No. _____

IN THE

Supreme Court of the United States

BRADLEY FREEMAN,
Petitioner,
v.

STATE OF NEW MEXICO,
Respondent.

On Petition for a Writ of Certiorari
to the New Mexico Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Charles D. Agoos
Attorney of Record
Assistant Appellate Attorney
Law Offices of the Public Defender
1422 Paseo De Peralta, Bldg. 1
Santa Fe, New Mexico 87501
(505) 395-2890
Charles.Agoos@lopdnm.us

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Question Presented

1. Does the Constitution require, before entering into a binding plea agreement with a criminal defendant, that the prosecution disclose favorable, material evidence of an affirmative defense which the prosecution bears the burden of disproving beyond a reasonable doubt and which can be raised pre-trial as a matter of law?

List of Parties

All parties appear in the caption of the case on the cover page.

List of Directly Related Proceedings

Twelfth Judicial District Court of New Mexico, D-1215-CR-2017-00217, *State of New Mexico v. Bradley Freeman*, Oct. 12, 2018;

New Mexico Court of Appeals, A-1-CA-38086, *State of New Mexico v. Bradley Freeman*, March 24, 2020; and

New Mexico Supreme Court, S-1-SC-38222, *State of New Mexico v. Bradley Freeman*, June 12, 2020.

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Jurisdiction

The New Mexico Supreme Court entered its decision denying the petition for writ of certiorari on May 13, 2020, and its decision denying rehearing on June 12, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a); *see also* United States Supreme Court, Miscellaneous Order, March 19, 2020 (extending the deadline for filing a petition for a writ of certiorari to 150 days due to COVID-19); *Lawrence v. Florida*, 549 U.S. 327, 335 (2007) (jurisdiction to review state habeas proceedings involving federal constitutional claims); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 342 (2006) (jurisdiction to review the denial of state appellate review of a state habeas proceeding involving federal law claims).

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides,

> [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

The Otero County Sheriff's Department received numerous reports that one of its officers, Joshua Marchand, was engaged in widespread and systemic entrapment, and the Federal Bureau of Investigation even notified the Sheriff's Department that it had opened a criminal investigation into the matter. Rather than taking action, the Sheriff's Department affirmatively withheld evidence of Officer Marchand's misconduct for over a year and continued to criminally charge suspects based on his illegal investigative techniques. After the details of the misconduct finally became public, the State was able to consolidate the windfall of guilty pleas that had resulted from the Sheriff's Department's suppression of the evidence of the police misconduct.

1. Factual Background

One of Officer Marchand's targets who pled guilty before the evidence became public was Mr. Freeman, a disabled U.S. military veteran with no prior criminal history. Mr. Freeman was charged with one count of distribution of a controlled substance for giving ten pills of his Alprazolam, which he had been lawfully prescribed as a medical treatment for post-traumatic stress disorder, to Officer Marchand while he was working as an undercover law enforcement officer.

The Otero County Sheriff's Department knew about Officer Marchand's misconduct and was in possession of the *Brady* materials well before Mr. Freeman's guilty plea. Three weeks before Mr. Freeman pled guilty, the Twelfth Judicial District Court of New Mexico denied a pre-trial entrapment motion against Officer Marchand in another case involving allegations of drug trafficking because, without the *Brady*

material, the defendant could not corroborate her allegations of entrapment. Three business days after the denial of that motion, and about eight months after his indictment, Mr. Freeman notified the District Court of his intention to plead guilty.

