CRIMINAL LAW — EVIDENCE — SEVENTH CIRCUIT HOLDS THAT POLICE OFFICER'S ALLEGEDLY FALSE STATEMENTS TO PROSECUTOR DID NOT CONSTITUTE A *BRADY* VIOLATION. — *Carvajal v. Dominguez*, 542 F.3d 561 (7th Cir. 2008).

Pursuant to the notion that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair,"[1] *Brady v. Maryland*[2] and its progeny provide criminal defendants a remedy against not only prosecutors, but also investigating police officers who fail to disclose impeaching or exculpatory evidence.[3] One of the elements that criminal defendants seeking relief must show is suppression by the government,[4] which for *Brady* purposes in the Seventh Circuit means that "the prosecution failed to disclose the evidence in time for the defendant to make use of it" and "the evidence was not otherwise available to the defendant through the exercise of reasonable diligence."[5] Recently, in *Carvajal v. Dominguez*,[6] the Seventh Circuit held that a police officer's allegedly false statements to the prosecutor about when he had identified the defendant as the suspect did not constitute a *Brady* violation.[7] The court's analysis invoked an overly expansive conception of the "reasonable diligence" required on the part of a defendant. Should future courts adopt this conception, the practical effectiveness of the government's duty to disclose will be impaired.

In early 2001, during a money laundering investigation, the Miami field office of the U.S. Drug Enforcement Agency (DEA) discovered that suspects in southern Florida were receiving money via wire transfers from Chicago.[8] The Miami DEA solicited Task Force Officer Wayne Hunter to organize two undercover money pickups in Chicago on April 16th and 23rd. On each occasion, Hunter sent police officer Louis Dominguez as the undercover officer.[9] Dominguez identified

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[1] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[2] 373 U.S. 83.

[3] Although *Brady* only imposed an affirmative obligation on the prosecutor, *see id.* at 87–88, a police officer's conduct can also result in a *Brady* violation. *See* Youngblood v. West Virginia, 126 S. Ct. 2188, 2190 (2006) ("*Brady* suppression occurs when the *government* fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" (emphasis added) (citation omitted) (quoting Kyles v. Whitley, 514 U.S. 419, 438 (1995))). The Seventh Circuit, along with other circuits, has imposed a common law duty on law enforcement to disclose evidence by denying immunity and imposing liability for breach. *See, e.g.*, Steidl v. Fermon, 494 F.3d 623, 631 (7th Cir. 2007).

[4] *See* Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

[5] Ienco v. Angarone, 429 F.3d 680, 683 (7th Cir. 2005) (citing United States v. O'Hara, 301 F.3d 563, 569 (7th Cir. 2002)).

[6] 542 F.3d 561 (7th Cir. 2008).

[7] *Id.* at 567.

[8] Carvajal v. Dominguez, No. 05-C-2958, 2007 WL 1687275, at *1 (N.D. Ill. June 11, 2007).

[9] *Id.* at *2–3.

Raul Carvajal as one of the money couriers present at both pickups, and Carvajal was later indicted.[10]

During criminal proceedings in the Southern District of Florida, Carvajal moved to suppress Dominguez's identification of him as a participant in the Chicago money pickups.[11] Carvajal contended that Dominguez had identified him using an "unduly suggestive" one-photograph procedure.[12] The court denied the motion, finding no substantial likelihood of misidentification, and Dominguez later testified to having interacted with Carvajal during both money pickups.[13] Nonetheless, Carvajal was acquitted.[14]

Carvajal then asserted a *Bivens*[15] cause of action against Dominguez in the Northern District of Illinois, alleging that Dominguez intentionally lied when he identified Carvajal as one of the money couriers.[16] Raising a *Brady* claim, Carvajal contended that Dominguez had violated his due process rights when Dominguez submitted false evidence and withheld impeachment evidence by failing to inform the prosecutor that he had learned Carvajal's name and seen Carvajal's photograph prior to the first pickup.[17] To prove his claim, Carvajal offered evidence that (1) a photograph of Carvajal was requested by an intelligence analyst within the Chicago DEA on April 9, 2001, and probably would have been received within a week;[18] and that (2) according to Hunter's deposition testimony for the civil suit, he knew Carvajal's name by April 15, 2001, and in accordance with normal practice "would have given all the information he had about Carvajal, if he knew it, to Dominguez prior to the April 16, 2001 operation."[19]

In response to Carvajal's claim, Dominguez insisted that "he first saw Carvajal's photo sometime between the first meeting on April 16 and May 14, 2001, the date of his written reports."[20] He moved for summary judgment, arguing that Carvajal could not prove prejudice

[10] *Id.* at *3.

