No. 22-186

IN THE

Supreme Court of the United States

TROY MANSFIELD,

Petitioner,

v.

WILLIAMSON COUNTY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Texas Civil Rights Project ("TCRP") is a non-profit organization made up of Texas lawyers and advocates who strive to advance the civil rights of Texans. Using litigation and other advocacy tools, TCRP's Criminal Injustice Reform program works to remedy injustices in Texas' criminal legal system for those suffering inside and outside of jails and prisons. TCRP offers the Court the perspective of practitioners and legal advocates whose work focuses on the most harmful practices in the criminal legal system, those that lead to severe miscarriages of justice.[1]

TCRP submits this brief in support of the Petition because the issue it presents—whether a criminal defendant has a constitutional right to the disclosure of exculpatory evidence at the time a guilty plea is being negotiated, and not just prior to trial—is of the utmost importance to the work TCRP does in seeking to ensure the fair and equitable administration of justice on behalf of Texans caught up in the state and federal criminal legal systems. The issue directly affects the cases, and the lives, of those on whose behalf TCRP regularly litigates and advocates. TCRP hopes that its perspective on the issue, and on the lives and cases of the people for

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief, and the required ten days' advance notice of intent to file was given to both parties in accordance with Rule 37.2(a).

whom it advocates, will assist the Court in deciding whether to grant the Petition.

SUMMARY OF ARGUMENT

In the current "system of pleas" that is the modern American criminal process, poor people and people of color often have little or no bargaining power in plea negotiations. Less-resourced defendants—who are usually unable to hire private counsel and are frequently incarcerated while awaiting trial—often agree to unjust and inequitable plea deals. In the most extreme examples of the consequences of this imbalance, innocent people like Petitioner plead guilty to crimes they did not actually commit. Given the ubiquity of guilty pleas, and the compounding challenges created by the environment in which many defendants are forced to consider them, it is critical that the Court take up the question presented by the Petition: whether the rule announced in *Brady v. Maryland*, 373 U.S. 83 (1963), applies at the plea negotiation stage.

In *Brady* the Court held that the right to due process of law guaranteed by the Fourteenth Amendment to the U.S. Constitution requires prosecutors to disclose to a charged criminal defendant evidence that "would tend to exculpate" the defendant. 373 U.S. at 87. The "*Brady* Rule" is fundamental to ensuring that those accused of crimes are treated fairly in America's criminal justice system, in that case by providing them with more accurate information about the strength of the case

against them. Indeed, as the Court then observed, "our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87.

With respect to the timing of the required disclosure, though, the Court in *Brady* was, for the most part, silent. Aside from plainly requiring the disclosure of exculpatory evidence to occur prior to trial, *Brady* itself did not specify *when* in the course of a criminal proceeding the obligation to disclose exculpatory evidence is triggered. The intervening years have seen a deep split in authority arise over the timing question, and specifically whether *Brady* requires the disclosure of exculpatory evidence during pretrial plea negotiations. On one side of the split, Texas is among the jurisdictions that has recognized that a defendant's right to exculpatory evidence "extends to guilty pleas..." *Ex parte Lewis*, 587 S.W.2d 697, 700 (Tex. Crim. App. 1979). As the Petition explains, Pet. at 14, five of the federal Circuits—the Sixth, Seventh, Eighth, Ninth and Tenth—and the highest courts of four other States align with Texas on the issue. Ironically, though, the Fifth Circuit (wherein Texas lies), along with the First, Second, and Fourth Circuits, have ruled that *Brady* does not apply to plea bargaining. *Id.*

It is critical that the Court resolve this split and clarify when the *Brady* Rule is triggered, an issue now more pressing than at any time since *Brady* was

decided.[2] When *Brady* came down in 1963 a relatively high percentage of criminal cases proceeded to trial—that is, to the point in the proceedings at which *Brady* applied on its face. Nearly 60 years later, though, "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). As TCRP has seen with its own clients, guilty pleas have become the norm, and are so routine that many defendants barely consider going to trial. For these reasons, the issue presented by the Petition is well worth consideration by the Court.

