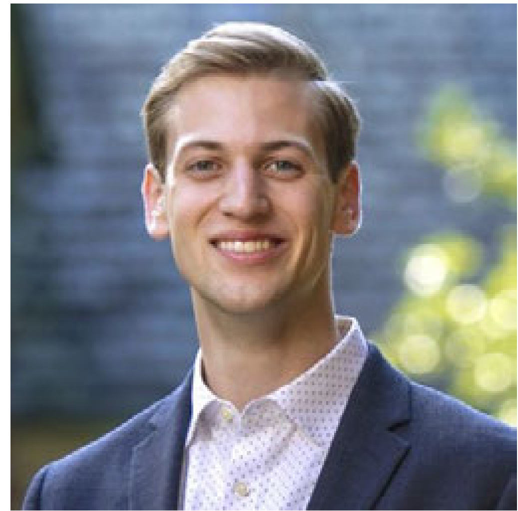
REFUSING TO RECOGNIZE REALITY

How a Stubborn Court Perpetuated Injustice in *Alvarez*

By Jay Hedges



Jay Hedges is a second year law student at St. John's University School of Law in Queens, New York, where he is a member of the Democratic Socialists of America. Prior to law school, Jay worked as a grant writer for Clayborn Temple, the organizing headquarters of the 1968 Sanitation Workers' Strike in Memphis, Tennessee. The organizing efforts of the striking sanitation workers brought Dr. Martin Luther King Jr. to Memphis to highlight the strike as part of his Poor People's Campaign. As a grant writer for Clayborn Temple during the 50th anniversary of the strike and Dr. King's assassination, Jay learned about the power of working class solidarity in the fight for racial and economic justice. After law school, Jay hopes to continue participating in that fight as a tenant lawyer in Queens.

INTRODUCTION

Wise criminal justice jurisprudence requires an understanding of the modern realities of the criminal justice system. This justice system has seen an increasing prevalence of plea bargaining as means of conviction,[1] and, unfortunately, many innocent defendants are induced to plead guilty.[2] Some courts have responded with sensitivity to these realities, in particular, by recognizing that a defendant's due process right to exculpatory evidence, established by *Brady v. Maryland*,[3] extends to the pre-trial phase of plea bargaining.[4] Other courts have ignored the realities of the criminal justice system, perpetuating injustice in the process, by failing to recognize pre-trial *Brady* rights.[5] Recently, in *Alvarez*, the Fifth Circuit stuck with its precedent and decided against recognizing "a defendant's constitutional right to *Brady* material prior to entering a guilty plea."[6]

In 2005, seventeen year old, George Alvarez, a ninth-grade special education student, was arrested and taken to the detention center of Brownsville, Texas, where an altercation with Officer Jesus Arias took place.[7] Officer Arias was moving Alvarez to his cell when the officer grabbed Alvarez by the arm, took him to the ground, then proceeded to place Alvarez in a chokehold.[8] All the while, Alvarez "squirmed and flailed his arms."[9] The incident was captured on video by multiple cameras in the detention center,[10] but Officer Arias falsely claimed that Alvarez assaulted him, grabbing his throat and upper thigh.[11] The police alerted the district attorney's office to charge Alvarez with assault of a public servant.[12] Alvarez's attorney reviewed the evidence on the case, which failed to mention the video recordings proving the officer lied.[13] When Alvarez was offered a plea deal, he accepted and pled guilty to the assault.[14]

Four years later, the videos of the altercation surfaced by happenstance in an unrelated case.[15] Alvarez filed a writ of habeas corpus in state court claiming that the withheld videos violated *Brady*.[16] After reviewing the new evidence, the state court found Alvarez "actually innocent" and dismissed all charges against him.[17] Months later, Alvarez sued the City of Brownsville under a federal statute in the district court, which found that the prosecution in Alvarez's case violated his *Brady* right to exculpatory evidence, granting Alvarez $2.3 million in damages.[18] The City of Brownsville appealed to the Fifth Circuit, which reversed the district court's ruling and dismissed Alvarez's suit with prejudice.[19]

