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.

On Appeal from the United States District Court for the
Southern District of Texas (No. 1:11-cv-00078)

BRIEF OF THE INNOCENCE PROJECT, THE INNOCENCE PROJECT OF TEXAS, THE INNOCENCE PROJECT NEW ORLEANS, AND THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW GEORGE C. COCHRAN INNOCENCE PROJECT AS AMICI CURIAE IN SUPPORT OF THE APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Counsel for *amici curiae* adopts the Appellee's statement of interested persons, but adds to it The Innocence Project, The Innocence Project of Texas, the Innocence Project New Orleans, and the University of Mississippi School of Law George C. Cochran Innocence Project.

2. Counsel for *amici curiae* adopts the Appellee's statement of the case.

3. Counsel for *amici curiae* is not aware of any currently pending related cases.

/s/ Alysson L. Mills
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure Rule 29.1, *amicus curiae* Innocence Project, Inc. makes the following disclosure: The Innocence Project is an association dedicated to providing pro bono legal and/or investigative services to prisoners. The Innocence Project does not have a parent corporation, and there is no publicly held corporation that has a 10% or greater ownership interest in the Innocence Project.

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY

The Innocence Project, Inc. ("IP") is a national legal services and criminal justice reform organization based in New York, New York. Founded in 1992 by Barry Scheck and Peter Neufeld, the IP represents convicted persons who seek to overturn their convictions in light of new evidence of actual innocence. To date, the IP's attorneys have served as lead or co-counsel to approximately 200 innocent persons in the United States—including 39 in the states that comprise the Fifth Circuit: two in Mississippi, 11 in Louisiana, and 26 in Texas—who were exonerated thanks to evidence that was first discovered or subjected to forensic testing during post-conviction proceedings.

Relevant here, the IP has represented clients who were exonerated after pleading guilty to crimes they did not commit. These clients include Joseph Buffey, the petitioner in *Buffey v. Ballard*, 782 S.E.2d 204 (W.Va. 2015), in which the West Virginia Supreme Court of Appeals unanimously held that defendants have a due-process right under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), to exculpatory evidence during plea negotiations. The state violated *Brady* in Buffey's case by failing to disclose an exculpatory DNA report that it received six weeks before Buffey's plea hearing.

Because many of the IP's clients were wrongfully convicted as a result of *Brady* violations—either at trial or in the course of plea negotiations—the IP has an interest in ensuring that a defendant's right to exculpatory evidence is protected. To that end, the IP not only regularly participates as *amicus curiae* or counsel of record in significant *Brady* cases such as this one, but also consults with legislatures, judges, and prosecutors on measures to improve systemic compliance with *Brady*. Most recently, the IP led a successful effort in New York state to adopt a landmark rule that requires criminal trial court judges to more directly supervise *Brady* disclosures and provides for sanctions in cases of willful noncompliance.

In addition to the IP, which provides legal services nationally, the Innocence Project of Texas, the Innocence Project New Orleans, and the University of Mississippi School of Law George C. Cochran Innocence Project represent convicted persons in Texas, Louisiana, and Mississippi who seek to overturn their conviction in light of new evidence of actual innocence. These organizations also have represented clients who were wrongfully convicted as a result of *Brady* violations.

The Innocence Project of Texas, based in Fort Worth, Texas, was founded in 2006. Its Executive Director, Mike Ware, is the past Special Fields Bureau Chief for the Dallas County District Attorney's Office. That office instituted the first-of-its-kind Conviction Integrity Unit, designed to re-examine questionable

convictions and set guidelines for prosecutors to guard against future error. This work is critical in Texas, where more people have been exonerated by DNA evidence than in any other state. The Innocence Project of Texas has helped free 16 wrongfully convicted persons and currently has more than 500 cases in queue for review.

The Innocence Project New Orleans, founded in 2001, is the second largest freestanding innocence project in the country, serving life-sentenced prisoners in Louisiana and southern Mississippi who have provable claims of actual innocence. In Louisiana and Mississippi—two states with the highest incarceration rates in the world—the Innocence Project New Orleans has helped free over 30 wrongfully convicted persons who collectively served over 650 years in prison.

