No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2021

ROBERT BETHEL,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition of Certiorari to The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled

Rachel Troutman (0076741)
Lead Counsel
Supervising Attorney, Death Penalty Dept.
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (Fax)
rachel.troutman@opd.ohio.gov

Joanna Sanchez (0087717)
Co-Counsel
Director, Wrongful Conviction Project
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (Fax)
joanna.sanchez@opd.ohio.gov

Counsel for Petitioner Robert Bethel

CAPITAL CASE

QUESTION PRESENTED

In *Brady v. Maryland,* 373 U.S. 83 (1963), this Court held that due process requires the government to disclose material exculpatory evidence to a criminal defendant. This Court decided in *United States v. Ruiz*, 536 U.S. 622, 633 (2002), that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." It did not, however, extend that holding to material exculpatory evidence.

The question presented is:

> Whether there is a fundamental difference between material exculpatory and impeachment evidence when a guilty plea is involved, and does due process require that a defendant be entitled to protections under *Brady v. Maryland,* 373 U.S. 83 (1963), when it comes to disclosing exculpatory evidence when it would impact a defendant's decision to plead guilty?

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Petitioner Robert Bethel respectfully requests that the Court grant a writ of certiorari to review the decision of the Ohio Supreme Court in this case.

OPINIONS BELOW

The opinion of the Ohio Supreme Court affirming the lower court's decision denying Bethel relief is published as *State of Ohio v. Robert Bethel,* 2022-Ohio-783, and is reproduced as Appendix A at A-1. The decision of the 10th District Court of Appeals of Ohio denying Bethel's motion for leave to file a new trial motion and motion for new trial based on newly discovered evidence is published as *State v. Bethel*, 10th Dist. Franklin No. 19AP-324, 2020-Ohio-1343 is reproduced as appendix B at A-13. The decision denying Bethel's 2009 Motion for Leave to file a Motion for a New Trial is published as *State v. Bethel*, 10th Dist. Franklin No. 09AP-924, 2010-Ohio-3837 and is reproduced as Appendix C at A-24.

The decision of the Ohio Supreme Court affirming Bethel's convictions and death sentence on direct review is reported as *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150 and is reproduced as Appendix E at A-46. The decision of the Franklin County Court of Common Pleas denying Bethel's petition for post-conviction relief is published as *State v. Bethel*, 10th Dist. Franklin No. 07AP-810, 2008-Ohio-2697, and is reproduced as Appendix F at A-170.

JURISDICTIONAL STATEMENT

In this petition, Robert Bethel seeks review of the decision in which the Ohio Supreme Court affirmed the denial of his motion for leave to file a motion for new trial and successive postconviction petition. The time for filing Bethel's petition for certiorari was extended by 60 days by Justice Kavanaugh on July 14, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall 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; nor shall private property be taken for public use, without just compensation.

Section One of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

INTRODUCTION

Faced with two unprepared attorneys and the death penalty, without knowledge of the exculpatory evidence in the State's possession, Robert Bethel entered into a poorly written plea agreement and provided the State with the proffered statement it required for the deal. When he later backed out of the plea agreement and then went to trial, the State used his proffered statement against him. Years later, in different instances, Bethel discovered two suppressed police reports that are favorable and material to the defense. The police reports are independently exculpatory and corroborate one another, and they indicate that two other individuals were the shooters.

Bethel filed a motion for new trial based on this suppressed information. He argued that, had he been provided the information in the suppressed police reports, he would not have had to accept the guilty plea—and thus he would not have had to proffer his false confession. The majority of the Supreme Court of Ohio found that Bethel's arguments concerning this aspect of prejudice "stray from the main question of *Brady*'s third prong—i.e. whether Bethel received a fair trial." *State v. Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, ¶ 38. It then noted that the suppressed items were immaterial because of the remaining evidence against Bethel, noting "most significantly, Bethel's confession." *Bethel*, 2022-Ohio-783, ¶ 36.

The dissenting Justices—Justice Donnelly joined by Justice Stewart—recognized the impact that the exculpatory information would have had on Bethel's decision to plead guilty, and thus provide a confession. The dissent stated that "the

state's duty to disclose exculpatory information, and the effect of its failure to disclose exculpatory information, extends to pretrial proceedings and trials alike." *Bethel*, ¶ 62 (Donnelly, J., dissenting).

