.* at 8a-9a. The next day, Yates spoke with a neighbor of the North Carolina property over the phone and, after the neighbor questioned Carraway's presence at the property, told her that "he would be coming back." *Id.* at 9a. That night, Carraway left the property. *Ibid.* He later returned to the District of Columbia and, on October 12, 2010, turned himself in to the police. *Id.* at 9a n.8.

In August 2011, a grand jury in the D.C. Superior Court returned an indictment charging Yates with conspiracy to commit murder, in violation of D.C. Code § 22-1805a (LexisNexis 2010); first-degree murder while armed, in violation of D.C. Code 22-2101, 22-4502

(LexisNexis 2010); and being an accessory after the fact to murder, in violation of D.C. Code §§ 22-1806, 22-2101 (LexisNexis 2010). Gov't C.A. Br. 1-2. The grand jury charged Walker with conspiracy to commit murder, in violation of D.C. Code § 22-1805a (LexisNexis 2010); first-degree murder while armed, in violation of D.C. Code §§ 22-2101, 22-4502 (LexisNexis 2010); being an accessory after the fact to murder, in violation of D.C. Code §§ 22-1806, 22-2101 (LexisNexis 2010); possession a firearm during a crime of violence, in violation of D.C. Code § 22-4504(b) (LexisNexis 2010); unlawful possession of a firearm, in violation of D.C. Code § 22-4503(a)(1) (LexisNexis 2010); carrying a pistol without a license, in violation of D.C. Code § 22-4504(a) (LexisNexis 2010); and assaulting a police officer, in violation of D.C. Code § 22-405(b) (LexisNexis 2010). Gov't C.A. Br. 1-2. Carraway pleaded guilty to second-degree murder, while Yates and Walker were tried before a jury. *Ibid.*

Yates's defense with respect to the accessory-after-the-fact charge was that "any actions he took following Hendy's murder were not done with the intent to hinder or prevent Carraway's arrest." Pet. App. 10a & n.9. He presented two witnesses in support of that defense. *Id.* at 9a-10a. A police officer testified that, at a police interview two days after the shooting, Yates identified Carraway as the shooter and the police obtained an arrest warrant for Carraway the next day. *Ibid.* Attorney Samuel Hamilton testified that Yates asked him in late September 2010 whether it would be "wise" for a person potentially facing charges "'to get a lawyer and to approach the authorities.'" *Id.* at 10a. Hamilton also said that Yates expressed "vague * * * concerns about possible retaliation." *Ibid.* Hamilton had a subsequent

meeting with Yates, Walker, and Carraway in which they asked whether an attorney could help someone who had concerns about retaliation. *Ibid.* Yates's defense to the murder charge itself was that he was an innocent bystander. *Id.* at 10a n.9. Walker presented no evidence at trial. *Id.* at 9a.

The jury found Yates guilty of second-degree murder while armed and being an accessory after the fact to murder. Gov't C.A. Br. 2. It acquitted him of murder conspiracy and first-degree murder while armed. *Ibid.* The jury found Walker guilty of conspiracy to commit murder, first-degree murder while armed, assaulting a police officer, and being an accessory after the fact to murder. *Ibid.* He was acquitted on the remaining charges. *Ibid.*; see *id.* at 2 & n.2.

The trial court sentenced Yates to concurrent terms of 24 years of imprisonment for second-degree murder while armed and 12 years of imprisonment for being an accessory after the fact. Gov't C.A. Br. 3. The court sentenced Walker to concurrent terms of eight years of imprisonment for conspiracy, 40 years of imprisonment for first-degree murder while armed, 180 days of imprisonment for assault on a police officer, and 30 years of imprisonment for being an accessory after the fact. *Ibid.*