This Court should grant *certiorari* to reverse the Fifth Circuit's holding that *Brady* is merely a trial right. Requiring disclosure of exculpatory evidence during plea negotiations makes sense given the predominant role of guilty pleas in modern criminal procedure. It can also help remedy the imbalances described herein, some of them systemic, in America's "system of pleas," and to ensure that all people accused of crimes are afforded due process of law. As this brief will explain, plea negotiations are seldom, if ever, conducted on a level playing field. Requiring that negotiating defendants be provided with a more accurate view of their cases can mitigate those inequities, especially for disadvantaged defendants.

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[2] Issues caused by failing to apply *Brady* at the plea negotiation stage appear to be reoccurring with relative frequency. Only four years ago, a petition for writ of *certiorari* was submitted to this Court on the very same issue. *Alvarez v. City of Brownsville,* 904 F.3d 382, 385-86 (5th Cir. 2018), *cert. denied,* 139 S. Ct. 2690 (2019).

ARGUMENT

I. The Criminal Legal System Today Is An Unequal "System of Pleas" In Which Disadvantaged Defendants Have Little Bargaining Power

When *Brady* was decided in 1963, "between one-fourth and one-third of state felony charges led to a trial." Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC (Sept. 2017).[3] That number has fallen radically since 1963; today as many as "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012); *see also Lafler*, 566 U.S. at 170.[4] A criminal trial—what Justice Scalia once described as "the gold standard of American justice... with its innumerable

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[3] Available at: www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/.

[4] According to statistics compiled by the Texas Judiciary for 2021, 96% of criminal cases in Texas district courts were resolved through pleas. OFFICE OF COURT ADMINISTRATION, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2021, at 60, *available at* https://www.txcourts.gov/media/1454127/fy-21-annual-statistical-report-final.pdf. Similarly, in Texas statutory county courts, 99% of criminal cases were resolved through pleas. *Id.* at 67. In 2021 alone, more than seventy thousand (70,000) criminal cases were disposed of by guilty or *nolo contendere* pleas in Texas district courts, *id.* at 105-06, while more than ninety thousand (90,000) misdemeanor cases were resolved through guilty or *nolo contendere* pleas. *Id.* at 115–16.

constitutional [guarantees]"—is to some extent a relic of the past. *See Lafler*, 566 U.S. at 186 (Scalia, J., dissenting). Thus, for decades now, plea bargaining has been "'not some adjunct to the criminal justice system; it *is* the criminal justice system.'" *Frye*, 566 U.S. at 144 (*quoting* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992) (emphasis in article)).[5]

The modern context in which plea negotiations frequently take place, though—that is, under the specter of cash bail and pretrial detention, by defendants appointed overburdened legal counsel, and with structural advantages that favor prosecutors—concentrates bargaining power with the prosecution, to the detriment of the historically disadvantaged. These forces foster an unequal, unbalanced system, in which an accused must gamble with their liberty and proceed to trial in order to be afforded constitutional rights. The result is often unduly harsh outcomes, and even, in cases like this one, an innocent person being leveraged into pleading guilty—perhaps the ultimate unfair result.

As TCRP explains in the following sections, the environment in which plea negotiations are conducted is for many (and maybe most) defendants

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[5] In the early years of our country, the judiciary actually discouraged plea bargaining. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5 (1979). However, by the end of the nineteenth century and beginning of the twentieth century, plea bargains had "bec[o]me a dominant method of resolving criminal cases." *Id.* at 6.

not a balanced one. By granting the Petition, the Court can consider whether applying the *Brady* Rule at the plea negotiation stage could help level that uneven playing field.

A. Cash bail and pretrial detention force poor defendants and defendants of color to fight their charges from a jail cell.