Bethel now asks this Court to address the issue left open by *United States v. Ruiz*, 536 U.S. 622 (2002). *Ruiz* created a fundamental distinction between impeachment evidence and exculpatory material evidence, and it is an issue that has divided United States Circuit Courts of Appeals as well as state courts. Due process should require the disclosure of material exculpatory evidence pre-plea to ensure fairness in the criminal justice system and to avoid wrongful convictions.

STATEMENT OF THE CASE

On June 25, 1996, James Reynolds and Shannon Hawk were shot to death in an isolated field in Columbus. Four years later, the State indicted Robert Bethel and Jeremy Chavis for their murders. Chavis was a juvenile at the time and avoided capital specifications. Bethel, who had turned eighteen three months prior, was not so lucky.

Bethel was facing capital charges, with unprepared attorneys and no knowledge of the exculpatory evidence in the State's files.

Four years after the deaths of Reynolds and Hawk, Bethel was indicted for two counts of aggravated murder, with two death penalty specifications on each count. The court appointed him counsel, Joseph Edwards and Ron Janes, but Bethel soon grew concerned about whether their representation was adequate. Bethel's fears were well-founded. Janes later admitted that they were not prepared for the trial scheduled on August 30, 2001. Tr. Vol. IV, p. 200. They had not even hired an

investigator until ten days before the trial date. Tr. Vol. XIV, p. 6-7, 27. The investigator, Gary Phillips, testified that counsel told him they were in "a panic mode" because of their lack of investigation. *Id.* at 31.

To avoid a sure death sentence, Bethel agreed to provide a statement, albeit false, to the State implicating himself and Chavis as the shooters and to testify against Chavis. This would enable Bethel to secure a plea deal to save his life. To ensure Bethel's statement was consistent with their theory of the crime, prosecutors provided Bethel with several videotapes of State's witnesses. Tr. Vol. IV, p. 128, 174, 176-77; Vol. X, p. 179. Bethel also reviewed the coroner's reports, photographs, witness statements, and police summaries. His statement was consistent with the evidence he reviewed. Tr. Vol. III, p. 2.

Relying on the plea agreement—which the trial judge would later describe as "inartfully stated"—Bethel believed that he could avoid the next day's trial with his unprepared attorneys, and that if he refused to testify against his co-defendant, he would go back to his pre-plea posture. *See* Tr. Vol. V, p. 8. Subsequently, Bethel elected not to testify against Chavis. The State terminated the plea agreement and reinstated the capital charges. Bethel, now with new counsel, moved to suppress his proffered statement under the terms of the agreement. He lost, and his proffer was used against him. Bethel ended up in a worse position than where he had started.

The State's case against Bethel heavily relied upon Bethel's confession, Donald Langbein, and Theresa Campbell.

The State's theory at trial was that Bethel and Chavis sought to kill Reynolds to keep him from testifying against their friend, Tyrone Green. Tr. Vol. X, p. 20-22.

Reynolds had witnessed Green murder a man in August of 1995, and Reynolds was listed as a witness in the discovery documents provided to Green's counsel. *Id.* at 37-39, 50-51. Four years after Reynolds' murder, police found those discovery documents in Cheveldes Chavis, Jeremy Chavis's brother's, house. *Id.* at 72-79.

Donald Langbein was the original source of evidence against Bethel and Chavis. The police investigation had seemingly gone cold until Langbein was arrested on federal gun charges in 2000. *See State v. Bethel*, 2006-Ohio-4853, ¶ 21, 110 Ohio St. 3d 416, 417, 854 N.E.2d 150, 161. Langbein provided significant details to point the State in the direction of Bethel and Chavis—and away from himself. *See State v. Bethel*, 2006-Ohio-4853, ¶ 6, 110 Ohio St. 3d 416, 417, 854 N.E.2d 150, 161. *See also id*. at ¶¶ 8, 17, 20, 22, 91, 101.

The State's witnesses included Donald Langbein and Theresa Campbell. Tr. Vol. XI, pp. 35-36, 149-150. Campbell's testimony was questionable at best. Despite testifying that she had a conversation with Bethel about the murders, she did not remember when the conversation occurred. *Id*. at 148. She also admitted to not remembering who Reynolds and Hawk were until after the prosecutor told her. *Id.* at 147-48.

