Docket No. S20P0937

IN THE

Supreme Court of Georgia

STATE OF GEORGIA

WILLIE WILLIAMS PALMER,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

Brief of the Georgia Association of Criminal Defense Lawyers
Amicus Curiae
Supporting Willie Williams Palmer

Gregory A. Willis, Esq.
Ga. Bar No. 766417
The Willis Law Firm
6000 Lake Forrest Dr., Suite 375
Atlanta, GA 30328
Tel: (404) 835-5553
E-mail: gw@willislawga.com
Chair, GACDL Amicus Committee

Matthew K. Winchester, Esq.
Ga. Bar No. 399094
Law Office of Matthew K. Winchester
1800 Peachtree Street NW, Suite 300
Atlanta, GA 30309
Tel: (678) 517-6894
E-mail: k.winchestercb@gmail.com
Writer, GACDL Amicus Committee

Brian Steel, Esq.
Ga. Bar No. 677640
The Steel Law Firm, P.C.
1800 Peachtree St. N.W., Suite 300
Atlanta, GA 30309
E-mail: TheSteelLawFirm@msn.com
Tel: (404) 605-0023
Writer, GACDL Amicus Committee

Hunter J. Rodgers, Esq.
Ga. Bar No. 438018
3939 Atlanta Road S.E.
Smyrna, GA 30080
Tel: (770) 286-6765
E-mail: hjrodgers.esq@gmail.com
Writer, GACDL Amicus Committee

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INTRODUCTION

This case should be simple. The prosecution stipulated at the motion for new trial that its expert (a doctor) had changed his opinion regarding Willie Palmer's cognitive ability at the time he committed these crimes. It stipulated that, prior to trial, the expert relayed his changed, now favorable professional opinion to the two district attorneys prosecuting this case, and that neither district attorney disclosed the information to the defense. The doctor's changed expert opinion was material evidence and the prosecuting attorneys suppressed it. Textbook *Brady* violation.

But in 1994, this Court imported a fourth element into Georgia's *Brady* jurisprudence: the evidence suppressed could not be material capable of discovery through defense counsel's reasonable diligence. If a reasonably diligent defense lawyer would have found the evidence, then prosecutors were under no obligation to disclose.

Where did that fourth prong come from? It is not found in *Brady* itself, nor any of the U.S. Supreme Court's subsequent decisions on the subject. Rather, it originated in federal circuit case law; case law since undermined—if not flatly contradicted—by the United States Supreme Court. In spite of this sandy foundation, Georgia's appellate courts have built a vast jurisprudence applying the erroneous diligence requirement, not just in habeas cases, but also on direct appeal. Georgia's "defense diligence" requirement cannot stand.

AMICUS AND ITS INTEREST

A frequent friend of this Court, the Georgia Association of Criminal Defense Lawyers (GACDL) is a professional association of Georgia lawyers who regularly rise to the Constitution's clarion to defend those accused of crimes and to secure due process. It includes both public defenders and private counsel, united in aspiration to improve the administration of criminal justice and to sustain the rule of law. GACDL's standing *Amicus Curiae* Committee believes that its views will aid the Court in the adjudication of S20P0937.

This case involves Georgia's expanded requirements for defendants to prove a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Although states are not only permitted, but encouraged, to confer greater protections than the federal Constitution,[1] providing more onerous burdens to prove federal constitutional claims does not achieve that desired result. Given the blatant *Brady* violation in this case, and the State's reliance upon Georgia's erroneous diligence requirement to excuse the prosecutors' misconduct, *Amicus* believes this case presents an excellent vehicle to reconsider the "defense diligence" requirement in Georgia's prior *Brady* case law.

[1] *See Elliott v. State*, 305 Ga. 179, 188 (II) (C) (2019).

VIEWS OF THE AMICUS

The Georgia and United States Constitutions prohibit cruel and unusual punishments,[2] which courts are tasked to determine by examining punishment in the light of "evolving standards of decency."[3] In 1989, this Court held that State execution of intellectually disabled persons violated Georgia's cruel and unusual punishment clause.[4] For forty years in Georgia, and almost twenty across the nation, the intellectually disabled have been categorically exempt from the death penalty.

Willie Palmer is intellectually disabled, but has been sentenced to death. How? The prosecution broke the law. After its first two attempts to convict Palmer ended due to its failure to disclose material evidence to the defense, the State learned that its expert, Dr. Peterson, had changed his opinion and concluded that Palmer was

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[2] *See* GA. CONST. 1983, Art. I, Sec. I, Para. XVII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison."); U.S. CONST., Amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Georgia also explicitly prohibits banishment from beyond the state and whipping as punishments for crimes. GA. CONST. 1983, Art. I, Sec. I, Para. XXI.

