No. 18-854

IN THE

Supreme Court of the United States

GEORGE ALVAREZ,

Petitioner,

v.

CITY OF BROWNSVILLE, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATUTES AND OTHER AUTHORITIES

Respondent City of Brownsville, Texas (the "City") files this brief in opposition to the petition for certiorari of Petitioner George Alvarez ("Alvarez").

RESPONSE TO ALVAREZ'S STATEMENT OF THE CASE

A. Factual Background.

1. City & Departmental Organization.

The City of Brownsville is a Texas home rule municipality. Its police department (BPD) has 245 sworn officer positions.[1] Its police chief and policymaker at the relevant time was Carlos Garcia.[2]

2. Alvarez's Arrest & Detention.

On November 27, 2005, Alvarez was booked into the city jail for burglary of a motor vehicle and public intoxication.[3] The jail had been equipped with a video camera system with sixteen cameras positioned throughout the jail.[4] The cameras, all plainly visible,[5] were controlled by a server located inside the booking area.[6]

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1. ROA.3321.
2. ROA.2703.
3. ROA.2594.
4. ROA.430, 637.
5. ROA.2839-40.
6. ROA.637.

3. Different Versions of the Arias-Alvarez Altercation Video.

As noted by the concurring opinion of Judge Jones, *see Alvarez*, 904 F.3d at 394-95, the record contains different video recordings of the Alvarez-Arias scuffle. In support of its motion for summary judgment, the City submitted an un-redacted version,[7] as well as an enhanced version of the un-redacted video.[8] There is also a redacted version,[9] which Alvarez had submitted to the state district court and Texas Court of Criminal Appeals (CCA) in support of his habeas plea of actual innocence, and which he also submitted to the federal district court in the present case. The redacted version omits certain key events leading up to the altercation – approximately 38 seconds of footage (time counter 21:06:40 through 21:07:18).

In those redacted 38 seconds, Alvarez, escorted by four jailers, can be seen walking to a padded cell. He stopped, removed his hands from his pockets, assumed a defensive posture, and refused to proceed. A jailer gestured at least four separate times for him to walk, but he refused.[10] In his deposition, Alvarez admitted: "I understand I wasn't compliant. I wasn't going to the room, so they got the right to do whatever they got to do."[11]

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7. ROA.277, 634-35.

8. ROA.278.

9. ROA.283, 1782-84.

10. ROA.260, 277, 634-35.

11. ROA.255.

This omitted recording undermines Alvarez's theory of actual innocence – his claim that the altercation was provoked by the jailer's unjustified attack on him. The un-redacted recording instead proves that Jailer Arias used minimal force justifiably – he placed Alvarez in an "arm bar" hold to escort him to the padded cell physically, because Alvarez refused to walk there as directed. Video stills (time counter 21:07:18 - 21:07:20) show where Arias attempted to place Alvarez's left arm in this hold.[12]

Alvarez, however, threw off Arias's arm hold, prompting Arias to apply a headlock, with pressure on the side of Alvarez's head and neck, by the ear area and the chin. The video proves that the headlock did not compress Alvarez's tracheal area.[13] Video stills (time counter 21:07:21) show Alvarez in the head lock hold, with pressure being applied to Alvarez's head, not his trachea.[14]

Once in a headlock, Alvarez pushed his body back against Arias, causing both men to fall backwards, with Alvarez on top. Arias continued to hold Alvarez in the headlock for approximately 45 seconds, as the other jailers restrained him.[15]

Importantly, the felony indictment to which Alvarez pled guilty – that Alvarez assaulted Arias by grabbing Arias's genitals – is neither proven nor refuted by any version of the video recording. The camera angle does

12. ROA.1588-94.

13. ROA.277, 431, 635.

14. ROA.1595-96.

15. ROA.277, 431, 635.

not allow the viewer to see Alvarez's hands at all times. However, video stills do corroborate the indictment by showing Alvarez reaching for Arias's groin (time counter 21:07:43 - 21:07:45; 21:07:54 - 21:07:57).[16]

4. Parallel Investigations of the Arias-Alvarez Altercation.

BPD utilizes separate tracks for investigating crimes and possible disciplinary violations. In the present case, both procedures were utilized – a criminal investigative procedure to establish probable cause for recommending charges against Alvarez for assaulting Arias; and an administrative inquiry into whether Jailer Arias had violated the departmental use-of-force policy when he subdued Alvarez.[17]

The criminal investigation was conducted by an officer of the Brownsville Criminal Investigation Division (CID), Detective Rene Carrejo.[18] Det. Carrejo's job was to collect the relevant evidence and send it to the district attorney's office.[19] Carrejo took statements from the jailers and provided those to the prosecutor.[20] However, he did not provide the video to the prosecutor because, he testified, he did not know one existed.[21]

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16. ROA.1602-26.

17. ROA.454-56.

18. ROA.530.

19. ROA.454-56, 532, 2716-19.

20. ROA.532-33.

21. ROA.531.

The video was stored on a server in the jail office.[22] There is no evidence that CID could not have reviewed the recordings on the server. The cameras in the jail were all plainly visible.[23] Det. Carrejo had known the jail was equipped with cameras, but because the video equipment had only recently been upgraded to add recording capability to the closed-circuit cameras in the jail cells, he was unaware that cameras had made recordings.[24] So he did not ask the jailers for a copy of the video.[25]

The routine administrative investigation was conducted by jail supervisors, not by CID. The jail supervisor (Sgt. David Infante), who downloaded a video recording of the Arias-Alvarez scuffle for the administrative review, testified that he did not think to advise CID Investigator Carrejo of its existence because Carrejo did not ask.[26] Because the video cameras were in plain view, Jail Sgt. Infante assumed that if CID investigators had wanted him to copy the recording for them, they would have requested it.[27] After reviewing the video and jailer statements, the jail supervisors recommended no discipline to the Chief of Police.[28]

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22. ROA.637.

