No. 16-40772

In the United States Court of Appeals for the Fifth Circuit

GEORGE ALVAREZ,
Plaintiff – Appellee,

v.

THE CITY OF BROWNSVILLE,
Defendant – Appellant.

Appeal from the United States District Court
for the Southern District of Texas
No. 1:11-cv-78

BRIEF OF *AMICI CURIAE* FORMER STATE AND FEDERAL PROSECUTORS IN SUPPORT OF AFFIRMANCE

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, *amici curiae* provide this supplemental statement of interested persons in order to fully disclose all those with an interest in this brief. The undersigned counsel of record certifies that the following persons and entities have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Amici curiae:	Mary Beth Buchanan Ann Campbell Flannery John Gleeson Bruce Green Steven H. Levin Ronald H. Levine Caren Myers Morrison William N. “Bill” Nettles Julie Rose O’Sullivan Terry L. Pechota Paul Shechtman
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statute and Rule

Other Authorities

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are former state and federal prosecutors, many of whom held senior supervisory positions in their offices.[1] All of us share an abiding interest in the fair administration of the criminal law. Because of our common backgrounds, we also share a special appreciation of the prosecutor's role as "'the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995) (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)).

We submit this brief because the question this case presents—whether the state must share material evidence of a defendant's innocence before extracting a guilty plea—strikes at the heart of the prosecutor's role. Obtaining a guilty plea without disclosing material innocence evidence is both unconstitutional and at odds with the prosecutor's obligation to "serv[e] . . . the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *United States* v. *Agurs*, 427 U.S. 97, 110-11 (1976) (internal quotation marks omitted). Because it is a prosecutor's "duty to refrain from improper methods" likely "to produce a wrongful conviction," *Berger*, 295 U.S. at 88, this Court should hold that the state must share all material evidence of innocence before obtaining a guilty plea.

[1] *Amici*'s identities and former positions are listed in the Addendum to this brief.

SUMMARY OF ARGUMENT

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. That rule should apply at the plea stage as much as at trial. A contrary holding would tip the scales against already-overmatched criminal defendants, encourage unscrupulous prosecutorial conduct, and render the right articulated in *Brady* a dead letter. In an era in which the criminal trial has given way to a system characterized almost entirely by plea bargaining, there is no good reason to permit the state to withhold material evidence of innocence at the very stage at which access to it is most important.

Plea bargaining has come to define American criminal procedure. As the Supreme Court has observed, plea bargaining is no longer "some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri* v. *Frye*, 566 U.S. 134, 144 (2012) (internal quotation marks omitted). As mandatory minimums, sentencing guidelines, and other factors cause post-trial sentences to balloon, more and more defendants—guilty and innocent—plead guilty simply because trial presents risks they cannot afford to take. See, *e.g.*, Albert W.

Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 940 (2016).

To define the *Brady* rule "without taking account of the central role [of] plea bargaining" is to invite injustice. *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012). As this case reveals, defendants who are made aware of evidence proving their innocence are far less likely to plead guilty. Because withholding such evidence undermines the very "purpose of the prosecution's *Brady* obligation," *United States* v. *Nelson*, 979 F. Supp. 2d 123, 130 (D.D.C. 2013), this Court should, consistent with every other United States Court of Appeals to address the issue, decline to restrict the *Brady* right to the small handful of cases that go to trial.

ARGUMENT

I. THE DOMINANCE OF PLEA BARGAINING CREATES STRONG INCENTIVES FOR BOTH GUILTY AND INNOCENT DEFENDANTS TO PLEAD GUILTY

1. As the Supreme Court has observed, the American criminal justice system is "for the most part a system of pleas, not a system of trials." *Lafler*, 566 U.S. at 170. In each of the last five fiscal years, roughly 97 percent of federal criminal convictions have been obtained by plea bargain. U.S. Sentencing Comm'n, 2016 Sourcebook of Federal Sentencing Statistics, Figure C. That ratio

has remained nearly constant for more than twenty years—and to the extent it has changed, the trend is toward even more pleas.[2]