About six months after Mr. Freeman's guilty plea, the evidence of Officer Marchand's misconduct became public, and the District Attorney dismissed every pending criminal case involving Officer Marchand. In dismissing the cases, the District Attorney publicly acknowledged that Officer Marchand had been engaging in a pattern and practice of systemic entrapment and had been under investigation for over a year. The District Attorney's letter describes a pattern of dishonesty by Officer Marchand, including "concerns over the handling of evidence, evidence going missing, problems with the chain of custody for evidence, and possible alcohol intoxication by Deputy Marchand while working undercover," and acknowledges that reports of the misconduct were withheld in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The letter also states that the County Sheriff's Department withheld evidence and complaints about Officer Marchand from the Office of the District Attorney and the Federal Bureau of Investigation, despite repeated requests for over a year. The District Attorney's letter describes numerous reports that Officer Marchand was using drugs with defendants, which "would in all likelihood be considered objective entrapment under New Mexico law."

Indeed, under New Mexico constitutional law, it is a violation of substantive due process for an undercover officer to target patients at a V.A. hospital, provide and use illegal drugs with them, solicit their lawfully possessed prescription medicine,

and then charge them with drug trafficking. *See State v. Vallejos*, 945 P.2d 957, 958, 962, 965 (N.M. 1997) (noting other states, including Florida, New Jersey, West Virginia, and New York, recognize objective entrapment as a matter of state constitutional due process). In New Mexico, then, every crime constitutionally contains an essential element of non-entrapment, and a criminal defendant may raise the issue of objective entrapment both pre-trial as a matter of law, potentially resulting in a dismissal with prejudice, and at trial, requiring the prosecution to prove non-entrapment beyond a reasonable doubt. *See id.* at 961 (Unlike the pre-trial normative inquiry, "[t]he factual inquiry is conducted primarily by the jury. However, if the trial court finds that police conduct created a substantial risk that a person not predisposed to commit the crime would have been induced to commit it and that no reasonable jury could find otherwise, then a directed verdict for the defendant is proper."); Uniform Jury Instruction 14-5161 New Mexico Rules of Criminal Procedure Annotated (2020).

After the *Brady* material concerning Officer Marchand became public, Mr. Freeman moved the Twelfth Judicial District Court to withdraw his guilty plea. At the hearing on the motion, Mr. Freeman argued that the withheld evidence was subject to mandatory disclosure under *Brady v. Maryland* and its progeny and that the information went beyond mere impeachment evidence and was evidence of Mr. Freeman's actual innocence. The parties discussed the related case where the defendant moved to dismiss the charges due to Officer Marchand's entrapment and the Twelfth Judicial District Court had denied the motion due to the absence of the

Brady materials, which would have corroborated the defendant's claims. Mr. Freeman decided to plead guilty days after that motion was denied and would not have pled guilty had the *Brady* materials concerning Officer Marchand been disclosed. Mr. Freeman was entrapped by Officer Marchand and pled guilty only because he knew he would be unable to prove it. Given the suppression of the *Brady* materials, Mr. Freeman argued, his plea was not knowing, intelligent, and voluntary.

The Twelfth Judicial District Court of New Mexico denied Mr. Freeman's motion for plea withdrawal, despite the *Brady* violation and acknowledging an entrapment defense on the merits, because he "chose to accept a plea offered by the State," and "his decision to plea[d] guilty was made after a risk/benefit analysis."

2. Procedural Posture

Mr. Freeman appealed the denial of his motion for plea withdrawal to the New Mexico Court of Appeals.

The New Mexico Court of Appeals transferred the case to the New Mexico Supreme Court. The New Mexico Court of Appeals determined that the New Mexico Supreme Court, rather than itself, properly had appellate jurisdiction over the motion. It reasoned that because Mr. Freeman's motion for plea withdrawal was filed only once the *Brady* material became public, months after his initial plea, the motion functioned as a petition for a writ of habeas corpus under New Mexico state law. While the New Mexico Court of Appeals has appellate jurisdiction over most direct proceedings, appellate jurisdiction over state collateral proceedings lies only in the New Mexico Supreme Court.

The New Mexico Supreme Court declined to review Mr. Freeman's case. Unlike appeals from direct state proceedings, appeals from a denial of a petition for a writ of habeas corpus are discretionary under New Mexico state law.

Reasons for granting the petition.