23. ROA.2839-40.

24. ROA.637.

25. ROA.531-34.

26. ROA.535.

27. ROA.2816, 2821, 2828-31, 2836-41.

28. ROA.2594-98, 2822-25.

5. Chief Garcia's Role.

At the conclusion of the administrative review process, the Chief reviews his supervisors' reports and decides whether to assign the case to the Internal Affairs Unit (IAU) for further disciplinary review.[29] Whether the case is assigned to IAU for further investigation is solely the Chief's function.[30]

On December 8, 2005, the jail division commander, Ramiro Rodriguez, wrote his one-page report to Chief Garcia concluding no excessive force had been used by Jailer Arias and recommending closure of the administrative review.[31] Commander Rodriguez's report references the video of the incident and the arrest and offense reports filled out by patrol officers, Ruben Cuellar and Jim Brown.[32] It is unclear whether the video itself was sent to Chief Garcia.[33]

Commander Rodriguez's administrative inquiry report was stamped received by the Chief Garcia's office on the date it was written – December 8, 2005.[34] However, it is undisputed that Chief Garcia did not review the report or the video. As he testified, it was his customary practice

29. ROA.2721, 2806.

30. ROA.2806, 3236-37.

31. ROA.2594.

32. ROA.2594.

33. ROA.2719-20.

34. ROA.2594.

to sign off on reports he reviewed,[35] and the space for his signature on the report is unsigned.[36] Why he did not review this report is unknown, perhaps because he was out for the day, or on vacation.[37]

Importantly, Chief Garcia did not assign the case for IAU review, and thus, the copy of the video made by Jail Sgt. Infante did not end up in any confidential IAU file. Although there is abundant testimony in the record about the secrecy of internal affairs investigations, that testimony is a red herring because there was never any internal affairs investigation of this jailhouse scuffle. The administrative inquiry ended as an exonerating report to the Chief (which he did not review).

No evidence showed that Chief Garcia was part of any prosecution team that delivered evidence of Alvarez's assault of Arias to the prosecutor. As Garcia testified, a department the size of BPD requires everyone to do their jobs.[38] The Chief was not directly involved in case processing by CID.[39] With approximately 245 officers under his command, Chief Garcia could not feasibly read all criminal investigation files and play a check and balance role in assuring that *Brady* material in all of those cases be properly submitted to the prosecutor.[40] It is CID's function

35. ROA.2720-29.

36. ROA.2594.

37. ROA.2721-23.

38. ROA.2716.

39. ROA.2748, 3427-28.

40. ROA.3412-13.

to gather all of the relevant evidence in a criminal case and submit it to the district attorney.[41]

6. BPD Policies and Practices on Handling of *Brady* Material.

As the district court correctly noted, BPD's official policy is to provide all evidence, including exculpatory evidence, to the district attorney's office in all criminal cases.[42] However, the court drew a false dichotomy between the overall policy of complete disclosure of *Brady* material by BPD as a whole and the alleged secrecy of IAU investigations, which, according to the court, "remain appropriately confidential."[43] The court wrongly assumed the jailhouse video of the Alvarez and Arias altercation was bottled up in an IA file, and could never have seen the light of day without Chief Garcia's permission – when in fact no IA investigation of this incident was ever ordered.

There is no evidence of any policy of *disallowing* officers involved in administrative inquiries from sharing *Brady* information with CID.[44] Indeed, as Chief Garcia testified, the jail supervisor, Sgt. Infante, had a duty to disclose the video to CID because "**at that stage, it is not in the hands of internal affairs. An administrative inquiry was being conducted.**"[45]

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41. ROA.2716.

42. ROA.1094 (citing Doc. 81-1, ROA.974-78).

43. ROA.1094.

44. *See* ROA.3391.

45. ROA.2750 (emphasis added).

According to Garcia, Sgt. Infante should have told CID that the video in question existed, and he certainly should have disclosed its existence if he knew CID had overlooked it.[46] Although Garcia had not reduced his expectation in this regard to a formal, written policy, he relied on the fact that a generous formulation of the basic *Brady* obligation is taught to all officers in basic Texas peace officer training – to submit all relevant evidence to the prosecutor.[47] As the district court correctly determined in this case, Alvarez's case was the only instance in which the BPD failed to turn over evidence that could have affected a guilty plea.

7. *State v. Alvarez.*

On January 25, 2006 – some six weeks after the BPD closed the administrative inquiry into Arias's use of force – the grand jury true-billed Alvarez for assaulting Arias.[48] In other words, the administrative inquiry was completed and filed away even before the criminal case against Alvarez was filed.

The indictment alleged that Alvarez committed an assault on a peace officer in violation of Tex. Penal Code § 22.01(b),[49] a third degree felony. That offense requires proof that the offender "intentionally, knowingly, or recklessly cause[ ] bodily injury to another" (*id.*, at § 22.01(a)(1)), and that the assault was "committed against

46. ROA.2704-06.

47. ROA.2707-10, 2713-15, 2733; *see also* ROA.3403-08, 3437.

48. ROA.3513-15, 3702.

49. ROA.3513-4, 3702.

a person the actor knows is a public servant while the public servant is *lawfully discharging* an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant." *Id.*, at § 22.01(b)(1) (emphasis added).

The issue whether Arias was "lawfully discharging" his official duties was central to Alvarez's later claim of actual innocence. Under Texas law, "lawful discharge" "means that the public servant is not criminally or tortiously abusing his or her office as a public servant" by, "for example," . . . "the use of unlawful, unjustified force." *Hall v. State*, 158 S.W.3d 470, 474 (Tex. Crim. App. 2005). Texas defines justified force in this context as follows:

> An officer or employee of a correctional facility is justified in using force against a person in custody when and to the degree the officer or employee reasonably believes the force is necessary to maintain the security of the correctional facility, the safety or security of other persons in custody or employed by the correctional facility, or his own safety or security.