The current environment in which plea negotiations are conducted is already structurally unfair to many people accused of crimes. One way this unfairness manifests itself is the increasing prevalence of pre-trial detention. In America's contemporary "system of pleas," a significant number of criminal defendants are unable to afford bail, and are forced to wait in jail until the adjudication of their cases. *See* Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas,* 31 CRIM. J. POL'Y REV. 1015, 1016 (2020). For example, over the last 25 years in Texas, the number of defendants held in pretrial detention rose from just over 32 percent to nearly 75 percent. *See* TEXAS JUDICIAL COUNCIL, CRIMINAL JUSTICE: COMMITTEE REPORT & RECOMMENDATIONS 2 (2016)[6]. Indeed, as of September 21, 2022, 8,178 of the 10,040 individuals (approximately 80%) held in the Harris County jail in Houston were accused individuals who were being held pre-trial. *See* Harris

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[6] Available at: https://www.txcourts.gov/media/1436204/criminal-justice-committee-pretrial-recommendations-final.pdf

County, Tex., *Jail Population* (accessed Sept. 27, 2022).[7] Similarly, during 2014 and 2015 in Harris County, 40.3 percent of misdemeanor arrestees remained in custody until the disposition of their case. *See O'Donnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1114 (S.D. Tex. 2017). The result of the increases in numbers of pretrial detainees is that many defendants who are too poor to pay for their release are forced to fight their charges from inside a jail cell even though they are legally presumed innocent.

This increased use of pretrial detention has had real-life consequences. Indeed, a number of studies have confirmed what TCRP knows from its own work representing clients who are in jail before trial: awaiting trial behind bars negatively affects dispositions and sentencing decisions. *See* Petersen, s*upra*, at 1017. Specifically, research has indicated a strong correlation between pretrial detention and conviction through guilty pleas, longer sentences imposed, and even recidivism. *See id.* at 1017 ("[P]retrial detainees are more likely to be prosecuted, convicted, incarcerated, have lengthier sentences, and recidivate at higher rates." (citations omitted)); *see also* Ram Subramanian, Leon Digard, Melvin Washington II & Stephanie Sorage, *In the Shadows: A Review of the Research on Plea Bargaining*, 2020 VERA INST. JUST. 1, at 11. Similarly, a 2018 study examining 76,000 arrests in Delaware showed that the likelihood of a defendant pleading guilty

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[7] Available at:
https://charts.hctx.net/jailpop/App/JailPopCurrent

increased by 46 percent when they were held in pretrial detention. Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 805 (2018). And another study looking at 331,971 cases in Philadelphia from 2006 to 2013 found that pretrial detention resulted in a 4.7 percent increase in the likelihood of a guilty plea from someone who otherwise would have been acquitted, diverted, or had their charges dismissed. *See* Subramanian, *et al.*, *supra*, at 13.

While researchers have only just begun to explore the relationships behind these statistics, it is intuitively easy to explain these patterns. The poor conditions of confinement in jails, including overcrowding, violence, and dramatically higher rates of infectious diseases like tuberculosis and HIV, weigh heavily on people detained pretrial. *See* Petersen, *supra*, at 1017-18. Additionally, pretrial detainees incur challenges beyond the walls of their jail cell by facing the potential loss of their homes, their jobs, or even their families and children while they are locked up. *Id.* at 1018.

Studies also show that racial disparities in the application of pretrial detention also drive innocent people to plead guilty and lead to worse outcomes than would otherwise be expected. Generally, White defendants are considerably more likely to have their most serious charges dropped or reduced in a negotiated plea than are Black defendants. *See* Carlos

Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1215 (2018) ("[W]hite defendants are over twenty-five percent more likely than black defendants to see their top charge dropped or reduced [in a plea deal] than black defendants."). And statistics also show that Black defendants are more likely to be held in pretrial detention than similarly situated White defendants, which in turn leads to harsher sentencing outcomes. *See* Subramanian, *et al.*, *supra*, at 26. "In this way, people of color... face 'cumulative disadvantage' in the criminal legal system, and their increased vulnerability to pretrial detention in turn increases the likelihood that they will receive a worse plea deal than white people..." *Id.*

Faced with such insurmountable pressure, many poorer defendants and defendants of color find that the costs of pretrial detention far outweigh the potential future benefits of continuing to fight their cases from jail. *See* Petersen, *supra*, at 1018. Individuals who must consider plea bargains while incarcerated are severely disadvantaged, as prosecutors have substantial leverage that they can use to swiftly secure guilty pleas regardless of the individual's factual guilt or innocence. *See id.* at 1017. As one TCRP client poignantly put it, "I had no idea what was happening. I just knew I wanted to get out."[8]

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[8] Many of TCRP's clients have faced the choice between seeing their loved ones and keeping a job or staying in jail to fight their cases. Some choose to maintain their innocence and spend

B. Often represented by overburdened appointed counsel, indigent defendants struggle to get adequate information to evaluate their cases.

