No. 22-186

IN THE

# Supreme Court of the United States

TROY MANSFIELD,
*Petitioner*,

v.

WILLIAMSON COUNTY, TEXAS,
*Respondent.*

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

## BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONER TROY MANSFIELD

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SEPTEMBER 29, 2022

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Other Authorities**

## INTEREST OF THE *AMICI CURIAE*[1]

*Amici curiae* listed in the Appendix are law professors and scholars at U.S. law schools who teach, research, and write about criminal procedure, criminal law, and legal ethics. They share a common view that prosecutors must disclose exculpatory information during plea-bargaining negotiations.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made any monetary contribution to its preparation or submission. *Amici curiae* gave notice of their intent to file this brief to all parties in accordance with Rule 37.2 and all parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

1.a. Most criminal cases today are resolved through plea bargaining instead of trial. The essence of plea bargaining is negotiation between the government and the defendant toward an agreement by which the defendant pleads guilty to a crime, waiving the right to trial and other fundamental constitutional rights in exchange for a reduction of charges or a lower sentence.

By its nature, plea bargaining recognizes that a defendant never has an obligation to plead guilty and is entitled to put the government to its proof at trial. Because a guilty plea stemming from a plea agreement results in the waiver of critical constitutional rights, due process requires that it be "voluntary" and constitute an "intelligent admission" that the defendant committed the offense charged. *Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *see also, e.g.*, *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005); *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969).

A rational defendant's decision whether to accept a prosecutor's plea offer depends on the defendant's assessment of the risk of conviction at trial. Instead of going to a trial at which she faces an X probability of conviction with a resulting punishment of Y years, the defendant accepts a punishment of up to X*Y. The

punishment imposed through the plea agreement is at most the expected value of punishment from the trial.

Permitting prosecutors to withhold material exculpatory evidence that the government would be obliged by *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose before trial leads defendants to overestimate the likelihood of conviction and therefore to enter guilty pleas that do not reflect an accurate assessment of the likely result at trial. Such guilty pleas do not meet the voluntary, knowing, and intelligent standard.

b. In determining what due process requires in the context of plea negotiations and guilty pleas, this Court has looked to three considerations: (1) the nature of the private interest at stake, (2) the value of the additional proposed safeguard to the defendant and the fairness of the system, and (3) the adverse impact of the proposed requirement upon the government's interests. *Ruiz*, 536 U.S. at 631. All three considerations support requiring disclosure of material exculpatory evidence at the plea-bargaining stage.

First, the private interests at stake in plea bargaining are important because guilty pleas may result in fines, imprisonment, and even death.

Second, requiring disclosure of exculpatory evidence would increase the fairness of the system by

providing the defendant with critical information about the risk of conviction and, therefore, the type of guilty plea that she should be willing to accept.

Third, under *Brady,* the government is already required to disclose material exculpatory evidence before trial. Requiring disclosure of the *Brady* information at an earlier stage of the proceedings does not unduly burden the government. Moreover, if in a rare case the government considers it essential not to disclose certain evidence before trial, it will not have to do so because it controls both whether and when it will engage in plea negotiations and always has the option of dismissing the charges.

2. The current system in which most criminal defendants plead guilty is of recent origin. Historically, guilty pleas were uncommon and disfavored. Concern that innocent people might plead guilty was central to the historic reluctance to accept guilty pleas.

The current system in which trial is the rare exception could not function without the vast majority of defendants pleading guilty. As a result, there is immense pressure on prosecutors to secure guilty pleas.

Notwithstanding that this pressure raises constitutional concerns, this Court has permitted plea bargaining because of the "mutuality of advantage" it

offers defendants and prosecutors. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Brady v. United States*, 397 U.S. 742, 752 (1970)). In doing so, however, this Court has emphasized that plea bargains are constitutional only insofar as they are fair. *See Santobello v. New York*, 404 U.S. 257, 261 (1971).

Accordingly, the Court has imposed procedural requirements designed to ensure that plea negotiations are a fair process in which the defendant voluntarily chooses to waive his rights. *Id.*

Requiring prosecutors to disclose material exculpatory evidence is a prerequisite to the fairness of plea negotiations. Just as a party to a contract is obligated to disclose a material fact if doing so is in accordance with standards of fair dealing and good faith and is necessary to correct a mistake about a basic assumption made by the other, RESTATEMENT (SECOND) CONTRACTS § 161 (Am. L. Inst. 1981), so too prosecutors must disclose material exculpatory information in their possession. Especially considering the special obligations of prosecutors to seek justice, as well as the importance of waivers of important constitutional rights, withholding material exculpatory evidence during plea negotiations cannot be seen as acting in good faith or in accordance with reasonable standards of fair dealing.