[11] *Id.* at *4.

[12] *Id.* Dominguez only viewed one photograph at the time he identified Carvajal as one of the suspects instead of selecting Carvajal from among multiple photographs of different individuals or a formal line-up.

[13] *Id.* Several points were relevant in the court's determination: "Dominguez had an excellent opportunity to view Carvajal at the time of the two money pickups, there was no evidence that Dominguez was pressured to select Carvajal's photograph, and Dominguez was an experienced and trained law enforcement officer." *Id.* Other supporting evidence included a cell phone number registered to Carvajal's ex-wife and called by Dominguez to schedule the money pickups, and a car registered to Carvajal's ex-wife observed at a different pickup. *Id.* at *4, *6.

[14] *Id.* at *4.

[15] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[16] *Carvajal*, 2007 WL 1687275, at *5.

[17] *Id.* at *8.

[18] *Id.* at *1.

[19] *Id.* at *2. Hunter had not testified to these facts during the criminal trial.

[20] *Carvajal*, 542 F.3d at 564; *see also Carvajal*, 2007 WL 1687275, at *3.

resulted from any false statements to the prosecutor, given Carvajal's acquittal and the immateriality of the withheld evidence.[21]

The district court denied Dominguez's request for summary judgment on the *Brady* claim.[22] First, the court addressed whether an acquitted defendant has standing to make a *Brady* claim given that successful claims must demonstrate that the withheld evidence affected the result of the trial. The court found standing appropriate because "an acquittal 'alone does not show that police officers complied with *Brady* or that the defendant's trial was fair.'"[23] The court then addressed whether there was a genuine issue in dispute regarding the information available to Dominguez prior to the first money pickup.[24] The court found a dispute in light of the evidence offered by Carvajal, indicating that such information "would have been material for impeachment purposes."[25]

The Seventh Circuit reversed.[26] Writing for the panel, Judge Tinder[27] held that even if Dominguez had lied to the prosecutor about the information available to him in identifying Carvajal, a *Brady* violation had not occurred.[28] The court began by explaining that *Sornberger v. City of Knoxville*[29] and *Harris v. Kuba*[30] had already established that facts similar to those alleged in Carvajal's complaint did not constitute a *Brady* violation. These cases involved police officers who had alleg-

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[21] *Carvajal*, 2007 WL 1687275, at *8.

[22] *Id.* at *10.

[23] *Id.* at *8 (quoting Carroccia v. Anderson, 249 F. Supp. 2d 1016, 1024 (N.D. Ill. 2003)). The Seventh Circuit has yet to address this issue, and the district courts within the circuit are split. *See, e.g.*, Gregory v. Oliver, 226 F. Supp. 2d 943, 953 (N.D. Ill. 2002) (finding "no reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed to the defense," because "[the defendant] was acquitted even without the withheld evidence").

[24] *Carvajal*, 2007 WL 1687275, at *9.

[25] *Id.*

[26] *Carvajal*, 542 F.3d at 571. The summary judgment motion was immediately appealable because the district court's order effectively denied Dominguez the qualified immunity to which he was generally entitled as a police officer. *See id.* at 566. As such, the court did not review the district court's denial of summary judgment for egregious error. The questions before the court were (1) "whether the facts alleged, taken in the light most favorable to the plaintiff, amount[ed] to a constitutional violation"; and (2) "whether the violated right was clearly established." *Id.* A "yes" response to both questions — that is, a finding that a *Brady* violation had occurred — would have been necessary to uphold the denial of summary judgment.

[27] Judge Tinder was joined by Judges Kanne and Williams.

[28] *Carvajal*, 542 F.3d at 567.

[29] 434 F.3d 1006 (7th Cir. 2006). Teresa Sornberger was arrested for robbery and signed a confession, but the prosecution dropped the charges shortly before trial because the actual offender was apprehended. *Id.* at 1011–12. Sornberger filed a lawsuit, claiming that the police officers had generated a false report about her confession and then lied to the prosecutor. *Id.* at 1027.