The University of Mississippi School of Law George C. Cochran Innocence Project was formed in 2006 in response to an overwhelming request for aid from Mississippi prisoners and also serves as a legal clinic at the University of Mississippi School of Law. The University of Mississippi School of Law George C. Cochran Innocence Project has helped free five wrongfully convicted persons and continues to review cases across Mississippi.

Together the Innocence Project of Texas, the Innocence Project New Orleans, and the University of Mississippi School of Law George C. Cochran Innocence Project submit this brief as *amici curiae* in support of the Appellee in

this case. The Appellee consents to this brief's filing. In response to *amici curiae*'s request for consent, the Appellant's counsel, Ramón Viada, stated: "I will only consent to a brief if the Court will simultaneously grant me leave to respond to it. Otherwise, not."

Pursuant to Rule 29(c)(5), counsel for *amici curiae* represent that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION

In *Brady v. Maryland*, the Supreme Court held that due process requires the government to disclose evidence that "would tend to exculpate" a defendant.[1] The question in this case is whether *Brady* requires the government to disclose exculpatory evidence known to it at the time a defendant pleads guilty.

Amici curiae The Innocence Project, The Innocence Project of Texas, the Innocence Project New Orleans, and the University of Mississippi School of Law George C. Cochran Innocence Project ("*Amici*") have a real interest in this case. *Amici* have represented clients who pleaded guilty to crimes they did not commit. In many of these cases, the government possessed, but did not disclose, evidence that proved the client's innocence.

Joseph Buffey, for instance, pleaded guilty in 2002 to two counts of sexual assault and one count of robbery, crimes he did not commit. He told his court-appointed attorney he was innocent—but within weeks of his arraignment, and before DNA testing in the case could be completed, the prosecution made a "take it or leave it" plea offer that he accepted on the advice of counsel. Incredibly, *six weeks before the trial court accepted his guilty plea*, a police lieutenant authored a report concluding that DNA evidence from the elderly victim's sexual assault examination kit excluded him—but no one disclosed the report to the defense. An

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

attorney later obtained the report during Buffey's post-conviction proceedings. When the Supreme Court of Appeals of West Virginia unanimously vacated Buffey's plea and sentence in 2015, it unequivocally held that the state had violated Buffey's "due process rights, as enunciated in *Brady*," by withholding exculpatory evidence from him.[2]

There are other examples. Dale Duke of Dallas, Texas pleaded no contest to the aggravated assault of his seven-year-old step-daughter. He was exonerated 19 years later, after it was discovered that at the time of his plea prosecutors possessed a statement by the victim's grandmother that the victim's accusation was untrue and coerced.[3]

Stephen Brodie of Richardson, Texas, who is deaf, pleaded guilty to sexually molesting a five-year-old girl. He was exonerated 17 years later, after it was discovered that at the time of his plea police possessed the facts that hair and fingerprints found at the scene did not match his (the fingerprints in fact matched a convicted child rapist).[4]

Antrone Johnson of Dallas, Texas pleaded guilty to the aggravated sexual assault of a minor. He was exonerated 13 years later, after it was discovered that at

[2] *Buffey v. Ballard*, 782 S.E.2d 204, 221 (W. Va. 2015).

[3] *Dale Duke*, NAT'L REGISTRY OF EXONERATIONS (June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3859.

[4] *Stephen Brodie*, NAT'L REGISTRY OF EXONERATIONS (June 2016), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3056.

the time of his plea a prosecutor possessed, among other things, the victim's express statement that "Johnson did not make her give him oral sex."[5]

Some of *Amici*'s clients were induced to take guilty pleas to crimes they did not commit after being wrongly convicted at trials, with exculpatory evidence withheld in both proceedings. For example, Steven Phillips of Dallas, Texas was charged with a rape and sexual assaults that had been committed by a lone perpetrator having a distinct modus operandi. After Phillips was wrongly convicted of rape at trial, he was induced to plead guilty to remaining charges in the hopes of avoiding a life sentence. After DNA testing cleared Phillips of the rape post-conviction, a joint reinvestigation by his counsel and the Dallas County District Attorney's Office revealed that prosecutors had withheld evidence that victims identified the man eventually determined to be the rapist in pre-trial and pre-plea lineups *25 years earlier*.[6]

Robert Jones of New Orleans, Louisiana was charged with a series of robberies, a rape, and a homicide, all committed by a lone perpetrator having a distinct profile. Jones was convicted of robbery and rape at a trial that Louisiana

[5] *Antrone Johnson*, NAT'L REGISTRY OF EXONERATIONS (June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3829.