[3] *See Hall v. Florida*, 572 U.S. 701, 708 (2014) ("To enforce the Constitution's protection of human dignity" found in the Cruel and Unusual Punishment Clause, "this Court looks to the evolving standards of decency that mark the progress of a maturing society.") (citation and quotation marks omitted); *accord Fleming v. Zant*, 259 Ga. 687, 689 (3) (1989). *But see Conley v. Pate*, 305 Ga. 333, 340 (2019) (Peterson, J., concurring) (questioning Georgia's adoption of the "evolving standards of decency" test in light of state cruel and unusual punishment clause's original public meaning).

[4] *See Fleming*, 259 Ga. at 690 (3); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

intellectually disabled. Dr. Peterson was in good company: four other experts in the field concluded the same.[5] Like the other four experts, the State did not call Dr. Peterson to testify in the third trial; unlike those four, however, the prosecutors, Daniel Craig and Ashley Wright, also dismissed Dr. Peterson after learning of his changed opinion.[6] True to form, the State then chose not to disclose Dr. Peterson's changed view to the defense, despite its impact on the case.

After obtaining a conviction and death sentence against Palmer, the State carried on about its business. Yet when its deception was discovered, it adamantly refused to admit what had happened—though did not deny it.[7] Only after the case was set for a hearing did the State agree to stipulate to Dr. Peterson's disclosure.[8]

Before the trial court, the State argued that prosecutors Craig and Wright did nothing wrong because they did not actively prevent or inhibit Palmer's counsel from contacting Dr. Peterson.[9] To support their argument, the State pointed to Georgia's case law insulating *Brady* violations by excusing governmental suppression of exculpatory or impeaching evidence if that evidence could have been readily obtained through defense counsel's due diligence.

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[5] The other experts who shared this professional opinion were Dr. Edwin Sperr, Dr. Kimford Meader, Dr. James Maish, and Dr. Jonathan Venn.
[6] V59.50.
[7] V57.294.
[8] R14.4839.
[9] V14.4564-65.

The reasonable diligence prong has no basis in *Brady*, has been rejected by its progeny, and serves to undermine the duty of prosecutorial disclosure. GACDL's position is that this Court must abandon its diligence requirement; the State's misconduct against Palmer, and its subsequent arguments opposing relief, are quintessential examples that show why the requirement is untenable.

I. With its Overriding Purpose to Ensure Fair Trials with Fully Informed Juries, *Brady* Demands that Prosecutors see Justice Done, not Cases Won.

Due process safeguards liberty against deprivation through state action, embodying "the fundamental conceptions of justice which lie at the base of our civil and political institutions."[10] By contrast, a "defense-diligence" requirement serves as an escape valve for prosecutors who "substitute their own judgment of the defendant's guilt for that of the jury."[11] But only a jury, that "main pillar in the temple of justice,"[12] when acting on proof beyond a reasonable doubt, "may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government"[13]—a protection guaranteed by Georgia's constitution over a decade before the federal.[14]

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[10] *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (citing *Hebert v. Louisiana*, 272 U.S. 312, 316-17 (1926)).
[11] *United States v. Tavera*, 719 F.3d 705, 708 (6th Cir. 2013).
[12] *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 206 (1848).
[13] *United States v. Haymond*, 588 U.S. —, —, 139 S. Ct. 2369, 2373 (2019) (plurality opinion).
[14] *See* GA. CONST. 1777, Art. LXI ("Freedom of the press and trial by jury to remain inviolate forever.")

For these reasons, courts have long recognized the unique position that the prosecutor occupies. Prosecutors hold "the responsibility of a minister of justice and not simply that of an advocate."[15] They represent not just any "ordinary party to a controversy," but the "sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all[.]"[16] Just as other lawyers faithfully execute their client's interest, prosecutors "must always be faithful to [their] client's overriding interest that justice shall be done."[17] For while the prosecutor "may strike hard blows," they are "not at liberty to strike foul ones."[18]

In *Brady v. Maryland*, the Supreme Court of the United States held that due process is violated where prosecutors suppress evidence favorable to the accused that is material either to guilt or to punishment, regardless of good or bad faith.[19] *Brady* was later extended to cover impeachment evidence,[20] as well as confirming prosecutors' affirmative duty to disclose.[21] Throughout it all, the analytical

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[15] Ga BAR R. 4-102, Ga. R. Prof. Cond., Rule 3.8, Cmt. [1].
[16] *Berger v. United States*, 295 U.S. 78, 88 (2) (1935).
[17] *United States v. Agurs*, 427 U.S. 97, 110-11 (III) (1976) (citation and quotation marks omitted).
[18] *United States v. Young*, 470 U.S. 1, 7 (II) (1985) (citation and quotation marks omitted); *see Scipio v. State*, 928 So.2d 1138, 1145-46 (Fla. 2006).
[19] *Brady*, 373 U.S. at 87. *Contra United States v. Leon*, 468 U.S. 897, 908 (1984) (holding evidence obtained in violation of Fourth Amendment nevertheless admissible if government actors relied in objective good faith upon invalid warrant).
[20] *Giglio v. United States*, 405 U.S. 150, 153-54 (1972).
[21] *Kyles v. Whitley*, 514 U.S. 419, 432 (III) (1995) (prosecution has an affirmative duty to disclose favorable evidence to defense); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion) (prosecution must disclose *Brady* material

framework has remained the same, requiring defendants to show three "essential elements of a *Brady* prosecutorial misconduct claim."[22] First, the evidence suppressed "[must be] 'favorable to the accused, either because it is exculpatory, or because it is impeaching.'" Second, the State [must have] "suppressed the evidence, 'either willfully or inadvertently.'" Third, "prejudice [must] ensue[]."[23] If a defendant shows all three, due process requires a new trial.

