No. 22-5900 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2022

ROBERT BETHEL,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition of Certiorari to The Supreme Court of Ohio

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled

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I. This case is an appropriate vehicle.

The State argues that this case is not an appropriate vehicle for this Court to resolve the question presented. That is not so. While Bethel's case is unique in that he eventually went to trial, the issue before this Court applies to his case and more traditional plea cases alike: Does due process require the disclosure of exculpatory evidence before a defendant enters a guilty plea? Notably, in *Lafler*, . this Court recognized that a subsequent trial – even a fair one, which Bethel did not receive – cannot "wipe[] clean" an error of constitutional magnitude that occurred during plea bargaining. *Lafler v. Cooper*, 566 U.S. 156, 169 (2012) To suggest otherwise "ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials." *Id*. at 170. *See also*, *Missouri v. Frye*, 566 U.S. 134, 144 (2012) ("[I]t is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process."). This Court's observation is especially relevant in Bethel's case, where the government's nondisclosure of exculpatory evidence pre-plea not only impacted Bethel's evaluation of the options before him, but also led to the creation of false inculpatory evidence that was the "most significant[]" evidence against him at his subsequent capital trial. *See Bethel*, 2022-Ohio-783, ¶ 36. Indeed, "the negotiation of [the] plea bargain, rather than the unfolding of [his] trial" was "the most critical point" for Bethel. *Frye*, at 144.

The State contends that the Supreme Court of Ohio denied Bethel's *Brady* claim based on a factual, rather than legal, determination. BIO, p. 2. But the State's

reading of the majority opinion by the Supreme Court of Ohio is exceedingly narrow. Characterizing *Brady* as only a "trial right" and focusing its materiality analysis solely on whether Bethel received a fair *trial*, the majority effectively ignored the impact of the government's nondisclosure during the negotiation of the plea bargain, treating his subsequent trial as a "backstop," just as this Court cautioned against in *Lafler* and *Frye*. *Bethel*, 2022-Ohio-783, ¶ 38 ("This question invites us to stray from the main question of *Brady's* third prong—i.e., whether Bethel received a fair trial."). Considering only the fairness of Bethel's trial, the majority concluded that the withheld evidence was immaterial *because of* the very evidence that would not exist but for the error during plea negotiations: Bethel's false proffer statement. *Id*. at ¶¶ 36-37.

However, where a *Brady* violation is alleged to have occurred in facilitation of a plea agreement, the proper materiality consideration for a reviewing court is not simply how the nondisclosure of evidence impacted a subsequent trial, but how it impacted the plea proceedings. *See Bethel*, 2022-Ohio-783, ¶ 62-63 (Donnelly, J., dissenting). *Cf. Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (to establish he was prejudiced by his counsel's errors, a defendant who has pled guilty "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").

Here, the impact was significant. Bethel, who was indigent, was initially appointed attorneys Joseph Edwards and Ron Janes. Unprepared for trial, the attorneys implored Bethel to plead guilty, telling him how "very, very devastating"

the State's case was against him. Tr. Vol. 4, p. 178. And at that time, they believed that to be true. They were unaware that within the police files, there was a report documenting that then-inmate Donald Langbein told inmate Shannon Williams that, "[Donald 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." *State v. Bethel*, 10th Dist. No. 09AP-924, 2010-Ohio-3837, ¶ 10. Nor were they aware that on July 1, 2001, jail inmate Ronald Withers reported to law enforcement 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. Without that evidence, Bethel's counsel not only convinced him to plead guilty, but also to make a statement implicating himself and Chavis as the shooters.

The State claims that "Bethel offered no evidence explaining with any specificity how the ATF report and Summary 86 would have affected his decision to give the proffer statement and plead guilty." BIO, p. 21. First, this is simply false. The record is replete with evidence demonstrating that Bethel did not want to plead guilty to begin with, and he certainly did not want to give a proffered statement to do so. Bethel's first set of attorneys admitted that they urged Bethel to enter into a plea agreement based on their assessment of the case against him. They believed they had seen all of the relevant discovery and, as Janes explained, he "did everything in [his] power" to get Bethel to take the deal to avoid the death penalty. Tr. Vol. 4, p. 183. Bethel fought against taking a deal, but he was overrun by attorneys who lacked the

relevant information to know any better at that time. *See State v. Bethel,* 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 26 ("Bethel **softened his position** and ultimately agreed to a plea bargain and to testify against Jeremy Chavis.") (emphasis added).

