NO. 16-40772

In the United States Court of Appeals for the Fifth Circuit

GEORGE ALVAREZ,

Plaintiff-Appellee,

V.

CITY OF BROWNSVILLE,

Defendant-Appellant.

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF GEORGE ALVAREZ

On appeal from the U.S. District Court for the Southern District of Texas, D. Ct. No. 1:11-cv-78 (Hon. Hilda G. Table)

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit bar association founded in 1958 that works to ensure justice and due process for the accused. Its nationwide membership includes many thousands of private, public, and military defense counsel and law professors and judges. It frequently provides *amicus* input on issues of broad importance to the criminal-justice system.

This case involves an important question of criminal law: Under the U.S. Constitution, may a prosecutor withhold proof of innocence while a defendant pleads guilty? This issue strikes at the heart of the due-process guarantee and the fairness of the justice system, so NACDL has a strong interest in the Court's resolution of this matter and welcomes the Court's invitation to submit this brief.

STATEMENT OF THE CASE

A prison guard accused 17-year-old George Alvarez of assault, and the State procured a guilty plea from him despite a video that proved he is actually innocent. *See Alvarez v. City of Brownsville*, 860 F.3d 799, 800-01 (5th Cir. 2017). A panel of this Court held that Alvarez had no constitutional right to the exculpatory video because he pleaded guilty. *Id.* at 801-03. As discussed below, however, the due-process protections recognized in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny compel the conclusion that the State may not withhold exculpatory information while a defendant pleads guilty to a crime he did not commit.

The following is a brief summary of the facts, which are more fully described in the now-vacated panel opinion. *See* 860 F.3d at 800-01. In 2005, the Brownsville Police arrested Alvarez for public intoxication and suspicion of burglary. *Id.* at 800. After an altercation at the jail, a guard pressed assault charges against Alvarez. *Id.* at 800. He was then charged in state court with felony assault on the guard. *Id.* Unaware of evidence that would show his innocence, Alvarez entered into a plea agreement that avoided years of imprisonment he could face at trial and instead provided for community supervision and a suspended eight-year prison sentence. *Id.* Because he did not complete a substance-abuse treatment program that was part of his community supervision, Alvarez's suspended sentence was revoked and he was incarcerated. *Id.*

Several years later, a video of the jailhouse altercation was discovered during a civil lawsuit involving a different detainee but the same prison guard. *Id.* After Alvarez learned of the video, he filed a writ of habeas corpus in state court, contending the video established his innocence. *Id.* The Texas Court of Criminal Appeals ultimately concluded that Alvarez was "actually innocent" and set aside his conviction. *Id.* Soon thereafter, all charges against Alvarez were dismissed. *Id.*

Alvarez then filed this action under 42 U.S.C. § 1983, asserting claims based, in part, on the nondisclosure of the video. *Id.* Alvarez prevailed on this *Brady*-related claim against the City of Brownsville, and the City appealed. A

panel of this Court, bound by a prior panel opinion, reversed the district court's judgment, holding that Alvarez had no constitutional right to the video because he pleaded guilty. *Id.* at 803. The Court then granted Alvarez's petition for rehearing en banc and invited *amicus* briefs from NACDL and the Department of Justice (the Government).

SUMMARY OF THE ARGUMENT

Under this Court's current precedent, the Constitution allows a prosecutor to induce a defendant to plead guilty *while withholding information that confirms the defendant is innocent*. This is not the law in many other jurisdictions, and it should not be the law here.

This Court should join others that hold a defendant has a due-process right to receive material, exculpatory information from the prosecution before entry of a guilty plea.[1] The Supreme Court has not yet addressed whether a defendant's right to exculpatory information applies in the guilty plea context, but the reasoning underlying its prior decisions compels the recognition of this right. *Brady*'s "purpose," the Supreme Court has explained, is "to ensure that a miscarriage of justice does not occur" in any criminal proceeding. *United States v. Bagley*, 473 U.S. 667, 675 (1985). A prosecutor's duty to disclose evidence of the defendant's

[1] "Exculpatory information" refers to information that could establish a defendant's factual innocence. *See* BLACK'S LAW DICTIONARY 637 (9th ed. 2009). Because the video in this case already established Alvarez's actual innocence, all references to exculpatory information in this brief presume that the information is "material" under the standard the Supreme Court has articulated for a post hoc *Brady* analysis. *See United States v. Bagley*, 473 U.S. 667, 682 (1985).