Tex. Penal Code § 9.53. "Thus, if a [jailer's] use of force is reasonable within the meaning of Section 9.53 of the Penal Code, he is lawfully discharging his official duties, and, if assaulted at this time, the actor is guilty of assault of a public servant rather than mere misdemeanor assault." *Hall*, 158 S.W.3d at 475.

The requirement that the offender inflict "bodily injury" on the victim requires proof only that the victim suffered pain, however minor. *See* Tex. Penal Code

§ 1.07(a)(8) (defining "bodily injury" to include "physical pain"); *see also Lane v. State*, 763 S.W.2d 785, 786 (Tex. Crim. App. 1989) (for purposes of determining whether a "bodily injury" has been inflicted, the "degree of injury sustained by a victim and the 'type of violence' utilized by an accused," are "of no moment").

Alvarez hired his own lawyer, Oscar De la Fuente, to represent him in *State v. Alvarez*.[50] Despite the fact that Alvarez had seen and even made an obscene gesture at one of the video cameras in the jail,[51] there is no evidence that Mr. De la Fuente made any attempt to subpoena any records from the City or review anything more than the State's case file.[52]

On March 10, 2006 – some six weeks after being indicted – Alvarez waived all of his trial rights and pled guilty as charged in the indictment, swearing that he was pleading "guilty only because I am guilty."[53] There is no evidence that any city actor had any involvement in the plea bargaining.

On May 30, 2006, Alvarez was sentenced to eight years of confinement, probated to ten years of supervision with confinement in a substance abuse facility for a minimum of 90 days and a maximum of one year.[54] On November 22, 2006, the state court revoked the suspension of

50. ROA.3519.

51. ROA.259-60.

52. ROA.1932.

53. ROA.3528-32.

54. ROA.3599-3604.

his sentence due to non-compliance with the terms of probation and remanded him to prison for the remainder of his eight-year sentence.[55]

8. ***Ex Parte Alvarez.***

In unrelated litigation, Alvarez's present counsel, Mr. Eddie Lucio, discovered the video of the Arias-Alvarez altercation.[56] Subsequently, on May 17, 2010, Mr. Lucio filed an application for writ of habeas corpus on Alvarez's behalf, citing three grounds: (1) that newly discovered evidence – i.e., the jailhouse video – showed Alvarez to be "actually innocent" of the crime for which he was imprisoned; (2) that police withheld exculpatory evidence (*i.e.*, the video) thereby violating Alvarez's due process rights under *Brady*; and (3) that Alvarez's plea should be set aside because it could not have been knowingly and voluntarily made.[57]

In his habeas application, Alvarez did not argue that the video disproves every element of the assault charge. He did not contend, for example, that the video affirmatively disproves that Alvarez had grabbed Jailer Arias's genitals, for it does not. Rather, Alvarez's theory of "actual innocence" was based on a claim that it was Jailer Arias, not Alvarez, who had provoked the altercation without any justification. To set up this argument, Alvarez's counsel filed a redacted version of the jailhouse video, which omitted all of the events leading up to the altercation – some 38 seconds of footage (time counter

55. ROA.3505-06, 3670-72.

56. ROA.30-31.

57. ROA.3676-83.

21:06:40 through 21:07:18), which showed Alvarez refusing to walk forward as directed.[58]

In the habeas proceeding, the State of Texas was represented by then Cameron County District Attorney Armando Villalobos.[59] Mr. Villalobos's office only filed a general denial, alleged that Alvarez had pled *nolo contendre* - when in fact he had pled guilty - and consented to a new trial.[60] There is no evidence that the District Attorney ever attempted to confirm with the City whether the video submitted with Alvarez's habeas application was authentic.[61]

On June 16, 2010, the district court held a hearing on Alvarez's petition for habeas corpus. As reflected by the hearing transcript, Alvarez's theory of innocence depended on the claim that Jailer Arias's initial contact was unjustified.[62] Mr. De la Fuente, the defense lawyer in *State v. Alvarez*, testified that the video showed "no

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58. ROA.283, 1782-84, 3851.

59. ROA.3806-07. Mr. Villalobos would later be convicted on several counts of racketeering in an enterprise with Mr. Lucio, Alvarez's counsel in the habeas proceeding. *See* Indictment, Jury Verdict, and Judgment of Conviction in *U.S. v. Armando Villalobos*, B-12-374, in the U.S. District Court for the S.D. Tex., Brownsville Div., ROA.1784-1860.

60. ROA.3806.

61. ROA.2061-65. The Assistant District Attorney who filed the answer for the State, Mr. Lane Haygood, testified that Mr. Lucio failed to advise him that the video supporting Alvarez's habeas corpus application had been redacted, an omission Haygood believed material and fraudulent. *Id.*

62. See ROA.1924-50.

interaction between [Alvarez] and the guard" before the take-down and "no indication that Mr. Alvarez isn't following the instructions the guard is giving him."[63] Mr. De la Fuente could say that truthfully only because the video in evidence had been redacted to delete those very scenes. Mr. De la Fuente correctly confirmed that the video does not depict whether Alvarez grabbed Arias's groin.[64] He admitted: "It [the video] isn't clear on that point."[65]

On June 6, 2010, the state district court issued findings of fact and conclusions of law in Alvarez's favor and recommended that a new trial be ordered.[66] The state district court did not find that the video was exculpatory, but rather, that it constituted impeachment evidence.[67] Given the State's failure to point out Alvarez's guilty plea to the offense, it is hardly surprising that the state district court's findings of fact include no finding that Alvarez's guilty plea was involuntary, only that had he seen the video, he "possibly would not have pled no contest."[68]

On October 13, 2010, the Texas Court of Criminal Appeals (CCA) found Alvarez "actually innocent" of the charge, based upon the trial court's findings of fact and

63. ROA.1937-38.

64. ROA.1938.

65. ROA.1938.

66. ROA.3809-18.

67. ROA.3809-18.

68. ROA.3810.

upon its review of the record.[69] The record reviewed by the CCA included only the redacted video, not the complete video.[70]