The numbers in state courts are roughly the same. The Supreme Court of Louisiana, for example, reports that in 2016, there were 147,576 criminal cases initiated in state district courts—and only 472 trials.[3] The same year in Texas, 101,598 of 107,386 criminal convictions in Texas state district courts—94.6 percent—resulted from guilty or nolo contendere pleas.[4] And as of 2012, the United States Supreme Court reported that "ninety-four percent of state convictions are the result of guilty pleas"—reflecting a ten- to twenty-five-percent increase over the past half-century. Compare, *e.g.*, *Lafler*, 566 U.S. at 170 and U.S. Dep't of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 2006-Statistical Tables at 1, 24 (2010), http://bit.ly/2oSOEC2 (reflecting that, as of 2006, 94 percent of state felony convictions resulted from guilty or nolo contendere pleas) with *Brady* v. *United States*, 397 U.S. 742, 752 n.10 (1970) (estimating that between 70 and 85 percent of state felony convictions were the result of guilty pleas). The result is that of the roughly 2.2 million Americans in

[2] See, *e.g.*, U.S. Sentencing Comm'n, 2011 Sourcebook of Federal Sentencing Statistics, Figure C; U.S. Sentencing Comm'n, 2006 Sourcebook of Federal Sentencing Statistics, Figure C; U.S. Sentencing Comm'n, 2001 Sourcebook of Federal Sentencing Statistics, Figure C; U.S. Sentencing Comm'n, 1996 Sourcebook of Federal Sentencing Statistics, Figure C.

[3] Supreme Court of Louisiana, 2016 Annual Report of the Judicial Council of the Supreme Court at 25 (2016), http://bit.ly/2EpaCkB.

[4] Office of Court Admin., Annual Statistical Report for the Texas Judiciary: FY 2016 at Detail-10 (2016), http://bit.ly/2mcF9vp.

prison, more than two million are there because they pleaded guilty. See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014), http://bit.ly/2mbEc5R.

2. At first glance, the reasons for these exploding plea-bargain rates appear simple. From a prosecutor's perspective, the plea stage presents an opportunity to process a charge at a fraction of the cost of a trial—and with no risk of acquittal. See, *e.g.*, *Lafler*, 566 U.S. at 144 (noting the plea bargain's "potential to conserve valuable prosecutorial resources"). For a defendant, a plea offer provides an opportunity to own up to a wrong and, in the process, obtain a vastly more favorable sentence than would be available after trial. See *ibid.*

"[N]ow that bargaining is the norm," however, its ubiquity has altered much of the criminal-justice system. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1128 (2011). The shift from a system centered on the jury trial to one dependent on pleading has coincided with increases in post-trial punishments that add to the incentive to plead. And while *amici* agree with the United States that "[n]o participant in the criminal justice system has an interest in an actually innocent defendant pleading guilty," Br. 17, experience suggests that these recent changes increase the risk of precisely that result.

A primary cause of the explosion in plea bargaining is the expanding regime of mandatory minimum sentences. Because of overlapping criminal statutes, "a single episode may fall within the definition of several criminal offenses, ranging from trivial misdemeanors to serious felonies." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1962 (1992). Defendants therefore have an incentive to plead guilty to avoid the most serious charges. And even within statutory ranges, prosecutors exert control over what sentence to recommend—thereby providing another incentive for defendants to plead guilty in exchange for leniency. See Fed. R. Crim. P. 11(c)(1) (plea agreements "may specify that an attorney for the government will . . . recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate").

The sentencing guidelines only increase the pressure to plead guilty. See Bibas, 99 CAL. L. REV. at 1128. For instance, where two defendants are convicted of the same crime, offense levels are decreased for those who "clearly demonstrate[] acceptance of responsibility for [their] offense[s]"—a difficult standard to meet for defendants who are found guilty after trial. U.S. Sentencing Guidelines Manual § 3E1.1 (U.S. SENTENCING COMM'N 2016); see also *id.* cmt. 1(A) ("[A] defendant who falsely denies . . . relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of

responsibility."). Other provisions of the guidelines set forth additional benefits for those who plead guilty or cooperate. *E.g.*, *id.* § 5K1.1 (departure from guidelines range permissible "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person"). See generally Hon. John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 639-40 (2008) (noting that the Guidelines "tipped the balance of sentencing power sharply . . . toward the prosecutor"). But as with mandatory minimums, it is far from clear that these are *discounts* that one obtains by pleading, rather than *surcharges* that one pays for exercising the right to face a jury. Indeed, there is good reason to think they are the latter. See Alschuler, 79 ALB. L. REV. at 924-25 ("Surely our nation did not achieve its record for mass incarceration while sentencing 95 percent of all offenders to less than they deserve."). In either event, given the increasing cost the system exacts on those who take their cases to trial, it is scarcely surprising that "fewer [have] paid the price each year." Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 85 (2005).[5]