Langbein testified that both Chavis and Bethel confided in him their involvement in the murders. *Id.* at 35. According to Langbein, Chavis and Bethel waited until it was "a good time" with "no witnesses," and then Bethel shot Reynolds and Hawk with a nine-millimeter gun, while Chavis used a shotgun. *Id.* at 35-36. Langbein's new-found motivation to help the police led him to wear a wire, and he

wore it on five separate meetings with Bethel in an attempt to "get a confession." *Id.* at 127, 198-99. He was not successful on any of the five occasions. *Id.* at 130, 199.

No physical evidence linked Bethel to the crime. The police recovered 25 bags of evidence from the crime scene, yet Bethel was not linked to any of it. Tr. Vol. X, pp. 122-134. The murder weapons were never recovered. The State's discovery documents regarding Green's case did not contain Bethel's fingerprints. *Id.* at 90-91. The police recovered them on November 19, 2000, from a house to which Bethel had no connection. *Id.* at 72, 82. Bethel had only one brief contact with the Chavises and Langbein from 1996 until the wired conversations in 2000.

The defense attempted to show that Bethel's proffer was a false confession motivated by Bethel's fear of conviction based on his attorneys' lack of preparation and investigation. *Id.* at 33–35. Both Langbein and Campbell were incredible witnesses, to whom Bethel had never confessed. Bethel had an alibi. Tr. Vol. XII, p. 129.

The jury found Bethel guilty of all charges. He was sentenced to death for both killings. Tr. Vol. XVII, p. 4. More than five years later, Bethel discovered that the State had failed to disclose to him evidence that would have been favorable to his defense.

Two separate but corroborating pieces of suppressed evidence implicate Langbein.

Suppressed evidence implicates Donald Langbein and co-defendant Jeremy Chavis—not Bethel—as the people who shot and killed James Reynolds and Shannon

Hawk. Both Langbein and Chavis made statements that they were the shooters, as demonstrated by police reports. Neither statement, however, was disclosed to Bethel.

The first suppressed statement was discovered in November 2008 as a result of a public records request by an outside party. *State v. Bethel,* 10th Dist. No. 09AP-924, 2010-Ohio-3837, ¶ 10. A police report documents that then-Franklin County jail inmate Donald Langbein told inmate Shannon Williams that, "[Langbein] was involved in a homicide with an individual who is now incarcerated at the Federal Penn., Ashland, KY, where the victim was shot seventeen times." *Id.* Chavis was, at the time of the conversation, incarcerated at the Federal Correctional Institution in Ashland, Kentucky for an unrelated conviction. *Id. See also* Tr. Vol. 11, p. 59. Langbein stated that "the other individual who was arrested was the driver following this homicide." *Bethel*, 2010-Ohio-3837 at ¶ 10. Langbein's admission to Williams occurred just three days after Bethel's arrest.

Years after his conviction, Bethel discovered a second suppressed statement that is significant on its own but especially so when considered in conjunction with Langbein's suppressed statement. The second item is a police report dated July 1, 2001, and it details a conversation between Franklin County Jail inmate Ronald Withers, Columbus Police Detective Ed Kallay, and ATF Agents Ozbolt and Burt. The report describes that "[Jeremy] Chavis told Withers that his cousin was the other shooter, and his cousin is also incarcerated." *State v. Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, ¶ 14. Langbein is Chavis's cousin.

Thus, the State suppressed *two* reports from separate sources corroborating that Langbein, not Bethel, was the second shooter. Two different witnesses—Williams and Withers—provided very similar information to police, six months apart from one another, implicating the same two people in the killings: Langbein and Chavis.

Bethel filed for a new trial based on these violations of *Brady v. Maryland,* 373 U.S. 83 (1963). After the lower courts denied Bethel relief, the Supreme Court of Ohio accepted jurisdiction in Bethel's case to determine whether there had been a *Brady* violation and whether Ohio law was in line with this Court's precedent regarding *Brady*.

The Supreme Court of Ohio changed Ohio law in order to comply with this Court's precedent, but it ultimately ruled against Bethel. In its determination of the merits of Bethel's alleged *Brady* violation, the court held that Bethel did not establish the suppressed evidence was material. It found that the suppressed evidence was double hearsay, but it mostly rested its decision on the fact that Bethel failed to undermine the credibility of his conviction "in view of the strong evidence that corroborated the conclusion reached during the investigation that the evidence—most significantly, Bethel's confession—showed that Bethel had committed the murders." *State v. Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, ¶ 36.