Brady and its progeny recognize that even in an adversarial system, the government's goal is to see justice done, not cases won. Society wins not only when the guilty are convicted, but when criminal trials are fair;[24] fairness instills confidence in the convictions and ensures finality. As the ultimate "opportunity to be heard," due process requires a jury trial be fair, and one of the most basic components of fairness is ensuring the jury has the evidence tending to show both innocence and guilt.[25] Where the government tips the scales to hide away evidence that supports the defendant's innocence, the resulting imbalance could cause more than an erroneous verdict. In this case, a man's life could be lost.

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regardless of whether defendant's request was specific or general).

[22] *Banks v. Dretke*, 540 U.S. 668, 691 (II) (A) (2004).

[23] *Skinner v. Switzer*, 562 U.S. 521, 536 (II) (C) (2011) (punctuation omitted) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)); *accord Banks*, 540 U.S. at 691.

[24] *Brady*, 373 U.S. at 87.

[25] *Agurs*, 427 U.S. at 116 (Marshall, J., dissenting).

II. The Georgia "Diligence Requirement" Rests on Archaic Case Law long since Repudiated by the United States Supreme Court.

Brady's mandate is simple: err on the side of disclosure.[26] Only when the prosecution knows "that [] defense counsel already has the material in its possession should it be held to not have 'suppressed' [that *Brady*/*Giglio* material] in not turning it over to the defense. Any other rule presents too slippery a slope."[27] In almost-sixty years since *Brady* was decided, the Supreme Court of the United States has never wavered on its stance that the State must provide defendants with material, exculpatory evidence in its possession.

Yet nondisclosure of *Brady* material "is still a perennial problem, as multiple scholarly accounts attest."[28] One of the main reasons for this is the concept of "reasonable diligence," where reviewing courts require a defendant to prove that they neither possessed the suppressed evidence, nor could obtain it themselves with any reasonable diligence.[29]

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[26] *See Kyles*, 514 U.S. at 439 ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."); *Agurs*, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."). *Cf. Carpenter v. United States*, 585 U.S. —, —, 138 S.Ct. 2206, 2221 (IV) (2018) (discussing in Fourth Amendment context, that whenever faced with doubt about a search, "the Government's obligation is a familiar one—get a warrant.").

[27] *Dennis v. Sec'y, Penn. Dep't of Corr.*, 834 F.3d 263, 292 (3d Cir. 2016) (en banc).

[28] *Tavera*, 719 F.3d at 708 (collecting authorities in footnote).

[29] *Cain v. State*, 306 Ga. 434, 439 (3) (2019) (quoting *McCray v. State*, 301 Ga. 241, 246 (2) (c) (2017)).

A) The origins of reasonable diligence in habeas corpus and extraordinary motion for new trial case law.

"Reasonable diligence" is nowhere to be found in *Brady*, nor its progeny. Diligence emerged in Georgia's *Brady* law through the conflation of habeas corpus and extraordinary motion for new trial legal standards into direct review.[30] Unlike direct review, both post-conviction remedies require the defendant to have exercised diligence in pursuing claims or evidence.[31] Both require diligence for the simple reason that "litigation must come to an end."[32] Absent diligence in these settings, post-conviction review turns into a late-night infomercial, constantly crying out, "But wait! There's more!" Instead, to secure finality in judgments, diligence requirements ensure that litigants actively pursue their causes.

Brady has nothing to do with finality, and everything to do with preserving the integrity of the justice system. Adding the diligence prong not only hampers defendants' ability to prove *Brady* violations, it also ignores *Brady*'s key purpose. Georgia's diligence prong places the burden of discovering exculpatory information on the defendant, thereby "releas[ing] the prosecutor from the duty of disclosure"

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[30] Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 151 (2012).
[31] *See Watkins v. Ballinger*, — Ga. —, —, 840 S.E.2d 378, 380 (2020) (discussing diligence in habeas corpus); *Bharadia v. State*, 297 Ga. 567, 573-74 (2015) (diligence in extraordinary motions for new trial).
[32] *Id.* at 574 (quoting *Llewellyn v. State*, 252 Ga. 426, 429 (2) (1984)).

and "reliev[ing] the government of its *Brady* obligations."[33]