innocence exists not just to ensure fair trials, but also because "elementary fairness requires it," *United States v. Agurs*, 427 U.S. 97, 110 (1976), and because "the prosecutor's role transcends that of an adversary: he is the representative not of an ordinary party to a controversy, but of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Bagley*, 473 U.S. at 675 n.6 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Adhering to these principles, numerous other courts have applied the *Brady* doctrine to require the disclosure of exculpatory information at the plea stage. This Court should too. Plea bargaining continues to flourish in jurisdictions that already recognize this right, and requiring such disclosure is important because nearly all criminal proceedings today are resolved at the plea stage. Innocent defendants plead guilty for many reasons, including fear that the trial outcome could be even worse than the offered plea deal. Given these realities, defendants have a dire need to be informed of exculpatory information during plea bargaining.

Despite all of this, the Government contends in its brief that a prosecutor has no constitutional duty to disclose evidence supporting innocence before a defendant pleads guilty and is sentenced—no matter how strong the evidence or how severe the punishment. But due process demands more. The Constitution does not allow a prosecutor to withhold evidence of a defendant's innocence while inducing him to accept a guilty plea as a means of risk mitigation.

ARGUMENT

The Court should hold that a defendant's due-process rights are violated if the government withholds exculpatory information before the defendant pleads guilty and is sentenced. This rule necessarily follows from the Supreme Court's *Brady* precedent, and it represents the prevailing view among lower courts and leading commentators. Enforcing this right is also crucial for defendants given the realities of today's criminal justice system. The pervasive use of plea bargaining and the dynamics of those negotiations underscore the important role that the disclosure of exculpatory information has in the search for truth and justice.

I. Today's justice system is a system of pleas, so disclosure of exculpatory information in plea bargaining is imperative.

A. Plea bargaining dominates modern criminal justice.

"[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Almost all criminal convictions—97% in federal courts and 94% in state courts—result from plea bargains. *Missouri v. Frye*, 566 U.S. 134, 143 (2012). In effect, as the Supreme Court aptly observed, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id.* at 144 (quotation omitted).

This is unsurprising given plea bargaining's potential benefits, including "limiting the probable penalty" while facilitating "the objectives of punishment" and preserving "scarce judicial and prosecutorial resources." *Brady v. United*

States, 397 U.S. 742, 752 (1970). Yet the justice system's paramount focus is still "to ascertain the truth," not merely to reach acceptable bargains. *See Jenkins v. Anderson*, 447 U.S. 231, 238 (1980). The "overriding interest" is that "'justice shall be done.'" *Agurs*, 427 U.S. at 111. And that interest is no less important at the plea-bargaining stage, which "is almost always *the* critical point for a defendant." *Frye*, 566 U.S. at 144 (emphasis added).

Indeed, the Supreme Court has emphasized that applying existing constitutional protections during plea bargaining, not just at trial, is vital given plea bargaining's modern preeminence. *See id.* at 140-44 (right to effective assistance of counsel); *Lafler*, 566 U.S. at 164-70 (same). These protections must include the right to receive exculpatory information, which serves as a crucial bulwark against the threat of "[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions." THE FEDERALIST NO. 83 (A. Hamilton). Even if a prosecutor unintentionally withholds exculpatory information while a defendant pleads guilty, the prosecutor is impermissibly cast "in the role of an architect of a proceeding that does not comport with standards of justice." *Brady*, 373 U.S. at 88.

Requiring disclosure of exculpatory information during plea bargaining can only reduce claims of wrongful conviction and mitigate the risk of innocent

persons pleading guilty to crimes they did not commit—and that is a very real risk, especially when a defendant is unaware of information that supports his innocence.

B. Empirical data shows that many innocent defendants plead guilty, often to avoid the risks trial poses.

In our imperfect system it may be inevitable that some innocent people will be charged and plead guilty. *Cf. North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (permitting defendants to plead guilty while maintaining their innocence). But what is *not* inevitable is for a defendant to plead guilty and for a court to set his punishment while evidence of innocence is withheld. Yet this occurs all too often.

Some instances are attributable to law enforcement abuses. In Los Angeles, California, dozens of defendants pleaded guilty to felony gun and drug charges before it was discovered that the evidence against them was fabricated. Samuel Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 533-36 (2005). Within this Circuit, 31 innocent defendants in Tulia, Texas, pleaded guilty to drug charges based on the false testimony of a police officer, *id.*, and at least 20 people in St. Charles Parish, Louisiana, pleaded guilty before it was revealed that an officer had lied under oath in the criminal investigation. Russell Covey, *Police Misconduct As A Cause of Wrongful Convictions*, 90 WASH. U.L. REV. 1133, 1142 (2013).