[30] 486 F.3d 1010 (7th Cir. 2007). A few months after Keith Harris was convicted of armed robbery and attempted murder, Girvies Davis and Ricky Holman confessed to the crime. *Id.* at 1013. The investigating officers then made allegedly false statements to the prosecutors that Harris "associated with and knew" Davis in order to show that Davis's confession was false. *Id.*

edly made false statements to the prosecutor but were held not to have breached their duty to disclose. In applying those cases to *Carvajal*, the court concluded that the facts could at most "support an inference that Dominguez did see the photo before the first pickup and that he lied about when he saw the photograph."[31] The alleged wrongdoing consisted merely of a "lying witness" allegation against Dominguez; therefore, Carvajal could not prove a *Brady* violation occurred.[32]

The court then explained how the facts alleged by Carvajal did not satisfy the required elements of a *Brady* violation. First, evidence must be "favorable to the accused, either being exculpatory or impeaching."[33] The court found, however, that too many inferences were necessary to reach such a conclusion in this case.[34] The evidence at issue — that is, Dominguez's knowledge of Carvajal prior to his first undercover transaction — was not exculpatory because it is "regular police practice" to review information about individuals one might meet while undercover.[35] And the evidence lacked significant impeachment value because "the best Carvajal could have achieved [was] casting some doubt on Dominguez's credibility," yet Carvajal "presented no persuasive explanation that Dominguez was motivated by some malice or even that he purposefully lied."[36]

Second, evidence must have been "suppressed by the government, either willfully or inadvertently."[37] The court found, however, that the withheld evidence could not be classified as suppressed. Carvajal failed to perform "reasonable diligence," which would have easily revealed the inconsistencies between Dominguez's and Hunter's testimonies.[38] Although both Dominguez and Hunter were accessible during the criminal proceedings, Carvajal's motion to suppress Dominguez's identification testimony had focused on the one-photograph procedure, with no consideration of the information available to Dominguez prior to the identification.[39] The court held that Carvajal failed to sufficiently "probe" the veracity of Dominguez's testimony.[40]

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31 *Carvajal*, 542 F.3d at 567.

32 *Id.*

33 *Id.* at 566.

34 *Id.* at 568.

35 *Id.*

36 *Id.* at 568–69.

37 *Id.* at 566.

38 *Id.* at 567 (quoting Ienco v. Angarone, 429 F.3d 680, 683 (7th Cir. 2005)) (internal quotation marks omitted).

39 *Id.* at 567–68.

40 *Id.*

Finally, there must be "a reasonable probability that prejudice ensued — in other words, 'materiality.'"[41] The court found it improbable, however, that if Dominguez had disclosed that he had seen Carvajal's photograph before the first undercover transaction, then either the charges would have been dropped or Dominguez's identification would have been suppressed.[42] The court reasoned that misidentification by Dominguez was unlikely given his excellent opportunities to view Carvajal and the existence of other evidence indicating Carvajal's involvement, and that Dominguez's awareness of Carvajal prior to the first money pickup would not have unraveled the prosecution's entire case.[43]

The Seventh Circuit's holding was hardly unexpected. The insignificance of the allegedly suppressed evidence, as well as Carvajal's ultimate acquittal, made a finding of a *Brady* violation extremely unlikely. Still, the court did seemingly depart from established *Brady* precedent in its discussion of whether the evidence in *Carvajal* was suppressed. Even though Carvajal had no knowledge that Dominguez might have provided false testimony regarding the date that he first received the photograph, the Court still found that the information was not suppressed because Carvajal could have discovered it through "reasonable diligence." The court thereby invoked an overly expansive conception of "reasonable diligence," one in which defendants are expected to probe the veracity of each element of police testimony, whether or not they have reason to suspect deception. The consequences of this conception for the practical effectiveness of the duty to disclose in ensuring fair trials should deter future courts from adopting it.