Under Texas law, the "actual innocence" finding was not a judgment of acquittal. It merely entitled Alvarez to a new trial based on the newly discovered evidence which he claimed to prove his innocence. *See Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. 1996). Accordingly, the CCA reversed Alvarez's conviction and remanded him to the county sheriff's custody "to answer the charges as set out in the indictment." *Ex Parte Alvarez*, No. AP-76,434 (Tex. Crim. App. Oct. 13, 2010) (per curiam).[71] Upon District Attorney Villalobos's instruction, the trial court dismissed the indictment on October 20, 2010.[72]

B. Procedural Background.

Alvarez filed this Section 1983 suit against the City and against Arias, Chief Garcia, Infante, Henry Etheridge (the supervisor over the Internal Affairs Unit), and Robert Avitia (the commander over the city jail who supervised Infante). Alvarez asserted claims for excessive force, fabrication of evidence, and concealment of evidence under the *Brady* doctrine.[73]

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69. *See Ex Parte Alvarez*, No. AP-76,434 (Tex. Crim. App. Oct. 13, 2010) (per curiam), ROA.3823-4.

70. ROA.1782-84.

71. ROA.3823-4.

72. ROA.3827-28.

73. ROA.25-60.

On August 10, 2012, the defendants moved for summary judgment.[74] The supporting record included copies of the original unredacted video, still shots made from the video, and the redacted video for comparison purposes.[75] In response, Alvarez filed only a redacted version ("Exhibit B"), to which the City objected on the ground of authenticity.[76] No ruling was made on the City's objections.

On February 25, 2013, the magistrate judge recommended that the defendants' motion be granted in part and denied in part.[77] On one hand, the magistrate judge recommended an immunity-based dismissal of Alvarez's *Brady* claim against each of the individual defendants, including Chief Garcia, noting that "Alvarez has shown no bad faith on the part of the individual officers."[78] However, the magistrate recommended that the City's motion as to the *Brady* claim be denied.[79] On March 19, 2013, the initial district judge assigned to the case (Andrew Hanen) adopted this recommendation.[80]

On September 17, 2013, Judge Hanen recused himself (presumably because he was presiding over *U.S. v. Villalobos*), and this case was assigned to Judge Hilda Tagle.[81]

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74. ROA.209-45.

75. ROA.277-83.

76. ROA.612-13.

77. ROA.666-98.

78. ROA.694.

79. ROA.726-33.

80. ROA.721.

81. ROA.768.

On December 30, 2013, following docket call, Judge Tagle requested the parties to file cross motions for summary judgment on the *Brady* claim.[82] The motions were filed on January 31, 2014.[83] Alvarez contended that the three *Brady* elements of suppression, favorability, and materiality were *res judicata* via the district court and CCA rulings in *Ex parte Alvarez*.[84]

On June 19, 2014, Judge Tagle denied the City's (second) motion for summary judgment and granted Alvarez's motion on liability.[85] The court refused to give the CCA opinion collateral estoppel effect.[86] However, in deciding all of the three *Brady* elements in Alvarez's favor, the court found *Ex parte Alvarez* "strongly persuasive" and effectively conclusive on all issues.[87]

On October 15, 2014, following a jury trial on the issue of damages,[88] the district court entered a final judgment in favor of Alvarez for $2,300,000 (damages and attorneys' fees), plus interest.[89]

The en banc Fifth Circuit reversed and rendered judgment for the City on the issues of no municipal liability

82. ROA.957-58.

83. ROA.959-86, 989-1017.

84. ROA.994-96.

85. ROA.1084-1100.

86. ROA.1090-91.

87. ROA.691-93.

88. ROA.1297.

89. ROA.1517.

and no underlying *Brady* violation. *Alvarez v. City of Brownsville*, 904 F.3d 382 (5th Cir. 2018) (en banc), *cert. filed* Dec. 14, 2018, No. 18-854. The en banc Fifth Circuit did not reach several issues raised by the City, including whether the video in question was exculpatory evidence, whether any city officer deprived Alvarez of due process by what was in effect a negligent omission to deliver the video to the prosecutor, whether the evidence proved that any violation by the City proximately caused Alvarez to plead guilty and serve four years in prison, and whether the damages awarded were excessive. *See* City's Appellant's Brief and Supplemental En Banc Brief.

REASONS FOR DENYING THE PETITION

A. Overview.

A Section 1983 claim against a municipality raises two different issues – "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the City is responsible for that violation." *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). In this case, the en banc Fifth Circuit rejected Alvarez's claim on both elements – there was no underlying constitutional violation by police investigators who failed to deliver pertinent evidence (a video-recording of the underlying incident) to prosecutors prior to Alvarez's guilty plea; and in any event, the City is not responsible because the investigating officer's failure to discover and produce the video prior to Alvarez's guilty plea was not the proximate cause of any deliberate indifference on the part of the municipal policymaker, Chief Garcia.

Ordinarily, this Court will not decide a constitutional question if there is some other ground upon which to

dispose of the case. *Escambia Cty. v. McMillan*, 466 U.S. 48 (1984). Therefore, the beginning and ending point for certiorari review in this case should be the non-constitutional issue of municipal responsibility. Certiorari should be denied because that alternative basis for the judgment was correctly decided by the Fifth Circuit and is otherwise unworthy of discretionary review.

The Court should also deny the writ because the constitutional issue raised by Alvarez can be avoided on other grounds that the petition does not address. In this Section 1983 case, the liability of the City does not depend only on whether persons accused of crimes have a right to receive exculpatory evidence before pleading guilty. Municipal liability in this case must also depend on a constitutional violation by a city actor – whether a city police officer "deprived" Alvarez of due process by unknowingly omitting to deliver the allegedly exculpatory video to the prosecutor at a time before the indictment against Alvarez had already been returned, when no *Brady* rights had even attached. The detective whose job it was to submit all relevant evidence to the prosecutor had no involvement in the prosecutor's decision to submit the charge to a grand jury. City officers had no control over the plea bargain Alvarez struck with the prosecutor a few months later.