## ARGUMENT

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that the Due Process Clause requires prosecutors to disclose material exculpatory evidence to a defendant before a criminal trial. The lower court erred in this case in holding that this *Brady* obligation does not extend to pretrial plea negotiations. Disclosure of material exculpatory evidence during plea negotiations is essential to ensuring that resulting guilty pleas are knowing and intelligent, the standard this Court's precedents unequivocally require. Disclosure is also necessary to assure the kind of fair and open negotiations that underpin the constitutional legitimacy of plea bargaining. This Court should grant review to clarify that the Due Process Clause requires prosecutors to disclose material exculpatory evidence during pretrial plea negotiations.

### I. Due process requires disclosure of *Brady* material at the plea-bargaining phase of a criminal case.

#### A. Disclosure of *Brady* material is necessary to ensure that a guilty plea is voluntary and made knowingly and intelligently.

1. The Constitution establishes an elaborate system of procedures in criminal cases, culminating in a trial by jury. A defendant waives these procedural

protections when he enters a guilty plea. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (pleading guilty involves waiver of the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one's accusers, and the Sixth Amendment right to trial by jury).

Recognizing the gravity of a defendant waiving these constitutional rights, this Court has imposed a high bar for accepting guilty pleas. In particular, due process requires that a guilty plea be "voluntary" and constitute an "intelligent admission" that the defendant committed the offense. *Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *see also, e.g.*, *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) ("A guilty plea . . . is valid only if done voluntarily, knowingly, and intelligently."); *United States v. Ruiz*, 536 U.S. 622, 629 (2002) ("[T]he Constitution insists," among other things, "that the defendant enter a guilty plea that is voluntary" and that the defendant must "make related waivers knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." (internal quotation marks omitted)); *Boykin*, 395 U.S. at 243–44 ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."). If a guilty plea is not "voluntary and knowing, it has been obtained in violation of due process and is therefore

void." *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

The essence of plea bargaining is negotiation between the government and the defendant toward an agreement by which the defendant pleads guilty, waiving these fundamental constitutional rights, in exchange for a reduction of charges or a lower sentence than the defendant would face at trial. Put differently, plea bargaining allows a defendant to secure a lighter punishment in exchange for waiving the right to put the government to its proof at trial, thereby relieving the government of the cost of trial and the risk that a defendant it believes to be guilty will be acquitted.

By its nature, plea bargaining recognizes that a defendant never has an obligation to plead guilty. To the contrary, the defendant is presumptively innocent, with the government bearing the burden to present admissible evidence proving the defendant's guilt beyond a reasonable doubt. *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and

beyond a reasonable doubt."). The defendant need not admit guilt or be witness against himself; a guilty defendant may put the government to its proof. *Malloy v. Hogan*, 378 U.S. 1, 7–8 (1964).

A rational defendant's decision whether to accept a prosecutor's plea offer depends on the defendant's assessment of the risk of conviction at trial. In theory, a defendant will accept a plea offer if the offer promises a punishment that reflects a punishment equal to or less than she would have received if convicted discounted by the likelihood of an acquittal. *See* Russell M. Gold et al., *Civilizing Criminal Settlements*, 97 B.U. L. Rev. 1607, 1615 (2017) ("Instead of receiving the full, appropriate sentence, the defendant would receive her expected sentence: that punishment discounted by the chance of acquittal."). Thus, if a defendant perceives a high risk of conviction, she is likely to be more amenable to a less favorable plea offer from the prosecutor. By the same token, a defendant who perceives that he is likely to be acquitted will demand a more favorable plea agreement.

In this way, from the defendant's point of view, plea bargaining operates as an expedient substitute for trial. Instead of going to a trial at which she faces an X probability of conviction with a resulting punishment of Y years, the defendant accepts a punishment of up to X*Y. *See id.* The punishment imposed through the plea agreement is at most the

expected value of punishment from the trial. *See* Frank H. Easterbrook, *Plea Bargaining Is A Shadow Market*, 51 Duq. L. Rev. 551, 556 n.18 (2013).