The confusion stems in part from language in *Kyles v. Whitley* and *United States v. Agurs*.[34] *Agurs* identified three different contexts in which *Brady* applies, each involving "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense."[35] This is best understood "as a general description of what constitutes *Brady* evidence," rather than the imposition of "a new hurdle for defendants."[36] Similarly in *Kyles*, the Court held that *Brady* is not violated by showing that "the prosecution knew of an item of favorable evidence unknown to the defense" without meeting the other prongs.[37] Read in the context of the *Kyles* Court's broader discussion on materiality, this language "is meant to define the prosecution's duty both to become aware of evidence in the government's possession and to weigh the materiality of evidence."[38]

B) The United States Supreme Court repeatedly rejects any diligence requirement in the Brady *context.*

The United States Supreme Court not only "has never required a defendant to exercise due diligence to obtain *Brady* material,"[39] but has affirmatively rejected a

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[33] *Tavera*, 719 F.3d at 711 (II) (A).
[34] *Agurs*, 427 U.S. at 103; *Kyles*, 514 U.S. at 437.
[35] *Agurs*, 427 U.S. at 103.
[36] *People v. Chenault*, 495 Mich. 142, 153 (III) (A) 845 N.W.2d 731 (2014).
[37] *Kyles*, 514 U.S. at 437.
[38] *Chenault*, 495 Mich. at 154.
[39] *Lewis v. Connecticut Com'r of Correction*, 790 F.3d 109, 121 (II) (A) (2d Cir. 2015); *see Agurs*, 427 U.S. at 107 ("[I]f the evidence is so clearly supportive of a

diligence requirement. Two cases control here: *Strickler v. Greene*[40] and *Banks v. Dretke*.[41] In both cases, the High Court confronted a diligence requirement for defendants, and in both cases, rejected it. In *Strickler*, the Court rejected any notion of an expectation that defense counsel should know of *Brady* material, since in the context of a *Brady* claim, "a defendant cannot conduct the reasonable and diligent investigation" required by habeas case law "to preclude a finding of procedural default when the evidence is in the hands of the State."[42]

Later, in *Banks*, the Court found no support for "the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."[43] Indeed, the *Banks* Court observed that a contrary rule—declaring that a "prosecutor may hide, defendant must seek"—could not survive "in a system constitutionally bound to accord defendants due process."[44]

C) Georgia's diligence requirement survives in spite of its rejection.

Diligence entered Georgia's *Brady* jurisprudence in this Court's 1994 case,

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claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.").

[40] 527 U.S. 263 (1999).

[41] 540 U.S. 668 (2004).

[42] *Strickler*, 527 U.S. at 287-88 (citation and punctuation omitted) .

[43] *Banks*, 540 U.S. at 695.

[44] *Id.* at 696.

Zant v. Moon, 264 Ga. 93 (1994).[45] *Moon* imported the diligence requirement from the Eleventh Circuit's decision in *United States v. Meros*.[46] *Meros*, in turn, relied upon *United States v. Valera*,[47] which cited two Fifth Circuit[48] precedents, *United States v. Prior* and *United States v. Cravero*, for support[49]—though *Cravero* contradicts the diligence prong.[50] Ironically, the *Moon* Court's ruling did not turn on reasonable diligence; rather, the Court denied the Appellant's *Brady* claim because the prosecution did not possess the disputed evidence.[51]

The Georgia and federal circuit cases predate *Strickler* and *Banks*. Prior to *Banks*, some courts "were avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule. But the clear holding in *Banks* should have ended that practice."[52] Instead of recognizing the Supreme Court's rejections of a diligence requirement, Georgia has continued its application by overlooking *Banks*.

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[45] Justices Carley and Sears-Collins concurred in judgment only, and Justice Benham dissented. *Id.* at 101.
[46] *Id.* at 100 (3) (citing *United States v. Meros*, 866 F.2d 1304 (11th Cir. 1989)).
[47] *Meros*, 866 F.2d at 1308 (II) (A) (1) (citing *United States v. Valera*, 845 F.2d 923, 927-28 (11th Cir. 1988)).
[48] The United States Court of Appeals for the Eleventh Circuit has adopted as precedent all decisions of the former Fifth Circuit published prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).
[49] *Valera*, 845 F.2d at 927-28 (I) (quoting *United States v. Cravero*, 545 F.2d 406, 420 (5th Cir. 1976); *United States v. Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977).
[50] *See Cravero*, 545 F.2d at 420 ("[T]here is no *Brady* violation when the accused or his counsel knows before trial about the allegedly exculpatory information and makes no effort to obtain its production.") (footnote omitted).
[51] *Moon*, 264 Ga. at 100 (3).
[52] *Tavera*, 719 F.3d at 712 (footnote omitted).

Strickler has been cited six times in Georgia, but only twice for the correct *Brady* analysis.[53] The remaining Georgia cases all cite *Strickler* for other aspects of *Brady* law.[54] One 2018 case from the Court of Appeals even cites to *Strickler* immediately after discussing the erroneous four-prong framework for Georgia.[55] Only three Georgia cases cite to *Banks*, and two of them contradict it: after setting forth four prongs, both cases cite *Banks* as support for the erroneous framework, one of which was *Palmer II*.[56]

III. Georgia should Jettison its Diligence Requirement and Return to the Correct *Brady* test.

This Court should overrule its diligence jurisprudence in favor of the United States Supreme Court's original, unchanged test. Beyond it being an error of federal constitutional law, decisive in its own right,[57] no other reasons exist to contemplate

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[53] *See Floyd v. State*, 263 Ga. App. 42, 43-44 (2003); *Nikitin v. State*, 257 Ga. App. 852, 854 (1) (2002).