2. Yates filed a motion for judgment of acquittal or a new trial on various grounds. Pet. App. 48a. The government thereafter "informed Yates about the grand jury testimony of 'W-10,' who was Carraway's mother and had not been a witness at trial." *Id.* at 23a. "In the grand jury, W-10 testified to having overheard Yates urge Carraway to surrender to the police." *Ibid.* Specifically, the government disclosed that W-10 testified

that on October 12, 2010 (the day Carraway surrendered to the authorities), W-10 spoke with Carraway outside W-10's place of work, where W-10 also saw Walker and Yates. *Ibid.* Carraway told W-10 that he was in some trouble and going to turn himself in. *Ibid.* Walker was quiet and appeared to be rushing Carraway. *Ibid.* Yates appeared agitated and rushed. *Ibid.* According to the government's disclosure, "Yates kept saying, 'We need to go, if you're going to do this, you need to go now before you decide not to do it. You said you were going to turn yourself in today, let's go.'" *Ibid.*; see *id.* at 65a-68a.

As relevant here, Yates "argued that the government's failure to disclose W-10's grand jury testimony before trial violated *Brady* [v. *Maryland*, 373 U.S. 83 (1963),] because her testimony showed that his intent was not to shield Carraway from arrest but rather to encourage him to surrender." Pet. App. 24a. The trial court, however, "disagreed that there had been a *Brady* due process violation for two reasons." *Ibid.* First, the court observed that "because W-10 was with Yates when he urged Carraway to turn himself in, Yates already knew she could testify to that fact, so the government did not suppress her favorable evidence." *Ibid.*; see *id.* at 56a-60a (district court's oral ruling). Second, the court explained that "even if Yates had presented W-10's testimony at trial, the court was 'absolutely convinced' there was no reasonable probability that it would have changed the outcome of the trial." *Id.* at 24a; see *id.* at 60a-62a (district court's oral ruling); see also Yates Reply in Support of Mot. for New Trial 16 (Oct. 24, 2012) (making no claim that Yates was unaware that W-10 had heard him urge Carraway to turn himself in).

3. Walker and Yates appealed. The court of appeals considered their appeals together and affirmed. Pet. App. 1a-46a.

As relevant here, Yates renewed his claim that the government violated its *Brady* obligations by failing to disclose W-10's grand jury testimony. Pet. App. 24a. Like the trial court, the court of appeals rejected that claim. *Id.* at 25a. The court explained that "[i]t is well-settled that '*Brady* only requires disclosure of information unknown to the defendant.'" *Ibid.* (quoting *United States* v. *Derr*, 990 F.2d 1330, 1335 (D.C. Cir. 1993), overruled on other grounds by *United States* v. *Bailey*, 36 F.3d 106 (D.C. Cir. 1994), rev'd, 516 U.S. 137 (1995)). The court further explained that "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *Ibid.* (quoting *United States* v. *Starusko*, 729 F.2d 256, 262 (3d Cir. 1984)). Observing that "Yates does not claim to have been unaware that W-10 was present and heard him urge Carraway to surrender, nor does he claim to have been unable to secure W-10's testimony to that effect at trial," the court determined that *Brady* did not require disclosure of the grand-jury testimony. *Ibid.* In light of that determination, the court found it "unnecessary" to address the district court's finding that the evidence was not material. *Ibid.*

ARGUMENT

Petitioners contend (Yates Pet. 15-24; Walker Pet. 8-14) that the government had a constitutional duty under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose W-10's grand jury testimony that she heard Yates urge Carraway to turn himself in to the authorities in October 2010. They further contend (Yates Pet. 7-15;

Walker Pet. 11-14) that this Court's review is warranted to resolve a conflict among federal and state courts concerning the scope of the prosecution's obligation under *Brady* to disclose information that a defendant already knew, or should have known with the exercise of due diligence.