[5] Other factors unrelated to guilt and innocence distort the plea process as well. For example, studies demonstrate that defendants kept in pretrial detention plead guilty at a 25 percent higher rate than similarly situated releasees. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 747 (2017).

3. As this case reveals, the "trial penalty" operates on the innocent and the guilty alike. Faced with a choice between a suspended sentence and a mandatory, two-to-ten-year prison term (along with a possible $10,000 fine), Mr. Alvarez chose the former.[6] Innocent defendants elsewhere face—and are forced to make—similar choices. *E.g.*, U.S. Br. 12 (acknowledging that the plea process holds "hazards for the innocent"). See generally John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 173 (2014) (noting that false guilty pleas are most likely to arise where individuals facing relatively minor offenses are presented with an opportunity to "get out of jail, to avoid the hassle of having criminal charges hanging over their heads, or to avoid being punished for exercising their right to trial"); Rakoff, *supra* ("[B]y creating such inordinate pressures to enter into plea bargains, [the plea-bargain system] appears to have led a significant number of defendants to plead guilty to crimes they never actually committed.").

Nor is the false-plea phenomenon limited to minor offenses. The National Registry of Exonerations identifies, among hundreds of post-plea exonerees, 72 Americans who pleaded guilty to murder or manslaughter but were later

[6] Compare Dkt. No. 88, *Alvarez* v. *City of Brownsville*, No. 1:11-cv-0078, at 2 (S.D. Tex. June 19, 2014) (noting that Alvarez "pled guilty [to assault on a public servant] and received a suspended sentence of eight years with ten years of probation") with 3 V.T.C.A. § 12.34 (mandatory penalty for third degree felony is a "imprisonment . . . for [a] term of not more than 10 years or less than 2 years").

exonerated.[7] And of the 353 Americans who have been exonerated by the Innocence Project's post-conviction DNA work, more than ten percent were in prison as a result of false guilty pleas.[8]

In certain respects, our guilty-plea system creates unique risks for innocent defendants. As noted, much of what attracts prosecutors to the plea-bargain system is the prospect of avoiding the risk of acquittals. As a result, the weaker the evidence of guilt (or the more substantial the exculpatory evidence), the stronger the incentive to offer an attractive plea deal may be. Cf. William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L. Q. 1, 2 (1990) (noting that prosecutors are least likely to provide "voluntary discovery . . . when the defendant might benefit most from it, that is, where the government's case is weak"). The obvious result is that, in many cases, the most attractive deals are offered to the very people whom society has the least interest in convicting. *E.g.*, Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 930-31 (2008) ("[I]t is entirely possible that most wrongful convictions . . . are based on negotiated guilty pleas to comparatively light charges.").

[7] The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Crime&FilterValue1=8_Murder&FilterField2=Group&FilterValue2=P.

[8] The Innocence Project, DNA Exonerations in the United States, http://bit.ly/2qGTvIW.

4. While the City of Brownsville scarcely argues that *Brady* should be limited to the trial stage, the United States suggests in its *amicus* brief that "in the vast majority of cases," innocent defendants advised by competent counsel will not plead guilty. U.S. Br. 12-13. But neither reason nor evidence supports that view. In fact, as we have discussed, there is ample reason to doubt it: Given the weighty consequences of a false conviction at trial, it may in many cases be perfectly rational for even an innocent defendant to accept a plea. See, *e.g.*, Rakoff, *supra* ("[T]he typical person accused of a crime combines a troubled past with limited resources: he thus recognizes that, even if he is innocent, his chances of mounting an effective defense at trial may be modest at best. If his lawyer can obtain a plea bargain that will reduce his likely time in prison, he may find it 'rational' to take the plea."). In such circumstances, one might expect that "competent counsel" would encourage that approach. See, *e.g.*, Alschuler, 79 ALB. L. REV. at 936 ("[I]t would be unconscionable for a lawyer to block his client from [obtaining] a beneficial [plea bargain merely because his client professes his innocence]."). [9] And that is precisely the problem: It is not by *tricking* defendants, but by making pleading a sensible option for innocent and guilty alike, that the plea-bargain system exacts its greatest toll.