As guilty pleas have increased in frequency, this Court has on several occasions considered how the requirement of effective assistance of counsel applies in the context of plea negotiations. As a general matter, of course, "the proper standard for attorney performance is that of reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court has on several occasions considered how that standard applies to the negotiation of guilty pleas. In *Frye* for example, the Court held that defense attorneys must share all plea offers with their client and advise them regarding whether to accept or reject them. 566 U.S. at 145. And in *Lafler*, the Court held that providing unsound legal advice during the plea-bargaining process can constitute ineffective assistance of counsel. 566 U.S. at 162–63. Despite these and similar holdings though, many indigent defendants, including many defendants of color, find themselves represented by overworked and overburdened appointed counsel incapable of providing effective assistance.

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months or years detained indefinitely awaiting trial. Others simply take the first offer presented, knowing they have a loved one they must care for. There is no correct choice, only one where the prosecutor holds all the cards while TCRP's clients, and many like them, make incalculably important decisions while confined to a cell.

Relying on a study examining the workload of public defenders in Louisiana, the American Bar Association has identified, on average, how much time an attorney *should* spend in providing adequate representation in certain types of criminal cases. *See The Louisiana Project: A Study of the Louisiana Defender System and Attorney Workload Standards*, 2017 A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS 1.[9] According to this report, low-level felonies, mid-level felonies, high-level felonies (crimes carrying sentences of ten years or more), and felonies punishable by life without parole require, on average, 21.99 hours, 41.11 hours, 69.79 hours, and 200.67 hours of attorney time, respectively. *Id.*

As a practical matter, though, these benchmarks have been impossible to meet, especially for lawyers appointed to represent indigent clients. For example, the New York Times has reported that at least one Louisiana public defender was assigned 194 felony cases in a given year, a caseload appropriate for five full-time lawyers. *See* Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony*

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[9] Available at: americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf. Similar workload reports and studies have been compiled by the ABA for Oregon, Rhode Island, New Mexico, Indiana and Missouri. *See* https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/publications/.

Cases, and No Time, N.Y. TIMES, Jan. 31, 2019.[10] Statistics like this show what is already generally understood by criminal defense practitioners; despite the standards set forth in *Frye* and *Lafler*, many poor defendants struggle to obtain adequate information to fight their charges because they are appointed overburdened and overworked counsel.

C. Prosecutors have unbalanced structural advantages in plea negotiations.

Further compounding the effect of the unequal administration of justice on less resourced individuals is the fact that prosecutors have a structural advantage in plea negotiations. Most plea bargaining occurs informally and behind closed doors. *See* Meghan J. Ryan, *Criminal Justice Secrets,* 59. AM. CRIM. L. REV. 1541, 1556 (2022). Records of negotiations or plea offers are not consistently kept, and even final plea agreements are often not reduced to writing. *Id.* This closed framework benefits only the prosecutor by foreclosing the possibility of individuals accused of crimes—and their counsel—fully assessing the quality of their offer by comparing it with plea

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[10] Available at: https://www.nytimes.com/interactive/2019/01/31/us/ppubli-defender-case-loads.html. Even if all of this attorney's 194 cases were only low-level felonies, per the ABA's figures he would have needed to put in approximately 4,266.06 hours to provide his clients with effective representation (194 felony cases X 21.99 hours = 4,266.06 hours)—that is, more than 82 hours a week, every week, for a year.

deals other similarly situated defendants are offered. *Id.*

Because they lack information about what plea offers prosecutors make to others for similar crimes, similarly situated defendants may be treated differently—particularly based on their economic status or race. *Id.* at 1585. Scholars have indeed found striking racial and economic disparities in finalized plea deals. *See* Berdejo, *supra*, at 1190-91 (documenting "striking racial disparities" in plea bargaining); *see also* Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 993 (2021) ("There is some preliminary evidence to suggest that similarly situated defendants are not treated consistently in plea bargaining. When scholars have been able to access and review plea, charging, and sentencing data, they have found disparities on the basis of wealth and race.").