Walker's claim does not warrant review because he is raising it for the first time in this Court. In any event, the court of appeals correctly rejected petitioners' *Brady* claim, and its decision does not conflict with any decision of this Court. To the extent that federal courts of appeals and state courts of last resort may disagree as to whether the prosecution must disclose exculpatory information that a defendant could have discovered with reasonable diligence, this case is not a suitable vehicle for addressing any such disagreement. The court of appeals here found that the government did not violate *Brady* when the defendant has not claimed to be unaware of the undisclosed information; this case does not involve a circumstance in which the defendant could have discovered the information with reasonable diligence. This Court has repeatedly denied petitions for writs of certiorari presenting similar questions. See *Georgiou* v. *United States*, 136 S. Ct. 401 (2015) (No. 14-1535); *Rigas* v. *United States*, 562 U.S. 947 (2010) (No. 09-1456); *Cazares* v. *United States*, 552 U.S. 1056 (2007) (No. 06-10088); *Metz* v. *United States*, 527 U.S. 1039 (1999) (No. 98-6220); *Schledwitz* v. *United States*, 519 U.S. 948 (1996) (No. 95-2034). It should follow the same course here. Finally, further review is unwarranted because, (i) regardless of the application of any due-diligence requirement, petitioners would not be entitled to relief under *Brady* because they are unable to demonstrate a reasonable probability that the outcome

of their trial would have been different had the information been disclosed; and (ii) as a practical matter, petitioners' overall sentences would be unaffected by a decision in their favor on the question presented because they were sentenced to longer concurrent sentences for other convictions that are not called into doubt by the *Brady* issue raised in the petition.

1. As an initial matter, Walker's *Brady* claim is not properly before this Court because he failed to raise it below. Walker did not raise a *Brady* claim in the trial court. He did not file a new trial motion or join in Yates's new trial motion, and thus he forfeited any *Brady* claim. Walker also failed to raise the claim properly in the court of appeals.

Although Walker contends (Pet. 7) that, in the court of appeals, he adopted Yates's argument on the *Brady* claim, the record does not support that assertion. In his opening brief on appeal, Walker stated that he "adopts the arguments raised in his coappellant's brief, in particular the issues of the prosecutor's misstatement of evidence during closing and of the court's allowing [a witness] to opine on the meaning of 'suit up.'" Walker C.A. Br. 23. He then briefly presented argument on those two claims. *Id.* at 22-23. He did not argue, or even mention, Yates's *Brady* claim, which relates to testimony about Yates's statement, not Walker's. Nor did Walker reference the *Brady* claim in his reply brief. See Walker C.A. Reply Br. 10-16. Accordingly, the court of appeals only considered and addressed the fact-specific *Brady* claim with respect to Yates, not Walker. Pet. App. 23a-25a.

The first time Walker mentioned the *Brady* claim was in his petition for rehearing en banc in the court of appeals, where, as here, he asserted that he had raised

the claim previously by joining in Yates's claims on appeal. See Walker Pet. for Reh'g 12-13. As explained above, that assertion is not supported by the record. Because Walker failed to raise the *Brady* claim below, the claim is not properly before this Court and further review is unwarranted. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (This Court does not review issues "not pressed or passed upon below.") (citation omitted).

At a minimum, Walker's petition is not a good vehicle for addressing the underlying issue, and this Court should deny review on that basis. Even if this Court decided that the claim was properly presented, the Court could review it only for plain error in light of Walker's forfeiture of the claim in the district court. See Fed. R. Crim. P. 52(b). And in any event, review of Walker's petition is unwarranted for all the reasons identified below.

2. To establish a *Brady* claim, a defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the establishment of the defendant's guilt or innocence. *Brady*, 373 U.S. at 87. Evidence is material under *Brady* if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)) (opinion of Blackmun, J.). The decision below correctly found that petitioners have not carried that burden here.

a. The court of appeals correctly determined that the government had no obligation under *Brady* to disclose the grand jury testimony of W-10 stating that she had heard Yates urge Carraway to turn himself in to the

authorities on October 12, 2010. The *Brady* rule is designed to ensure disclosure of "information which had been known to the prosecution but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976); see *Giles* v. *Maryland*, 386 U.S. 66, 96 (1967) (White, J., concurring in the judgment) ("[A]ny allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense.").