This Court should use this case to clarify the types of evidence that the prosecution team may not legally suppress in order to secure a guilty plea. *See Wilde v. Wyoming*, 362 U.S. 607 (1960) (indicating that plea withdrawal may be the appropriate remedy for suppression of exculpatory evidence).

In *United States v. Ruiz*, this Court affirmed the constitutionality of a federal "fast track" plea bargaining program that required criminal defendants to waive their right to disclosure of impeachment and affirmative defense evidence. 536 U.S. 622 (2002). This Court balanced the "due process considerations" at issue and "conclude[d] that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *See id.* at 631-33 (the "fast track" plea agreement required disclosure of evidence of the defendant's "factual innocence"). This Court added that "for most (though not all) of the reasons previously stated," the same was true of the waiver of affirmative defense evidence "in the context of [the federal 'fast track'] agreement." *Id.* at 633.

After *Ruiz*, it is not clear whether prosecutorial suppression of non-impeachment evidence continues to remain a basis for plea withdrawal in a case where evidence was actually withheld, there is evidence of governmental misconduct and a suggestion of innocence, and the defendant actually moved to withdraw his

plea. *See* John G. Douglass, *Can Prosecutors Bluff? Brady v. Maryland and Plea Bargaining*, 57 Case W. Res. L. Rev. 581, 584, 586, 588-89 (2007) ("The question is whether undisclosed *Brady* evidence undermines our confidence in the adjudication of guilt that is based on that plea."); Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651, 663 (2007) ("Neither the fast track agreement nor the Supreme Court's opinion in *Ruiz* identified the theories of relevance that fall within the phrase 'factual innocence.'").

In such circumstances, due process considerations should support the prosecution's constitutional obligation to disclose material, favorable evidence. "*Ruiz* does *not* assert that the prosecutor can withhold important information from the defendant when, as a consequence, the defendant will be misled into thinking that the 'concessions' offered by the prosecutor are valuable when, in fact, they are not." Wayne R. LaFave et al., Criminal Procedure § 21.3(c) (4th ed. 2019); *State v. Huebler*, 275 P.3d 91, 97 (Nev. 2012) ("In our opinion, the considerations that led to the decision in *Ruiz* do not lead to the same conclusion when it comes to material exculpatory information."); Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 Cardozo L. Rev. de novo 138, 148 (2016) (core impeachment evidence includes information regarding promises to prosecution witnesses and the criminal history of prosecution witnesses); Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. Crim. L. & Criminology 1, 64 (2017) (arguing for a modified pre-plea due process balancing).

An affirmative defense is traditionally an issue on which the defendant bears the burden due to the "defendant's knowledge or access to evidence other than his own on the issue." *See Patterson v. New York*, 432 U.S. 197, 211 n.13 (1977) (quoting *People v. Patterson*, 347 N.E.2d 898 (N.Y. 1976) (Breitel, J., concurring)); *Dixon v. United States*, 548 U.S. 1, 8-9 (2006); *Smith v. United States*, 568 U.S. 106, 112 (2013). The suppressed evidence in Mr. Freeman's case is more analogous to exculpatory evidence of "factual innocence" than the impeachment evidence at issue in *Ruiz* because, under New Mexico law, the State constitutionally bears the burden of proving non-entrapment beyond a reasonable doubt, the issue can be raised both pre-trial as a matter of law and at trial as a jury question, and evidence of governmental misconduct may be more readily within the knowledge of the State than the defendant. *See United States v. Nelson*, 979 F. Supp. 2d 123, 131 (D.D.C. 2013) ("Exculpatory evidence is that which would tend to show freedom from fault, guilt or blame." (internal quotation marks and citation omitted)).

"The central question is whether the withholding of material evidence could taint a criminal proceeding so substantially that the defendant's decision to plead guilty could not fairly be called knowing and intelligent." *United States v. Wright*, 43 F.3d 491, 495 (10th Cir. 1994); *Brady v. United States*, 397 U.S. 742, 748 (1970).