The petition also assumes, incorrectly, that the video evidence at issue in this case was exculpatory. It is not. The video is neutral on the elements of the charged offense, if not *inculpatory*. It very plainly shows that Jailer Arias used reasonable force to restrain Alvarez when he resisted the jailers' lawful commands to proceed to a jail cell, and it also proves that Arias's decision to resort to force

was reasonable and measured. And even if the video has some impeachment value, there can be no constitutional violation per *Ruiz*.

In short, although Alvarez has used language in his petition such as "suppression" of evidence to suggest something more sinister, what this case boils down to is a claim that a police officer proffering a probable cause packet to the prosecutor can be liable under Section 1983 essentially for negligence in allowing exculpatory evidence to fall through cracks.

B. The City Is Not Responsible under Section 1983 for the Alleged *Brady* Violation.

1. Essential Elements of Section 1983 Municipal Liability.

"[U]nder § 1983, local governments are responsible only for 'their *own* illegal acts.'" *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) (emphasis original in *Pembaur*); *see also Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 665-83 (1978). Local governments "are not vicariously liable under § 1983 for their employees' actions." *Connick*, 563 U.S. at 60.

"Plaintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury." *Connick*, 563 U.S. at 60 (quoting *Monell*, 436 U.S. at 691). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id.* at 61.

In this case, there is no express City policy that caused any injury. As the district court correctly noted, "the official policy of the BPD is to provide all evidence, including any exculpatory evidence, to the District Attorney's Office in all criminal cases."[90] In addition, per the district court, there was no evidence of a custom of *Brady* violations so persistent and widespread as to have the force of law.[91]

To impose liability on the City, the district court relied instead on a "single-incident" exception to the pattern of similar violations normally required to show deliberate indifference on the part of the final policymaker.[92] Imposing Section 1983 liability on a local government for the single action of its final policymaker was first recognized in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). There, the Court held that a policymaker's on-the-spot, single decision of ordering his deputies to conduct an illegal search was actionable under § 1983. 475 U.S. at 480-81. Here, unlike in *Pembaur*, no proof exists that Chief Garcia directed anyone to conceal the Alvarez video from prosecutors.

"Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high." *Bryan County v. Brown*, 520 U.S. 397, 408 (1997); *see also City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989).

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90. ROA.1094.

91. ROA.1096.

92. ROA.1095.

Accordingly, this 'single incident exception' is "narrow" and "rare." *See Connick*, 563 U.S. at 63-64.

The district court adapted the single incident exception to fit what it viewed as a failure of supervision on the part of Chief Garcia – that Chief Garcia set up a system in which only he could have released the video to the prosecutor; and the court held that Chief Garcia had essentially dropped the ball by failing to review the use-of-force report on Arias's use of force to restrain Alvarez.[93]

In policymaker "failure to act" cases, the plaintiff must prove that the policymaker's inaction was deliberately indifferent to the plaintiff's constitutional rights. *Connick*, 563 U.S. at 61. "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.'" *Id.* (quoting *Bryan County*, 520 U.S. at 410). A city's "'policy of inaction' in light of notice that its program will cause constitutional violations 'is the functional equivalent of a decision by the city itself to violate the Constitution.'" *Id.* at 61-62 (quoting *Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part)).

Finally, to recover from a municipality under Section 1983, a plaintiff must satisfy a "rigorous" standard of causation, *Bryan County*, 520 U.S. at 405; "he must 'demonstrate a direct causal link between the municipal action and the deprivation of federal rights.'" *Connick*, 563 U.S. at 75 (Alito, J., concurring) (quoting *Bryan County*, 520 U.S. at 404).

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93. ROA.1097-98.

2. No Deliberate Indifference by the Final Policymaker.

The theory on which the district court held the City liable – that the altercation video was bottled up in an IA file and could not be disclosed to CID investigators unless the Chief of Police authorized its disclosure – was based upon several false assumptions, each of which is discussed in turn below.

a. *The Video Was Never Concealed in an IA File.*

The unsupported assumption that the altercation video was hidden away in an "IA file" is the most glaring of the false premises on which the district court's judgment against the City was based. The district court's fundamental misunderstanding of this point is no better exemplified by the court's identification of Sgt. Infante as "an IAD officer,"[94] when in fact he was a jail supervisor. No proof exists that an IA investigation into the matter was ever ordered. The inquiry into whether Jailer Arias used excessive force in his take-down of Alvarez was conducted by jail supervisors in the form of the routine review which is performed anytime there is a use-of-force incident in the jail.

By contrast, an internal affairs investigation could not be initiated without an order of the Chief of Police,[95]

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94. ROA.1094.

95. *See* BPD Internal Affairs Policy Document, ¶ VI.A, ROA.2806-07 ("The Chief of Police will assign cases to the Internal Affairs Unit."); *see also* Depo. of H. Etheridge, head of IAU, testifying "[O]nly the chief can direct a IA investigation. Only he can initiate it." ROA.3277.

which presupposes the Chief's review. No such order was given. Chief Garcia did not see the administrative inquiry reports; he did not refer the case to IAU, so there was never any IA investigation. As Chief Garcia testified, "it was not in the hands of internal affairs. An administrative inquiry was being conducted."[96]

b. *The Video Was Fully Accessible to CID.*

The district court's false assumption that the video was solely in the hands of an "IAD officer" who could not release any evidence to CID under any circumstances paved the way for the equally false assumption that the video could not have been available for CID officers to deliver to the prosecutor unless Chief Garcia authorized its release to CID. In fact, the video-recording was created by plainly visible camera equipment in the city jail office, and a copy of it – one copy – was downloaded onto a disc by a jail supervisor, Sgt. Infante, as part of his supervisory administrative review of Arias's use of force. Infante's creation of the copy for his administrative review of Arias's use of force did not preclude other investigators, such as the CID investigators investigating Alvarez's assault of Arias, from making a copy for their separate investigation. No evidence exists to prove that the server which contained the original electronic copy of the video in its hard drive at the city jail office was ever secreted away in an IA file or locked cabinet that required the Chief's approval to access.