Here, the court of appeals declined to find a *Brady* violation because "Yates does not claim to have been unaware that W-10 was present and heard him urge Carraway to surrender, nor does he claim to have been unable to secure W-10's testimony to that effect at trial." Pet. App. 25a. According to the court of appeals, the trial court found that "Yates already knew" that Carraway's mother could testify to the conversation in which Yates urged Carraway to turn himself in. *Id.* at 24a. Petitioners have not challenged the court of appeals' understanding of the record on this point, and the court's statements are a reasonable interpretation of the record. In Yates's written filing raising his *Brady* claim, he did not claim that he lacked knowledge that Carraway's mother heard him urge Carraway to turn himself in. Yates Reply in Support of Mot. for New Trial 16. At a hearing in the district court, although defense counsel at one point mentioned "the sincerity of [Yates's] representation that he didn't remember," Pet. App. 59a, when the district court questioned him, defense counsel said, "it is reasonable to think that" Yates did not remember, not that Yates was claiming that to be true, *ibid.* Moreover, Yates did not proffer an affidavit claiming lack of knowledge, and defense counsel stated that the defense

would have to "consider" asking for an evidentiary hearing to establish that proposition, without asserting that Yates could truthfully so testify. *Id.* at 61a.

Accordingly, the court of appeals correctly determined that the government had not violated *Brady*. Pet. App. 61a; see *United States* v. *Wilson*, 787 F.2d 375, 389 (8th Cir.) ("The government is under no obligation to disclose to the defendant that which he already knows."), cert. denied, 479 U.S. 857, and 479 U.S. 865 (1986); *United States* v. *Paulino*, 445 F.3d 211, 224-225, 227 (2d Cir.) (finding no *Brady* violation where the government failed to disclose statements made in the midst of trial by counsel for another defendant because the statements contained only "information already known in substance to the defense"), cert. denied, 549 U.S. 980 (2006); *Allen* v. *Lee*, 366 F.3d 319, 325 (4th Cir.) (en banc) (per curiam) (finding no *Brady* violation where the defendant had "personal knowledge" of the information contained in undisclosed jail records), cert. denied, 543 U.S. 906, and 543 U.S. 919 (2004). Indeed, Walker acknowledges (Pet. 11) that "[i]nformation that is actually known to the defense, of course, cannot be the basis of a *Brady* claim."

b. Petitioners contend (*e.g.*, Yates Pet. 15-19; Walker Pet. 11) that the court of appeals' ruling "contravenes" this Court's precedent, focusing on *Strickler* v. *Greene*, 527 U.S. 263 (1999), and *Banks* v. *Dretke*, 540 U.S. 668 (2004). That contention lacks merit. In *Strickler*, the Court addressed a *Brady* claim on federal habeas review, but stated that its decision "d[id] not reach, because it [wa]s not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them."

527 U.S. at 288 n.33. In *Banks*, the state prosecutor maintained an open-file discovery policy and affirmatively represented to the defendant that the State had turned over all exculpatory material, but in fact the State did not disclose information about a paid informant and about rehearsal sessions with a prosecution witness. 540 U.S. at 675-678. On federal habeas review, the Court rejected the argument that a "defendant[] must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695. But the Court did not address a situation where the defendant was aware of the relevant information and did not claim that he could not secure the evidence or testimony underlying the *Brady* claim.

Petitioners contend (*e.g.*, Yates Pet. 19-22; Walker Pet. 9) that *Brady* should be interpreted to require disclosure of exculpatory evidence without regard to a defendant's knowledge of the information or his ability to obtain the evidence with due diligence, given that a defendant may not have shared the information with defense counsel or may have forgotten what he once knew. They also advocate for such an interpretation to enforce the prosecutor's "duty" to learn of exculpatory evidence, Yates Pet. 16, and "equaliz[e]" resources between the prosecution and the defense, *id.* at 23; see, *e.g.*, Walker Pet. 11. The purpose of the *Brady* rule, however, "is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. "Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair

trial." *Ibid.* (footnote omitted); see *Kyles*, 514 U.S. at 436-437 ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense."). *Brady*'s concern for the fairness of trial, rather than the broader policy considerations put forth by petitioners, supports the conclusion that due process is not violated when the defendant, as here, "does not claim to have been unaware" of the substance of the information that the government allegedly failed to disclose, "nor does he claim to have been unable to secure [pertinent evidence relating to that information] at trial." Pet. App. 25a.[3]