Yet the examples are not limited to "misconduct" cases. The Innocence Project, for instance, has exonerated 349 people through DNA testing, and 11% of

those exonerees had pleaded guilty.[2] Of course, many prosecutions do not involve DNA or similarly definitive evidence, so the full scope of this "innocence problem" is difficult to quantify. *See* Stephanos Bibas, *Plea Bargaining's Role in Wrongful Convictions*, in EXAMINING WRONGFUL CONVICTIONS 157 (2014).

Scholars have identified various reasons innocent people plead guilty, but they generally point to a defendant's desire to minimize risk.[3] According to now-Third Circuit Judge Bibas, risk assessment plays a key role in plea bargaining decisions, and because innocent defendants are generally more risk-adverse, they are more likely to accept a deal they consider favorable compared to the worst-case outcome. *See Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2507-10 (2004). The plea-bargaining process reveals why this happens.

Prosecutors—trying to do their best to efficiently administer justice—have wide discretion to "charge high" and "bargain low," and this can induce innocent defendants to plead guilty. Bibas, *supra*, in EXAMINING WRONGFUL CONVICTIONS 159. Because cases against innocent defendants are more likely to involve weaker evidence, prosecutors often unknowingly offer the largest "discounts" in these cases. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1152

[2] *Available at* https://www.innocenceproject.org/americas-guilty-plea-problem-scrutiny/; *see also* Albert Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 930 (2016) (stating that 17% of convicts exonerated between 1989 and 2016 originally pled guilty).

[3] *E.g.*, John Blume & Rebecca Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 172-80 (2014); Russell Covey, *Plea-Bargaining Law After* Lafler *and* Frye, 51 DUQ. L. REV. 595, 616-17 (2013).

(2008). And defendants often obtain a more favorable outcome by pleading instead of going to trial. *See Frye*, 566 U.S. at 144 (quoting with approval the observation that "often" "individuals who accept a plea bargain receiv[e] shorter sentences than other individuals who are less morally culpable but take a chance and go to trial").

Thus, an innocent defendant can have even greater incentive than a guilty one to accept a plea rather than risk higher punishment at trial. Even if a defendant is sure of his innocence, trial is still a risky proposition. In this case, for example, 17-year-old Alvarez testified that he felt hopeless because he had only his word against a police officer's word. *See* ROA.2684, ROA.3815. In other cases, innocent defendants are limited in their defense because of mental illness or substance abuse. *See* John Douglass, *Can Prosecutors Bluff? Brady v. Maryland and Plea Bargaining*, 57 CASE W. RES. L. REV. 581, 582 (2007); *see, e.g.*, *State v. Gardner*, 885 P.2d 1144 (Idaho Ct. App. 1994) (vacating a guilty plea when exculpatory evidence was withheld from innocent defendant who could not recall alleged crime because of sleep deprivation and drug use).

All of this shows that even if a defendant knows he is innocent, the risks of trial will often cause him to plead guilty, especially when he is deprived of exculpatory information. This practical reality reinforces prosecutors' "special role . . . in the search for truth." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). When a prosecutor (even unwittingly) fails to disclose exculpatory information while a

defendant pleads guilty and receives punishment, the result is a proceeding that defies fundamental standards of justice. *See Brady*, 373 U.S. at 87-88. This is precisely what the Supreme Court rejected in *Brady* and its progeny.

II. Due process requires that the government disclose exculpatory information before a defendant pleads guilty.

A. The principles underlying *Brady* apply in all criminal cases, not just the minority of cases that end in a trial.

The Constitution's Due Process Clauses impose on federal and state governments certain duties consistent with the "overriding interest that 'justice shall be done'" in all criminal proceedings. *Agurs*, 427 U.S. at 111. *Brady* exemplifies this principle: "Under *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 565 U.S. 73, 75 (2012). Whether a *Brady* violation occurs does not hinge on the prosecutor's good or bad faith, nor does it depend on whether exculpatory information was known to the prosecutor or only to police investigators. *Kyles v. Whitley*, 514 U.S. 419, 432, 437-38 (1995). This is because *Brady*'s "purpose" is to ensure that even unintentional "miscarriage[s] of justice do[] not occur." *Bagley*, 473 U.S. at 675.