The Fifth Circuit, on grounds of strict adherence to its precedent, held that by pleading guilty Alvarez was precluded from asserting any *Brady* right to exculpatory evidence.[20] In defense of its ruling, the court summarized the case law concerning pre-trial *Brady* rights beginning with *United States v. Ruiz*,[21] which the court read as foreclosing, though indirectly, the extension of *Brady* rights to the plea-bargaining process.[22] Next, the court surveyed the sister circuits which also doubted the defendant's right to exculpatory evidence pre-trial.[23] Looking to the First Circuit, the court agreed with the reasoning in *United States v. Mathur*[24] that *Brady* is a trial right, so unless there is a trial, there can be no *Brady* violation.[25] Another line of reasoning the court cited follows that when a defendant pleads guilty, the defendant is choosing to confess to the crime committed, so there is no need for the protection of *Brady* material.[26] The Fifth Circuit concluded by repeating that it would "not disturb this circuit's settled precedent and abstains from expanding the *Brady* right to pretrial plea bargaining context for Alvarez."[27]

While the court in *Alvarez* hid behind its precedent without interrogating its reasoning,[28] two concurring judges authored opinions which elaborated on why they, too, refused to extend to the

plea-bargaining phase a defendant's right to exculpatory evidence.[29]

The first concurrence, authored by Judge Higginson, expressed reluctance to shape the discovery practice of criminal proceedings through a judicial decision, explaining that the Who, What, and When, details of an extended *Brady* right would be difficult to outline.[30] Judge Higginson also stated that the constitutional protections already in place for defendants were sufficient, so the added protection of a pre-trial *Brady* right was unnecessary.[31]

In contrast to Judge Higginson's reluctant pragmatist approach, Judge Ho authored a fierce formalist defense of the circuit's precedent and chastised the district court for ignoring it.[32] In three sections, Judge Ho fleshed out two of the reasons against extending *Brady* rights cited by the court—the trial right[33] and the nature of pleas[34]—and then made a diminished exchange value argument.[35]

Dissenting, Judge Costa pointed out that the 5th Circuit was an outlier among all other jurisdictions (federal and state) in holding that defendants who plead guilty are "not entitled to evidence that might exonerate [them]."[36] Tackling the court's and concurrences' reasonings, Judge Costa argued that the *Brady* right should follow in the footsteps of the right to effective counsel, which had recently been extended to the plea-bargaining phase by the Supreme Court.[37] Judge Costa also argued against the idea that a guilty plea is necessarily an admission of guilt, citing research and cases showing that it is not rare for an innocent person to plead guilty.[38] Thus, Judge Costa argued, Alvarez's due process rights were violated.[39]

The Fifth Circuit's relatively brief opinion, in the face of an obvious injustice, is telling.[40] The precedent supremacy exercised by the court reeks of stale formalism, out of touch with the realities of the modern criminal justice system. The Fifth Circuit incorrectly reasoned and wrongly decided *Alvarez*. Applying constitutional principles to the reality of our modern criminal justice system demonstrates that courts ought to recognize a defendant's right to exculpatory evidence prior to entering a plea agreement.

I

THE COURT'S REASONING IS FOUNDED ON FAULTY PREMISES

The Fifth Circuit has committed itself to its precedent, however, as the modern criminal justice system increasingly becomes "a system of pleas,"[41] misunderstanding the nature of pleas and precluding *Brady* rights from the plea-bargaining process allows for an unfair erosion of those rights.

The Trial Right Limitation Misreads and Misapplies Brady

The court's assertion that Brady is a "trial right" [42] plucks phrases from *Brady* out of context. The Fifth Circuit cites *Mathur*'s reasoning which stated, "The animating principle of *Brady* is the 'avoidance of an unfair trial.'"[43] This line of reasoning emphasizes the original wording of *Brady* but takes that wording out of context and deprives it of the Supreme Court's intent.