While no two cases are ever exactly the same, the danger of prosecutors treating similarly situated defendants differently, including based on race or economic status, is of great constitutional concern. *See* Ryan, *supra*, at 1586 ("The Court has expressed its apprehension about similarly situated criminal defendants being treated differently."). Unequal treatment of that kind is an important aspect of the context in which the Court can, if it grants the Petition, consider the value of applying the *Brady* Rule at the plea negotiation stage.

In addition to the opacity of the system, prosecutors also have another structural advantage in negotiating plea agreements—their control over the charging decision itself. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty,* THE NEW YORK REVIEW OF BOOKS (Nov. 20, 2014)[11] ("[I]t is the prosecutor, not the judge, who effectively exercises the sentencing power, albeit cloaked as a charging decision."). Through their charging decision, prosecutors are effectively unconstrained in their ability to try to induce a guilty plea by filing or threatening to file charges that carry risks of a harsh sentence, and then offering substantial leniency in exchange for pleading guilty.[12] *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *see also* Bruce A. Green, *The Right to Plea Bargain with Competent Counsel after Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process Too Long, Too Expensive, and Unpredictable in Pursuit of Perfect Justice,* 51 DUQ. L. REV. 735, 739–40 (2013). Indeed, the Court has recognized that in plea negotiations, "[t]he prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." *Bordenkircher*, 434 U.S. at 364. Accordingly, there is a strong incentive for prosecutors to overcharge defendants—especially those subject to

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[11] Available at: http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

[12] It is precisely that threat that Petitioner faced, and that the Fifth Circuit referred to below as his "Hobson's choice." Pet. App. 3a.

pretrial confinement, as discussed *supra*—to give themselves an advantage and "start the 'bidding.'" John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 181 (2014) (citing Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms,* 126 HARV. L. REV. 150, 154 (2012) (noting that the current charging system is akin to "sticker price" on a new car—it is not intended to be the sale price, and only a fool would pay it)).

Finally, while some jurisdictions have statutes or rules that provide guidelines and limits on plea negotiations, *see, e.g.*, FED. R. CRIM. P. 11; ARIZ. R. CRIM. P. 17.4; COLO. R. CRIM. P. 11(f), plea bargaining is, "for the most part, an unregulated 'industry.'" *See* Blume, *et al., supra,* at 165. And even where minimal regulations are present, they generally only focus on whether a plea was made knowingly and intelligently. *See, e.g.*, *Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); FED. R. CRIM. P. 11(b)(2); *see also Bordenkircher*, 434 U.S. at 363.

As a result, with these structural advantages discussed above, prosecutors have effectively unfettered bargaining power in plea negotiations. This power in turn is often used unfairly by prosecutors with respect to less resourced individuals,

who can be induced, in the face of perceived risks, to agree to results that might instead be fought off by defendants who are not incarcerated and/or who can afford private counsel. In other words, for much of the historically disadvantaged population accused of a crime, "[t]he prosecutor is now the proverbial judge, jury, and executioner in the mine-run of cases." 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).[13]

For all these reasons, many of which are unlikely to change, parties to plea negotiations do not operate on equal footing, all the more so for disadvantaged defendants. The Court should grant the petition to consider whether requiring disclosure of exculpatory evidence at the plea negotiation stage to all criminal defendants, including (but not limited to) those who are otherwise disadvantaged by race or economic status, will help the system operate on a more equal basis.

II. The Current Plea-Bargaining System Coerces Innocent People to Plead Guilty.

The idea that an innocent person would plead guilty to a crime he or she did not commit was once thought apocryphal in American criminal law. *See*

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[13] Available at: https://www.brennancenter.org/ourwork/analysisopinion/reduce-federal-crimes-and-givejudgesflexibility.