3. The decision below does not conflict with the decision of a federal court of appeals or a state court of last resort.

a. Petitioners correctly observe (Yates Pet. 7-9; Walker Pet. 12) that some federal courts of appeals and state courts have determined that the nondisclosure of exculpatory evidence did not violate *Brady* in circumstances where the defendant did not actually possess the evidence in question but could discover it in the exercise of due diligence. See, *e.g.*, *United States* v. *Parker*, 790 F.3d 550, 561-562 (4th Cir. 2015) ("[W]hen 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

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[3] Nor did the government suppress evidence by failing to disclose that it had memorialized W-10's observations of the October 12, 2010, conversation through grand jury testimony. Grand jury testimony is generally "inadmissible as hearsay as long as the witness can be subpoenaed to testify," *United States* v. *Hicks*, 848 F.2d 1, 4 (1st Cir. 1988) (emphasis omitted) (non-disclosure of witness's grand jury testimony was not a *Brady* violation), and petitioners have made no claim that they could not secure W-10's testimony for trial, Pet. App. 25a.

to the benefit of the *Brady* doctrine.") (citation and internal quotation marks omitted); *United States* v. *Infante*, 404 F.3d 376, 387 (5th Cir. 2005) (no suppression where psychiatric records of government's "star witness" were contained in public file and witness's charges were "closely related to the conspiracy with which the defendant is charged"); *Ellsworth* v. *Warden*, 333 F.3d 1, 6 (1st Cir. 2003) (en banc) ("[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.") (quoting *United States* v. *LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983)); *United States* v. *Zuazo*, 243 F.3d 428, 431 (8th Cir. 2001) ("The government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels."); *Commonwealth* v. *Paddy*, 15 A.3d 431, 451 (Pa. 2011); *State* v. *Kardor*, 867 N.W.2d 686, 688 (N.D. 2015); see also, *e.g.*, Yates Pet. 7-9 (citing additional cases).

Petitioners contend (Yates Pet. 9-15; Walker Pet. 12-13) that those decisions conflict with decisions from other federal and state courts holding that there is no due-diligence requirement for a *Brady* claim. Any conflict, however, is not implicated by the court of appeals' decision in this case. Although the court of appeals in this case stated that "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself," Pet. App. 25a (citation omitted), its decision rested on the narrower determination that no *Brady* violation occurred where Yates "d[id] not claim to have been unaware" of the contested infor-

mation, "nor does he claim to have been unable to secure" pertinent evidence regarding the information for trial. *Ibid.* The decisions cited by petitioners do not squarely hold otherwise, and the court of appeals' narrow ruling makes this case an inappropriate vehicle for considering any disagreement on the broader question.

b. Petitioners' reliance (Yates Pet. 9; Walker Pet. 13) on the Tenth Circuit's decision in *Banks* v. *Reynolds*, 54 F.3d 1508 (1995), is misplaced. Although the Tenth Circuit stated in *Banks* that "the fact that defense counsel 'knew or should have known' about [exculpatory] information, therefore, is irrelevant to whether the prosecution had an obligation to disclose," *id.* at 1517, in that case the defendant knew only that two other suspects had been arrested for the crime; the prosecution failed to disclose not only that already known fact, but also eyewitness accounts placing those suspects at the scene, a report that one of the suspects had confessed to the crime, and potentially exculpatory information from their criminal histories. *Id.* at 1510-1511. Petitioners have not cited a case in which the Tenth Circuit has identified a *Brady* violation where, as here, the defendant did not claim he was unaware of the exculpatory information.