[9] In addition to the availability of *nolo contendere* pleas, whereby defendants plead guilty without admitting guilt, the Supreme Court has ratified the practice of *Alford* pleading, whereby a defendant agrees to be sentenced for a crime while maintaining his factual innocence. See *North Carolina* v. *Alford*, 400 U.S. 25 (1970).

II. PROVIDING EXCULPATORY MATERIAL AT THE PLEA STAGE FURTHERS THE INTERESTS OF JUSTICE AND REDUCES THE LIKELIHOOD OF FALSE GUILTY PLEAS

As the United States acknowledges in its *amicus* brief, "[n]o participant in the criminal justice system has an interest in an actually innocent defendant pleading guilty." U.S. Br. 17. But to limit the *Brady* rule to the trial context is to court precisely that result. Fundamental notions of justice, and the Supreme Court's long-expressed understanding of the prosecutor's role, counsel in favor of providing defendants with material evidence of their innocence before they plead guilty.

1. A chief goal of constitutional criminal law is to establish "procedures under which criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth." *United States* v. *Leon*, 468 U.S. 897, 900-01 (1984) (internal quotation marks omitted). Consistent with that objective, the "chief business" of a prosecutor is "not merely to prevail in the instant case," but "to establish justice." *Brady*, 373 U.S. at 87-88 & n.2. Indeed, both before and after *Brady*, the Supreme Court has acknowledged that, in criminal proceedings, the prosecutor acts as "the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles*, 514 U.S. at 439 (quoting *Berger*, 295 U.S. at 88).

The *Brady* decision rests largely on that understanding of the prosecutorial role. In stating its holding, the *Brady* Court expressly relied on the proposition that "[t]he United States wins its point" *not* by obtaining convictions, but by ensuring that "justice is done its citizens in the courts." *Brady*, 373 U.S. at 87-88. And in refusing to affirm a conviction obtained by the suppression of exculpatory materials, the court expressed its unwillingness to "cast[] the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 88.

2. Limiting *Brady* to the small percentage of cases that go to trial would bring about the very result *Brady* sought to avoid. If withholding evidence of innocence at *trial* makes a prosecutor the "architect[]" of an unjust proceeding, withholding it at *the pleading stage* may be even worse. That is because it is at the pleading stage—not at trial—that the prosecutor is most clearly in the driver's seat: As one former federal prosecutor (and current district judge) has observed, "because of mandatory minimums, sentencing guidelines . . . , and simply his ability to shape whatever charges are brought," the prosecutor "can effectively dictate the sentence." Rakoff, *supra*. At trial, by contrast, there is at least an expectation of adversarial presentation before a neutral arbiter.

For that reason, while *Brady* evidence is critical at trial, its importance at the plea stage is perhaps even greater. At trial, there exists a complex web of rights

and procedural rules designed to ensure fairness. The plea stage, by contrast, is "so secretive and without rules that we do not even know whether or not it operates in an arbitrary manner." See Rakoff, *supra*. And while the state's failure to share exculpatory evidence at trial does not necessarily result in the waiver or violation of other rights, the plea stage is different: A defendant who pleads guilty while unaware that the state possesses evidence of his innocence waives a host of Fifth, Sixth, and Fourteenth-Amendment rights in the process.[10]

For these reasons, any contention that the right to see material evidence of innocence is limited to the trial stage must fail. To be sure, the Supreme Court has *encountered* assertions of that right only in the trial context and, as a result, has occasionally referred to the *Brady* right as protecting fairness at trial. But *Brady* and the cases that follow it rest on the premise that "our system of the administration of justice suffers when *any* accused is treated unfairly." *Brady*, 373 U.S. at 87 (emphasis added); see also, *e.g.*, U.S. Br. 8 (noting that the "overriding concern" of the *Brady* doctrine is "the justice of the finding of guilt" (quoting *United States* v. *Bagley*, 473 U.S. 667, 678 (1985)). That rationale applies equally, if not even more strongly, to the pleading stage.