Although *Brady* concerned evidence withheld from a trial, its reasoning goes further. The Supreme Court explained, for example, that "our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373

U.S. at 87. Thus, a due-process violation occurs any time a prosecutor orchestrates "a proceeding that does not comport with standards of justice." *Id.* at 88. The Court reiterated this reasoning in *Agurs*, explaining that the duty to disclose exculpatory information exists not just to promote fair trials, but also because "elementary fairness requires it." 427 U.S. at 110. And in *Bagley*, the Court stated that *Brady*'s "departure from a pure adversary model" is necessary because "the prosecutor's role transcends that of an adversary"—the paramount goal "is not that it shall win a case, but that justice shall be done." 473 U.S. at 675 n.6 (quoting *Berger*, 295 U.S. at 88). Since *Bagley*, moreover, the Supreme Court has framed the *Brady* prejudice standard in terms of the effect on the "proceeding," not just a trial. *Id.* at 682.

These cases show that *Brady* is grounded in an "overriding concern with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. That "overriding concern" applies equally in the 97% of cases in which guilt is determined on a plea. *See Brady*, 397 U.S. at 758 (recognizing that negotiated pleas are "no more foolproof than full trials to the court or to the jury"). Whether a defendant is convicted by trial or by plea, a "miscarriage of justice" occurs if the prosecution fails to disclose exculpatory information. *See Bagley*, 473 U.S. at 675. Either way, the resulting conviction is contrary to "elementary fairness." *See Agurs*, 427 U.S. at 110.

This Court nevertheless held in *Matthew v. Johnson* that "where no trial is to occur, there may be no constitutional violation" under *Brady*. 201 F.3d 353, 361

(5th Cir. 2000). The Court reasoned that "[b]ecause a *Brady* violation is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt, it follows that the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation." *Id.* at 361-62. The Court should reconsider this analysis.[4]

Matthew acknowledged *Brady*'s concern that undisclosed information could affect a jury's *or judge's* assessment of guilt, but then assumed that only assessments at trial are relevant. *See* 201 F.3d at 361-62. This is too narrow: Judges assess guilt at the plea stage as well. *See, e.g.*, FED. R. CRIM. P. 11. When the government presents a "factual basis" for a plea to the court while withholding evidence that the factual basis is false, the corruption of the "assessment of guilt" is no less severe than if the same information was withheld during a trial. In both circumstances, the government's failure to disclose exculpatory information creates a constitutionally intolerable risk of an inaccurate and unreliable outcome. *Cf. Brady*, 397 U.S. at 758 (reasoning that a key safeguard against innocent defendants condemning themselves is the court's role in confirming "that there is nothing to question the accuracy and reliability of the defendants' admissions").

[4] Two contextual points limit *Matthew*'s guidance for the Court here. First, the nature of the evidence in *Matthew* was entirely different. The sexual-abuse case against Matthew remained "strong" despite certain undisclosed victim statements. 201 F.3d at 356-58. Here, however, the undisclosed video proved Alvarez innocent. 860 F.3d at 800-01. Second, *Matthew* did not involve a de novo review of the *Brady* issue, but rather a *Teague* analysis to determine whether a state court "would have felt compelled" to recognize a pre-plea *Brady* right. 201 F.3d at 358-59.

What is more, *Matthew* overlooked that *Brady* requires the disclosure of information material to not just guilt, but also punishment. *Brady*, 373 U.S. at 87. Evidence of innocence is inherently relevant to sentencing, so a court's sentencing function is also distorted when exculpatory information is withheld.

Matthew also questioned whether the Constitution should "protect a defendant's own decision making regarding the costs and benefits of pleading and of going to trial." 201 F.3d at 362. But the Constitution is very much concerned with factors affecting the defendant's decision making: the defendant has a right to effective assistance of counsel and a plea must be knowing, intelligent, and voluntary. *See Frye*, 566 U.S. at 140-44; *Brady*, 397 U.S. at 748. These rights are subverted when exculpatory information is withheld—as this case aptly demonstrates. Alvarez was facing a felony charge and the prospect of a trial that would pit his word against a law-enforcement officer. Deprived of evidence showing he is actually innocent, Alvarez understandably felt compelled to plead guilty to avoid a potentially worse outcome at trial. *See* ROA.2684.