[54] *See Jones v. Medlin*, 302 Ga. 555, 560 (2) (2017) (citing to *Strickler* for the rule that prosecutors have an affirmative duty to learn of any favorable evidence known by other government actors); *Henley v. State*, 285 Ga. 500, 506 (4) (2009) (same); *Johnson v. State*, 300 Ga. 252, 260 (2016) (citing to *Strickler* for ripeness analysis of pre-trial *Brady* claim); *McClendon v. State*, 347 Ga. App. 542, 547 (2018) (citing *Strickler* for materiality language).

[55] *See Ibid.*

[56] *See Brannon v. State*, 298 Ga. 601, 605 (3) (a) (2016); *Palmer II*, 279 Ga. at 852 (2). The third case, *McClendon v. State*, provides a parenthetical citation to *Banks* for support that the State violates *Brady* when it fails to disclose evidence of a witness's payment for their information. *McClendon*, 347 Ga. App. at 553 (3).

[57] *Cf. Williams v. Taylor*, 529 U.S. 362, 393-94 (2000) (rejecting ineffective assistance claim where the Virginia Supreme Court imposed an additional factor upon the *Strickland v. Washington*, 466 U.S. 668 (1984) test).

a diligence requirement in Georgia's *Brady* jurisprudence.

A) Diligence requirements contradict the purpose of Brady.

Brady's mandate is self-executing: prosecutors examine their files, determine what they believe may be exculpatory or impeaching, and then disclose the information they think qualifies.[58] Because the prosecutor's decision is final,[59] discovering *Brady* material can prove enormously difficult. And with empirical support showing that prosecutors cannot accurately speculate about evidence's materiality, it is no small wonder that policing prosecutorial misconduct can be daunting.[60] Putting a diligence requirement upon the defendant in effect says, "Yes, the State had this evidence, and yes, it should have disclosed it, but had you looked for it, you could have found it, so disclosure was unnecessary." Not so.

A defendants' duty to investigate "simply does not relieve the State of its duty to disclose exculpatory evidence under *Brady*[.]"[61] This "investigation-based" element violates the spirit and foundation of *Brady*.[62]

In a period of strained public budgets (or any period), prosecutors "should not

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[58] *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987).
[59] *Ibid.*
[60] *See Weisburd*, *supra*, at 163 n.133 (collecting authorities);
[61] *State v. Williams*, 392 Md. 194, 227, 896 A.2d 973 (2006).
[62] *See South Carolina v. Durant*, __ SE2d __, 2020 LEXIS 61 at *4-5 (II) (No. 27964; decided May 6, 2020) (holding that defense counsel cannot be faulted for failing to discover Brady material as it is exclusively the State's duty to disclose exculpatory and impeaching evidence).

be excused from producing that which the law requires [them] to produce, by pointing to that which conceivably could have been discovered had defense counsel expended the time and money to enlarge his investigation."[63]

Prosecutors have a broad duty of disclosure. Under *Brady*, prosecutors must presume in favor of disclosure, resolving any doubts about evidence's exculpatory or impeaching nature "in favor of producing it."[64] Ample disclosures are "as it should be" because they "tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."[65]

The United States Supreme Court has encouraged open file policies, noting that "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*."[66] Georgia's diligence requirements "flip[s] that obligation," enabling prosecutors "to excuse [their] failure

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[63] *Amado v. Gonzalez*, 758 F.3d 1119, 1136-37 (II) (C) (2) (9th Cir. 2014).
[64] *Id.* at 1136.
[65] *Kyles*, 514 U.S. at 439-40. *Cf. Leon*, 468 U.S. at 900-01 (approving general goal of establishing "procedures under which criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth") (citation and quotation marks omitted).
[66] *Strickler*, 527 U.S. at 823 n. 23. *See Banks*, 540 U.S. at 695 ("Our decisions 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.").

by arguing that defense counsel could have found the information himself."[67]

A defense-diligence requirement in the *Brady* context ignores that *Brady* is aimed "at defining an important prosecutorial duty; it is not a tool to ensure competent defense counsel."[68] Ineffective assistance of counsel claims serve that interest.[69] Of course, *Brady* and *Strickland* claims have some overlap: "when the government complies with its obligation to provide favorable and material evidence, it becomes the defendant's burden to then make use of that evidence."[70] If defense counsel loses the benefit of *Brady* by failing to make use of this information, they "most certainly then would have been guilty of ineffective assistance of counsel."[71]

For example, in *Gulley v. State*, this Court denied a *Brady* claim involving a police file because the defense "clearly could have obtained this information" themselves.[72] There, the record showed the file "was open and available" for