[6] *Steven Phillips*, NAT'L REGISTRY OF EXONERATIONS (June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3533.

courts later found was tainted by multiple, material *Brady* violations.[7] But facing a mandatory sentence of life without parole, Jones agreed to plead guilty to manslaughter rather than go to trial for homicide. Jones later discovered, *twenty-one years after his conviction*, that the only witness against him in the homicide case fully recanted the allegations. The state possessed the information, memorialized in an internal file memorandum, *before* Jones pleaded guilty.[8] Incredibly, the state withheld the memorandum from Jones, and continued to deny that the witness recanted the allegations, during the more than eight years of post-conviction *Brady* litigation.[9]

These of *Amici*'s clients are only examples. There are more stories like theirs.[10] In each instance, the wrongful convictions—accompanied by years, sometimes decades, of wrongful incarceration—could have been avoided if the government had timely disclosed exculpatory evidence that was already in its possession.

In a criminal justice system that depends heavily on pleas, and with a plea process heavily controlled by the prosecution, a criminal defendant might plead

[7] *See Jones v. Cain*, 2014-0226 (La. App. 4. Cir. 10/8/14), 151 So. 3d 781.

[8] *Robert Jones*, NAT'L REGISTRY OF EXONERATIONS (February 24, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5096.

[9] *Robert Jones*, INNOCENCE PROJECT NEW ORLEANS, http://www.ip-no.org/exonoree-profile/robert-jones.

[10] For more stories of innocent people who pleaded guilty, see guiltypleaproblem.org.

guilty for any number of reasons having nothing to do with guilt. It is untenable, however, that a prosecutor or law enforcement officer might sit idly by as a defendant pleads guilty, all the while possessing evidence that the defendant, in fact, is innocent. If *Brady* does not require a prosecutor to disclose exculpatory evidence to a defendant who pleads guilty, then *Brady* means little in today's criminal justice system.

ARGUMENT

I. Ours is "a system of pleas" and some innocent people plead guilty.

At the time that *Brady* was decided, "between one-fourth and one-third of state felony charges led to a trial."[11] Today, that figure is one-twentieth.[12] The "gold standard of American justice—a full-dress criminal trial with its innumerable constitutional [guarantees]"[13]—is a rarity. "[C]riminal justice today is for the most part a system of pleas, not a system of trials."[14] As many as "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of

[11] Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/.
[12] *Id.*
[13] *Lafler v. Cooper*, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting).
[14] *Id.* at 170.

guilty pleas."[15] Plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[16]

Society takes for granted that a guilty plea "quite validly removes the issue of factual guilt from the case"[17]—but the reality is that in our system some innocent people like George Alvarez plead guilty. *Amicus curiae* the United States calls such cases "unusual" and "exceptional,"[18] but to the contrary, sadly, these cases are not rare. *Amici*'s clients, all of whom pleaded guilty before they were exonerated, are just examples. In 2015, the National Registry of Exonerations reported that fifteen percent of all exonerees nationwide originally pleaded guilty to crimes they did not commit.[19] Data compiled by the Innocence Project indicates that 38—or eleven percent—of the 353 individuals exonerated *by DNA* since 1989 originally pleaded guilty to crimes they did not commit.[20]

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[15] *Missouri v. Frye*, 566 U.S. 134, 143 (2012); *Lafler*, 566 U.S. at 170.

[16] *Frye*, 566 U.S. at 144 (citation omitted).