Ellen Yaroshefsky, *Ethics and Plea Bargaining*, 23-FALL CRIM. JUST. 28, 29 (2008). However, this once conventional wisdom does not stand up to scrutiny. *Id.* Rather, as the instant case shows, plea bargaining in America so stacks the deck against less resourced individuals through the use of pretrial detention, overburdened appointed counsel, and a prosecutor-friendly structure, that even innocent people plead guilty on a regular basis. *See id.*

The instant case provides only one such example. In 2015, the National Registry of Exonerations reported that fifteen percent of all exonerees nationwide originally pleaded guilty to crimes they did not commit. *Innocents Who Plead Guilty*, NAT'L REGISTRY OF EXONERATIONS (Nov. 24, 2015).[14] Similarly, data compiled by the Innocence Project indicates that 38 of the 353 individuals exonerated by DNA since 1989—or approximately eleven percent—originally pleaded guilty. *See DNA Exonerations in the United States*, INNOCENCE PROJECT.[15] In another study, researchers found that 56.4 percent of "innocent" participants accepted a plea offer. Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative*

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[14] Available at: https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf.

[15] Available at: https://www.innocenceproject.org/dna-exonerations-in-the-united-states/.

Empirical Study of Plea Bargaining's Innocence Problem, 103 J. CRIM. L. & CRIMINOLOGY 1, 34 (2013).

Perhaps nowhere is it more evident that innocent people do plead guilty than in Harris County, Texas. Unlike most other places in America, Harris County operates a drug lab that continues to test substances collected by police even after a case has concluded. *See* Subramanian, *et al.*, *supra*, at 47. Using this lab, the County has uncovered hundreds of criminal cases in which innocent people had pleaded guilty to drug possession, particularly so with misdemeanor charges. *Id.* After examining misdemeanor cases, it was discovered that the majority of individuals pleaded guilty so they could be released from jail because they otherwise could not afford bail; pleading not guilty would likely have resulted in several more months in pretrial detention, with the looming possibility of years in prison if convicted at trial. *Id.* "Ultimately, [this] research shows what is known intuitively—that cases exist in which the plea offer made, and the opportunity to be released from jail, effectively coerce people who are factually innocent into pleading guilty." *Id.*[16]

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[16] Recently, Texas has had several high-profile cases involving wrongful guilty pleas. For example, Christopher Ochoa falsely pleaded guilty to rape and murder in order to avoid a death sentence, and later falsely testified against Richard Danziger. However, both men were exonerated after serving twelve years in prison when DNA testing confirmed another man committed the crimes. *See State v. Oakley*, 227 S.W.3d 58, 59 (Tex. 2007); *see also Ex parte Ochoa*, No. AP-74,246 (Tex. Crim. App. Dec. 19, 2001) (unpublished *per curiam* opinion); *Ex parte Danziger*, No.

Just how often innocent people plead guilty across the nation is unknown. As Judge Rakoff has written:

> How prevalent is the phenomenon of innocent people pleading guilty? The few criminologists who have thus far investigated the phenomenon estimate that the overall rate for convicted felons as a whole is between 2 percent and 8 percent. The size of that range suggests the imperfection of the data; but let us suppose that it is even lower, say, no more than 1 percent. When you recall that, of the 2.2 million Americans in prison, over 2 million are there because of plea bargains, we are then talking about an estimated 20,000 persons, or more, who are in prison for crimes to which they pleaded guilty but did not in fact commit.

See Rakoff, *supra*.

AP-74,244 (Tex. Crim. App. Dec. 19, 2001) (unpublished *per curiam* opinion).

III. Whether The Court Should Require Disclosure Of Exculpatory Evidence When Guilty Pleas Are Being Negotiated, And The Effect of Such A Requirement On Our "System Of Pleas," Merits The Court's Consideration.