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[67] *Gonzalez*, 758 F.3d at 1136.
[68] *Chenault*, 495 Mich. at 155; *see also United States v. Nelson*, 979 F. Supp.2d 123, 133 (D.D.C. 2013) ("[T]he prosecution bears the burden of disclosing any exculpatory evidence in its possession, and it is no response to a Brady claim that defense counsel could have learned of the evidence through 'reasonable pre-trial preparation.'") (citing *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 896-97 (D.C. Cir. 1999)).
[69] *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations.").
[70] *Chenault*, 495 Mich. at 155 n.7.
[71] *Tavera*, 719 F.3d at 712; *accord Chenault*, 495 Mich. at 155 n.7 ("Failures on the part of defense counsel to make use of known and available evidence can instead be evaluated under the Sixth Amendment's guarantee of effective assistance of counsel.").
[72] 271 Ga. 337, 342 (4) (1999), *habeas corpus granted on other grounds, Schofield*

inspection pre-trial, "but the defense did not examine it."[73] A defense investigator went to the police department, "spent an hour talking to one of the detectives" about the case, "but he never asked to look in the file."[74] The defense subpoenaed "the entire [police] investigative file" to a pre-trial hearing, but again, "the defense did not examine the file."[75] Which is more surprising: that this Court found there was no *Brady* violation, or that the defendant was later granted relief by habeas for ineffective assistance of counsel?[76]

By requiring defendants to attempt to "discover" exculpatory evidence suppressed by the State, courts "punish the client who is in jail for his lawyer's failure to carry out a duty no one knew the lawyer had."[77] *Banks* makes plain that clients do not lose the benefit of *Brady* when their lawyer fails to "detect" favorable information, because the prosecutors are obligated to produce it.

B) Georgia has rarely relied upon reasonable diligence to decide a Brady *claim.*

A defendant's *Brady* claim can fall apart multiple ways. The evidence, though not disclosed by the State, can come out at trial—Georgia has long held that "there

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v. Gulley, 279 Ga. 413 (2005).
[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*; *Schofield*, 279 Ga. at 416 (affirming habeas corpus writ for ineffective assistance and vacating death sentences).
[77] *Tavera*, 719 F.3d at 712.

is no violation when the information sought becomes available to the accused at trial."[78] Countless cases from both this Court and the Court of Appeals dismiss *Brady* claims on this ground.[79] Or, the alleged *Brady* evidence winds up not being *Brady* material at all, like when witnesses testify and later receive lenient plea deals, but no agreement existed at the trial.[80] Even with those initial hurdles, appellate courts still have three avenues to deny *Brady* claims: the complained-of evidence could be inculpatory, rather than exculpatory;[81] the evidence was never suppressed;[82]

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[78] *Burgeson v. State*, 267 Ga. 102, 104 (2) (1996) (citing *Stephens v. State*, 264 Ga. 761, 762 (3) (1994)). *But see In Matter of Lee*, 301 Ga. 74, 79 n.12 (2017) (per curiam) ("[W]e caution that when a prosecuting attorney delays the disclosure of exculpatory evidence until trial, he plays with fire," and a "prudent prosecutor would disclose exculpatory evidence as promptly as reasonably possible"); *Boyd v. United States*, 908 A.2d 39, 57 (D.C. 2006) ("[A] prosecutor's timely disclosure obligation with respect to *Brady* material can never be overemphasized, and the practice of delayed production must be disapproved and discouraged.") (punctuation omitted; quoting *Sykes v. United States*, 897 A.2d 769, 777 (D.C. 2006)).

[79] *See, e.g.*, *Burgeson*, 267 Ga. at 104 (2) (denying *Brady* claim because information became available during trial, not after); *accord Riley v. State*, 251 Ga. App. 64, 67-68 (2) (2001); *Herndon v. State*, 229 Ga. App. 457, 459 (6) (1997), *overruled on other grounds*, *Felix v. State*, 271 Ga. 534, 540 (1999). *See also State v. Echols*, 347 Ga. App. 278, 280-81 (2018) (reversing trial court's dismissal of accusation for *Brady* violation where evidence was discovered pre-trial, therefore not suppressed).

[80] *See, e.g.*, *Younger v. State*, 288 Ga. 195, 200-01 (4) (2010); *Williamson v. State*, 300 Ga. App. 538, 545-46 (4) (b) (2009); *Varner v. State*, 297 Ga. App. 799, 801-02 (1) (a) (2009); *Pihlman v. State*, 292 Ga. App. 612, 614-15 (1) (2008); *Tate v. State*, 278 Ga. App 324, 326 (2) (2006). *See also Heidt v. State*, 292 Ga. 343, 350-51 (7) (2013) (denying *Brady* claim where defendant failed to prove any favorable evidence existed).

[81] *See, e.g.*, *Cook v. State*, 274 Ga. 891, 893 (2) (2002); *Nelson v. State*, 279 Ga. App. 859, 864 (2) (2006).