In *Brady v. Maryland*, the petitioner, Brady, was sentenced to death for a murder which he admittedly participated in but did not commit himself.[44] The prosecution provided Brady with some extrajudicial statements from his co-defendant, Boblit, but withheld statements in which Boblit confessed to being the one who actually killed the victim.[45] Brady claimed prejudice regarding the prosecution's non-disclosure, but for which he would not have received the death penalty.[46] The Court's decision was an extension of its prior rulings in *Mooney v. Holohan* and *Pyle v. Kansas*.[47] *Mooney* established that nondisclosure by the prosecution may violate due process when used to "contrive a *conviction* through the pretense of a trial." [48] *Pyle* held that a person is deprived of constitutional rights when that person's "*imprisonment* resulted from . . . the deliberate suppression . . . of evidence favorable to him."[49] Notice that the cases from which *Brady* was derived did not emphasis the application of the disclosure right to a trial, but recognized the right whenever the state sought "conviction" or "imprisonment" of an individual. Of course, prosecutors seek to convict and imprison defendants through plea deals as well as trials, so limitation of *Brady* to a trial right ignores the reasons for which disclosure rights developed.

Also, over-emphasizing the *Brady* Court's usage of the word "trial" as a limiting qualification, ignores the key motivation of the Court—system-wide fairness: "[O]ur system of the administration of justice suffers when any accused is treated unfairly."[50] The Fifth Circuit appears to value such fairness by citing *Mathur* which says, "courts enforce *Brady* in order 'to minimize the chance that an innocent person [will] be found guilty.'"[51] But if the Fifth Circuit truly desired to protect the innocent, then it would not have read *Brady* as limiting the due process right to full-blown trials.[52]

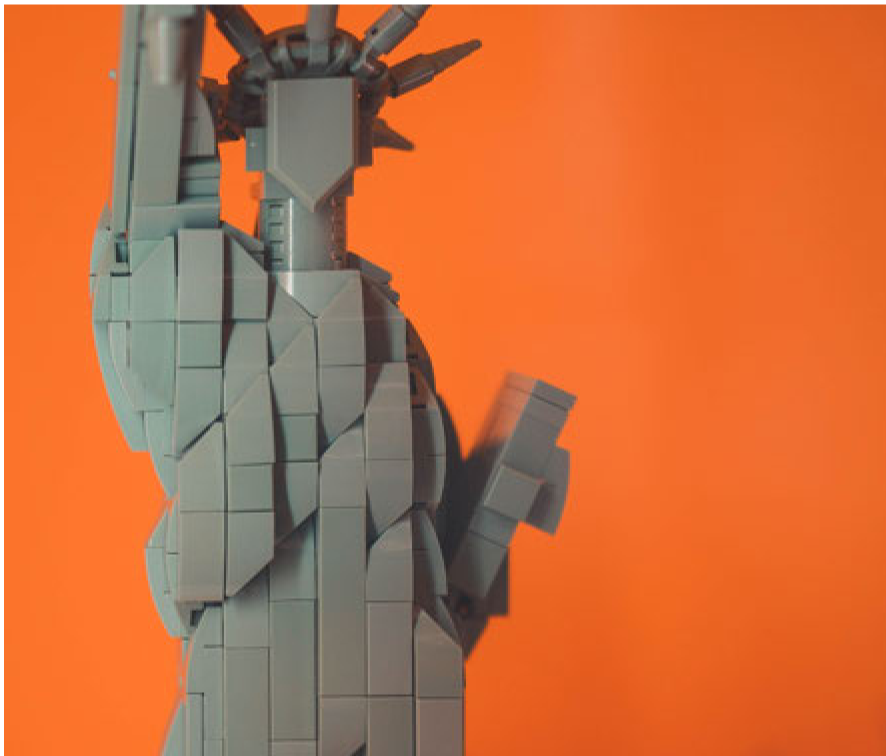
Understanding that limiting *Brady* to trials fails to minimize the chance that an innocent person would "be found guilty," however, requires recognizing that many innocent defendants wind up pleading guilty, a fact that seems entirely lost on the Fifth and First Circuits.[53]

Viewing Pleas as Admission of Guilt Ignores the Often Coercive Nature of Plea Bargaining

Characterizing pleas as an admission of guilt ignores the coercive nature of plea-bargaining in which the innocent as well as the guilty take pleas.[54] The Fifth Circuit subscribes to this misunderstanding, quoting *Mathur*'s argument that a plea means the defendant is "choosing to admit guilt."[55] An amici brief in support of Alvarez, authored by the Innocence Project, discusses multiple examples of cases it had been involved with where an innocent defendant pleaded guilty and was later exonerated by DNA or other exculpatory evidence withheld by the prosecution.[56]