2. Under *Brady*, the government must disclose to the defendant before trial all material exculpatory evidence in its possession. 373 U.S. at 87. The point of the *Brady* requirement is to assure that the defendant has all relevant evidence supporting his defense to the government's charges; disclosure of *Brady* material is essential to assuring that the defendant receives a fair trial. *Id*. at 87–89 ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . ."). By definition, material exculpatory evidence reduces the likelihood that a defendant will be convicted or makes the penalty the defendant will likely receive less severe than would otherwise be the case.

It necessarily follows, of course, that during plea negotiations a defendant cannot accurately assess the likelihood of conviction if the government is not required to disclose material exculpatory evidence. That is because the defendant will be negotiating without knowing about evidence undermining the government's case that he would be able to present at

trial; the defendant will be negotiating with a distorted and inaccurate understanding of what the evidence at trial for and against guilt will be.

Because exculpatory evidence reduces the likelihood of conviction, it affects the type of guilty plea that a rational defendant would be willing to accept. *See* Gold et al., *supra*, at 1624–26. Permitting the government to withhold material exculpatory evidence during plea negotiations is bound to lead a defendant to overestimate the likelihood of conviction and therefore to enter into a guilty plea that produces a punishment exceeding the expected value of the punishment that would have resulted from going to trial. *See, e.g.*, *United States v. Avellino*, 136 F. 3d, 249, 255 (2d Cir. 1998). Consequently, requiring prosecutors to disclose material exculpatory evidence at the plea-bargaining stage is essential to ensuring that a defendant's plea is voluntary, knowing, and intelligent.

In this way, material exculpatory evidence is fundamentally different from the impeachment evidence that this Court held a prosecutor need not turn over in plea negotiations. *Ruiz*, 536 U.S. at 630. As the Court explained in *Ruiz*, impeachment evidence is not critical to a defendant's estimate of the strength of the prosecutor's case because it is unpredictable and its effect uncertain. *Id.* Among other things, impeachment evidence may not be effective at trial because the government may opt not

to call the witness who might be impeached. *See id.* ("It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant.").

In sharp contrast, material exculpatory evidence *is* critical to a defendant's assessment of the strength of the prosecutor's case. *Brady* material is substantive evidence that tends to support the defense. *Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material . . . ."). The defendant's ability to introduce that evidence at trial does not depend on whether the government chooses to call a particular witness. Rather, the defendant can introduce exculpatory evidence during the defense case, after the government has rested, to support a "not guilty" verdict or conviction of a lesser charge. It therefore bears directly on any realistic evaluation of the likely outcome at trial; a defendant who does not know about material exculpatory evidence has a distorted view of the likely strength of the government's case at trial. *See* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 57 (2021) ("The whole idea behind plea bargaining is that defendants . . . negotiate a plea offer that is less than their expected punishment. But it is impossible for

defendants to do that if they don't know what evidence the prosecutor has.").

For these reasons, it cannot fairly be said that a defendant who pleads guilty pursuant to a plea agreement where the government has failed to disclose material exculpatory evidence has knowingly and intelligently waived his constitutional rights. That exculpatory information necessarily affects the defendant's assessment of his case and may lead the defendant to insist on a more favorable agreement or even refuse to plead guilty at all.

### B. Broader principles of due process also require disclosure of exculpatory material during plea negotiations.

In determining what due process requires in the context of plea negotiations and guilty pleas, this Court has looked to three considerations: (1) the nature of the private interest at stake, (2) the value of the additional proposed safeguard to the defendant and the fairness of the system, and (3) the adverse impact of the proposed requirement upon the government's interests. *Ruiz*, 536 U.S. at 631. All three considerations support requiring the government to disclose material exculpatory evidence during plea negotiations.

First, the private interests at stake in the plea process are highly important. Guilty pleas may result

in fines, imprisonment, and in the most severe circumstances, death. Those interests warrant significant procedural protections.

Second, the value added by requiring prosecutors to disclose exculpatory evidence in plea negotiations is also significant. As explained above, because material exculpatory evidence bears on the likelihood a defendant will be convicted at trial, it directly affects the type of plea agreement that a rational defendant would be willing to accept. Requiring disclosure therefore directly protects the interests at stake by reducing the punishment a defendant will receive pursuant to a negotiated plea agreement.

It is one thing to say that a guilty plea is knowing and intelligent when entered by a defendant who did not know about mere impeachment evidence concerning a witness in the case. It is quite another thing to say that a guilty plea is knowing and intelligent if the defendant did not know about material substantive evidence that could be presented at trial and very well be the basis for acquittal.