Bethel argued that he would not have falsely confessed to avoid the death penalty if the two police reports would not have been suppressed. But the majority noted that "[t]his argument invites us to stray from the main question of *Brady*'s

third prong—i.e., whether Bethel received a fair trial." *Id.* at ¶ 38, citing *United States v. Agurs*, 427 U.S. at 108 (1976).

Justice Donnelly, joined by Justice Stewart, dissented from this decision, writing that "[t]his notion seems to presuppose that our only consideration of the suppressed evidence must be in the context of a spontaneous attempt to admit it into evidence at trial. To the contrary, the state's duty to disclose exculpatory information, and the effect of its failure to disclose exculpatory information, extends to pretrial proceedings and trials alike." *Id.* at ¶ 62 (Donnelly J., dissenting), citing *United States v. Nelson*, 979 F.Supp.2d 123, 129 (D.D.C.2013).

The main source of evidence against Bethel was the result of a plea agreement Bethel entered into without the required information. But for the failure to disclose the exculpatory evidence pre-plea, Bethel would not have falsely confessed as a part of the agreement.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case under Supreme Court Rule 10. It presents a well-recognized and entrenched conflict of authority as to whether *Brady* requires prosecutors to disclose exculpatory evidence before a guilty plea. Although *United States v. Ruiz,* 536 U.S. 622 (2002), by its plain language, applies only to the disclosure of impeachment evidence prior to a guilty plea, the precedent of this Court "rejected any such distinction between impeachment evidence and exculpatory evidence." *United States v. Bagley*, 473 U.S. 667, 676 (1985). As a result, there is a conflict between the various United States Courts of Appeals in how to apply *Ruiz*,

as well as conflict between federal courts and state courts of last resort, and among the various state courts. Indeed, even the Justices of the Supreme Court of Ohio—the court from which this case originates—hold conflicting views regarding this issue.

This is a capital case, and it comes to this Court on direct review, without the deference required by the AEDPA. It is an ideal vehicle to resolve this issue.

A. The analysis behind *Ruiz* compels a different result when it comes to exculpatory evidence.

In *United States v. Ruiz,* 536 U.S. 622 (2002), this Court held that the defendant has no due process right to impeachment evidence in the government's possession, prior to pleading guilty. In making that finding, this Court weighed the competing interests before reaching its conclusion:

> [D]ue process considerations include not only (1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests.

Id. at 631. That very calculus requires a different result when the evidence in question is exculpatory.

This Court explained that impeachment evidence is difficult to characterize as critical information the defendant must have, because the "random way" it could be helpful depends upon the defendant's knowledge of the prosecution's case—something to which the defendant has no right. *Id.* at 630. Thus, with regard to the private interest at stake, the benefit to the defendant is often limited.

It specifically noted that the particular plea agreement at issue for Ruiz included the caveat that the "Government will provide 'any information establishing

the factual innocence of the defendant' regardless." *Id.* at 631. This and other guilty-plea safeguards—like the requirements in Fed.Rule Crim. Proc. 11—diminished the concern that "innocent individuals, accused of crimes, will plead guilty." *Id.* at 631.

But consider that logic with suppressed exculpatory evidence. A defendant need not know the prosecution's case in order to recognize how a piece of exculpatory evidence could help establish their innocence. And what happens in cases where the government does not agree to provide exculpatory evidence, regardless of the plea? An innocent individual, accused of a crime and without the knowledge of evidence that supports their innocence, will plead guilty to avoid the rigors of trial, a more severe charge, or a lengthier sentence. *See* The National Registry of Exonerations, *Detailed View*, available at https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last accessed Oct. 19, 2022) (in 25% of the known exonerations since 1989, the wrongfully convicted individual pled guilty to a crime they did not commit).

There are no protections in Rule 11 to ensure that does not happen. Even the Rule 11 requirement that the judge "satisfy himself that there is a factual basis for the plea" does not assess this risk, as its purpose is just to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *McCarthy v. United States*, 394 U.S. 459, 467 (1969). Moreover, if the defendant is unaware of the exculpatory evidence, then the judge most certainly is as well.