96. ROA.2750.

c. *Chief Garcia Reasonably Relied upon CID to Locate and Disclose the Video.*

As the Fifth Circuit has recognized, the *Brady* doctrine only applies to the members of the "prosecution team," "which includes all law enforcement officers who have worked on the case and thereby contributed to the prosecutorial effort." *Kyles v. Whitley*, 5 F.3d 806, 831 (5th Cir. 1993) (King, J., dissenting), *rev'd*, 514 U.S. 419 (1995); *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979).[97] The sound reason for this rule is that the duty imposed by *Brady* and its progeny does not extend to an entire police department; only the knowledge of the prosecutor's agents can be imputed to the prosecutor for purposes of determining whether constitutional disclosure obligations have been fulfilled.

Since Chief Garcia was not part of the prosecution team that investigated the potential assault charge against Alvarez, his alleged failure to have injected himself into the minutia of the Alvarez prosecution was not deliberate indifference on the part of the City to Alvarez's *Brady* rights. In any police organization the size of Brownsville's,

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97. *United States v. Barcelo*, 628 Fed. Appx. 36, 38 (2d Cir. 2015) ("Individuals who perform investigative duties or make strategic decisions about the prosecution of the case are considered members of the prosecution team, as are police officers and federal agents *who submit to the direction of the prosecutor and participate in the investigation*.") (emphasis added); *Chatman v. City of Chicago*, No. 14 C 2945, 2016 U.S. Dist. LEXIS 122880 (N.D. Ill. Sept. 12, 2016) (granting immunity-based summary judgment for internal affairs officers who had failed to disclose *Brady* materials, reasoning that no duty to disclose has yet to be recognized where the internal investigators were not part of the prosecution team.).

there is inevitably a division of labor. The Chief's role in overseeing administrative inquiries is to ensure officer compliance with internal policies.

In short, Chief Garcia had no check and balance function in overseeing every criminal prosecution in this 240+ member police department. He reasonably expected that CID would gather and disclose *Brady* material, and that the jailers would disclose to CID anything that CID had omitted to find themselves, including the video at issue in this case.[98] Chief Garcia, as well as other members of his command staff, all expected city jailers to advise CID investigators of the existence of videos relevant to a criminal prosecution.[99] And Sgt. Infante himself acknowledged the same.[100]

In his dissenting opinion, Judge Graves noted that Chief Garcia overlooked review of 9 of 13 recorded internal files wherein jailers were assaulting detainees, including the Alvarez file. *Alvarez*, 914 F.3d at 404 (referring to ROA.2731, 2808). The salient part of this assertion is that the administrative inquiry files concerned "jailers assaulting detainees," not detainees assaulting jailers.

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98. ROA.2750.

99. *See* Garcia Depo. at pp. 5-16, 50 (ROA.2704-15, 2749-50) (repeatedly testifying that jailers should have told CID that the video existed); Avitia Depo., at p. 111 (ROA.496) (former jail commander) ("Q. What's the BPD policy on disclosing evidence to the district attorney's office for review by the grand jury?" A. All evidence should be submitted to the district attorney's office."), *id.*, pp. 116-19 (ROA.497) ("Videos are videos. They should be able to be available to either one of the investigations.").

100. ROA.2816, 2828-31.

The cited statistic says nothing of likelihood of any administrative inquiry file containing recognizable *Brady* material – in particular, a video exonerating the detainee of a later charge of assault on the jailer.[101]

3. No Proximate Causation Linking Policy and Injury.

The district court held that Chief Garcia's "decision not to review the IAD file [sic] caused the *Brady* violation in this case."[102] Putting aside the fact that there never was any "IAD file" in the first place, the court's assertion begged the question whether it would have been apparent to Chief Garcia that the video referred to by those materials was *Brady* material.

Before an indictment has been filed, no *Brady* rights attach. *See United States v. Williams*, 504 U.S. 36, 52 (1992) ("neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented"). When the administrative inquiry file crossed Chief Garcia's desk on December 8, 2005, Alvarez was not under any indictment. He was not indicted until January 25, 2006.[103]

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101. Of the nine administrative inquiry files that went unreviewed by Garcia, only three involved altercations in which the detainee was later charged. ROA.2808. The only inquiry file alleged to contain *Brady* material besides the inquiry into Arias's use of force on Alvarez was that involving detainee Jose Lopez, who received a copy of the video during his criminal trial and was acquitted of assault. ROA.2808.

102. ROA.1098

103. ROA.3513-4, 3702.

In addition, nothing in any of those administrative review materials[104] appeared likely to become *Brady* material for a future prosecution. The administrative inquiry reports from Jailer Arias's supervisors, Sgt. Infante and Cmdr. Rodriguez, all recite the basic facts of the scuffle and conclude that Arias's use of a headlock to gain Alvarez's compliance was reasonable and justified. Had Chief Garcia reviewed those reports, he would have been justified in relying on them. *See Coon v. Ledbetter*, 780 F.2d 1158, 1162 (5th Cir. 1986) (sheriff not indifferent in accepting as true the versions of an event given by his subordinates). And the *complete*, unredacted video plainly shows that Jailer Arias used reasonable force to restrain Alvarez after Alvarez refused to comply with the jailers' repeated directions for him to walk into a jail cell.[105]

C. No City Actor Violated Alvarez's *Brady* Rights.

1. Procedural Due Process: Essential Elements.

A municipality cannot be liable under Section 1983 "[i]f a person has suffered no constitutional injury at the hands of the individual police officer." *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). The right to a fair trial associated with *Brady v. Maryland*, 373 U.S. 83, 87 (1963), is a procedural due process right. *See Albright v. Oliver*, 510 U.S. 266, 273 n.6 (1994); *cf. United States v. Ruiz*, 536 U.S. 622, 631 (2002) (applying three-part due process

104. The administrative inquiry materials consisted of Rodriguez's 12/8/05 Interdepartmental Communication (IDC), Infante's 11/27/05 IDC, Arias's 11/25/05 IDC, and Sgt. Brown's 11/27/05 offense report and supplement, ROA.2594-2602.