[82] *See, e.g.*, *Heidler v. State*, 273 Ga. 54, 55 (2) (2000) (denying *Brady* claim where DFACS records were not only provided by the prosecution but also subpoenaed

or, the exculpatory evidence, though suppressed, was not material.[83] Even the few cases which use the correct *Brady* test all deny the claims on various grounds.[84]

The only Georgia cases to rest their decisions exclusively on reasonable diligence grounds illustrate the flaws in the requirement. Take *Gonnella v. State*,[85] where this Court reversed the denial of a *Brady* claim. After the defense filed a motion to reveal the deal, the State disclosed that its star witness, the co-defendant, had entered a plea agreement to testify against the defendant in return for pleading to voluntary manslaughter.[86] What the State did *not* disclose, however, was the

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separately by defense counsel pre-trial); *Bradford v. State*, 205 Ga. App. 383, 384 (1992) (denying *Brady* claim where evidence at issue was already known to defendant); *Bolick v. State*, 244 Ga. App. 567, 573-74 (2) (2000) (denying *Brady* claim where defense cross-examined victim at trial about information allegedly suppressed).

[83] *See, e.g.*, *Mitchell v. State*, — Ga. —, — 838 S.E.2d 847, 853-54 (2) (b) (2020); *Burgess v. Hall*, 305 Ga. 633, 638 (3) (2019); *Grant v. State*, 295 Ga. 126, 127 (2) (2014); *Hester v. State*, 292 Ga. 356, 358 (2) (2013); *Blackshear v. State*, 285 Ga. 619, 622 (2009); *Waldrip v. Head*, 279 Ga. 826, 832-33 (II) (H) (2005); *Watkins v. State*, 276 Ga. 578, 583 (4) (2003).

[84] *See, e.g.*, *Nikitin*, 257 Ga. App. at 853-56 (1) (citing to *Strickler* for proper test but still denying *Brady* claim where (1) defendant failed to show evidence was exculpatory or material; (2) defendant had personal knowledge of impeaching statement from victim; and (3) defendant showed evidence was suppressed, though failed on materiality); *Floyd*, 263 Ga. App. at 43-44 (citing to *Nikitin*, but denying *Brady* claim because "the state did not suppress the evidence because the prosecutor introduced it at trial"); *Nelson*, 279 Ga. App. at 864 (citing to *Floyd*, but denying *Brady* claim where evidence was inculpatory, introduced at trial, and defense counsel had opportunity to cross-examine); *Callahan v. State*, 280 Ga. App. 323, 326-27 (1) (b) (2006), *overruled on other grounds*, *State v. Lane*, — Ga. —, —, 838 S.E.2d 808, 819 (2020) (same).

[85] 286 Ga. 211 (2009).

[86] *Id.* at 213-14 (2).

amended agreement which, "contrary to the State's ordinary practice in such plea deals," allowed the co-defendant to "seek a better outcome for himself regarding his sentence" after testifying against the defendant.[87] The State argued on appeal that this evidence was obtainable through the defense's reasonable diligence, but this Court rejected that argument because the paperwork was not available until a week after the co-defendant's testimony.[88] This, mind you, despite the prosecution affirming "that it understood its obligation [to disclose *Brady* material] and would abide by the law."[89] That is what Georgia's diligence requirement does: it allows a prosecutor, *who actively avoided its disclosure duties*, to argue that the flagrant disobedience of due process can be ameliorated by the defense's failure to look for suppressed information.

C) No stare decisis *considerations weigh in favor of this Court retaining the diligence requirement.*

Assuming for the sake of argument that *Banks* and *Strickler* did not bar a *Brady* diligence requirement,[90] *stare decisis* does not support its retention. While

[87] *Id.* at 214.
[88] *Id.* at 215.
[89] *Id.* at 213.
[90] *See Lejeune v. McLaughlin*, 296 Ga. 291, 298 (2014) ("[E]ven the venerable doctrine of stare decisis does not permit [Georgia courts] to persist in an error of *federal* constitutional law") (citation omitted; emphasis in original); *accord Collier v. State*, 307 Ga. 363, 367 n.2 (2019); *State v. Burns*, 306 Ga. 117, 123-24 (2) (2019); *Ringgold v. State*, 304 Ga. 875, 878 (2019).

stare decisis promotes important principles,[91] that does not make it "an inexorable command."[92] Instead, courts conduct a four-factor test "that considers 'the age of the precedent, the reliance interests at stake, the workability of the decision, and, *most importantly*, the soundness of its reasoning.'"[93]

In Palmer's case, all four factors weigh in favor of overruling *Moon* and Georgia's *Brady* defense-diligence requirement. *Moon* is twenty-six years old, much younger than other precedents this Court has since overruled.[94] Second, the State has little reliance interests at stake because substantial reliance interests are "most common with rulings involving contract and property rights."[95] Even if the State has some interest in maintaining this diligence requirement—though it is difficult to imagine what that could be—this sort of reliance interest does not "outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected."[96] Third and finally, the workability is simple,