[10] Some courts have held that a guilty plea cannot be "knowing" or "intelligent" if it is entered without knowledge of exculpatory evidence in the government's possession. *E.g.*, *Sanchez* v. *United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (failure to disclose "automatically render[s] a guilty plea[] unknowing and involuntary"); cf. *United States* v. *Ruiz*, 536 U.S. 622, 629-30 (2002) (holding that *impeachment* information, as distinct from innocence evidence, need not be disclosed at the plea stage).

3. The fairness concerns on which *Brady* rests have practical consequences. This case, of course, provides a prime example: Mr. Alvarez, an innocent defendant, pleaded guilty solely because he was offered a deal that eliminated the downside risk of trial. Without access to the state's evidence of his innocence, he had no way to evaluate the likelihood of an acquittal—much less persuade the City to drop the charges against him.

Other, similar cases reinforce the point. In *State* v. *Gardner*, for example, the defendant was charged with vehicular manslaughter after the car he was driving swerved into an oncoming truck, killing one person and injuring others. See 885 P.2d 1144, 1147 (Idaho Ct. App. 1994). Gardner, who could not remember the incident afterwards, assumed (based on exposure to certain inculpatory evidence) that he "might have fallen asleep while driving because he had not slept during the preceding night." *Ibid.* As a result, he pleaded guilty. Unbeknownst to him, however, police had obtained—but failed to disclose—a written statement in which the driver behind him testified that Gardner's left front tire had blown out "about ten feet in front of the truck" and caused his car to swerve. *Ibid.* It was only by acknowledging that the suppression of evidence was unlawful that the Idaho Court of Appeals could invalidate Gardner's plea. *Ibid.* Similar cases are legion. See, *e.g.*, Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 657-59

(2007) (citing cases in which defendants who lacked knowledge of their innocence pleaded guilty).

4. As the United States recognizes, no societal interest is served by convicting individuals like Mr. Alvarez and Mr. Gardner. U.S. Br. 17. It argues, however, that convictions such as these can be remedied without reference to *Brady*. That argument fails for the following reasons.

First, the United States suggests that "existing remedies," such as "the grant of habeas corpus relief in this case," are "typically available to defendants who admit their guilt but later claim actual innocence." U.S. Br. 13. Not so. In fact, the relief Mr. Alvarez obtained in this case is *anything but* ordinary: Although *Texas* law provides that actual innocence is grounds for disturbing a guilty plea, *e.g.*, *Ex Parte Alvarez*, 2010 WL 4009076, at *1 (Tex. Crim. App. Oct. 13, 2010), *federal* law does not, *e.g.*, *Herrera* v. *Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence . . . have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."). Thus, if this Court excludes the plea process from *Brady*'s ambit, relief for innocent individuals in Mr. Alvarez's position will be subject to the vagaries of state-by-state procedural law.

Nor is it correct that prosecutorial ethics rules render *Brady* superfluous by adequately "discourag[ing] the prosecution of cases where directly exculpatory

evidence exists." U.S. Br. 13. To be sure, as the United States observes, it is unethical for prosecutors to pursue charges that they know to be unsupported by probable cause. *Ibid.* And we, like the United States, believe that, in the vast majority of cases, state and federal prosecutors will adhere to their ethical duties.

But as the *Brady* court recognized, the disclosure of innocence evidence *reinforces* the prosecutor's role of "establish[ing] justice." *Brady*, 373 U.S. at 87 n.2. No matter how upstanding the typical government lawyer, liberty requires that there be a "forum" *other than* the state's "private deliberations" for "ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 439-40. Prosecutorial discretion alone is no safeguard against wrongful convictions. See, *e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970) (criminal verdict based on preponderance of the evidence was unconstitutional and threatened to "dilute[]" the "moral force of the criminal law" by "leav[ing] people in doubt whether innocent men are being condemned").