Bethel's first set of attorneys believed it was in Bethel's best interest to have accepted the plea agreement. That opinion changed upon viewing the Withers and Williams Reports, as demonstrated by the affidavit of his counsel. *See* Janes Affidavit, Motion for Leave, Ex. E. Had Bethel's attorneys known about the Williams and Withers reports at the time of his proffer, they would have changed the advice they gave to Bethel. Ron Janes was clear: "As original co-counsel, I can say that our entire team's strategy prior to trial would have changed in how we viewed the case had the report been turned over." *Id.* at ¶ 17. Janes characterized the reports as "game changers" and "the most helpful pieces of evidence in Bethel's defense that [he] had seen to date in the case." *Id.* at ¶ 11. Janes was certain that he "would not have advised him to provide the prosecution with a proffered statement admitting to shooting the two victims." *Id.* at ¶ 12.

According to the State, regardless of the impact the undisclosed evidence may have had on the advice provided to Bethel by counsel, there are reasons to affirm the lower court's judgment. BIO, p. 19. First, the State argues that the Williams and Withers reports cannot be material for *Brady* purposes because, in the State's estimation, they would be inadmissible at trial. BIO, p. 19-20. "The materiality standard, however, is not reducible to a simple determination of admissibility."

Johnson v. Folino, 705 F.3d 117, 129 (7th Cir. 2013). "Rather . . . inadmissible evidence may be material if it could have led to the discovery of admissible evidence." *Id*. at 130*, citing Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (en banc); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002); *Bradley v. Nagle*, 212 F. 3d 559, 567 (11th Cir. 2000); *United States v. Phillip*, 948 F.2d. 241, 249 (6th Cir. 1991).

Had Bethel known about the two suppressed police reports, it would have led to admissible evidence: testimony by Jeremy Chavis and/or Donald Langbein. Without knowing that Chavis told Withers about Langbein's involvement, defense counsel did not know the value of calling Jeremy Chavis as a defense witness for Bethel. Chavis's testimony would most definitely have been admissible evidence. There is no reason to presume that, faced with his statements to Withers, Chavis would deny stating that Langbein was the shooter and not Bethel.

In addition, defense counsel could have directly asked Langbein on cross-examination about his statements to Williams. Langbein's own involvement in the crime certainly explains his interest in implicating Bethel instead. A witness's interest or bias, which motivates that witness's testimony, is entirely relevant and is fodder for cross-examination. And even if Langbein denied his own role in the crime once asked about it, Bethel would have been permitted to present evidence to contradict Langbein.

As the Supreme Court of Ohio stated in *Harper v. State*, 106 Ohio St. 481, 140 N.E. 364 (1922), "Where a witness has been cross-examined as to matters which are merely collateral and immaterial to the issue and such as have no tendency to

show bias or interest in favor of or against a party, his answer is, in general, conclusive upon the party making the inquiry; but where the cross-examination is with respect to matters involved in the subject under consideration, or is with the view of showing the feeling, bias or interest of the witness with respect to the parties or either of them, the party cross-examining may, in a proper case, call witnesses to contradict the testimony so elicited on cross-examination." *Id.* at 486. Langbein had a motive for pointing the finger at Bethel, and Bethel's attorneys could have cross-examined [him] as to any expressions or acts tending to show a bias for or against either of the parties." *State v. Hilty*, 11th Dist. Trumbull Case No. 89-T-4204, 1990 Ohio App. LEXIS 4509, at *7 (Oct. 19, 1990).

The State points out that Bethel has also maintained that the suppressed statements could also impeach the police investigation. Yet it claims that, "even if Bethel were to admit Chavis's statements for this purpose, the State could have been able to rehabilitate the investigation with evidence that Jeremy Chavis told Cheveldes [Chavis] that he (Jeremy) committed with [sic] murders *with Bethel*." BIO, p. 21. Putting aside the fact that Jeremy Chavis's statements to an uninterested party (Withers) carry stronger weight than his purported words to Cheveldes (Langbein's cousin), the State's proposed use of this evidence is contrary to law.

Chavis's statements to Cheveldes are out-of-court statements, and the State never called Cheveldes as a witness against Bethel. In *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, the Supreme Court of Ohio recognized that "a law-enforcement officer can testify about a declarant's out-of-court statement

for the nonhearsay purpose of explaining his or her next investigative step." *Id.* at ¶ 88. But it specified that, in order to avoid implicating the Confrontation Clause, "[t]estimony offered to explain police conduct is admissible as nonhearsay only if it satisfies three criteria: (1) the conduct to be explained [is] relevant, equivocal, and contemporaneous with the statements, (2) the probative value of the statements is not substantially outweighed by the danger of unfair prejudice, and (3) the statements [do not] connect the accused with the crime charged." *Id.* (internal citations omitted).

Finally, the State maintains that even if Bethel had not made the proffer statement, the result of his trial would not have changed. BIO, p. 24. In doing so, the State overestimates the strength of the other evidence used against Bethel. Though law enforcement recovered 25 trash bags of evidence from the crime scene, no physical evidence linked him to the crime. Tr. Vol. 10, pp. 122-134. The murder weapons were never recovered. The State's discovery documents from Tyrone Green's case – which allegedly supplied the motive for the murders – were found in Cheveldes Chavis's house and did not contain Bethel's fingerprints. *Id.* at 90-91.