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[91] *See State v. Hudson*, 293 Ga. 656, 661 (2013).
[92] *Olevik v. State*, 302 Ga. 228, 244 (2) (c) (iv) (2017) (citation and quotation marks omitted).
[93] *Duke v. State*, 306 Ga. 171, 184 (4) (2019) (emphasis in original) (quoting *State v. Jackson*, 287 Ga. 646, 658 (5) (2010)).
[94] *See State v. Turnquest*, 305 Ga. 758, 774 (4) (2019) (collecting cases which overruled precedents as old as forty-five years).
[95] *Savage v. State*, 297 Ga. 627, 641 (2) (b) (2015).
[96] *Olevik*, 302 Ga. 228, 246 (2) (c) (iv) (2017) (quoting *Arizona v. Gant*, 556 U.S. 332, 349 (2009)). *Cf. Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("The mere fact that law enforcement may be made more efficient can never by itself justify disregard of [constitutional rights]").

unequivocal, straightforward, and aligned with *Brady*—err in favor of disclosure.[97] Thus, the Georgia "defense diligence" case law should be overruled.

CONCLUSION

At its core, Georgia requirement for defense diligence in the *Brady* context conflicts with many cherished principles of state constitutional law. Our governing charter proudly declared that government is instituted "for the protection, security, and benefit of the people,"[98] yet here, the prosecution obtained an unfair conviction through unethical conduct, insulated from review by an erroneous condition.

Our government's "paramount duty," which "shall be impartial and complete," is the protection of persons.[99] Daniel Craig and Ashley Wright actively suppressed information which categorically barred Palmer from receiving the death penalty in any Georgia Judicial Circuit. Public officers are "the trustees and servants of the people,"[100] yet the prosecutors here abused their authority in an unlawful attempt to execute Palmer.

Since the Georgia "defense diligence" requirement contains neither rhyme nor reason, neither method nor madness, and is not rooted in basic *Brady* principles, *Amicus* requests this Court to reverse the lower court and grant Palmer a new trial.

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[97] *See* nn. 53-54, *supra*, and accompanying text.
[98] GA. CONST. 1983, Art. I, Sec. II, Para. I.
[99] GA. CONST. 1983, Art. I, Sec. I, Para. II.
[100] GA. CONST. 1983, Art. I, Sec. II, Para. I.

Respectfully submitted this 8th day of July, 2020.

/s/ Gregory A. Willis

Gregory A. Willis, Esq.
Ga. Bar No. 766417
The Willis Law Firm
6000 Lake Forrest Dr., Suite 375
Atlanta, GA 30328
Tel: (404) 835-5553
E-mail: gw@willislawga.com
Chair, GACDL Amicus Committee

/s/ Matthew K. Winchester

Matthew K. Winchester, Esq.
Ga. Bar No. 399094
Law Office of Matthew K. Winchester
1800 Peachtree Street NW, Suite 300
Atlanta, GA 30309
Tel: (678) 517-6894
E-mail: K.Winchestercb@gmail.com
Writer, GACDL Amicus Committee

/s/ Brian Steel

Brian Steel, Esq.
Ga. Bar No. 677640
The Steel Law Firm, P.C.
1800 Peachtree St. N.W., Suite 300
Atlanta, GA 30309
Tel: (404) 605-0023
E-mail: TheSteelLawFirm@msn.com
Writer, GACDL Amicus Committee

/s/ Hunter J. Rodgers

Hunter J. Rodgers, Esq.
Ga. Bar No. 438018
3939 Atlanta Road S.E.
Smyrna, GA 30080
Tel: (770) 286-6765
E-mail: hjrodgers.esq@gmail.com
Writer, GACDL Amicus Committee

IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

WILLIE WILLIAMS PALMER *Appellant,*	
	CASE No. S20P0937
vs.	
STATE OF GEORGIA *Appellee*.	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Paulding County District Attorney's Office, by and through counsel, in the foregoing matter with a copy of **Brief of Georgia Association of Criminal Defense Lawyers as *Amicus Curiae* in support of Appellant Willie Williams Palmer** by delivering a copy via United States Mail, with postage pre-paid, to the following:

Joshua Smith
Asst. District Attorney
Burke County District Attorney's Office
735 James Brown Blvd., Suite 2400
Augusta, GA 30901

Christopher M. Carr
Attorney General of Georgia
Department of Law
40 Capitol Square SW
Atlanta, GA 30334

Josh D. Moore & Thea Delage
Attorneys for Appellant
Office of the Georgia Capital Defender
104 Marietta St. NW, Suite 600
Atlanta, GA 30303

This the 8th day of July, 2020.

/s/ Greg Willis
GREG WILLIS
Ga. Bar No. 766417

/s/ Matthew K. Winchester
MATTHEW K. WINCHESTER
Ga. Bar No. 399094

/s/ Brian Steel
BRIAN STEEL
Ga. Bar No. 677640

/s/ Hunter J. Rodgers
HUNTER J. RODGERS
Ga. Bar No. 438018