105. ROA.3303.

test to accused's claimed right to receive impeachment evidence from the prosecution in advance of giving guilty plea) (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)). It follows that for Alvarez to prove that the City violated his due process rights, he needed to show that a city actor (1) "deprived" him of a constitutionally protected liberty interest, and (2) failed to afford him constitutionally required procedures.

2. No "Deprivation" of Liberty by Any City Actor.

"[T]he word 'deprive' in the Due Process Clause connote[s] more than a negligent act." *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *see also Davidson v. Cannon*, 474 U.S. 344, 347 (1986) ("[T]he protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care."). Historically, the due process guarantee "has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Id.* (emphasis added).[106]

The question of when police officers are liable under § 1983 for failing to turn over exculpatory evidence to

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106. The no fault *Brady* rule, even where it applies, imputes to the prosecutor "evidence '*known* only to police *investigators*,'" *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (emphasis added) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995)), thereby imposing a duty on the individual prosecutor "'to learn of any favorable evidence *known to the others acting on the government's behalf in this case*, including the police.'" *Id.* (quoting *Kyles*, 514 U.S. at 437) (emphasis added). In *Brady* situations, the imputation of knowledge to the prosecutor follows common law agency principles. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (citing Restatement (Second) of Agency § 272).

the prosecution has not been addressed by this Court. However, it has been variously addressed by several of the courts of appeals. "The great weight of circuit court authority agrees with the 'majority' position" articulated in *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1076 (2001). Martin A. Schwartz & John E. Kirklin, SECTION 1983 LITIGATION: JURY INSTRUCTIONS § 9.01[A] (2016 Supplement). The majority position is that the "no fault" *Brady* standard does not apply to claims for damages. *Id.*

The courts of appeals have applied different formulations of the fault standard applicable to police in cases where police are alleged to have suppressed *Brady* evidence. Some require a plaintiff to show that the defendant acted in bad faith to prove a violation of the plaintiff's *Brady* rights.[107] Others, while holding that mere negligence does not support a *Brady* claim against police, have declined to impose a bad faith requirement but have determined instead that deliberate or reckless conduct suffices.[108] The Sixth Circuit has applied a similar standard to police officers as the no-fault standard applied to prosecutors, but still requires an additional showing that "the 'exculpatory value' of the suppressed evidence must

107. *See Jean*, 221 F.3d at 663 ("the concept of constitutional deprivation articulated in both *Daniels* and [*Arizona v.*] *Youngblood* [, 488 U.S. 51 (1988)] requires that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial. This is what is meant by 'bad faith.'"); *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004); *cert. denied*, 543 U.S. 1153 (2005); *Porter v. White*, 483 F.3d 1294 (11th Cir. 2006), *cert. denied*, 552 U.S. 1185 (2008).

108. *Steidl v. Fermon*, 494 F.3d 623, 631 (7th Cir. 2007); *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1087 (9th Cir. 2009).

be 'apparent.'"[109] The Fifth Circuit, while not addressing this issue directly, has suggested that a heightened fault standard such as intentional concealment must apply.[110]

The issue of the requisite fault required for a "deprivation" of liberty in the present case is further complicated by the limited involvement of the Brownsville police in the prosecution of Alvarez. Det. Carrejo's involvement ended with the delivery of a complaint and witness statements for the prosecutor to consider in determining *whether* to bring assault charges against Alvarez. Brownsville's involvement ended before Alvarez was indicted, when no disclosure obligations are owed under *Brady. See Williams*, 504 U.S. at 52. No evidence exists that Det. Carrejo, or any other Brownsville officer for that matter, participated in subsequent grand jury proceedings that resulted in Alvarez's indictment, much less in the plea negotiations that ended in his guilty plea some six weeks later.

This is not a case of intentional concealment or coverup. At worst, it is a situation where the detective assigned to the case (Carrejo) was negligent in failing to ask jailers whether a video existed and in failing to inspect the cameras himself. As the district court noted, "Alvarez has shown no evidence of bad faith on the part of the individual officers [Garcia, Infante, and Arias],"[111] and plaintiff's

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109. *See Moldowan v. City of Warren*, 578 F.3d 351, 388-89 (6th Cir. 2009), *cert. denied*, 561 U.S. 1038 (2010).

110. *See Mowbray v. Cameron Cnty.*, 274 F.3d 269, 278 n.5 (5th Cir. 2001).

111. ROA.693, 721.

own expert, Robert Verry, similarly concluded that no evidence existed to show that the non-disclosure of the video by these individuals was knowing or purposeful.[112] As for the Brownsville officers who did actually review the video as part of an unrelated inquiry into Jailer Arias's performance – Jail Sgt. Infante and Cmdr. Rodriguez – that review also occurred pre-indictment, before any *Brady* obligations had ripened.

Moreover, as neither Infante nor Rodriguez were any part of the prosecution team but only jail supervisors, the agency principles that operate under *Brady* to impute knowledge from agents (police investigators) to principals (prosecutors) (*see Giglio*, 405 U.S. at 154 (citing Restatement (Second) of Agency § 272)), cannot be stretched to impute knowledge of these non-prosecutorial agents (jail supervisors) to a police investigator (Carrejo) and ultimately to the prosecutor.[113] Indeed, the agency principles imported into the *Brady* doctrine to facilitate systemic justice have no place in Section 1983 suits in any event. *See Pembaur*, 475 U.S. at 479 (noting that Section 1983 liability attaches only to actual wrongdoers and cannot be founded on principles of vicarious responsibility) (citing *Monell*, 436 U.S. at 692-94 & n.57).