[17] *Menna v New York*, 423 U.S. 61, 62 n.2 (1975) ("[A] *counseled* plea of guilty is an admission of factual guilt so reliable that, where *voluntary* and *intelligent*, it quite validly removes the issue of factual guilt from the case.") (emphasis added).

[18] Brief for the United States as Amicus Curiae in support of Appellant at 12–13.

[19] *Innocents Who Plead Guilty*, NAT'L REGISTRY OF EXONERATIONS (November 24, 2015), https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf.

[20] *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited December 27, 2017).

The reasons innocent people plead guilty are varied, but one thing is constant: As they make their life-altering decision, the deck is stacked against them. Thanks to over-criminalization and mandatory-minimum sentences, in today's criminal justice system prosecutors hold all of the power, and the threat of long-term or life imprisonment is great. "The prosecutor is now the proverbial judge, jury, and executioner in the mine-run of cases."[21] "[I]t is the prosecutor, not the judge, who effectively exercises the sentencing power, albeit cloaked as a charging decision."[22] Prosecutors can use the threat of serious charges to "bludgeon" a defendant to plea.[23] "Eventually there may come a point where, even for the innocent, accepting the prosecutor's offer may seem more attractive than the risk of trial."[24]

For instance, *Amici*'s client Stephen Brodie, who is deaf, confessed to sexually molesting a five-year-old girl after he was interrogated for 18 hours over the course of eight days, sometimes without a sign language interpreter. He

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[21] Ted Cruz, *Reduce Federal Crimes and Give Judges Flexibility* in BRENNAN CTR. FOR JUSTICE, SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE (Inimai Chettiar & Michael Waldman eds., 2015), https://www.brennancenter.org/sites/default/files/publications/Solutions_American_Leaders_Speak_Out.pdf.

[22] Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE NEW YORK REVIEW OF BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

[23] *Id. See also* Cruz, *Reduce Federal Crimes and Give Judges Flexibility* (By using his extraordinary charging power to apply pressure, the prosecutor thus "nudg[es] both judges and juries out of the truth-seeking process.").

[24] A. Hessick & R. Saujani, *Plea Bargaining and Convicting the Innocent*, 16 BYU J. PUB. L. 189, 199 (2002).

pleaded guilty to a crime he did not commit to avoid the risk of a 99-year sentence if he went to trial.[25]

Amici's client Michael Phillips pleaded guilty to a rape he did not commit because he feared a life sentence if he went to trial. His court-appointed counsel told him that no jury would believe a black man over a white woman. He accepted a plea offer and received a more lenient sentence.[26]

Indigent defendants, in particular, feel the pressure acutely: Lacking the resources to make bail for even minor charges, and facing the potential loss of their homes, their employment, or even their children, indigent defendants might feel compelled to accept whatever deal a prosecutor offers, even if they are innocent, just to get out of jail. Indeed, there is a direct link between poverty and guilty pleas: One study found that pre-trial detention "leads to a 13% increase in the likelihood of being convicted, an effect largely explained by an increase in guilty pleas among defendants who otherwise would have been acquitted or had their charges dropped."[27] Another study found that, even controlling for other critical factors like the severity of the offense, demographics, and the defendant's criminal

[25] *Stephen Brodie*, NAT'L REGISTRY OF EXONERATIONS (June 2016), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3056.
[26] *Michael Phillips*, NAT'L REGISTRY OF EXONERATIONS (September 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4483.
[27] Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, (January 12, 2017), *available at* https://ssrn.com/abstract=2777615.

history, defendants in pre-trial detention are more likely to plead guilty.[28] The sad truth is that indigent defendants sometimes plead guilty not because they are, but because exercising the constitutional right to trial literally costs too much.