The *Carvajal* court properly cited *Sornberger* and *Harris* for the proposition that lying does not constitute a *Brady* violation, but failed sufficiently to distinguish their facts from those in Carvajal's case. In both *Sornberger* and *Harris*, the defendant had direct or first-hand knowledge of alleged police deception, so the withheld evidence, or the very fact that a police officer was lying, was not suppressed. In *Sornberger*, the police allegedly lied about what had occurred during the defendant's interrogation.[44] The defendant, therefore, knew of the alleged deception in the police account of the interrogation because she

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[41] *Id.* at 566–67. Departing from the district court's conclusion, the Seventh Circuit in dicta suggested that acquitted defendants are categorically unable to satisfy this element because of the outcome-dependent analysis required by the Supreme Court. *Id.* at 570.

[42] *Id.* at 568.

[43] *Id.* at 568–69.

[44] Sornberger v. City of Knoxville, 434 F.3d 1006, 1027 (7th Cir. 2006).

knew what had actually occurred in the interrogation room.[45] Similarly, in *Harris*, the defendant alleged that the police had lied about who his acquaintances were.[46] Since Harris knew exactly who he did and did not associate with, he was able to recognize the police deception as soon as the false evidence was presented. In contrast, until Hunter's deposition for the civil suit, Carvajal did not know that his photograph had been available to Dominguez before the first money pickup. Precisely when Dominguez received information about Carvajal likely being a money courier was a function of the DEA's internal investigation procedures. Carvajal did not observe or receive notification of when Hunter provided Dominguez with Carvajal's name and photograph. During the criminal proceedings, then, Carvajal had no reason even to suspect that Dominguez's account of when he first saw the photo was inaccurate.

The fact that Carvajal lacked direct knowledge of Dominguez's alleged deception was a factual distinction worthy of recognition by the court. As noted earlier, evidence suppression, one of the central requirements for prevailing on a *Brady* claim, cannot exist where evidence is "otherwise available . . . through the exercise of reasonable diligence."[47] When a criminal defendant has direct knowledge of withheld evidence, as in *Sornberger* and *Harris*, she necessarily fails to satisfy the suppression element because the evidence is still readily accessible to the defendant and thus useable in her defense. Conversely, when a criminal defendant lacks direct knowledge of withheld evidence, that same conclusion cannot be drawn. Thus, the court must conduct a case-dependent analysis of reasonable diligence.

In failing to distinguish the *Carvajal* case from *Sornberger* and *Harris*, the court unfortunately invoked an expanded conception of "reasonable diligence." In most circuits applying a "reasonable diligence" standard, evidence is suppressed unless withheld evidence is publicly available or the criminal defendant is on notice that it may exist.[48] The *Carvajal* court abandoned this established understanding of

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[45] *Id.* at 1029 (stating that the defendant knew the circumstances of her confession and "[had not been] deprived of evidence held by the police or prosecutor that would have helped her question the officers' version of the events").

[46] Harris v. Kuba, 486 F.3d 1010, 1016 (7th Cir. 2007). The *Harris* court highlighted that merely withholding the truth from the prosecutor was insufficient: "Harris knew about his relationship, or lack thereof, with Davis. He was fully capable of challenging the officers' and prosecutors' contention to the contrary." *Id.* at 1017.

[47] *See* Ienco v. Angarone, 429 F.3d 680, 683 (7th Cir. 2005).

[48] Stated differently, "[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," United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982) (citations omitted), and when "a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government," United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991) (citing United States v. Dupuy, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985)). *See also, e.g.*, Unit-

"reasonable diligence," and instead relied upon a broader conception. The court never considered whether Carvajal had a valid reason to suspect Dominguez had lied about the identification process — that is, whether other knowledge or evidence should have prompted Carvajal to inquire into precisely when the photograph was provided to Dominguez. Instead, focusing on the accessibility of the witnesses who ultimately provided Carvajal with the withheld evidence, the court explained that, because Dominguez and Hunter were available during the criminal proceedings, Carvajal could have discovered Dominguez's alleged deception during the criminal proceedings through questioning and investigation. But the Seventh Circuit itself had previously rejected this sort of rigorous standard. In *Boss v. Pierce*,[49] the court declared: "We regard as untenable a broad rule that any information possessed by a defense witness must be considered available to the defense for *Brady* purposes."[50] Information possessed by prosecution witnesses would presumably be even less available. Thus, when the *Carvajal* court concluded that there was no *Brady* violation because "both Hunter and Dominguez were accessible to the defense" and Carvajal could have further "investigate[d] their versions of the relevant events,"[51] it employed an expanded definition of reasonable diligence inconsistent with the logic of its own precedent.