3. No Denial of Procedural Rights.

The en banc Fifth Circuit's rule that *Brady* is a trial right and does not extend to the pre-plea phase of a criminal case is sound and should not be disturbed.

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112. ROA.526.

113. *See also* Restatement (2d) of Agency § 350, cmt. b ("The knowledge of another agent or of the principal does not affect the liability of the agent.").

Alvarez, 904 F.3d at 392-402. The City embraces all of these grounds. Judge Higginson's concurring opinion (*id.* at 395-97), which explains why the Court should not "constitutionaliz[e] *Brady* forward in time from a fair trial right ('existing *Brady*') to a pre-plea right ('new *Brady*')," is particularly instructive when considering how a finding of no-fault liability in this case could adversely impact police:

(a) *Who Owes New Brady Disclosure (After What, If Any, Search)?*

Existing *Brady* law imposes constructive knowledge on the government. *Id.* at 395 (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Thus, "[i]f an earlier-in-time, new *Brady* right is recognized, the orbit of government responsibility must be drawn." *Id.* (Higginson, J., concurring). For prosecutors, "plea agreement offers may well be withheld if a *Brady* imputation rule applies to prosecutors when a matter is still being investigated with disparate law enforcement involvement, especially when law enforcement is responding to reactive crimes and arrests." *Id.* For police, there may be reluctance to file any charges at all with a prosecutor while the matter is being investigated, due to the specter of Section 1983 liability in the event that a key piece of evidence might be inadvertently overlooked. Police, unlike prosecutors, have no control over the timing of plea bargains and do not share in the absolute immunity of prosecutors.

(b) *What Must Be Disclosed?*

According to Judge Higginson, "[t]he answer seems to be *Brady* minus *Ruiz*, yet that would revive difficult distinctions between exculpatory and impeachment

evidence which bedeviled earlier due process caselaw." *Alvarez*, 904 F.3d at 396. For police, who lack legal training, those difficult distinctions may be even more bedeviling. In this case, for example, the *redacted* version of the jailhouse video was deemed merely "impeachment" evidence by the state district court that recommended habeas relief. And, as previously discussed, the exculpatory value of the complete, un-redacted version raises a complex question, as Judge Jones noted in her concurrence. *Alvarez*, 904 F.3d at 394-95. Contrary to what his lawyer told the state habeas court, it proves that Alvarez did resist the jailers' request to proceed to a jail cell, and it proves that Arias used reasonable force to place Alvarez in a 45-second head lock while other jailers restrained him.[114] A brief headlock on an actively resisting detainee is reasonable force.[115]

(c) *When Must Disclosure Occur?*

As Judge Higginson has noted, "the constitution does not prevent accused persons from acknowledging responsibility and guilt," and yet any new *Brady* rule likely would require prosecutors to delay guilty pleas while

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114. The video does not show Arias applying pressure to Alvarez's trachea. It depicts him wrapping his right arm around Alvarez's head and never around his throat. *See* Video Stills, ROA.1602-1625. The time counter on the video proves that the head lock was also very brief – about 45 seconds (21:07:26 to 21:08:11) – and the hold was released as soon as the other jailers had secured Alvarez in handcuffs and leg shackles.

115. *See Hughes v. Smith*, 237 F. App'x 756, 759 (3d Cir. 2007) (affirming grant of summary judgment on eighth amendment excessive force claim where plaintiff asserted that officer put him in a headlock and punched him while he resisted arrest and scuffled with the officer).

evidence is gathered. *Id.* at 395-96. Police have no such control over the process, as this case illustrates. Within a few weeks after Det. Carrejo delivered the probable cause package on the Alvarez assault to the prosecutor, the prosecutor, without further police involvement, secured an indictment and Alvarez's guilty plea.

Police generally do not assist the prosecutor in framing an indictment. Without input from the prosecutor, police are often in no position to anticipate what might be relevant to the charges ultimately brought. Critically, police are in no position to affect the timing of a plea the accused desires to make. Yet under Alvarez's theory of the case, any plea bargain struck before the police gather and present all conceivable relevant evidence to the prosecutor puts the police at risk of unlimited personal civil liability for overlooking evidence that might fall through the cracks before a plea agreement is reached.

(d) ***What Other Pre-Trial Guarantees Protect the Criminally Accused from Uninformed Guilty Pleas?***

Judge Higginson has correctly pointed out that "the constitution already protects against ineffective assistance of counsel, which occurs regardless of the attractiveness of a plea offer if counsel, in the best position to have ascertained innocence, fails to investigate the law and circumstances relating to a defendant's guilty plea." *Alvarez*, 904 F.3d at 396 (internal quotations omitted) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). If there is an impetus to constitutionalize the plea-bargaining process to prevent the criminally accused from feeling coerced to plead guilty without all of the relevant evidence, the solution, it would seem, would be to require defense

counsel to discover that evidence through the available state pretrial-discovery procedures rather than hold police strictly liable for overlooking the evidence that defense counsel never asked for in formal discovery. It should be up to defense counsel and their clients to determine whether to pursue discovery in advance of a guilty plea; the burden to produce without request all relevant evidence prior to a plea should not be laid on police, which have no control over the timing of a plea deal.

The red herring in this case – that IAU investigations are confidential – is not absolute but subject to judicial oversight. Brownsville is a civil service city,[116] and under state civil service laws the civil service director is authorized to release disciplinary materials contained in personnel records wherever "required by law." Tex. Loc. Gov't Code § 143.089(f). Under Texas law, *Brady* material in personnel files is discoverable through a judicial process. *See Ealoms v. State*, 983 S.W.2d 853, 859 (Tex. App.—Waco 1998, pet. ref'd).

116. *See* Brownsville Code Chap. 34 (available online at: www.municode.com/library/tx/brownsville/codes/code_of_ordinances).

CONCLUSION

Accordingly, this Court should deny Alvarez's petition for certiorari.

Respectfully submitted,

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