Given all of these realities, it is not difficult to see how "the prosecutor-dictated plea bargain system, by creating such inordinate pressures to enter into plea bargains, [has] led a significant number of defendants to plead guilty to crimes they never actually committed."[29]

II. If *Brady* "is a trial right" only, it is "a hollow reed."

Brady holds that due process requires the government to disclose evidence that "would tend to exculpate" a defendant.[30] The United States argues the government has no duty to disclose exculpatory evidence to a defendant who

[28] Will Dobbie, Jacob Goldin, and Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, (Working Paper, 2017), *available at* https://scholar.harvard.edu/cyang/publications/effects-pre-trial-detention-conviction-future-crime-and-employment-evidence ("Forty-four percent of . . . detained defendants plead guilty compared to just 20.7 percent of initially released defendants."); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 747 (2017) (defendants detained for misdemeanors are twenty-five percent more likely to plead guilty than are non-detained defendants); *see also* Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments* (Working Paper, 2016), *available at* http://home.uchicago.edu/~npope/pretrial_paper.pdf ("[B]eing detained increases the probability of . . . pleading guilty by 10 percentage points.").

[29] Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE N.Y. REV. OF BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

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

pleads guilty because *Brady* "is a trial right" only.[31] But if *Brady* "is a trial right" only, it is "a hollow reed."[32] "Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process."[33]

Nothing in *Brady* restricts the right to exculpatory evidence solely to defendants who go to trial. While sometimes characterized as a "trial right,"[34] the due-process concerns that necessitate *Brady*'s rule do not arise solely at trial. The touchstone of due process is fairness.[35] *Brady* admonishes that "our system of the administration of justice suffers when any accused is treated unfairly."[36] Is it not true that a prosecutor who withholds exculpatory evidence from a defendant who succumbs to a plea offer casts himself "in the role of an architect of a proceeding that does not comport with the standards of justice"?[37]

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[31] Brief for the United States as Amicus Curiae in support of Appellant at 5–6.

[32] *Buffey*, 782 S.E.2d at 212 n.19 ("[I]f *Brady* is exclusively a trial right, it has become a hollow reed.") (internal marks and citation omitted).

[33] *Frye*, 566 U.S. at 143–44 (quoting *Lafler*, 566 U.S. at 170).

[34] *E.g.*, *United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010) ("The *Brady* right, however, is a *trial* right.") (citing *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (right to *Brady* material is "a right that the Constitution provides as part of its basic 'fair trial' guarantee")).

[35] *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) ("fundamental fairness" is "the touchstone of due process"). *See also Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981) ("the phrase expresses the requirement of 'fundamental fairness'").

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

[37] *Id.* at 88.

It goes without saying that the interests in justice and fairness are equally important in the negotiation of a plea as in the conduct of a trial; indeed, resolution by plea is "highly desirable" only inasmuch as the plea process "presuppose[s] fairness in securing agreement between an accused and a prosecutor."[38] The Supreme Court has long recognized that the plea process "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."[39]

It is only just and fair to disclose exculpatory evidence to a defendant who decides to plead. "[T]he decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted."[40] That decision "cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution."[41] "A defendant who is forced to make a choice about going to trial or pleading guilty unaware that the government has not disclosed evidence 'which, if made available, would tend to exculpate him,'"[42] does not do so intelligently and voluntarily.

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[38] *Santobello v. New York*, 404 U.S. 257, 261 (1971).

[39] *Id.* at 262.

[40] *United States v. Oakes*, 411 F. Supp. 2d 1, 4 (D. Me. 2006) (internal citations omitted).

[41] *Buffey*, 782 S.E.2d at 212–13 (quoting *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995)) (internal quotation marks omitted).

[42] *United States v. Nelson*, 979 F. Supp. 2d 123, 130 (D.C. Cir. 2013) (quoting *Brady*, 373 U.S. at 87–88).

In this regard, exculpatory evidence "is entirely different" from impeachment evidence.[43] Unlike impeachment evidence, which is not "critical information of which the defendant must always be aware prior to pleading guilty,"[44] exculpatory evidence "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."[45] Whereas impeachment evidence's impact on a plea in any case is "random,"[46] exculpatory evidence in every case "diminishes the possibility that innocent persons accused of crimes will plead guilty."[47] Unsurprisingly, most courts that have considered the issue have concluded that *Brady* requires a prosecutor to disclose exculpatory evidence to a defendant who pleads guilty.[48]

III. Applying *Brady* in guilty plea cases will not "impose serious costs."

Contrary to the argument of the United States, applying *Brady* in guilty plea cases will not "impose serious costs on the criminal justice system."[49] If that were true, the numerous jurisdictions that already mandate pre-plea disclosure of

[43] *McCann v. Mangialardi*, 337 F.3d 782, 787–88 (7th Cir. 2003) (reasoning that "it is highly likely" given the "a significant distinction between impeachment information and exculpatory evidence" that Supreme Court would require prosecution to disclose exculpatory evidence before guilty plea is entered).