Finally, requiring disclosure would have minimal impact on the government. Under *Brady*, the government is already required to disclose material exculpatory evidence before trial. 373 U.S. at 87. Requiring disclosure of exactly the same exculpatory evidence at an earlier stage of the process would not impose any significant cost on the government. In

conducting its plea negotiations, the government knows about the exculpatory evidence and so can take it into account. The government has no legitimate interest in putting the defendant in the position of negotiating in the dark.

To be sure, this Court cited concern in *Ruiz* that requiring disclosure of impeachment evidence during plea negotiations could put witnesses at risk or compromise ongoing negotiations. *Ruiz*, 536 U.S. at 631–32 (requiring disclosure of impeachment material "risks premature disclosure of Government witness information, which . . . could disrupt ongoing investigations and expose prospective witnesses to serious harm") (internal quotation marks omitted). But with substantive exculpatory evidence, those concerns are far less substantial.

Disclosure of impeachment evidence almost inevitably identifies witnesses who are expected to testify against a defendant, thereby providing the defendant with an opportunity and motive to interfere with the witness. Exculpatory evidence, in contrast, tends to show that the defendant did not commit the crime; its disclosure typically does not create an incentive for a corrupt defendant to interfere with or retaliate against any witness. Moreover, disclosure of information about witnesses is far more likely to disrupt an investigation than is disclosure of substantive exculpatory evidence that simply goes to whether the defendant is guilty. And, in all events,

the government has the ability to obviate potential problems resulting from disclosure of exculpatory evidence. It controls when it will enter into a plea agreement and, consequently, the timing of any necessary disclosure, and it can always opt to proceed to trial or dismiss charges if it deems disclosure of the exculpatory evidence too risky.

## II. Disclosure of exculpatory evidence is critical to the constitutional integrity and fairness of plea bargaining.

Not every person who pleads guilty would have been convicted of the offense charged. Indeed, exonerations based on DNA evidence have taught us that innocent people sometimes plead guilty. Defendants who might well be acquitted plead guilty because they prefer to accept a favorable plea agreement than risk going to a trial at which they would face a far more substantial punishment. Indeed, it seems apparent that that is exactly what happened in this case.

Today's criminal justice system no longer resembles the historical system in which guilt was determined by trial. The vast majority of criminal cases are resolved by a negotiated deal under which a defendant admits to guilt to avoid facing a much harsher penalty if he exercises his constitutional right to go to trial. Maintaining fairness and integrity in plea bargaining is critical to ensuring that plea

bargaining is a constitutional process under which a defendant chooses to admit guilt to avoid the risk of a harsher penalty instead of an unconstitutional system under which defendants are punished for exercising their constitutional rights. The disclosure of material exculpatory evidence is a necessary procedural safeguard to ensure that the plea negotiation process is fair and perceived to be fair.

A. The current system in which most criminal defendants plead guilty is of recent origin. Historically, guilty pleas were uncommon. Although a court could base a conviction on a defendant's "confession" of guilt, in medieval times, the process was rarely used. *See* R. F. HUNNISETT, THE MEDIEVAL CORONER 69 (1961); 2 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 225 (Sollom Emlyn ed., 1736). Instead, pleading not guilty was "the most common and usual plea" and was preferred under the law. *See* FERDINANDO PULTON, DE PACE REGIS ET REGNI 192 (1609).

In the mid-eighteenth century, Blackstone stated that courts were reluctant to accept guilty pleas and would "generally advise" defendants "to retract it." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *324 (observing that courts were "very backward in receiving and recording [a guilty plea] . . . and will generally advise the prisoner to retract it"); *see also*, *e.g.*, John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. Chi. L. Rev. 263, 278 (1978)

(discussing an English case from 1743 where the defendant attempted to plead guilty to robbery but was dissuaded from doing so by the court when it refused to commute his death sentence). Guilty pleas were similarly atypical in early America. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1, 8–9 (1979).

Concern that innocent people might plead guilty was central to the historic reluctance to accept guilty pleas. As one treatise explained, the innocent might plead guilty because they feared the consequences of being found guilty after having confessed innocence or because they had "misdirected hopes of mercy." WILLIAM E. AUCKLAND, PRINCIPLES OF PENAL LAW 167 (2d ed. 1771).