Matthew's reasoning also undervalues the "overriding concern with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. "[J]ustice suffers when *any* accused is treated unfairly." *Brady*, 373 U.S. at 87 (emphasis added). And when a person pleads guilty to a crime another committed, it creates a double injustice by convicting the innocent and freeing the guilty. *Cf. Herrera v. Collins*, 506 U.S.

390, 398 (1993) ("The central purpose of any system of criminal justice is to convict the guilty and free the innocent.").

Requiring disclosure of exculpatory information at the plea stage serves the same critical purposes that it does at trial: it helps ensure accurate, reliable outcomes and preserves public confidence in the criminal process by elevating the adversarial system above "a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth." *Kyles*, 514 U.S. at 439. The Court should therefore hold that a defendant has a due-process right to receive exculpatory information before pleading guilty. This follows from all of the Supreme Court's *Brady* cases, including *United States v. Ruiz*, 536 U.S. 622 (2002).

B. *Ruiz* does not foreclose defendants' constitutional right to exculpatory information during plea bargaining.

The Supreme Court has not yet addressed whether the government must disclose exculpatory information before a guilty plea. In *Ruiz*, the Court held that the Constitution does not require the government to disclose impeachment information regarding government informants or other potential witnesses before a defendant pleads guilty. *Id.* at 625, 633. But *Ruiz* did not address the government's duty to disclose *exculpatory* information because the plea agreement in that case expressly provided that the government would disclose (on an on-going basis) "any [known] information establishing the factual innocence of the defendant." *Id.*

Even though *Ruiz*'s holding is limited to impeachment evidence, a panel of this Court previously suggested that *Ruiz* does not support a distinction between impeachment and exculpatory information. *United States v. Conroy* 567 F.3d 174, 179 (5th Cir. 2009). To be sure, the Supreme Court did not address a constitutional duty to disclose exculpatory information in *Ruiz*, but that is because it did not have to—the government had already promised it would produce evidence of innocence. 536 U.S. at 625, 631. And reviewing the Supreme Court's reasons for holding that the government need not disclose impeachment information before a guilty plea leads to exactly the opposite conclusion for exculpatory information.

Initially, if *Brady* is merely a "trial right," then the Supreme Court could have easily disposed of *Ruiz* on that basis alone. It did not. Instead, the Court's constitutional analysis emphasized that impeachment information is not "critical" because it "may, or may not" help the defendant, which makes it "difficult to distinguish, in terms of importance," from other permissible unknowns in plea bargaining. *Id.* at 630-31. Not so for exculpatory information—it *is* critical because it has independent value to support the defendant's innocence. *See id.* The due-process balancing in *Ruiz* also emphasized (1) the safeguard built into the plea agreement that exculpatory information would be disclosed, and (2) the government's interest in securing "factually justified" pleas. *Id.* at 631. The balance of private and government interests is much different when the defendant

lacks any guarantee that exculpatory information has been disclosed and the government is pursuing a plea that the facts do not actually support.

For these reasons, *Ruiz* does not foreclose a defendant's constitutional right to exculpatory information before pleading guilty, and this Court should align itself with numerous others that have reached this same conclusion.[5]

C. Numerous other courts recognize the right to exculpatory information before pleading guilty.

Following *Ruiz*, other courts across the country deciding this issue have consistently held that a defendant is constitutionally entitled to exculpatory information at the plea stage. *See Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007); *United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005) (unpublished); *Garcia v. Hudak*, 156 F. Supp. 3d 907, 916 (N.D. Ill. 2016); *United States v. Nelson*, 979 F. Supp. 2d 123, 130 (D.D.C. 2013); *United States v. Danzi*, 726 F. Supp. 2d 120, 128 (D. Conn. 2010); *Buffey v. Ballard*, 782 S.E.2d 204, 216 (W. Va. 2015); *State v. Huebler*, 275 P.3d 91, 98 (Nev. 2012); *Hyman v. State*, 723 S.E.2d 375, 380 (S.C. 2012); *Medel v. State*, 184 P.3d 1226, 1234-35 (Utah 2008).[6]

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[5] The distinction that exists between exculpatory and impeachment information following *Ruiz* is a necessary byproduct of its facts and reasoning. Before *Ruiz*, the Supreme Court generally "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes." *Kyles*, 514 U.S. at 434. But the plea agreement in *Ruiz* nevertheless distinguished between the two, and this dichotomy carried over into the legal analysis, which differentiated between impeachment and exculpatory information. *Ruiz*, 536 U.S. at 630-31; *see McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (recognizing this "significant distinction").