[44] *Ruiz*, 536 U.S. at 630.

[45] *State v. Huebler*, 275 P.3d 91, 98 (Nev. 2012).

[46] *Ruiz*, 536 U.S. at 630.

[47] *Huebler*, 275 P.3d at 98.

[48] *See* Brief for the Appellee at 7–8.

[49] Brief for the United States as Amicus Curiae in support of Appellant at 15.

exculpatory evidence—by case law, by statute, or by both—would have experienced the "additional burdens on the government" that the United States portends.[50] They have not. To the contrary, jurisdictions that mandate pre-plea disclosure have *avoided* serious costs both by preventing wrongful convictions—which carry incalculable social costs—and, where a wrongful conviction has occurred, by providing critical means for relief.

"[T]he adverse impact on the government of an obligation to provide exculpatory information is not as significant as the impact of an obligation to provide impeachment information."[51] The disclosure of exculpatory evidence, unlike the disclosure of impeachment evidence, does not "seriously interfere with the Government's interest in securing those guilty pleas that are factually justified."[52] It does not "risk premature disclosure of Government witness information," which "could 'disrupt ongoing investigations' and expose prospective witnesses to harm."[53]

Rather, the disclosure of exculpatory evidence is merely an "added safeguard [that] comports with the prosecution's special role . . . in search for

[50] Brief for the United States as Amicus Curiae in support of Appellant at 15–16.
[51] *Huebler*, 275 P.3d at 98.
[52] *Ruiz*, 536 U.S. at 630.
[53] *Ruiz*, 536 U.S. at 630.

truth."[54] A prosecutor is "the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."[55] It is the "primary duty of the prosecutor . . . to seek justice within the bounds of the law, not merely to convict."[56] That a prosecutor or police officer might sit idly by as a defendant pleads guilty, all the while possessing evidence that the defendant is innocent, is untenable.

The United States Attorneys' Manual already requires federal prosecutors "to disclose exculpatory and impeachment information to criminal defendants and to seek a just result in every case."[57] As a matter of practice, federal prosecutors must turn over *Brady* evidence "reasonably promptly after it is discovered," often before a defendant pleads guilty.[58] Likewise, Rule 3.8 of the American Bar Association's Model Rules of Professional Conduct, adopted by Texas,[59]

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[54] *Huebler*, 275 P.3d at 98 (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (internal quotation marks omitted)).

[55] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[56] AM. BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE, Prosecution Function Standard 3-1.2(b). "The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants." *Id.*

[57] U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-5.001.

[58] *Id.* at § 9-5.001(D)(1).

[59] TEX. DISCIPLINARY R. PROF'L CONDUCT § 3.09(d) (1989). *See also Ex parte Lewis*, 587 S.W.2d 697, 700 (Tex. Crim. App. 1979) ("The requirement of due process and due course of law extends to guilty pleas as well as to contested cases.").

Louisiana,[60] and Mississippi,[61] already provides that a "prosecutor in a criminal case shall" "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused."[62]

Further, Texas statutory law requires pre-plea disclosure of exculpatory evidence within its possession upon request by the defense.[63] The impetus for Texas's law was the case of Michael Morton, who spent nearly 25 years in prison for the murder of his wife notwithstanding that all the while the state possessed, and suppressed, evidence that clearly exculpated him.[64] The suppressed evidence pointed to a man who was later identified through a DNA databank to have killed not only Michael Morton's wife, but another young wife and mother *two years after* Michael Morton went to prison. With no pre-plea disclosure requirement, the state's suppression of evidence sent an innocent man to prison and compromised public safety by leaving a known murderer on the street.