The "adverse impact of the requirement upon the Government's interest" is also not a factor that counsels in favor of *Ruiz*'s application to exculpatory evidence. As this Court noted, "a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." *Ruiz*, 536 U.S. at 631. Providing exculpatory evidence, however, **serves** the government's interest in securing factually justified convictions. And the value of this additional safeguard serves the overall goal for the guilty to be punished and the innocent freed.

This Court "implicitly [drew] a line" between impeachment and exculpatory evidence in the context of pre-trial plea negotiations. *Id.* at 633 (Thomas, J., concurring in judgment). The application of *Ruiz* has since been treated differently in different states, different circuit courts of appeal, and even among different justices of the same court. This Court's explicit guidance is necessary.

B. There is a conflict among United States Circuit Courts of Appeals.

There is a circuit split as to whether *Ruiz* creates a distinction between impeachment evidence and exculpatory evidence. Prior to *Ruiz*, in 1985, the Sixth Circuit was the first circuit to suggest the possibility that "unavailable" information that would "aid in [a defendant's] evaluation of the possibilities of success on trial," might constitute a constitutional violation if strong enough. *Campbell v. Marshall*, 769 F.2d 314, 324 (6th Cir. 1985) (holding that knowledge of a gun in the murder

victim's pocket was "important" but not "controlling in the decision whether to plead," the court found no due process violation.) Subsequently, three additional circuits held that exculpatory evidence must be disclosed pre-plea: the Eighth, Ninth, and Tenth. *See* e.g., *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988) (holding that a guilty plea may be challenged as unknowing or involuntary when evidence is unavailable to aid an attorney's chance for success at trial); *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995) (holding that a defendant challenging the voluntariness of a guilty plea may assert a *Brady* claim); *United States v. Wright*, 43 F.3d 491, 495-96 (10th Cir. 1994) (holding that "under certain limited circumstances, the prosecution's violation of *Brady* can render a defendant's plea involuntary"). The Fifth Circuit disagreed. *Matthew v. Johnson*, 201 F.3d 353, 362. (5th Cir. 2000) (holding that there is no constitutional violation because "a *Brady* violation is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt.").

Though in 2002 this Court resolved the question of whether *impeachment* evidence must be disclosed pre-plea, there remains a great divide whether the government has a duty to disclose non-impeachment *exculpatory* evidence prior to entering a plea agreement. The holdings of the Ninth and Tenth Circuits remain good law. *See Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007) (applying pre-*Ruiz* holding in *Sanchez*); *United States v. Dahl*, 597 Fed. Appx. 489, 490 (10th Cir. 2015) (reaffirming *Wright* in light of *Ruiz*); *United States v. Ohiri*, 133 Fed. Appx. 555, 562 (10th Cir. 15 2005) (distinguishing *Ruiz* and recognizing a pre-plea *Brady* right).

Since *Ruiz*, the Seventh Circuit noted that "*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence." *McCann v. Mangialardi,* 337 F.3d 782, 787-88 (7th Cir. 2003). In fact, the Seventh Circuit determined that *Ruiz* "strongly suggest[ed] that a *Brady*-type disclosure might be required" with exculpatory evidence. *Id.* at 787.

The Tenth Circuit also has noted the distinction between exculpatory and impeachment evidence pre-plea. As that court stated in *United States v. Ohiri*, 133 F.App'x 555 (10th Cir. 2005), "[b]y holding in *Ruiz* that the government committed no due process violation by requiring a defendant to waive her right to impeachment evidence before indictment in order to accept a fast-track plea, 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." *Id.* at 562.

Some circuits, however, have rejected or come close to explicitly rejecting the notion that a right to exculpatory material evidence applies pre-plea. The First and Fourth Circuits have held that *Brady* only applies to trials. *See e.g., United States v. Mathur*, 624 F.3d 498, 506–07 (1st Cir. 2010); *United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010). The Second Circuit questioned but declined to abrogate its pre-*Ruiz* decision in *United States v. Avellino*, 136 F.3d 249 (2d Cir. 1998). *See Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010). And the Fifth Circuit has expressly rejected the application of *Brady* to plea bargaining. *See*, e.g., *Alvarez v.*

City of Brownsville, 904 F.3d 382 (5th Cir. 2018); *United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009); *Matthew v. Johnson*, 201 F.3d 353, 361–62 (5th Cir. 2000).

The Sixth Circuit, where *Campbell* is technically good law, has recognized the split but has declined to rule explicitly, stating only that there was "disagreement among [its] sister circuits." *Robertson v. Lucas*, 753 F.3d 606, 621 (6th Cir. 2014).