In light of the circumstances in which plea bargaining is conducted, whether to apply the *Brady* Rule to require the production of exculpatory evidence during plea negotiations raises an important question, and one of widespread impact. Applying the *Brady* Rule at the time a plea is being negotiated can help to remedy the imbalance that currently characterizes our current broken "system of pleas." Providing individuals detained pre-trial with exculpatory evidence would add fairness to the decision of whether to plead guilty. In the plainest terms, it would allow people, including those often disadvantaged in the system, to make critical decisions based on more accurate information about the strengths and weaknesses of their cases. For some, it would make clear that the plea offer they have received is fair and is their best course of action. But for others, receiving exculpatory evidence at the time they are weighing whether to plead guilty will at the very least allow them to evaluate their cases and assess its risks more accurately, and may also help them to avoid the harmful effects of the imbalances in the system described above.

Taking up the question of whether applying *Brady* at the time plea negotiations are conducted will

also allow the Court to consider how earlier application of the *Brady* Rule will help ensure that all counsel, including appointed (and often overburdened) counsel, can meet the standards for effective representation set forth in *Strickland*, *Frye* and *Lafler*. "Competent representation requires analysis of the charges against the accused, as well as an independent investigation and evaluation of the evidence likely to be provided to the grand jury and/or admitted at trial." *Towards More Transparent Justice: The Michael Morton Act's First Year*, 2015 TEXAS APPLESEED & TEXAS DEFENDER SERVICE, at 27.[17] By requiring the disclosure of exculpatory evidence at the stage at which a case is most likely to be resolved, rather than waiting until the eve of trial, the Court can ensure that defense counsel are better equipped to provide their clients with competent advice about the value of a plea offer and the risks of turning it down. This in turn will both foster effective representation of criminal defendants generally and help to reduce the economic and racial disparities that exist in plea bargaining today.

In addition, requiring disclosure of exculpatory evidence before a person negotiates a guilty plea will help mitigate the negative effects of the existing power imbalance between prosecutors and defendants by counteracting the many structural advantages that favor prosecutors. The Court has recognized this

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[17] Available at: https://www.texasappleseed.org/sites/default/files/2015MortonAct-FinalReport.pdf.

asymmetry, noting that prosecutors may change their mind at any time in a proceeding: "The State may rethink its commitment at any point: it may choose not to seek indictment in a felony case, say, or the prosecutor may enter *nolle prosequi* after the case gets to the jury room." *Rothgery v. Gillespie County*, 554 U.S. 191, 210 (2008). This dynamic again places the power of informed decision-making in the hands of prosecutors. By addressing the important issue of the imbalance of information that currently exists in jurisdictions where the *Brady* Rule is not applied prior to trial, the Court can consider how it can help ensure all defendants have a clear picture of the risks they face and that similarly situated people are treated equally without regard to their economic status or race.

It is axiomatic that a negotiation in which the parties have equal and accurate information is more likely to produce a fair result. But in the current environment, in which overloaded public defenders try to provide effective counsel to incarcerated clients while negotiating with prosecutors who hold all the cards, whether those lawyers and clients are entitled to accurate information about the risks they are assessing is an issue that merits the Court's consideration. It is likely that prosecutors will always have structural advantages on their side, especially with respect to charging decisions. The risk assessment inherent in plea bargaining, a process that resolves more than nine in ten American criminal proceedings, should at least be based on

accurate information—including information that, by exculpating an individual, will foster better-informed decisions.

By granting the Petition and applying *Brady* to plea negotiations, this Court will confirm the due process protections guaranteed by the Constitution[18]— "[f]airness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections." *Moran v. Burbine*, 475 U.S. 412, 467 (1986) (Stevens, J., dissenting).

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[18] Contrary to what Respondent may argue, the Court would not be "creating" new constitutional rights or expanding existing rights for criminal defendants by applying *Brady* at the plea negotiation stage. Nowhere does the Fourteenth Amendment specify that due process is only a trial right, *see* U.S. CONST. amend. XIV, § 1, and no such limitation should be read into its text.

CONCLUSION

For the forgoing reasons, the Petition for a writ of *certiorari* should be granted.

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Respectfully submitted,

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