Indeed, in another case cited by Yates (Pet. 9), the Tenth Circuit has recognized that "a defendant's independent awareness of the exculpatory evidence is critical in determining whether a *Brady* violation has occurred" because that awareness renders the nondisclosed evidence "immaterial." *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (1999), cert. denied, 529 U.S. 1029 (2000); see also *Banks*, 54 F.3d at 1517 (explaining that whether the defendant "'knew or should have known'" of exculpatory information "will bear on whether

there has been a *Brady* violation"). And in another case, the Tenth Circuit held that the government has no obligation under *Brady* to produce exculpatory evidence "[i]f the means of obtaining the * * * evidence has been provided to the defense." *United States* v. *Wolf*, 839 F.2d 1387, 1391, cert. denied, 488 U.S. 923 (1988). Accordingly, a defendant's knowledge of the exculpatory information is relevant in the Tenth Circuit, even if it is sometimes considered only in the materiality element. Petitioners have not demonstrated that such a distinction would result in a different outcome in this case.

c. Petitioners also err in their reliance on cases from the Ninth Circuit. See Yates Pet. 10; Walker Pet. 11-12. Unlike this case, *Amado* v. *Gonzalez*, 758 F.3d 1119 (9th Cir. 2014), involved information that the defense did not know prior to the government's disclosure of it. *Id.* at 1128. And the court acknowledged in that case that "defense counsel cannot lay a trap for prosecutors by failing to use evidence of which defense counsel is reasonably aware for, in such a case, the jury's verdict of guilty may be said to arise from defense counsel's stratagem, not the prosecution's failure to disclose." *Id.* at 1135.

The Ninth Circuit's decision in *United States* v. *Howell*, 231 F.3d 615 (2000), cert. denied, 534 U.S. 831 (2001), likewise presented different circumstances from this one. See Yates Pet. 9-10; Walker Pet. 8. In that case, the government gave the defense two police reports containing material errors that misidentified the codefendant as carrying contraband at the time of arrest, when the contraband was in fact found on the defendant. *Howell*, 231 F.3d at 623. The prosecutor learned of the material errors in the reports before trial, yet failed to disclose them to the defense, which

then crafted its trial strategy around the erroneous police reports, only to discover mid-trial that the government disavowed their accuracy. *Id.* at 623-624. The court of appeals rejected the government's argument that the prosecutors had no duty to disclose the mistakes because the defendant knew "the truth" and therefore knew that the reports were "wrong." *Id.* at 625. Unlike in *Howell*, however, this case does not involve "the government's duty to disclose evidence of a flawed police investigation," *ibid.*, which was a driving force of the decision in *Howell*. In other cases, the Ninth Circuit has found no *Brady* violation when the defendant "had all the 'salient facts regarding the existence of the [evidence] that he claims [was] withheld.'" *Rhoades* v. *Henry*, 596 F.3d 1170, 1181 (2010) (quoting *Raley* v. *Ylst*, 470 F.3d 792, 804 (9th Cir. 2006), cert. denied, 552 U.S. 833 (2007)) (brackets in original); see *Cunningham* v. *Wong*, 704 F.3d 1143, 1155 (9th Cir.) (same), cert. denied, 571 U.S. 867 (2013); *United States* v. *Bond*, 552 F.3d 1092, 1095 (9th Cir. 2009) ("[W]here the defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression.") (citation and internal quotation marks omitted).

d. The cases petitioners cite (Yates Pet. 10-13; Walker Pet. 11-12) from the Second, Third, Sixth, and D.C. Circuits likewise do not squarely conflict with the decision below. Unlike this case, they do not involve information that was within defendant's knowledge.

In *Lewis* v. *Connecticut Commissioner of Corrections*, 790 F.3d 109 (2d Cir. 2015) (cited at Yates Pet. 11), it was not until after the defendant's trial that the defense learned, from a retired police officer who had