C. There is conflict among state courts.

Prior to *Ruiz*, the South Carolina Supreme Court held in *Gibson v. State*, that a defendant "may challenge the voluntary nature of his guilty plea . . . by asserting an alleged *Brady* violation." 514 S.E.2d 320, 523-24 (S.C. 1999). Following *Ruiz*, the court reaffirmed its pre-*Ruiz* holding that a pre-plea *Brady* violation may render a guilty plea involuntary. *Hyman v. State*, 723 S.E.2d 375, 380 (S.C. 2012).

Likewise, the highest state courts in Nevada and West Virginia have held that disclosure of material exculpatory evidence is required pre-plea. *See State v. Huebler*, 275 P.3d 91, 93, 96 (Nev. 2012); *Buffey v. Ballard*, 782 S.E.2d 204, 216 (W. Va. 2015). The Utah Supreme Court also held that nondisclosure of "material exculpatory evidence" renders a guilty plea involuntary. *Medel v. State*, 184 P.3d 1226, 1234, 1235 (Utah 2008). California has found that "*Ruiz* by its terms applies only to material *impeachment* evidence, and the high court emphasized that the government there had agreed to 'provide 'any information establishing the factual innocence of the defendant' regardless.'" *In re Miranda*, 43 Cal.4th 541, 582, 76 Cal.Rptr.3d 172, 182 P.3d 513 (2008) (quoting *Ruiz*, 536 U.S. at 631). Colorado courts have read *Ruiz* as making a distinction: "*Ruiz* made clear that there is no due process right to **non-**

exculpatory impeachment material," *People v. Corson*, 2016 CO 33, 379 P.3d 288, ¶ 31 (emphasis added).

But other states do not recognize such a distinction. The Mississippi Court of Appeals relied upon the Fifth Circuit's rejection of any distinction, and it found that a guilty plea precludes all *Brady* claims. *See Walton v. State*, 165 So.3d 516, 525 (Miss.App.2015). The Supreme Court of Wisconsin also read *Ruiz* to hold that "due process does not require the disclosure of material exculpatory impeachment information before a defendant enters into a plea bargain." *State v. Harris*, 272 Wis.2d 80, 2004 WI 64, 680 N.W.2d 737, ¶17 (although the court then vacated the guilty plea on the basis of its own state law, to prevent a manifest injustice). The same is true of Texas courts. *See Conroy v. Harris*, App. No. 07-18-00381-CV, 2019 Tex. App. LEXIS 3440, at *3-4 (Tex.Apr. 29, 2019) ("Indeed, a guilty plea bars a defendant from urging a *Brady* violation.").

Texas's highest court has, however, also acknowledged that it is even more unclear after *Ruiz* whether guilty pleas are involuntary if the State suppresses exculpatory evidence. *See Ex parte Palmberg*, 491 S.W.3d 804, 814 (Tex.Crim.App.2016), fn. 18 ("It is unclear whether or not *Brady v. Maryland* goes so far as to render guilty pleas involuntary if the prosecution does not disclose exculpatory information at the time of the plea, especially after the Supreme Court's holding in *United States v. Ruiz*."). The Supreme Court of Delaware has similarly recognized the uncertainty in the law with regard to *Ruiz*'s application but has not had the occasion to consider the issue on the merits. *See Brown v. State*, 108

A.3d 1201, 1206 (Del.2015), fn. 30 ("As in *Ruiz*, the impeachment evidence that came to light after Brown pled guilty and was sentenced did not go to his actual innocence or affect the voluntariness of his plea. In citing to this circuit split, we underscore the reality that our decision is limited to the case before it and fact patterns like it, and that if materially different situations emerge, they must be dealt with on their precise facts.").

D. There is a conflict between justices on the same supreme court.

The Supreme Court of Ohio is also in conflict with itself. Bethel had maintained that he never would have pled guilty, and thus never would have provided a false proffered statement, had he known about the exculpatory evidence he could have used. The majority in *Bethel* found that Bethel's arguments concerning this aspect of prejudice "stray from the main question of *Brady's* third prong—i.e. whether Bethel received a fair trial." *Bethel*, ¶ 38. But the dissent stated that "the state's duty to disclose exculpatory information, and the effect of its failure to disclose exculpatory information, extends to pretrial proceedings and trials alike." *Bethel*, ¶ 62 (Donnelly, J., dissenting) (citing *United States v. Nelson*, 979 F.Supp.2d 123, 129 (D.D.C.2013) (most federal courts agree that "a *Brady* violation can justify allowing a defendant to withdraw a guilty plea"); *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 48 (impact on the defense's trial-preparation and strategic decisions are relevant to the prejudice prong of the *Brady* analysis)).