Despite the anxiety about them, guilty pleas became increasingly common during the nineteenth century and early twentieth century. *See, e.g.*, Raymond Moley, *The Vanishing Jury*, 2 S. Cal. L. Rev. 97, 108 (1928) (showing that, while 15% of felony convictions in urban New York counties were by guilty plea in 1839, the proportion had risen to 90% by 1926). By the 1920s, many cities and states relied heavily on plea bargaining. Alschuler, *supra*, at 26. Guilty pleas likewise became the norm in the federal system, with a nearly 90% plea rate by 1925. AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, pt. I, at 56 (1934). Since the 1920s, dependency on guilty pleas has only increased.

Today, virtually all convictions are secured through guilty pleas. Over 98% of all federal criminal cases are disposed of through guilty pleas. U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 (2021). As this Court observed, "'plea bargaining[]' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971); *see Bordenkircher v. Hayes*, 434 U.S. 357, 361 (1978). The federal criminal justice process would grind to a halt without it. *See Santobello*, 404 U.S. at 261 ("Disposition of charges after plea discussions is . . . an essential part of the [criminal justice] process . . . .").

B. Because the criminal justice system as currently constituted could not function without the vast majority of defendants pleading guilty, there is immense pressure on prosecutors to resolve cases through plea bargaining. *See Bordenkircher*, 434 U.S. at 364 (noting "the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty"). This pressure on prosecutors to extract guilty pleas in almost all cases exacerbates the concern expressed hundreds of years ago about innocent defendants pleading guilty.

The pressure on prosecutors to secure guilty pleas leads them in turn to pressure defendants to plead guilty. For example, prosecutors may threaten to

bring harsher charges, charge family or friends, or use various other means to convince a defendant to accept a plea offer. *See, e.g.*, Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 74–75 (2015) ("[P]rosecutors are free to warn suspects of additional and more serious charges . . . ."); *United States v. Keeter*, 130 F.3d 297, 300 (7th Cir. 1997) ("Prosecutors may offer strong inducements, such as reduced charges or immunity for family members, to elicit confessions or guilty pleas."); *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (recognizing that prosecutors routinely use threats of enhanced mandatory sentencing to obtain guilty pleas).

Although governmental pressure on individuals to waive rights raises constitutional concerns, the Court has permitted plea bargaining because of the "the mutuality of advantage" it offers "to defendants and prosecutors"—each of whom has his "own reasons for wanting to avoid trial." *Bordenkircher*, 434 U.S. at 363 (quoting *Brady v. United States*, 397 U.S. 742, 752 (1970)).

The Court explicitly relied on this reasoning in *Bordenkircher*. There, the defendant argued that the prosecutor's threat to bring additional charges and seek a higher punishment if the defendant did not plead guilty constituted impermissible retaliation in violation of the Due Process Clause. *See id.* at 359–

60. This Court rejected the argument. Although agreeing that the government cannot retaliate for the exercise of constitutional rights, the Court reasoned that the consequences of rejecting a plea offer are not retaliatory because plea bargaining involves a "give-and-take" that is to the "mutual[] . . . advantage" of the defendant and prosecutor. *Id.* at 363. Thus, a defendant who rejects a plea offer is not punished for his decision to go to trial; instead that defendant simply concludes that the plea offer is not attractive enough to warrant waiving his rights.

Because prosecutors have an inherently superior bargaining position in plea bargaining, procedural protections are critical to ensure that the plea negotiations are a fair process actually aimed at producing a mutual advantage. *See Santobello*, 404 U.S. at 261 (stating that plea bargaining "presuppose[s] fairness in securing agreement between an accused and a prosecutor"). Indeed, this Court has repeatedly emphasized the importance of procedural protections in ensuring the fairness in plea negotiations. For example, the Court has stressed that the right to counsel at plea bargaining is necessary to ensure "fairness" in bargaining. *See Lafler v. Cooper*, 566 U.S. 156, 162, 169 (2012); *Santobello*, 404 U.S. at 261. Being represented "by competent counsel," the Court has said, safeguards against undue "prosecutorial persuasion[] and . . . false self-condemnation." *Bordenkircher*, 434 U.S. at 363. This Court has also pointed to "fairness" flowing

from the requirements that a sentencing judge develop a factual basis for a guilty plea, ensure that the guilty plea is voluntary and knowing, and be informed of any promises made to the defendant to induce the guilty plea. *See Santobello*, 404 U.S. at 261. From its earliest plea-bargaining cases, this Court has emphasized that plea bargains are desirable only insofar as they are fair. *See id.* at 261 ("[A]ll of these considerations presuppose fairness in securing agreement between an accused and a prosecutor.").