assisted in the defendant's arrest, that the state prosecutor failed to disclose that its prime witness "repeatedly denied having any knowledge of the murders and only implicated [the defendant] after a police detective promised to let [the witness] go if he gave a statement in which he admitted to being the getaway driver and incriminated [the defendant] and another individual." *Id.* at 113; see *id.* at 113-115. In reviewing the defendant's habeas petition, the Second Circuit recognized that "[e]vidence is not 'suppressed' [for *Brady* purposes] if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *Id.* at 121 (citation omitted; brackets in original). Although the Second Circuit declined to apply a due-diligence requirement where a defendant "was reasonably unaware of exculpatory information," *ibid.*, it did not relieve a defendant of a due-diligence obligation with respect to interviewing an individual whom the defendant knew had witnessed an exculpatory incident, which it viewed as "facts already within the defendant's purview," *ibid.*; see *United States* v. *Diaz*, 922 F.2d 998, 1007 (2d Cir. 1990) ("[T]here is no improper suppression within the meaning of *Brady* where the facts are already known by the defendant."), cert. denied, 500 U.S. 925 (1991); see also *Paulino*, 445 F.3d at 224-225; *United States* v. *Robinson*, 560 F.2d 507, 518 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978). Because petitioners here were aware that W-10 witnessed the alleged conversation, they would not prevail under that approach.

Dennis v. *Secretary*, 834 F.3d 263 (3d Cir. 2016) (en banc) (cited at Yates Pet. 10; Walker Pet. 11-12), involved the government's failure to disclose a time-

stamped receipt that would have supported the defendant's alibi defense, the existence of which defendant was unaware at the time of trial and which was not "publicly available." *Id.* at 275-276, 288-290. Accordingly, that case does not conflict with the ruling here, which involved information of which petitioners were aware. Furthermore, in finding a *Brady* violation on those facts, the Third Circuit construed a prior decision, which it reaffirmed, that had "reject[ed] defendant's argument that certain documents were * * * somehow 'suppressed' when the government had made the materials available for inspection *and they were defendant's own documents*." *Id.* at 292-293 (citing *United States* v. *Pelullo*, 399 F.3d 197, 212 (3d Cir. 2005) (emphasis added), cert. denied, 546 U.S. 1137 (2006)).

In *United States* v. *Tavera*, 719 F.3d 705, 711-712 (6th Cir. 2013) (cited at Yates Pet. 11; Walker Pet. 12), and *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 892-893, 896-897 (D.C. Cir. 1999) (cited at Yates Pet. 12-13), the courts of appeals reasoned that the due-diligence rule did not require the defense to attempt to interview trial witnesses to discover exculpatory information that was provided to police or prosecutors. *In re Sealed Case* additionally reasoned that the due-diligence rule did not require a defendant to subpoena police officers to learn whether they had negotiated cooperation agreements with witnesses. *Id.* at 897. Neither case held that the government suppresses evidence under *Brady* when it does not provide information that the defendant already knows or could reasonably obtain. To the contrary, the court in *Tavera* noted that the facts of that case involved "information known to investigating officers that defendants had no reason to know about," contrasting it with a prior case

in which the circuit had held that *Brady* did not apply to publicly available sentencing records. *Tavera*, 719 F.3d at 712 n.4 (quoting *Bell* v. *Bell*, 512 F.3d 223, 235 (6th Cir.) (en banc), cert. denied, 555 U.S. 822 (2008)).

e. The state cases on which petitioners rely (Yates Pet. 13-14; Walker Pet. 12-13) likewise do not create a conflict warranting this Court's review. In *People* v. *Chenault*, 845 N.W.2d 731 (Mich. 2014), the prosecution failed to disclose videotaped witness interviews that were arguably inconsistent with the witnesses' written statements; the defendant did not know the contents of the recorded interviews. *Id.* at 734. Unlike in this case, the prosecution in *Chenault* conceded that it had suppressed the videotaped witness interviews. *Id.* at 739 & n.8. The Michigan Supreme Court declined to adopt "a rule requiring a defendant to show that counsel performed an adequate investigation in discovering the alleged *Brady* material," but made clear that "evidence that the defense knew of favorable evidence, will reduce the likelihood that the defendant can establish that the evidence was suppressed for purposes of a *Brady* claim," *id.* at 738. That approach is consistent with the result and reasoning in petitioners' case.