[6] Several circuits have recognized the split between this Court and the courts cited above, but they have not definitively resolved the issue. *See Robertson v. Lucas*, 753 F.3d 606, 620 (6th Cir.

Several of these courts have agreed with the Seventh Circuit's reasoning that "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea." *McCann*, 337 F.3d at 788.[7]

The post-*Ruiz* rulings of the Nevada and West Virginia Supreme Courts are particularly instructive. *See Buffey*, 782 S.E.2d at 211-18; *Huebler*, 275 P.3d at 95-98. In *Huebler*, the court concluded that "the due process calculus" requires disclosure of exculpatory information before a guilty plea because it "is special not just in relation to the fairness of a trial but also in relation to whether a guilty plea is valid and accurate." 275 P.3d at 98. Requiring prosecutors to disclose information "that could establish the factual innocence of the defendant," the court reasoned, "diminishes the possibility that innocent persons accused of crimes will plead guilty," and it is a manageable obligation that "comports with the prosecution's special role in the search for truth." *Id.* (quotation omitted); *see also* Wayne LaFave, et al., 5 CRIM. PROC. § 21.3(c) (4th ed. 2015) (stating that *Huebler* represents "certainly the better view").

2014); *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010) (stating that *Ruiz* could be read to preclude *Brady*'s application pre-plea but not deciding the issue); *United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010) (recognizing the split but not resolving the issue).

[7] Because of the facts in *McCann*, the Seventh Circuit did not resolve the issue.

The West Virginia Supreme Court likewise concluded "that the better-reasoned authority supports the conclusion that a defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage." *Buffey*, 782 S.E.2d at 216. Therefore, the state violated a defendant's due-process rights by failing to disclose an exculpatory DNA report it possessed before the defendant pleaded guilty. *Id.* at 221.

As these courts and commentators recognize, completely excluding *Brady* from the plea stage creates "a risk too costly to the integrity of the system of justice to countenance." *Nelson*, 979 F. Supp. 2d at 130. It increases the likelihood that innocent persons will be punished, and it could permit some prosecutors to "withhold exculpatory information as part of an attempt to elicit guilty pleas." *Id.* (quoting *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995)); *accord United States v. Fisher*, 711 F.3d 460, 469 (4th Cir. 2013).

D. The right to exculpatory information in plea bargaining is a logical corollary of the right to effective assistance of counsel.

The rights to effective assistance of counsel and to exculpatory information serve complementary roles in promoting just and accurate outcomes. *See Herrera*, 506 U.S. at 398-99. The Supreme Court has held that the right to effective assistance of counsel exists during plea negotiations (not just at trial, as traditionally envisioned), in part because pleas now determine the outcome in nearly all cases. *See Frye*, 566 U.S. at 144; *Lafler*, 566 U.S. at 169-70; *Padilla v.*

Kentucky, 559 U.S. 356, 373 (2010); *see also United States v. Ash*, 413 U.S. 300, 309-10 (1973). The same reasoning supports the pre-plea right to exculpatory information. *See* Covey, *supra* n.3, 51 DUQ. L. REV. at 609-10 (concluding that *Frye* and *Lafler* imply that prosecutors must conduct plea negotiations within "minimum constitutional parameters," including disclosure of exculpatory information). If the government may withhold exculpatory information before a plea, defendants (and their counsel) will be misled into thinking that "concessions" are being made, and this distortion of the relevant circumstances can only serve to *undermine* the just and accurate resolution of cases.

Like the right to effective counsel, the right to exculpatory information cannot be limited to only the rare cases that end in trial. Both of these rights are too important to be lost just because ours has become a "system of pleas," and it is "insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." *Frye*, 566 U.S. at 143-44 (quotation omitted).

III. The Government's counterarguments are unpersuasive.

The Department of Justice's argument that defendants have no constitutional right to exculpatory information before pleading guilty is unconvincing for several reasons and, notably, inconsistent with the views some other law enforcement officials have expressed. *Compare* DOJ Br. 5-17, *with* Br. of Former State &

Federal Prosecutors in *Buffey v. Ballard*, 2014 WL 10417669, at *1 (Dec. 5, 2014) (stating that *Brady* "is not just a 'trial right'" and that law enforcement has a duty to disclose exculpatory information to a defendant before a guilty plea), *and* Br. of Nevada in *State v. Huebler*, 2008 WL 9029862, at *10 (Apr. 3, 2008) (stating that *Brady* claims can survive entry of a guilty plea because "[t]o rule otherwise could introduce an unacceptable level of gamesmanship into the litigation").