1. The Federal Circuit Courts and State Courts are divided on the question.

The Federal Circuit Courts and State Courts are divided on the question whether a *Brady* violation constitutes a legally sufficient basis for plea withdrawal.

The Seventh, Ninth, and Tenth Circuits have answered the question in the affirmative. *See McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) ("*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence."); *Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007) ("When the accused enters a plea rather than proceeding to trial, however, materiality is determined by whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial." (internal quotation marks and citation omitted)); *United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005) ("By holding in *Ruiz* that the government committed no due process violation . . . , the Supreme Court did not imply that the government may avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government's possession."); *see also United States v. Ellsbury*, 528 F. App'x 856, 858 (10th Cir. 2013) ("[W]ith respect to non-impeachment evidence, a movant challenging the voluntariness of his plea must show that but for the failure to produce such information he would not have entered the plea but instead would have insisted on going to trial." (internal marks and citations omitted)).

The Fifth Circuit has taken the opposite view. *See United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009) ("[A] guilty plea precludes the defendant from asserting a *Brady* violation."). The First and Second Circuits have also expressed doubts as to whether *Brady* applies to guilty pleas without deciding the question. *See United States v. Mathur*, 624 F.3d 498, 507 (1st Cir. 2010) ("[T]he right memorialized

in *Brady* is a trial right."); *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010) ("[T]he reasoning underlying *Ruiz* could support a similar ruling for a prosecutor's obligations prior to a guilty plea").

Notably, while the Fourth Circuit has expressed generalized doubts about *Brady*'s application to guilty pleas, *United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010) ("The *Brady* right, however, is a *trial* right."), it has also recognized that a *Brady* violation concerning evidence of law enforcement misconduct may render a plea insufficiently knowing, intelligent, and voluntary. *See 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."); *cf. Commonwealth v. Scott*, 5 N.E.3d 530 (Mass. 2014) (reaching a similar holding and discussing *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006)).

The Sixth Circuit has stated that the obligation to disclose *Brady* materials prior to a guilty plea is not clearly established. *See Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014) ("We do not decide whether appellants have a constitutional right to receive exculpatory *Brady* material from law enforcement prior to entering into a plea agreement.").

State courts are similarly split. *Compare Buffey v. Ballard*, 782 S.E.2d 204, 216 (W. Va. 2015) ("[A] defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage."); *Huebler*, 275 P.3d at 96-97 ("We are persuaded by language in *Ruiz* and due-process considerations that a defendant may challenge

the validity of a guilty plea based on the prosecution's failure to disclose material exculpatory information before entry of the plea."); *Medel v. State*, 184 P.3d 1226, 1234 (Utah 2008) ("Surely, if there is any evidence suggesting factual innocence—even if it is impeachment evidence—the prosecution will always have a constitutional obligation to disclose that evidence to the defendant before plea bargaining begins."); *with Ex Parte Palmberg*, 491 S.W.3d 804, 814-15 (Tex. Crim. App. 2016) ("But even assuming that the constitutional mandate to disclose exculpatory evidence to defendants under *Brady v. Maryland* extends to the plea bargaining stage of a prosecution, it certainly cannot apply where there is no exculpatory evidence to disclose.").

This Court should grant its writ of certiorari to clarify and unify the law with respect to this important federal constitutional question.

2. The question presented is a matter of significant public importance.

"[C]riminal justice today is for the most part a system of pleas, not a system of trials." *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). This Court has stated that, "[a]lthough the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, [] it does speak to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). In order to have a constitutionally fair system of plea bargaining, it is essential that a criminal defendant have, at a minimum, the right to effective assistance of counsel and the disclosure of *Brady* material:

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," *Lafler, post,* at 1388, 132 S.Ct. 1376, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