Along similar lines, the Court has stressed the importance of a prosecutor "acting forthrightly in his dealings with the defense." *Bordenkircher*, 434 U.S. at 365. That principle underpinned the Court's ruling in *Santobello* that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, . . . such promise must be fulfilled." 404 U.S. at 262. As the Court recognized, it would be unfair to hold a defendant to his guilty plea if the prosecutor fails to live up to her side of the bargain. *See id.*

This Court has also recognized the importance of candid, open communication between prosecutor and defendant to the integrity of the plea-bargaining process. In that regard, the Court held in *Bordenkircher* that the Due Process Clause did not prohibit a prosecutor from expressing his intent to bring additional charges if the defendant did not plead

guilty. *See* 434 U.S. at 364–65. The Court explained that, because the prosecutor had the power to bring those additional charges if the defendant pleaded not guilty, prohibiting the prosecutor from expressing his intent to seek the charges would "only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." *Id.* at 365 (citing *Blackledge v. Allison*, 431 U.S. 63, 76 (1977)).

C. Like the other procedural safeguards this Court has mandated, requiring prosecutors to disclose *Brady* material at the plea-bargaining stage is essential to the basic fairness and integrity of the process that is essential to plea bargaining's constitutionality. As explained in detail above, a rational defendant's decision to accept a plea offer rests on her assessment of the prosecutor's case, and a defendant cannot make that assessment with any sort of accuracy if the prosecutor withholds exculpatory material.[2] Aside from the right to

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[2] Of course, inculpatory evidence also affects the likelihood of conviction. But a defendant has no right to the disclosure of that information in plea negotiations because a prosecutor who withholds inculpatory evidence simply weakens his bargaining position in plea negotiations, with the likely result being a plea bargain more favorable to the defendant than would otherwise be the case or no plea bargain at all. A defendant who chooses to go to trial rather than accept a proposed plea bargain not knowing about incriminating evidence does not waive any constitutional rights.

counsel, there is no other procedural right that better guards against "false self-condemnation" in plea negotiations than the right to exculpatory evidence. *See id.* at 363.

The importance of disclosing this information is illustrated by basic principles of contract law. As this Court noted in *Puckett v. United States*, "[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts." 556 U.S. 129, 137 (2009) (citing *Mabry v. Johnson*, 467 U.S. 504, 508 (1984)). A basic tenet of contract law is that a party has an obligation to disclose a material fact if he "knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making" and if not disclosing "the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." RESTATEMENT (SECOND) OF CONTRACTS § 161 (AM. L. INST. 1981).

As explained above, knowledge of *Brady* evidence could affect whether a defendant agrees to plead guilty on the terms of a particular plea offer and even affect the decision whether to plead guilty at all. This Court requires the prosecution to disclose that evidence before trial, recognizing it would be fundamentally unfair to allow the government to obtain a conviction at trial where the defendant was not informed of material evidence tending to negate the government's case. *Brady*, 373 U.S. at 87–89. It

is equally fundamentally unfair to permit the government to obtain a conviction via a guilty plea secured through negotiations in which the government withheld from the defendant the very exculpatory evidence it would be required to disclose before the trial that the parties (the prosecution and the defendant) entered into the agreement to avoid.

Prosecutors are duty-bound to seek justice, not just convictions. *United States v. Agurs*, 427 U.S. 97, 110–11 (1976) ("[T]hough the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that justice shall be done.") (internal quotation marks omitted); CRIM. JUST. STANDARDS: PROSECUTION FUNCTION STANDARD 3-1.2 (A.B.A. 2017); Robert H. Jackson, *The Federal Prosecutor*, 31 Am. Inst. Crim. L. & Criminology 3, 4 (1940) ("Although the government technically loses its case, it has really won if justice has been done."). They should be held to a higher standard than private contracting parties. Considering the high standards expected of prosecutors and the gravity of waivers of important constitutional rights, withholding *Brady* evidence during plea negotiations cannot be seen as acting in good faith or in accordance with standards of fair dealing. In short, withholding *Brady* material in plea negotiations violates the implied duty of good faith and fair dealing that would apply even to private contracting parties. *See* Colin Miller, *Plea Agreements*

*as Constitutional Contracts*, 97 N.C. L. Rev. 31, 73 (2018).

## CONCLUSION

The Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A[1]

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