Relying on selected quotations from *Brady* and its progeny, the Government first asserts that *Brady* is exclusively "a trial right." (*Id.* 6-10.) These references to "trials," however, merely reflect the facts in those cases, not a limitation on *Brady*. The Government does not account for the broad due-process principles underlying *Brady*, nor does it grapple with the many decisions that reject its constricted view. *See supra* Parts III.A, III.C. The Government also fails to explain why, if *Brady* is only a trial right, the Supreme Court did not say that in *Ruiz*—the impeachment-specific constitutional analysis in *Ruiz* makes sense only if *Brady* applies at pleas and sentencing. *See supra* Part III.C. And the Government conveniently omits *any* mention of the *Brady* materiality standard, which is framed not in terms of "trial," but rather "the *proceeding*." *E.g.*, *Bagley*, 473 U.S. at 682 (emphasis added).[8]

[8] *Matthew* noted that *Bagley* took the term "proceeding" from *Strickland* and, from this premise, concluded that it refers to a fact-finder's determination of "guilt or innocence." *Matthew*, 201 F.3d at 362 n.13. But *Strickland* did not involve a determination of guilt or innocence (it was a penalty proceeding), and the Supreme Court's decisions applying *Strickland* bolster the conclusion that defendants have a pre-plea right to exculpatory information. *See supra* Part III.D.

The Government also contends that "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation." (DOJ Br. 13 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)); *see id.* at 12 (quoting *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975)). This argument proves too much in this context. Neither a defendant nor his counsel can meaningfully assess a plea when evidence of innocence remains hidden. Further, the Supreme Court has recognized that defense counsel's failure "to investigate or discover potentially exculpatory evidence" may deprive a defendant of his right to competent counsel. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Because defense counsel's failure to discover exculpatory information at the plea stage has constitutional significance, so too does the prosecution's suppression of that same information. *Cf. Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule [that] 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

The Government next asserts that a constitutional right is unnecessary because its internal policies and other rules encourage prompt disclosure of exculpatory information. But the Government concedes its policies do not create any rights for the accused. (DOJ Br. 14 n.5.) Separation of powers—an "essential precaution in favor of liberty"—counsels against judicial deference to the

Government's self-regulated policies when due-process rights are at stake. *See* THE FEDERALIST NO. 47 (J. Madison); *cf. United States v. Stevens*, 559 U.S 460, 480 (2010) ("[The Constitution] protects against the Government; it does not leave us at the mercy of *noblesse oblige*.").

Ethical guidelines, moreover, are no substitute for due-process protections that exist to guard against the erroneous deprivation of a person's liberty. Even if a prosecutor acts ethically and in good faith, a constitutional violation still occurs when a failure to disclose exculpatory information results in a "proceeding that does not comport with standards of justice." *Brady*, 373 U.S. at 88; *see Agurs*, 427 U.S. at 110 (explaining that *Brady* is concerned with "the character of the evidence, not the character of the prosecutor"); *see also Schultz v. Comm'n for Lawyer Discipline of the State Bar of Tex.*, 2015 WL 9855916, at *7 (Tex. Bd. Discip. App. Dec. 17, 2015) (recognizing that *Brady* protects the integrity of criminal proceedings, which is "an entirely different purpose" from ethical rules).

The Government further contends that the burden of disclosing exculpatory information before a guilty plea would strain its resources and impede the prompt resolution of criminal cases. (DOJ Br. 16-17.) This is unlikely for multiple reasons. First, the Government concedes that its policies and other rules already encourage prosecutors to promptly disclose exculpatory information. (*Id.* 14-15.) Judicial recognition of this duty will merely reinforce what is presumably occurring, not

create a new burden. In addition, empirical data from jurisdictions that recognize this duty undercuts the Government's conjecture about impediments. The Ninth and Tenth Circuits have long recognized *Brady*'s application at the plea stage, and plea bargains have not been hampered in those jurisdictions.[9] *See, e.g.*, *Smith*, 510 F.3d at 1148 (citing *Sanchez*, 50 F.3d at 1454); *United States v. Wright*, 43 F.3d 491, 496 (10th Cir. 1994).

The Government also bemoans a rule that will require prosecutors to search for and disclose exculpatory information that "would be reasonably likely to lead the defendant to reject a plea and go to trial." (DOJ Br. 16.) Yet prosecutors already must have procedures in place to (1) "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," and (2) assess, before trial, whether there is a reasonable probability that undisclosed information would affect the result of the proceeding. *Kyles*, 514 U.S. at 433-34, 437. Adapting these established procedures to the plea context is unlikely to impose a significant burden on the Government.