III. ADMINISTRABILITY CONCERNS DO NOT UNDERMINE THE CONCLUSION THAT DEFENDANTS ARE ENTITLED TO EXCULPATORY EVIDENCE BEFORE PLEADING

Proponents of limiting *Brady* to the pleading stage have also argued that exposing defendants to evidence of their innocence before they agree to plead guilty is impractical. That argument is misplaced.

1. Lived experience refutes the notion that the rule advanced here would hamper the resolution of criminal cases through guilty pleas. Most American jurisdictions *already* recognize that the *Brady* right applies at the pleading stage—and the plea-bargain system is no worse for wear. Indeed, as far back as 1985, the Sixth Circuit wrote that a *Brady* claim would lie where the withheld evidence "would have been controlling in the decision whether to plead." See *Campbell* v. *Marshall*, 769 F.2d 314, 324 (6th Cir. 1985). Thirty-one years later, in the state in which the Sixth Circuit is headquartered, there were more than 51,000 guilty or no contest pleas in criminal cases—and fewer than 1,500 criminal trials. The Supreme Court of Ohio, Ohio Courts Statistical Report 2016 at 17 (2016), http://bit.ly/2FfQiTU.

Nor has there been any backlash. To the contrary, in the intervening years, a steady drumbeat of state and federal jurisdictions have adopted the same rule, with no noted ill effects. See, *e.g.*, *United States* v. *Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *McCann* v. *Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003); *White* v. *United States*, 858 F.2d 416, 422 (8th Cir. 1988); *Sanchez*, 50 F.3d at 1453; *United States* v. *Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005); *Buffey* v. *Ballard*, 782 S.E.2d 204, 216-18 (W. Va. 2015); *State* v. *Huebler*, 275 P.3d 91, 96-98 (Nev.

2012); *Medel* v. *State*, 184 P.3d 1226, 1234-35 (Utah 2008).[11] And in recent years, what little commentary there is in favor of limiting the *Brady* rule to trial rests on the proposition that when it comes to plea bargains, the *Brady* right does not go far enough. *E.g.*, John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 446 (2001).

2. In light of this near-consensus, it is perhaps unsurprising that various governmental and professional entities have adopted or endorsed policies favoring pre-plea disclosure. Indeed, as the United States acknowledges (at 15), the Department of Justice itself requires prosecutors to disclose "[e]xculpatory information . . . reasonably promptly after it is discovered." United States Attorneys' Manual (USAM) § 9-5.001(D)(1). While prosecutors may, when it comes to *impeachment* evidence, "balance the goals of early disclosure against other significant interests," the only limitations placed on the prompt disclosure of *innocence* evidence relate to "classified or otherwise sensitive national security material." *Id.* § 9-5.001(D)(1) & (2).[12] In other words, short of national-security

[11] To *amici*'s knowledge, with the exception of panel decisions of this Circuit, no federal appellate court has adopted the rule the United States proposes here. Cf. *United States* v. *Mathur*, 624 F.3d 498, 507 (1st Cir. 2010) (suggesting in *dicta* that the *Brady* right is limited to trial, but resting holding on materiality); *Friedman* v. *Rehal*, 618 F.3d 142, 154-55 (2d Cir. 2010) (court "need not" decide whether *Ruiz* undermined earlier holdings applying *Brady* to plea stage); *United States* v. *Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010) (court "need not resolve" *Brady*'s application to plea stage).

[12] This obligation is earnest. A prosecutor who wishes to withhold classified or sensitive evidence must "obtain supervisory approval not to . . . disclose exculpatory information reasonably promptly," and upon obtaining such approval, must "*[provide notice] to the*

concerns, nothing—not the desire to avoid discovery (cf. U.S. Br. 15), not the "hamper[ing] of the expeditious resolution of criminal cases" (*id.* at 16), and not the belief that disclosure would "undermine the solemnity and significance of the plea" (*id.* at 15)—justifies a federal prosecutor's failure to promptly provide exculpatory material to a defendant. Department of Justice policy therefore suggests that the administrability concerns raised by those who would limit *Brady* are overstated.