Future courts should shy away from adopting *Carvajal*'s conception of "reasonable diligence" because of its consequences for the practical effectiveness of the duty to disclose in ensuring fair trials for criminal defendants.[52] First and foremost, this conception shifts the balance of fairness away from defendants by requiring them to engage in burdensome fishing expeditions. Although certain improprieties may be discoverable in the sense that questioning a police officer about every minute detail could reveal a deception, the withheld evidence may be practically unknowable.[53] For example, there may not

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ed States v. Perez, 473 F.3d 1147, 1150 (11th Cir. 2006); Spirko v. Mitchell, 368 F.3d 603, 610–11 (6th Cir. 2004); Kutzner v. Cockrell, 303 F.3d 333, 336 (5th Cir. 2002); United States v. Todd, 920 F.2d 399, 405 (6th Cir. 1990); United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990).

[49] 263 F.3d 734 (7th Cir. 2001).

[50] *Id.* at 740.

[51] *Carvajal*, 542 F.3d at 567–68.

[52] There is already growing concern that poor judicial enforcement, perpetuated by judicial interpretations that are "inconsistent, confusing, and increasingly deferential to the prosecutor's discretion," has begun to erode the effectiveness of the duty to disclose. Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 689 (2006) (describing how poor judicial enforcement causes prosecutorial gamesmanship); *cf.* Scott E. Sundby, Essay, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 658–61 (2002) (explaining the development of *Brady* as a "post-trial due process safety check" rather than a discovery mechanism).

[53] *Cf. Boss*, 263 F.3d at 740–41 ("[I]t is simply not true that a reasonably diligent defense counsel will always be able to extract all the favorable evidence a defense witness possesses.").

be other witnesses or evidence to raise the suspicion to ask certain questions, or witnesses might be uncooperative, forgetful, or deceptive.[54] Inferring reasonable diligence on the basis of a witness's accessibility overlooks these considerations. The consequence is that criminal defendants must engage in intensive and wide-ranging cross-examination and investigation to obtain the withheld evidence necessary for an adequate defense.[55]

Additionally, the Seventh Circuit's conception of "reasonable diligence" encourages distrust of investigating police officers who participate in criminal proceedings. While there are valid reasons that criminal defendants may harbor some suspicion,[56] the Seventh Circuit's conception warrants a level of questioning and disbelief of investigating police officers that calls into question the legitimacy of their role as impartial state actors in search of the truth. In *Carvajal*, the defense attorney did investigate the fairness of the photo identification process the police admitted using. However, in order to discover Dominguez's potential deception about when he first saw the photograph, Carvajal's attorney would have had to assume that he might be lying about the timing of that procedure. Thus, the court's interpretation of "reasonable diligence" inappropriately encourages suspicion regarding the integrity of police testimony about basic investigative procedures.

The Seventh Circuit's decision in *Carvajal* invoked an expanded conception of "reasonable diligence." Because the *Carvajal* court was able to reject the *Brady* claim on several additional, distinct grounds, the court's expanded conception did not ultimately produce an incorrect holding, and almost certainly does not form binding precedent. In the future, courts should shy away from such a rigorous standard for "reasonable diligence" because it encourages suspicion of law enforcement and interferes with the practical effectiveness of the duty to disclose in ensuring fair trials for criminal defendants.

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[54] *See id.*

[55] Cross-examination is not a feasible means for discovering deception. The purpose of cross-examination is to tell the client's story — not to investigate and gather new information. *See, e.g.*, J. Alexander Tanford, *Keeping Cross-Examination Under Control*, 18 AM. J. TRIAL ADVOC. 245, 245–46, 250–51 (1994); *id.* at 259 ("[M]ost effective trial lawyers do not use cross-examination as a fishing expedition.").

[56] Lying by police officers in criminal proceedings, known as "testilying," is a rampant problem. *See, e.g.*, COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, CITY OF N.Y., COMMISSION REPORT 36 (1994) (describing falsification as "the most common form of police corruption facing the criminal justice system"); Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" As Evidence of Bias and Motive To Lie*, 59 U. PITT. L. REV. 233, 245–56 (1998) (noting common settings for police falsification); Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1041–48 (1996).