Two witnesses testified that Bethel confessed to them his participation in the murders, but both suffered credibility issues. Theresa Cobb Campbell, Bethel's ex-girlfriend, testified that she remembered having a conversation with Bethel about the murders. Tr. Vol. 11, p. 48. But she could not remember when the conversation occurred and could not recall who the victims were until the prosecutor told her. *Id.* at 147-48. On cross-examination, Campbell revealed that she took numerous

medications that caused side effects that included hallucinations. *Id*. at 155, 167. She also testified to having a history of emotional problems and to previously suffering from two severe head injuries. *Id*. at 152, 154-55, 157.

Donald Langbein, the person implicated by the Williams and Withers reports, had strong incentive to point away from himself. He contacted law enforcement four years after Hawk and Reynolds were murdered and only after he was arrested on federal gun charges. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 21. Though Langbein claimed Bethel confessed to him, on five separate occasions he wore a wire while meeting with Bethel, and Bethel never confessed. Tr. Vol. 11, p. 127, 130, 198-99.

Without Bethel's false proffered statement, the jury would have been left with the testimony of two incredible witnesses and no physical evidence. On that meager evidence, there is a reasonable probability that they would not have convicted Bethel, much less sentenced him to death.

The State disagrees with the Ohio Supreme Court's holding that the evidence, both the ATF report and Summary 86, were suppressed. BIO, p. 26. The State argues that "Bethel failed to show that the defense was unaware of the *information* contained in the summaries." *Id*. The Court below correctly held that the State's argument was "problematic" because the actual question in this case "is whether Bethel knew about Wither's statement concerning what Chavis allegedly had said while in jail." *Bethel*, 2022-Ohio-783, ¶ 28.

Bethel had no way of knowing about what Langbein and Chavis had told third parties, and without the State's disclosure, he could not have obtained the police reports. Both the existence of the statements and the facts within those statements were suppressed. Bethel did not know Chavis told Withers he was the shooter, nor did he know that a document existed to this effect. The State's argument ignores the fact that all wrongly convicted individuals substantively know that they did not participate in crimes for which they are convicted, a conclusion that is as wrong as it is dangerous for justice.

Finally, the State is persistent in its argument, which was also dismissed by the Ohio Supreme Court, that because Bethel did not provide his own affidavit, "there is no evidence that he would have refused to give the proffer statement or plead had he been aware of the summaries." BIO, p. 23. The Ohio Supreme Court found that affidavits from Bethel's two former attorneys stating they were unaware of Summary 86 was sufficient and that the State's argument was an exaggeration. *Bethel*, 2022-Ohio-783, ¶ 27.

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

II. There is a split among courts.

Since this Court's decision in *United States v. Ruiz*, 536 U.S. 622 (2002), a clear split has emerged among the lower courts. Petergorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81

Fordham L. Rev. 3599, 3625-31 (2013). *Compare McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) ("[I]t) is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea"); *United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005) ("[T]he 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"), *with 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); *Alvarez v. City of Brownsville*, 904 F.3d 382 (5th Cir. 2018). *See also Robertson v. Lucas*, 753 F.3d 606, 621 (6th Cir. 2014) (recognizing the split among sister courts).

The State minimizes the extent of the split, arguing that *some* of the cited cases were resolved on grounds unrelated to the question left open by *Ruiz*. BIO, p. 27. But even in those cases, the courts "set the foundation for interpretation of *Ruiz* and pre-plea *Brady* requirements" in their jurisdictions. Petergorsky, 81 Fordham L. Rev. at 3626. Accordingly, absent clear guidance from this Court, whether relief is granted on claims of a *Brady* violation in guilty plea cases will remain jurisdiction dependent.

No fewer than six circuit courts have considered the issue, reaching different conclusions, and, in the past three months, this Court has received two petitions for certiorari presenting the question of the government's duty to disclose exculpatory evidence prior to a defendant entering a guilty plea. *State v. Bethel*, Sup. Ct. No. 22-

5900; *Mansfield v. Williams County, Texas*, Sup. Ct. No. 22-186 (certiorari denied December 5, 2022). No "further percolation" in the lower courts is needed. BIO, p. 28. As one circuit court judge recently remarked:

> Limiting *Brady's* reach to trial ignores the reality of the excesses of an unchecked adversary system. To guarantee due process in the modern criminal justice system, *Brady* much at least reach a prosecutor's intentional decision to withhold exculpatory evidence in pre-trial plea bargaining.
> . . .
>
> Only the Supreme Court can fully address this signal flaw in the jurisprudence of plea bargaining, a set that processes ninety-seven percent of the federal criminal docket. We must bring exculpatory evidence within the reach of *Brady* and refuse to sanction lying by prosecutors to avoid *Brady* obligations, at the least definitively resolve the acknowledged circuit split. The cold reality is that the want of certitude shadows the federal criminal dockets across the country.