One example described in the brief illustrates the coercive effects of white supremacy in plea bargaining. Michael Phillips, a black man, was told by his counsel that "no jury would believe a black man over a white woman."[57] Rather than go to trial and risk receiving a conviction and life sentence from a majority white jury and a white judge, Phillips pleaded guilty to a rape he did not commit and received a lesser sentence.[58]

The brief goes on to discuss the direct link between poverty and guilty pleas.[59] Working class pressures such as affording rent, maintaining employment, or the fear of losing one's children, force many low-income clients to "accept whatever deal a



Understanding that limiting Brady to trials fails to minimize the chance that an innocent person would "be found guilty," however, requires recognizing that many innocent defendants wind up pleading guilty, a fact that seems entirely lost on the Fifth and First Circuits.

prosecutor offers, even if they are innocent, just to get out of jail."[60] Waiting for a full trial, in which innocent defendants may otherwise be acquitted or have their charges dropped, can simply be too costly for low-income folks.[61] Working class pressures as well as judge and jury racism are just two examples which illustrate that guilty pleas are not necessarily admissions of guilt, but are sometimes deals innocent defendants are coerced into taking after assessing the risks of going to trial.[62]

The Fifth Circuit would have reached the better-reasoned outcome of extending *Brady* disclosure rights to plea bargaining had it (A) acknowledged that fairness in the criminal justice system requires fairness pre-trial and (B) recognized that pleas sometimes function as coercive deals rather than admissions of guilt.

II

THE BETTER APPROACH APPLIES CONSTITUTIONAL PRINCIPLES TO MODERN REALITIES

The Fifth Circuit could have used the following two applications of constitutional principles to extend *Brady* rights to plea-bargaining. First, the balancing test in *Ruiz* supports the due process right to exculpatory evidence pre-trial.[63] Second, the prosecutorial duty recognized by the Supreme Court requires disclosure of exculpatory evidence before the defendant enters a plea agreement.[64]

The Due Process Argument for Recognizing Pre-Trial Brady Rights

In reaching its conclusion that the Constitution does not require disclosure of "impeachment information" pre-trial, the Court in *Ruiz* used a Due Process balancing test.[65] The Court weighed (1) the nature of the defendant's private interest, (2) the value of the additional safeguard, and (3) the adverse impact of the requirement on the government.[66] While weighing these factors led the Court to refuse extending a right to impeachment information before the defendant enters a plea agreement,[67] applying this same test to exculpatory evidence yields a different result.

The nature of the private interest in avoiding unfair punishment is of grave constitutional significance.[68] The Fifth Amendment states that "No person shall . . . be deprived of life, liberty, or property without due process of law."[69] Since the deprivation of the defendant's liberty is at stake, the private interest in pre-trial disclosure is high.

Also, the value, as an added safeguard, of disclosing exculpatory evidence to defendants pre-trial is high.[70] A primary goal of the criminal justice system is to avoid punishing the innocent.[71] The bevy of individual cases listed by the Innocence Project, in which innocent defendants pled guilty in spite of withheld exculpatory evidence available to the prosecution, reveals the devastating consequences of not recognizing a right to pre-trial *Brady* material.[72] The years which these people spent behind bars because of the non-disclosure and suppression of exculpatory evidence is an incalculable damage.[73] And many of these non-disclosures caused a "double injustice . . . convicting the innocent and freeing the guilty."[74] Sometimes, the individual actually guilty of the crime, which the state failed to convict, went on to commit more crimes.[75] Thus, in many cases, disclosing exculpatory evidence would have been an invaluable safeguard against both punishing the innocent and letting the guilty go free.

The adverse impact of requiring the government to disclose exculpatory evidence is negligible.[76] Regarding the disclosure of impeachment information before trials, the Court in *Ruiz* mentioned witness intimidation and harm to ongoing investigations as

particularly adverse to the government.[77] Exculpatory evidence, on the other hand, "is entirely different,"[78] the disclosure of which pre-trial, rarely, if ever, carries the same risks as impeachment information. Still, the Department of Justice's brief in *Alvarez* cautioned against the extension of *Brady* rights because of the "serious costs" it would impose on the criminal justice system.[79] Yet the Innocence Project pointed out that the numerous jurisdictions which already recognize a pre-trial right to exculpatory evidence are not overly-burdened by the requirement.[80] These functioning jurisdictions cited by the Innocence Project indicate that the adverse impact of such a requirement is likely exaggerated by those who oppose extending the right.