Pre-plea disclosure requirements have not impeded plea negotiations in the jurisdictions that have adopted them. The United States can point to no evidence of

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[60] LA. R. PROF'L CONDUCT § 3.08(d) (2004). The Louisiana rule is even broader than the model rule, requiring the prosecutor to disclose to the defendant any exculpatory evidence he or she "knows, or reasonably should know."

[61] MISS. R. PROF'L CONDUCT § 3.08(d).

[62] MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2009).

[63] TEX. CODE CRIM. PROC. ANN. art. 39.14.

[64] *See Michael Morton*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/michael-morton/ (last visited Jan. 8, 2017).

any "lengthening of the plea process" or "reduc[tion in] the number of pleas" or uptick in "disputes about the government's disclosures."[65]

Pre-plea disclosure requirements also have not unduly undermined convictions by pleas. There is no evidence that courts that recognize the right to exculpatory evidence pre-plea have been unduly burdened with claims for post-conviction relief. Since the Supreme Court of Appeals of West Virginia decided *Buffey v. Ballard* over two years ago, there has been only *one* reported request for "*Buffey* relief."[66]

The reality is that it is extremely difficult to obtain exculpatory evidence after a conviction,[67] and few defendants have the resources to hire post-conviction counsel or conduct their own investigations.[68] *Amici* handle their clients' cases pro bono, but they have limited resources to screen and litigate the many claims presented to them. *Amici*'s waiting lists have hundreds, or in some instances thousands, of names. Applicants must wait years for a decision on their requests for assistance—and during that wait any exculpatory evidence in the government's possession risks being lost or destroyed. The fear that applying *Brady* in guilty plea

[65] Brief for the United States as Amicus Curiae in support of Appellant at 15–16.

[66] *See People v. Corson*, 379 P.3d 288, 290 (Co. 2016).

[67] *See, e.g.*, *Buffey v. Ballard*, 782 S.E.2d 204 (W. Va. 2015).

[68] Laurie L. Levenson, *Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545, 562 (2014) ("A postconviction investigation by an incarcerated inmate is nearly impossible for the inmate to conduct on his own.").

cases will "intrude on the strong interest in finality of criminal convictions"[69] is unfounded.

IV. Refusing to apply *Brady* in guilty plea cases will have perverse consequences.

While the cost of applying *Brady* in guilty plea cases is negligible, the cost of not applying it is considerable. As other courts have recognized, refusing to apply *Brady* in guilty plea cases will have the perverse consequence of dis-incentivizing the disclosure of evidence of innocence: "[I]f a defendant may not raise a *Brady* claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas."[70] The effect would be to continue to knowingly convict and incarcerate individuals who, like *Amici*'s clients, are innocent of crimes to which they were coerced to plead guilty. That risk is "too costly to the integrity of the system of justice to countenance."[71]

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[69] Brief for the United States as Amicus Curiae in support of Appellant at 16–17.

[70] *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *see also United States v. Fisher*, 711 F.3d 460, 469 (4th Cir. 2013) ("If a defendant cannot challenge the validity of a plea based on subsequently discovered police misconduct, officers may be more likely to engage in such conduct, as well as more likely to conceal it to help elicit guilty pleas."); *United States v. Nelson*, 979 F. Supp. 2d 123, 130 (D.C. Cir. 2013) ("[P]recluding a defendant from raising such a *Brady* claim after a guilty plea could create a risk too costly to the integrity of the system of justice to countenance—tempting a prosecutor to stray from that bedrock ideal and 'deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas.'") (quoting *Sanchez*); *Buffey v. Ballard*, 782 S.E.2d 204 (W. Va. 2015) (same, quoting *Sanchez*, *Fisher*, and *Nelson*).