Mansfield v. Williamson Cty., 30 F.4th 276, 282 (Higginbotham, J., concurring). *See id.* at 283 (Costa, J., concurring) ("The split on this issue begs for resolution.").

III. Due process requires the government to disclose exculpatory evidence to a defendant during plea proceedings.

The State argues that applying *Brady* to require the disclosure of exculpatory evidence before a defendant pleads guilty is unwarranted. BIO, p. 29. In *Ruiz*, this Court could have outright rejected the imposition of any disclosure obligations during guilty plea proceedings. It did not. *Ruiz*, 536 U.S. 622. Rather, it carefully analyzed the role of impeachment evidence in criminal proceedings, considered the competing interests of the defendant and government, and issued a narrow holding: the Constitution does not require the disclosure of impeachment evidence prior to

entering a plea agreement. *Id*. at 633. The State's reliance on *Ruiz* to argue that *Brady* is only a trial right is unsupportable. BIO, p. 29.

In fact, the required disclosure of exculpatory evidence before a plea is fully consistent with *Brady's* rationale and "retains *Brady's* vitality in a criminal justice system in which almost everyone pleads guilty." *Mansfield v. Williamson Cty*., 30 F.4th 276, 283 (5th Cir.) (Costa, J., concurring). In announcing its decision in *Brady*, one of the decisions relied on by this Court was a guilty-plea case. *Brady v. Maryland*, 373 U.S. 83, 87 (1963), citing *Wilde v. Wyoming*, 362 U.S. 607 (1960). *Wilde* involved the suppression of exculpatory evidence before the defendant pled guilty to murder. *Wilde*, 362 U.S. at 607. As Judge Costa of the Firth Circuit recently explained:

> In reviewing the state habeas proceeding [in *Wilde*], the Supreme Court remanded for a hearing on the claim that prosecutors had withheld "the testimony of two eyewitnesses to the alleged crime which would have exonerated the petitioner." The Court needed a federal issue to make that ruling in a state proceeding, so it necessarily saw a due process right to exculpatory evidence. A few years later, *Brady* confirmed this. It cited *Wilde* immediately before pronouncing that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. *Brady's* lineage thus further rejects carving guilty plea cases out of its protections.

Mansfield, 30 F.4th at 283 (Costa, J., concurring).

Though some state discovery rules may provide for the disclosure of exculpatory evidence, they differ by jurisdiction and are not an adequate substitute for constitutional protections. *See* BIO, p. 31-32. Nor is reliance on the disclosure practices of individual prosecutors sufficient. *See* Gross, et. al., *Government*

Misconduct and Convicting the Innocent, The National Registry of Exonerations, iii-iv (Sept. 1, 2020) ("Official misconduct contributed to the false convictions of 54% of defendants who were later exonerated. . . . Concealing exculpatory evidence—the most common type of misconduct—occurred in 44% of exonerations."). One look no further than Bethel's case to see that this is true. Though the trial prosecutor assured the court that all exculpatory evidence was disclosed, it was not; it was not until years after his conviction and death sentence that Bethel discovered the Williams and Withers reports implicating two other individuals in the murders. 8/16/02 Hrg., p. 19.

In support of suppressing exculpatory evidence, the State points to this Court's observation in *Menna v. New York*, 423 U.S. 61, 62 n. 2 (1975) that "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." BIO, p. 29. "[W]here voluntary and intelligent" is a critical caveat; a guilty plea entered without knowledge of exculpatory evidence is not voluntary. *See McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003). And crucially, the *Menna* court recognized that guilty pleas do not waive all antecedent constitutional violations. *Menna*, at n. 2.

In the nearly fifty years since the *Menna* decision, it has become abundantly clear that a guilty plea is not a "reliable" admission of factual guilt. *See* National Registry of Exonerations, available at https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last accessed Jan. 18, 2023) (Twenty-six percent of people who are known to have been exonerated since

1989 pled guilty to crimes they did not commit). Though, as the State warns, requiring the disclosure of exculpatory evidence to defendants pre-plea may result in fewer plea agreements (BIO, p. 31), that is a just result; rather than hiding evidence to induce potentially-innocent people to plead guilty to crimes they did not commit, prosecutors, armed with exculpatory evidence, should dismiss charges or investigate further before pursuing a case. Any reduction in guilty pleas is a small price for ensuring that defendants are afforded their constitutional rights and the innocent are not convicted.

CONCLUSION

For the foregoing reasons and the reasons put forth in his petition, this Court should grant his petition for writ of certiorari.

Respectfully Submitted,

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