Taken altogether, (1) the high value of disclosing exculpatory evidence for the accused and (2) the significant value as a safeguard added by the practice, weighed against (3) the negligible cost of the requirement as a burden on the government, means that disclosure of exculpatory evidence pre-trial surely passes the Supreme Court's due process balancing test. Thus, the Constitution ought to recognize such a right.

The Prosecutorial Duty Argument for Recognizing Pre-Trial Brady Right

Failing to recognize the prosecution's obligation to disclose exculpatory evidence before reaching a plea agreement perverts the revered role of the prosecutor in the criminal justice system.[81] Though Judge Higginson, in his concurrence, brings up legitimate concerns regarding the Who, What, and When of disclosure, prosecutors, rather than opposing the practice altogether, ought to be actively solving these pragmatic considerations.[82] Any increased burden on prosecutors is far outweighed by their duty as agents of the state. The Supreme Court described this duty in *Berger v. United States*:

> [A prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[83]

The notion that exculpatory evidence, proving the accused's innocence, may be withheld or even suppressed prior to that person pleading guilty runs contrary to the very nature and duty of the prosecutor.[84] Rather than being seen as an onerous burden, the practice of making sure the accused is not actually innocent ought to be seen as perfectly reasonable considering the prosecutor's "special role . . . in the search for truth."[85]

III

CONCLUSION

Interrogating the Fifth Circuit's reasoning reveals that its precedent is founded on faulty premises, inapplicable to the modern realities of the criminal justice system. Any well-reasoned argument regarding the defendant's right to exculpatory evidence pre-trial must be made with the reality of plea bargaining's prevalence and often coercive nature in mind. Therefore, considering these realities, the duty of prosecutors and the constitutional principle of due process make clear that defendants have a right to exculpatory evidence during plea-bargaining.

[1] Alvarez v. City of Brownsville, 904 F.3d 382, 411 (5th Cir. 2018) (Costa, J., dissenting) (noting the "ever-rising rates of pleas").

[2] *See* discussion *infra* Section I.B. Also, among these realities is that the criminal justice system is racist and classist. *See also* Matt Ford, *The Senseless Legal Precedent That Enables Wrongful Convictions*, New Republic (Sept. 12, 2018), (discussing how plea bargaining "disfavors poorer defendants" and, "[l]ike virtually every other aspect of the criminal-justice system, it punishes non-white defendants more harshly than their white counterparts"). Though it is beyond the scope of this note to discuss the extent and impact of the system's racism and classism, it is imperative that lawmakers, jurists, practitioners, students, and scholars keep these issues in mind when discussing criminal justice.

[3] 373 U.S. 83, 87 (1963) (holding nondisclosure by the prosecution of evidence favorable to the defendant violates the defendant's due process rights).

[4] *E.g.,* McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003); United States v. Ohiri, 133 F. App'x 555, 562 (10th Cir. 2005); Buffey v. Ballard, 782 S.E.2d 204, 216 (W. Va. 2015).

[5] *E.g.,* United States v. Conroy, 567 F.3d 174, 178–79 (5th Cir. 2009); United States v. Mathur, 624 F.3d 498, 506-07 (1st Cir. 2010).

[6] *Alvarez*, 904 F.3d at 389 (en banc).

[7] *Id.* at 385–86.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 387.

[12] *Id.* F.3d 382, 407–08 (5th Cir. The police reviewed the altercation internally in a separate department to determine whether Officer Arias's use of force was proper. *Id.* at 386–87. While an internal department evaluating the use of force viewed video footage of the altercation, the separate department which gathered evidence for the assault charge never viewed the footage. *Id.*

[13] *Id.* at 388.

[14] *Id.* The deal gave Alvarez a suspended sentence of eight-years and ten years of community supervision conditioned on completion of a substance abuse program. When Alvarez failed to complete the program, the state revoked the suspended sentence and remanded Alvarez to serve the remainder of his eight-year sentence. *Id.*

[15] *Id.*

[16] *Id.*; *see* Brady v. Maryland, 373 U.S. 83, 86 (1963).

[17] *Alvarez*, 904 F.3d at 388.