Missouri v. Frye, 566 U.S. 134, 143-44 (2012); *see also* Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 Wash. & Lee L. Rev. 285, 290 n.15 (2016) (quoting Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1624 (2005) ("[B]road discovery partially compensates for restricted defense counsel; it helps make up for the deficiency in adversary process of constrained defense advocacy.")); Russell D. Covey, *Plea-Bargaining Law After Lafler and Frye*, 51 Duq. L. Rev. 595, 623 (2013) ("The justification for demanding effective legal assistance of counsel at the plea-bargaining stage is predicated on . . . an educated evaluation of the strength of the state's case and of any affirmative defenses that might be available"); Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland*, 38 N.Y.U. Rev. L. & Soc. Change 407, 408 (2014) ("Following the U.S. Supreme Court's recent decisions on plea bargaining, the time has come to reexamine the *Brady* standard in the specific and predominate context of plea bargaining."); Máximo Langer, *Rethinking Plea Bargaining*, 33 Am. J. Crim. L. 223, 299 (2006); I. Bennett Capers, *The Prosecutor's Turn*, 57 Wm. & Mary L. Rev. 1277 (2016); Michael Nasser Petegorsky, *Plea*

Bargaining in the Dark, 81 Fordham L. Rev. 3599, 3647-48 (2013); James M. Grossman, *Getting Brady Right*, 2016 B.Y.U. L. Rev. 1525, 1558 (2016).

"There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978). Mr. Freeman argues that constitutional due process does not permit the withholding of exculpatory *Brady* material during plea negotiations. *Cf. id.* at 363 ("Defendants 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.").

3. This case is an excellent vehicle for this Court to address the question.

This case presents a pure question of federal constitutional law. The Twelfth Judicial District Court of New Mexico denied Mr. Freeman's motion because it held as a matter of law that the State's suppression during plea negotiations of material, exculpatory evidence of entrapment could not establish a legal basis for plea withdrawal. Mr. Freeman argued at each stage of the proceedings that the evidence went beyond mere impeachment evidence and that, but for the State's suppression, he would not have pled guilty. The State acknowledged that it would have been constitutionally obligated to disclose the evidence pursuant to *Brady v. Maryland*. Under New Mexico law, an appellate court reviews the denial of collateral relief premised upon a legal conclusion *de novo*, with no deference given to the lower court.

Dominguez v. State, 348 P.3d 183, 187 (N.M. 2015).

The undisputed facts raise the issue whether a guilty plea obtained as a result of a *Brady* violation but made after a risk/benefit analysis is constitutionally valid.

4. The New Mexico Courts erred in denying Mr. Freeman relief.

The Constitution does not permit the State to obtain a guilty plea by suppressing material, exculpatory evidence for several reasons.

A. Innocence. "Pleading guilty does not automatically mean the defendant is *actually* guilty." *Schmidt v. State*, 909 N.W.2d 778, 788 (Iowa 2018); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2495, 2531 (2004) ("Prosecutorial bluffing is likely to work particularly well against innocent defendants"). Allowing prosecutors, or law enforcement members of the prosecution team; to withhold material evidence during plea negotiations systemically increases the prevalence of innocent defendants pleading guilty and being wrongfully convicted. *Cf. Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring) ("The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses."); *Brady*, 397 U.S. at 758 (plea bargaining "is no more foolproof than full trials").

B. Deterrence. The rule of *Brady* is rooted not only in a criminal defendant's individual constitutional right to due process, but also in the recognition that due

process requires safeguards that deter law enforcement misconduct before and during the plea negotiation process. *See Fisher*, 711 F.3d at 469 ("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."); Bibas, *supra* at 2466 ("[T]rial safeguards such as exclusionary rules and entrapment defenses are designed to deter police misconduct. If plea bargains in fact mirror trials, then these rules continue to work well in a world of guilty pleas."). This Court should review Mr. Freeman's case and hold that when the State suppresses *Brady* material for long enough to induce an innocent defendant into pleading guilty, it does not get to keep the conviction. *Cf.* Brief for the Center of the Administration of Criminal Law at NYU School of Law in Support of Petitioner, *Stein v. United States*, No. 20-326, at 14-15 (Oct. 2020) ("This emphasis on conviction rates encourages prosecutors to employ all legally available tactics to obtain convictions."); *Brady*, 373 U.S. at 88 ("That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice").