[71] *Nelson*, 979 F. Supp. 2d at 130 ("[P]recluding a defendant from raising such a *Brady* claim after a guilty plea could create a risk too costly to the integrity of the system of justice to

The United States urges this Court to adopt a rule that would validate the government's decision to *deliberately* withhold exculpatory evidence from a defendant as soon as he or she indicates a willingness to accept a plea offer. That rule would, with good reason, undermine public confidence in the criminal justice system. Suppose, for example, that a defendant is told that several eyewitnesses identified him as the perpetrator of a murder and that he faces a potential life sentence if convicted at trial, and so he reluctantly accepts a plea to manslaughter in exchange for a lesser sentence. But prior to sentencing, the government discovers surveillance video confirming the defendant's alibi. Or the government receives forensic tests identifying another individual's blood or semen, as in Joseph Buffey's case, and the new suspect gives a credible confession to the crime when questioned, as in the cases of other of *Amici*'s clients. Or a new witness suddenly comes forward with credible evidence—bloody clothing or recorded admissions—that someone besides the defendant committed the murder.

Under any of these scenarios, an ethical prosecutor who learned of the exculpatory evidence would immediately disclose it and permit the defendant to withdraw his plea. Yet under the rule urged by the United States, a prosecutor could *constitutionally* deliberately hide any or all of the information and stand

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countenance—tempting a prosecutor to stray from that bedrock ideal and 'deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas.'") (quoting *Sanchez*).

mute while an innocent man or woman is convicted and sentenced. More troubling: For the minority of law enforcement officers who might be tempted, nothing would dissuade them from hiding the information from prosecutors—because of reluctance to admit error in a high-profile case, for instance, or because of racial animus—and, in turn, from hiding the information the defense and the court.

If a defendant who pleads guilty "waives the right to information,"[72] as the United States argues, prosecutors might be disinclined to assist even in cases presenting credible claims of innocence. A prosecutor's cooperation can make all the difference, as Stephen Brodie's and Michael Phillips's cases illustrate. Brodie and Phillips had served 17 and 24 years, respectively, for crimes to which they pleaded guilty but did not commit. The Conviction Integrity Unit formed by the Dallas County District Attorney's Office ultimately conducted DNA tests that exonerated them.[73]

Independent efforts by prosecutors to reexamine potential wrongful convictions, as in Brodie's and Phillips's cases, are commendable and consistent with a prosecutor's duty to ensure "that guilt shall not escape [n]or innocence

[72] Brief for the United States as Amicus Curiae in support of Appellant at 7.

[73] *Stephen Brodie*, NAT'L REGISTRY OF EXONERATIONS (June 2016), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3056; *Michael Phillips*, NAT'L REGISTRY OF EXONERATIONS (September 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4483.

suffer."[74] Most prosecutors readily disclose exculpatory evidence as soon as they become aware of it. But if this Court holds that a defendant who pleads guilty really has no "right to information," no matter how exculpatory, it will send the wrong message to the minority of prosecutors and law enforcement officers who might be tempted to do otherwise—and to the public at large, which expects fairness in the criminal justice system.

CONCLUSION

Nothing in *Brady* restricts the right to exculpatory evidence solely to defendants who go to trial. Indeed, *Brady* has played an important role in rectifying wrongful convictions by guilty pleas. Given that there is no evidence that applying *Brady* in guilty plea cases "imposes serious costs," and there is considerable risk that refusing to apply *Brady* in guilty plea cases will have perverse consequences, *Amici* urge the *en banc* Court to reverse the panel decision in this case and to abrogate *Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000), and *United States v. Conroy*, 567 F.3d 174 (5th Cir. 2009), to the extent necessary to affirm that *Brady* requires the government to disclose exculpatory evidence known to it at the time a defendant pleads guilty.

[74] *Berger*, 295 U.S. at 88.

January 10, 2018

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Rule 29 because it is 5,642 words, which is no more than one-half the maximum length (13,000 words) authorized by Rule 32(a)(7)(B)(i) for a party's principal brief.

January 10, 2018 *<u>/s/ Alysson L. Mills</u>*

Alysson L. Mills

CERTIFICATE OF SERVICE

I certify that I electronically filed the original of the foregoing brief with the clerk of this Court by using the CM/ECF system. I certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

January 10, 2018 *<u>/s/ Alysson L. Mills</u>*

Alysson L. Mills