[18] *Id.* at 388–89.

[19] *Id.* at 389. A panel of the Fifth Circuit initially heard the appeal and reversed, but the Fifth Circuit granted a rehearing en banc, again, reversing the district court. *Id.*

[20] *Id.*; *see* Matthew v. Johnson, 201 F.3d 353, 362 (5th Cir. 2000), *aff'd by* United States v. Conroy, 567 F.3d 174, 178–79 (5th Cir. 2009).

[21] 536 U.S. 622, 633 (2002) (holding that the constitution does not require the disclosure of impeachment information relating to any informants or other witnesses).

[22] *Alvarez*, 904 F.3d at 392. The court also discussed *Conroy* which held that the scope of *Brady* material was not different for impeachment information or exculpatory evidence, thus, according to *Ruiz*, the defendant was entitled to neither prior

to trial. *Conroy*, 567 F.3d at 178–79.

[23] *Alvarez*, 904 F.3d at 392.

[24] 624 F.3d 498 (1st Cir. 2010).

[25] *Alvarez*, 904 F.3d at 392–93. The Fifth Circuit also cited the Fourth Circuit's decision in United States v. Moussaoui, 591 F.3d 263, 285 (4th Cir. 2010), which supported the "trial right" limitation. *See Alvarez*, 904 F.3d at 393.

[26] *Id.* at 392; *see Mathur*, 624 F.3d at 507.

[27] *Alvarez*, 904 F.3d at 394.

[28] This is apparent from the court's refrain, choosing to not "disturb" or "uproot" "settled precedent" while exerting little effort to explain this precedent's validity. *Id.* at 389, 392, 394.

[29] *Id.* at 395 (Higginson, J., concurring); *id.* at 397 (Ho, J., concurring).

[30] *Id.* at 395–96 (Higginson, J., concurring).

[31] *Id.* at 396. While Judge Higginson listed these "protections," he neglected to explain how these protections failed to keep an innocent defendant like Alvarez out of prison. *Id.*

[32] *Id.* at 397 (Ho, J., concurring). In Part I of his concurrence, Judge Ho expressed his disdain for the district court's dismissal of the circuit's precedent, wielding Hamilton's *Federalist 78* to remind the district court that it ought to be bound by "strict rules and precedents," lest they exercise arbitrary discretion. *Id.* at 397–98.

[33] Judge Ho explained that since the original meaning of *Brady* was limited to a "trial right," and since pleas are meant to avoid trials, a *Brady* extension to the pre-trial phase would contradict the purpose of pleas. *Id.* at 399.

[34] Here, Judge Ho explained that the constitution is a series of rights which, if they are to be of value to citizens and the nation, must be waivable. *Id.* at 399–400.

[35] Judge Ho argues that the ability to waive one's right to exculpatory evidence is a powerful bargaining chip, thus, "[c]onverting the *Brady* right into a prosecutorial requirement would . . . giv[e] defendants less to offer the prosecution during negotiations." *Id.* at 401.

[36] *Id.* at 406 (Costa, J., dissenting).

[37] *Id.* at 409. The Supreme Court in *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012), decided the same day, held that the right to effective counsel ought to be extended to the plea-bargaining stage, since the criminal justice system is becoming a system of "pleas, not . . . trials." *Alvarez*, 904 F.3d at 406 (quoting *Lafler*, 566 U.S. at 170).

[38] *Id.* at 415-16 (citing Buffey v. Ballard, 782 S.E.2d 204, 210 (W. Va. 2015); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 173 (2014)).

[39] *Id.* at 416 ("It is difficult to think of greater deprivations of that liberty than the government's allowing someone to be held in prison without telling him that there is evidence that might exonerate him.").

[40] *See supra* text accompanying note 28.

[41] Lafler v. Cooper, 566 U.S. 156, 170 (2012); *see id.* (97% of convictions in federal cases resulted from pleas).

[42] *Alvarez*, 904 F.3d at 392–93 (quoting United States v. Mathur, 624 F.3d, 498, 507 (1st Cir. 2010)).

[43] *Mathur*, 624 F.3d at 506–07 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)); *see also* United States v. Moussaoui, 591 F.3d 263, 285 (4th Cir. 2010) (reading *Brady* as limited to a trial right).