The other state cases cited by Yates (Pet. 13-14) are inapposite because they do not involve circumstances where defendant was aware of the information that the government failed to disclose. See, *e.g.*, *State* v. *Ilk*, 422 P.3d 1219, 1227 (Mont. 2018) (court assumed defendant was "unaware" that the crime scene photos the prosecution failed to disclose "existed"); *State* v. *Reinert*, 419 P.3d 662, 666 (Mont. 2018) (failure to disclose state medical examiner's letter questioning credentials of state's forensic expert); *People* v. *Bueno*, 409 P.3d 320,

322-323, 327-329 (Colo. 2018) (en banc) (failure to disclose investigative reports detailing evidence of threats against inmates that would have supported defendant's "alternate-suspect" defense evidence; court concluded the evidence was unknown to the defense and had been suppressed "even if [it] were to apply a reasonable diligence requirement"); *Tempest* v. *State*, 141 A.3d 677, 685-686 (R.I. 2016) (failure to disclose witness's inconsistent statements to prosecutor that could have been used for impeachment).[4]

4. In any event, this case would not be a suitable vehicle in which to review the question presented because, even if petitioners were to prevail on their claim in this Court, (i) the outcome of their cases would not be different in light of their inability to satisfy *Brady*'s materiality prong, and (ii) petitioners' overall sentences would be unaffected because petitioners were sentenced to longer concurrent sentences for other convictions that are not called into doubt by the *Brady* issue raised in the petition.

a. Although the court of appeals found it unnecessary to address *Brady*'s materiality prong in light of its determination that the information about W-10 was not suppressed, Pet. App. 25a, the district court was "absolutely convinced" that no reasonable probability existed

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[4] Although Yates cites *Archer* v. *State*, 934 So. 2d 1187 (Fla. 2006) (per curiam), in support of his argument that Florida does not require a demonstration of due diligence for a *Brady* claim (see Yates Pet. 14), he acknowledges that other Florida cases are to the contrary, see, *e.g.*, *Bogle* v. *State*, 213 So. 3d 833 (Fla. 2017) (per curiam), cert. denied, 138 S. Ct. 738 (2018), and that, regardless, Florida has agreed with the court of appeals here that "a defendant's actual knowledge or possession of evidence can defeat a *Brady* claim," Yates Pet. 15 n.4 (citing *Occhione* v. *State*, 768 So. 2d 1037, 1042 (Fla. 2000) (per curiam)).

that disclosure of W-10's grand jury testimony would have affected the outcome of the trial, see *id.* at 24a-25a; *id.* at 62a. That determination was correct.

The accessory-after-the-fact charges were primarily based on petitioners' actions in helping Carraway escape to North Carolina a few days after the murder, around September 29, 2010. Pet. App. 7a-9a. As the district court found, statements made by Yates roughly two weeks thereafter, urging Carraway to turn himself in, would not have materially altered the jury's understanding of petitioners' state of mind at the pertinent time. See *id.* at 60a. That finding is even stronger with respect to Walker, who did not make the statements urging Carraway to turn himself in and, moreover, urged Carraway to alter his appearance in the immediate aftermath of the shooting, and helped him to do so, in addition to helping him abscond to North Carolina. *Id.* at 7a-9a. Accordingly, because the outcome of petitioners' case would not be affected by the Court's resolution of the issue on which they seek certiorari, further review is not warranted.

b. Furthermore, the undisclosed information about W-10's grand jury testimony relates only to petitioners' convictions for being accessories after the fact to murder, for which Yates received a sentence of 12 years of imprisonment and Walker received a sentence of 30 years of imprisonment. Gov't C.A. Br. 2-3. But in addition to those sentences, Yates received a concurrent sentence of 24 years of imprisonment for second-degree murder while armed, and Walker received a concurrent sentence of, *inter alia*, 40 years of imprisonment for first-degree murder while armed. *Ibid.* Because petitioners received concurrent sentences on other counts

that are longer than their sentences for being accessories after the fact to murder, a decision in their favor on the question presented would have no practical effect on the length of their prison sentences. The decision below accordingly does not warrant this Court's review, and the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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