But support for timely disclosure is not limited to the Department of Justice. In a number of states, including Colorado, ethical rules (quite apart from any *constitutional* requirement) "require[] prosecutors to disclose exculpatory evidence to the defense in advance of any critical stage of the proceeding," including at the plea stage. *In re Attorney C*, 47 P.3d 1167, 1168 (Colo. 2002) (en banc); see also, *e.g.*, *State* v. *Harris*, 680 N.W.2d 737, 751 (Wis. 2004) (guilty plea invalid because state law "requires, at a minimum, that the prosecutor disclose evidence that is favorable to the accused if nondisclosure of the evidence undermines confidence in the outcome of the judicial proceeding"). And, citing its view that "[a] plea entered into without the benefit of *Brady* information is inherently suspect," the American College of Trial Lawyers has proposed an amendment to the Federal Rules of Criminal Procedure that would "[r]equire disclosure of all favorable

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defendant of the time and manner by which disclosure . . . will be made." *Id.* § 9-5.001(D)(4) (emphasis added).

information to a defendant fourteen days before a guilty plea is entered." Am. College of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 95, 107 (2004). This broad acceptance of a timely-disclosure requirement casts further doubt on any claim that application of *Brady* would hamper the plea process.

3. Nor do the concerns that accompany the disclosure of *impeachment* evidence at the plea stage apply in the context of *innocence* evidence. In *United States* v. *Ruiz*, 536 U.S. 622, 633 (2002), the Supreme Court concluded that early disclosure of impeachment evidence was not constitutionally required. But in doing so, the Court rested largely on the limited value of impeachment evidence to defendants at the plea stage—and on the potential "disrupt[ion to] ongoing investigations" that would result from early "expos[ure]" of "prospective witnesses," who could be subject "to serious [intimidation and] harm." *Id.* at 631-32.

As numerous courts have observed, those rationales "indicate[] a significant distinction between impeachment information and exculpatory evidence of actual innocence." *E.g.*, *McCann*, 337 F.3d at 788.[13] Disclosure of *innocence* evidence

[13] The United States' Petition for Certiorari in *Ruiz* framed the Question Presented as "Whether before pleading guilty, a criminal defendant has a constitutional right to obtain *exculpatory* information, including impeachment material, from the government." Petition for Writ of

creates no risk of witness intimidation. And, unlike impeachment evidence, evidence of innocence *is* archetypally "critical information," *Ruiz*, 536 U.S. at 630, of which a defendant should be aware before pleading guilty. See *McCann*, 337 F.3d at 788.

In yet another respect, *Ruiz* supports the conclusion that innocence information must be shared before a plea. In *Ruiz*, the defendant argued that "in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty." *Ruiz*, 536 U.S. at 631. The Supreme Court expressly rejected that argument—and did so precisely because access to *innocence* evidence would safeguard against that result. *Ibid.* (holding that the "force of Ruiz's concern" was "diminish[ed]" because, under plea agreement at issue, government was bound to "provide any information establishing the factual innocence of the defendant"). By endorsing the view that *innocence* evidence, unlike impeachment evidence, materially lowers the risk of false guilty pleas, *Ruiz* "strongly suggests that a *Brady*-type disclosure" is "required" at the plea stage. *McCann*, 337 F.3d at 787.

Certiorari, *Ruiz*, 536 U.S. 622 (No. 01-595) (emphasis added). That the Court took it upon itself to limit its holding to impeachment material belies the assertion (U.S. Br. 10) that *Ruiz* "did not rest on a distinction between exculpatory and impeachment information."

CONCLUSION

For the reasons stated above, the Court should affirm the judgment below and hold that the *Brady* doctrine requires the disclosure of material, exculpatory evidence before a defendant enters into a guilty plea.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,216 words, which is less than half of the type-volume limitation for principal briefs as specified in Fed. R. App. P. 32(a)(7)(B)(i), excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2. This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 because it was prepared in Microsoft Word using 14-point Times New Roman font, with footnotes in 12-point Times New Roman font.

Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned counsel certifies that: counsel for *amici* authored this brief in whole; no counsel for a party authored this brief in whole or in part; and no person or entity other than *amici* and their counsel contributed monetarily to this brief's preparation or submission.

Dated: January 10, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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