[44] *Brady*, 373 U.S. at 84.

[45]*Id.*

[46] *Id.* at 88.

[47] *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942).

[48] 294 U.S. 103, 112 (1935) (emphasis added).

[49] 317 U.S. 213, 215–17 (1942) (emphasis added).

[50] *Brady*, 373 U.S. at 87.

[51] United States v. Mathur, 624 F.3d, 498, 507 (1st Cir. 2010) (quoting United States v. Moussaoui, 591 F.3d 263, 285 (4th Cir. 2010)).

[52] *See* Alvarez v. City of Brownsville, 904 2018) (Costa, J., dissenting).

[53] *See id.* 392 (majority); *Mathur*, 624 F.3d at 507. *But see* Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 Fordham L. Rev. 3599, 3613 (2013) ("[W]ithout [pre-plea disclosure of exculpatory evidence] innocent defendants are compelled to plead guilty." (citing John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 Emory L.J. 437, 496 (2001))).

[54] *See* Brief of Innocence Project, et al. as Amici Curiae Supporting Appellee at 23, Alvarez v. City of Brownsville, 904 F.3d 382 (5th Cir. 2018) (No. 16-40772) ("The effect [of not extending *Brady* to pleas] would be to continue to knowingly convict and incarcerate individuals who, like Amici's clients, are innocent of crimes to which they were coerced to plead guilty.").

[55] *Alvarez*, 904 F.3d at 392 (citing *Mathur*, 624 F.3d at 507). Judge Ho's concurrence went even further, arguing that by pleading guilty defendants, apparently so convinced of their guilt, indicate that they do not even want to see exonerating evidence. *Id.* at 397 (Ho, J., Concurring). Judge Ho must realize how insincere it sounds to argue that the accused does not want to know that there is evidence proving her or his innocence, but this rhetoric aligns with Judge Ho's understanding that pleas are waivers. *Id.* at 398; *see supra* note 34. This ignorance to the fact that innocent people plead guilty seemed to be shared by Justice Scalia, who suggested, "[O]ur system never permits or encourages innocent defendants to plead guilty." Petegorsky, *supra* note 53, at 3624 n.251 (citing Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Calif. L. Rev. 1117, 1134 (2011)).

[56] Brief of Innocence Project, *supra* note 54, at 8–10, 20; *see also id*. at 12 (15% of exonerees nationwide pled guilty).

[57] *Id.* at 14.

[58] *Id.* DNA evidence exonerated Phillips twenty-five years later. *Id.* at 9. A reinvestigation revealed that the prosecution in Phillips' case "had withheld evidence that victims identified the man eventually determined to be the rapist in pre-trial and pre-plea lineups . . . ." *Id.*

[59] *Id.* at 14. This link is especially strong when coupled with a cash bail system which holds defendants who cannot afford bail in jail before even being convicted of a crime. *Id.*

[60] *Id.*

[61] *Id.* at 15.

[62] Petegorsky, *supra* note 53, at 3612 (citing Douglass, *supra* note 53, at 448).

[63] United States v. Ruiz, 536 U.S. 622, 631 (2002).

[64] *See* Brady v. Maryland, 373 U.S. 83, 87 n.2 (1963) ("[The prosecutor] is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. . . . [T]he Government wins its point when justice is done in its courts." (quoting Judge Simon E. Sobeloff)); *see also* Buffey v. Ballard, 782 S.E.2d 204, 217 (W. Va. 2015) ("Both the United States Supreme Court and inferior courts throughout the country have consistently recognized that our criminal justice system has imbued prosecutors with a 'special role ... in the search for truth.'" (quoting Strickler v. Greene, 527 U.S. 263, 281 (1999))).

[65] *Ruiz*, 536 U.S. at 631.

[66] *Id.*

[67] *Id.*

[68] U.S. Const. amend. VIII; *see also* Alvarez v. City of Brownsville, 904 F.3d 382, 408 (5th Cir. 2018).

[69] U.S. Const. amend. V; *see also id.* amend. XIV, § 1 (guaranteeing due process under state law as well as federal law).