C. Balance of Power. Allowing a criminal defendant to withdraw his plea in light of a *Brady* violation is a necessary counterbalance for the vast and largely unchecked power of the prosecutor. *Cf.* Note, *Comparative Domestic Constitutionalism: Rethinking Criminal Procedure Using the Administrative Constitution*, 119 Harv. L. Rev. 2530, 2542-43 (2006) ("In the criminal context, the balance shifts dramatically toward expediency."). "The real question in cases where defendants plead guilty, then, should not be whether the plea of any individual

defendant is voluntary or knowing, but whether there is a sufficient check on prosecutors' use of the bargaining power." Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1049 (2006). The requirement that the prosecution may not secure a guilty plea through the suppression of material, exculpatory evidence is a modest procedural corrective of the plea bargaining system.

D. Institutional Legitimacy. "Our system's informational rules are the foundation on which much of the legitimacy of our criminal process depends. These rules validate the all-important outcome--the legal declaration of guilt--and explain why the system's answers about guilt should be accorded weight and respect. When these rules and principles are devalued, the outcomes are devalued as well." Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 Cardozo L. Rev. 965, 1020 (2008); *Buffey*, 782 S.E.2d at 218. In particular, recognition of a criminal defendant's right to withdraw a guilty plea obtained as a result of a serious *Brady* violation comports with the ideal that equally situated defendants should receive equal treatment of the law. *Cf. Fisher*, 711 F.3d at 469-70 ("Defendant should not be penalized because he did not discover [the officer's] misconduct earlier. In another case[,] . . . the suspect had not yet been sentenced . . . [and] the government allowed the suspect to plead to a less serious offense").

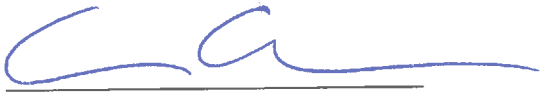
E. Efficiency. "Lived experience refutes the notion that the rule advanced here would hamper the resolution of criminal cases through guilty pleas." Brief of Amici Curiae Former State and Federal Prosecutors in Support of Affirmance, *Alvarez v. City of Brownsville*, No. 16-40772, 2018 WL 447039 (CA5), at 17 (Jan. 10, 2018); Ion

Meyn, *Flipping the Script on Brady*, 95 Ind. L.J. 883, 913 (2020) (attempting to "recast[] *Brady* as a potential prosecutorial ally"). Indeed, "the prosecution usually cannot point to a good reason why it would want to withhold non-impeachment *Brady* evidence other than to try to convince someone to accept a deal that she would not otherwise accept." Charlie Gerstein, *Plea Bargaining and Prosecutorial Motives*, 115 U.N.H. L. Rev. 1, 4 (2016). Permitting withdrawal when a *Brady* violation reasonably undermines confidence in a guilty plea "clothes a voluntary guilty plea with a strong, but not conclusive, presumption of finality." *See* Douglass, *supra* at 589-90 ("*Brady* functions as a kind of safety net for innocence").

Conclusion

Mr. Freeman was entrapped by police and then deceived into pleading guilty. Under these circumstances, his plea was not knowing, intelligent, and voluntary. This Court should grant its writ of certiorari to clarify that prosecutors and the prosecution team may not withhold material, exculpatory evidence of an entrapment defense in order to induce a criminal defendant into pleading guilty.

Respectfully submitted,



Charles D. Agoos
Attorney of Record
Assistant Appellate Attorney
Law Offices of the Public Defender
1422 Paseo de Peralta, Bldg. 1
Santa Fe, New Mexico 87501
(505) 395-2890
Charles.Agoos@lopdnm.us

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