The Government's finality concerns are also overstated. The Supreme Court "confronted a similar 'floodgates' concern in *Hill*," but "[a] flood did not follow in

[9] Each yearly U.S. Sentencing Commission Sourcebook contains a table showing the percentage of "Guilty Pleas and Trials in Each Circuit and District." Reviewing that data for 2006-2016 shows that nearly all criminal proceedings in the Ninth and Tenth Circuit are resolved by pleas (ranging from 96.8-98.9%). *See* https://www.ussc.gov/research/sourcebook/archive (select Sourcebook→"Tables and Figures"→"Sentencing Information"→Figure C, Table 10).

that decision's wake." *Padilla*, 559 U.S. at 371. Here, as in *Padilla*, "[i]t seems unlikely that [a decision for Alvarez] will have a significant effect on those convictions obtained as the result of plea bargains," especially given "professional norms" that already "generally impose[] an obligation" to disclose exculpatory information. *See id.* at 372; *Lafler*, 566 U.S. at 172 (rejecting a "floodgates" concern because there, as here, other courts had recognized the rule for years with no indication of systemic problems); *see also* Model Rules Prof'l Conduct R. 3.8(d) (requiring timely disclosure of exculpatory information); Tex. Disciplinary Rules Prof'l Conduct 3.09(d) (same).

Ultimately, the Government offers no good reason why the Constitution should allow a prosecutor to secure a guilty plea while withholding exculpatory information. Disclosing exculpatory information before a plea will reduce costly, delayed claims alleging ineffective assistance of counsel, prosecutorial abuse, and actual innocence. It will also reduce the likelihood of cases like Alvarez's and ensure that truth does not become the victim of efficiency—a result that would undermine not just *confidence* in the system, but its *integrity*. After all, the justice system is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

* * *

The Government agrees that justice suffers when an innocent person pleads guilty. It contends, however, that "the provision of counsel, plea colloquy requirements, and ethical rules" are sufficient to guard against this outcome. (DOJ Br. 17.) Not so. Defense counsel cannot meaningfully assist a client when exculpatory information is withheld; a court cannot accurately assess guilt and punishment when it is deprived of information that supports the defendant's innocence; and ethical rules, though appropriate, are insufficient to prevent and remedy the fundamental "miscarriage of justice" that occurs when an innocent defendant is subjected to punishment. *See Bagley*, 473 U.S. at 675.

IV. The Court should correct its course on this critical constitutional right.

NACDL takes no position on civil liability in this case; its interest is limited to whether a *Brady* right exists in plea bargaining.[10] Because that issue is ripe for resolution in this matter, the Court should decide it.

The facts here do not implicate the constitutional-doubt canon, which is based on respect for Congress, or the prudential principle under which courts generally resolve statutory before constitutional questions. *See Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347

[10] Like the Government, NACDL's interest in this matter focuses on whether, assuming the requirements for a *Brady* violation are otherwise satisfied, a defendant who pleaded guilty can assert that violation. (*See* DOJ Br. n.1.)

(1936) (Brandeis, J., concurring); *see also* Antonin Scalia & Bryan Garner, READING LAW 247 (2012) ("A *statute* should be interpreted in a way that avoids placing its constitutionality in doubt." (emphasis added)). What is more, the panel already decided the constitutional issue—and only that issue—so it is squarely presented for resolution. *Alvarez*, 860 F.3d at 803; *see Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992) (deciding constitutional rather than statutory issue when the district court did the same).

More broadly, a definitive resolution is much needed. For too long this Court has been an outlier on this important issue, leaving defendants here without constitutional protections guaranteed elsewhere. *Compare Matthew*, 201 F.3d at 361, *with, e.g.*, *Sanchez*, 50 F.3d at 1453, *and Wright*, 43 F.3d at 495-96. This Court should not delay its determination of this reoccurring issue that strikes at the heart of the due-process guarantee.

CONCLUSION

For these reasons, this Court should hold that a criminal defendant has a constitutional right to receive exculpatory information before pleading guilty.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2018, I electronically transmitted the attached document to the Clerk of the Court of the 5th Circuit Court of Appeals using the ECF System of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Jason N. Jordan
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1. This brief complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) because it contains 6,499 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

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