E. This is a matter of public interest.

Not only is this a capital case, but it involves an issue that affects a significant number of cases. This Court recognized ten years ago that plea bargaining makes up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions . . ." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). In 2020, 95% of felony convictions in the United States were the result of plea bargains.[1] Inherent in the plea-bargaining process is that some innocent people will plead guilty to avoid the rigors of trial, a more severe charge, or a lengthier sentence. *See* The National Registry of Exonerations, *Detailed View*¸ available at https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last accessed Oct. 19, 2022) (in 25% of the known exonerations since 1989, the wrongfully convicted individual pled guilty to a crime they did not commit).

It should not be difficult to imagine that an innocent defendant, facing a death sentence with two unprepared attorneys, would give in to the demands to accept a plea agreement to save his own life. "The fact that innocent individuals plead guilty has been empirically documented." Russell D. Covey, *Plea Bargaining After Lafler and Frye*, 51 Duq. L. Rev. 595, 616 (2013). There are a multitude of cases demonstrating that innocent defendants plead guilty when left with the impression that there is no other option. *See, e.g., McCann v. Mangialardi*, 337 F.3d 782 (7th Cir.

[1] *See* Gross, et al., Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement, 129, available at http://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf (accessed Oct. 12, 2022).

2003). And "as shortcomings in our criminal justice system and the plea-bargaining process are revealed by DNA exonerations and other showings of actual innocence, the due process concept of actual innocence has taken hold." *State v. Beres*, 943 N.W.2d 575, 587 (Iowa 2020).

In order to get that deal, Bethel made "some monumental concessions in response to the state's plea demands—namely, to enter a guilty plea, proffer a confession, and waive any rights against admission of the confession and guilty plea . . . ." *Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, ¶ 67 (Donnelly J., dissenting). But he did it all without knowing there was evidence disproving his guilt. The State benefitted from its own suppression when Bethel later withdrew his guilty plea and went to trial, because it then had Bethel's confession.

The majority of the Supreme Court of Ohio relied heavily on Bethel's confession in finding the suppressed items immaterial. *Bethel*, 2022-Ohio-783, ¶ 36. But Bethel's confession, a requirement for Bethel to obtain a life-saving plea deal, is precisely the result of Bethel's ignorance of the exculpatory information. Had Bethel known that there was independent information demonstrating he did not kill Reynolds and Hawk, he would not have been in the position of needing to take a deal to save his own life.

This goes to the heart of a defendant's rights to due process and a fair trial. Considering the effect of the information before a guilty plea does not "stray from the main question of *Brady*'s third prong—i.e. whether Bethel received a fair trial." *Bethel*, ¶ 38. Indeed, "[w]here misconduct by the state keeps a defendant and his

attorney unaware of circumstances tending to negate the defendant's guilt or to reduce his culpability, a guilty plea entered in ignorance of those facts may not be knowing and intelligent though it is otherwise voluntary." *State v. Gardner*, 126 Idaho 428, 434, 885 P.2d 1144 (App.1994).

It is time for this Court to address this issue, which remains unsettled amongst the circuit courts and state high courts. *Ruiz* created a fundamental distinction between impeachment evidence and exculpatory material evidence. Due process requires the disclosure of material exculpatory evidence pre-plea to ensure fairness in the criminal justice system and to avoid wrongful convictions.

CONCLUSION

For the foregoing reasons, Petitioner Bethel respectfully asks this Court to grant his petition for writ of certiorari.

Respectfully Submitted,

Office of the Ohio Public Defender, by:

/s/ Rachel Troutman
Rachel Troutman (0076741)
Lead Counsel
Supervising Attorney, Death Penalty Dept.

/s/ Joanna Sanchez
Joanna Sanchez (0087717)
Co-Counsel
Director, Wrongful Conviction Project

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (Fax)
rachel.troutman@opd.ohio.gov
joanna.sanchez@opd.ohio.gov

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