[70] *See Alvarez*, 904 F.3d at 413 (discussing the value of exculpatory evidence as a safeguard against innocent defendants pleading guilty); Buffey v. Ballard, 782 S.E.2d 204, 213–14 (W. Va. 2015) ("[T]he due-process calculus also weighs in favor of the added safeguard of requiring the State to disclose material exculpatory information before the defendant enters a guilty plea . . . ." (quoting State v. Huebler, 275 P.3d 91 (Nev. 2012))).

[71] Petegorsky, *supra* note 53, at 3614.

[72] Brief of Innocence Project, *supra* note 54, at 7–10. Joseph Buffey spent thirteen years in prison before DNA evidence, available to the prosecution's office six weeks before he pleaded guilty, exonerated him. *Id.* at 7–8; *see also Buffey*, 782 S.E.2d at 206. Dale Duke spent *nineteen* years incarcerated after pleading no contest to aggravated assault before being exonerated by statements known to the prosecution at the time of his case. Brief of Innocence Project, *supra* note 54, at 8. Stephan Brodie was exonerated after *seventeen* years in prison. *Id.* at 8. Antrone Johnson was exonerated after *thirteen* years. *Id.* at 8–9. *Twenty-five* years after pleading guilty, in hopes of avoiding a life sentence, Steven Phillips was cleared of his conviction through DNA evidence. *Id.* at 9. Robert Jones was exonerated after *twenty-one* years by evidence originally withheld by the prosecution. *Id.* at 9–10. Michael Morton spent *twenty-five* years in prison before being exonerated by DNA evidence which the prosecution had withheld and suppressed before Morton pleaded guilty. *Id.* at 21.

[73] Not to mention the fiscal burden on the state and tax payers of imprisoning unnecessary incarerees for years, a metric perhaps more compelling to the likes of the pragmatists and formalists unmoved by the plight of Alvarez and others. *See Alvarez*, 904 F.3d at 395 (Higginson, J., concurring); *id.* at 397 (Ho, J., concurring).

[74] *Id.* at 415 (Costa, J., dissenting) (internal quotations omitted).

[75] *See* Brief of Innocence Project, *supra* note 54, at 21.

[76] *See* Brief of Innocence Project, *supra* note 54, at 18-23.

[77] United States v. Ruiz, 536 U.S. 622, 631–32 (2002) (internal citations omitted).

[78] McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003). ken up by many prosecutors. *See* Brief for United States, *supra* note 79, at 2 ("[T]he United States has a substantial interest in the resolution of this case.").

[79] Brief for United States as Amicus Curiae Supporting Appellant at 15, Alvarez v. City of Brownsville, 904 F.3d 382 (5th Cir. 2018) (No. 16-40772). Judge Costa, in his dissent, points out that the Department of Justice's claim of burdensome costs is "puzzling" since it admits that the practice of disclosing exculpatory evidence pre-trial is already mandated by its own policy. *See Alvarez*, 904 F.3d at 410. So, if the Department of Justice is following its own policy, there would be no increase in costs should pre-trial *Brady* rights be recognized.

[80] *See* Brief of Innocence Project, *supra* note 54, at 18–19.

[81] *See* Buffey v. Ballard, 782 S.E.2d 204, 222–23 (W. Va. 2015) (Loughry, J., concurring). A significant part of Justice Loughry's concurrence expounds the prosecutorial duty argument. *Id.*

[82] *See Alvarez*, 904 F.3d at 395–96 (Higginson, J., Concurring). The Department of Justice's amicus brief reveals the opposition to recognizing pre-trial *Brady* rights ta

[83] 295 U.S. 78, 88 (1935) (*overruled on other grounds by* Stirone v. United States, 361 U.S. 212 (1960)).

[84] Instead of viewing disclosure of exculpatory evidence in this light, the Department of Justice cavils about how such a requirement would oblige prosecutors to do their job. *See* Brief for United States, *supra* note 79, at 16 ("[Should a *Brady* disclosure obligation be recognized,] the government would have to search the files of all members of the prosecution team for potentially exculpatory material and assess whether the material it uncovers, either individually or collectively, would be reasonably likely to lead the defendant to reject a plea and go to trial.").

[85] Strickler v. Greene, 527 U.S. 263, 281 (1999).

This case comment was written during St. John's University School of Law's Spring 2019 Writing Competition. The sources were provided to each participant in the competition, thus, research for the case comment was conducted entirely within the already provided materials.