No. 16-40772

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEORGE ALVAREZ,
Plaintiff-Appellee,

v.

CITY OF BROWNSVILLE,
Defendant-Appellant.

On Appeal from the United States
District Court for the Southern District of Texas

SUPPLEMENTAL BRIEF OF APPELLEE GEORGE ALVAREZ ON REHEARING EN BANC

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January 3, 2018

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Heck v. Humphrey,
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Hyman v. State,
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Kyles v. Whitley,
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McCann v. Mangialardi,
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McCarthy v. United States,
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McDonough Power Equip., Inc. v. Greenwood,
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Monell v. New York City Dep't of Social Servs.,
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Orman v. Cain,
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State v. Wilson,
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United States v. Bagley,
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United States v. Beasley,
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United States v. Ramirez,
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United States v. Ruiz,
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United States v. Stinson,
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United States v. Wright,
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Va. Office for Prot. and Advocacy v. Stewart,
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Wearry v. Cain,
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White v. Maggio,
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White v. United States,
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Other Authorities

ABA Model R. Prof. Conduct 3.8(a).. 32

Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L. J. Ann. Rev. Crim. Proc. iii (2015)...26, 28

American College of Trial Lawyers, Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16, 41 Am. Crim. L. Rev. 93 (2004).. 34

Black's Law Dictionary (10th ed. 2014).. 5

Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After* Brady v. Maryland, 38 N.Y.U. Rev. L. & Soc. Change 407 (2014) 27

Daniel McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. Crim. L. & Criminology 1 (2017) 25, 29

Ellen Yaroshefsky, *Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 Temp. Pol. & Civ. Rts. L. Rev. 343 (2010) 27

James Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), https://perma.cc/87ZU-PDCU 27, 34

Jane Campbell Moriarty & Marisa Main, *"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 Hastings Const. L.Q. 1029 (2011) 26

Jed Rakoff, Individual Rules of Practice (Feb. 13, 2017), https://perma.cc/UHQ2-B7EN 34

Jed Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. Books (Nov. 20, 2014), https://perma.cc/S9XN-KSTX 25, 27

Jenia Turner & Allison Redlich, *Two Models of Pre-plea Discovery in Criminal Cases: An Empirical Comparison*, 73 Wash. & Lee L. Rev. 284 (2016) 33

Kevin McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651 (2007) 27, 30

Lee Sheppard, *Disclosure to the Guilty Pleading Defendant:* Brady v. Maryland *and the* Brady *Trilogy*, 72 J. Crim. L. & Criminology 165 (1981) 27, 30

Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 Am. J. Crim. L. 223, (2006) 27

Michael Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 Harv. L. Rev. 293 (1975) 28

Mike Work, *Creating Constitutional Procedure:* Frye, Lafler*, and Plea Bargaining Reform*, 104 J. Crim. L. & Criminology 457 (2014) 27

Nat'l Registry of Exonerations, U.C. Irvine Newkirk Cent. for Science & Soc., *Exonerations in 2016* (2017), https://perma.cc/S544-WAPK 28, 29

Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017) 27

Richard Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. Times (Sept. 25, 2011), https://nyti.ms/2oaRVvI 26

Robert Scott & William Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992) 19

Ronald Wright, Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background, Wake Forest Univ. Legal Studies Paper (Sept. 2005), Appendix 1 (Disposition of Federal Criminal Cases and Defendants, 1871-2002), https://perma.cc/5JUK-6TWV. 19

INTRODUCTION

The Due Process Clause requires the criminal justice system to conform to principles of fundamental fairness. George Alvarez accepted a plea agreement without knowing that the City of Brownsville possessed a video showing that he did not commit the crime with which he had been charged. After the video surfaced, the Texas Court of Criminal Appeals of Texas declared him "actually innocent," notwithstanding his earlier plea.

Alvarez ultimately spent four years in prison for a crime he did not commit. The district court held that the City's failure to disclose the exculpatory video violated due process, and a jury awarded damages to Alvarez. The City now argues that the government may, consistent with due process, withhold exculpatory evidence when negotiating a plea. That position is wrong.

The Supreme Court has long recognized that due process requires the government to disclose exculpatory evidence to criminal defendants. Although this disclosure requirement has traditionally been associated with a defendant's right to a fair trial, the right to receive exculpatory evidence also applies during plea negotiations. This result is consistent with the Supreme Court's recognition that other fair-trial safeguards apply at the plea-bargaining phase.

And this result makes sense. An innocent person can have good reason to plead guilty if it is likely that a criminal trial will involve only a battle of credibility with a police officer, and the prosecutor offers a plea agreement that provides for little or no prison

time (compared to a lengthy sentence that would result from conviction at trial). Pre-plea disclosure of exculpatory evidence would enable the defendant to make the plead-or-go-to-trial choice knowingly, voluntarily, and with sufficient awareness of the relevant circumstances, as due process demands.

For these and other reasons explained below, Alvarez was entitled to disclosure of the exculpatory evidence at issue here before he accepted the plea agreement.

STATEMENT OF THE ISSUES

1. Whether due process requires the government to disclose non-impeachment exculpatory evidence to a criminal defendant before entering a plea agreement.

The City raises other issues that need not be reached by the en banc Court and may be considered by the panel on remand:

2. Whether Alvarez was entitled to summary judgment on the City's liability.

3. Whether the district court properly denied the City's motions for new trial and remittitur.

STATEMENT OF THE CASE

After serving four years of an eight-year sentence, appellee George Alvarez was declared actually innocent by the Texas Court of Criminal Appeals based on newly discovered video evidence showing that Alvarez did not commit the crime for which he had been imprisoned. On the basis of that evidence, he was released from prison unconditionally. The video had been in the government's possession, but was not disclosed to Alvarez before he pleaded guilty.

After his release, Alvarez brought this Section 1983 suit, maintaining that appellant City of Brownsville violated his right to due process by failing to disclose exculpatory evidence. The district court agreed, and a jury later issued a $2 million verdict in Alvarez's favor.

Bound by this Court's precedents, a panel of this Court reversed solely on the ground that due process did not require the government to disclose the exculpatory video to Alvarez before entering the plea agreement. This Court then granted en banc review. As explained below, the Court should hold that due process entitled Alvarez to pre-plea disclosure of the exculpatory video and then remand to the panel to consider the City's other arguments.

I. Legal background

A. Due-process disclosure obligations

1. In *Brady v. Maryland*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process." 373 U.S. 83, 87 (1963). Withholding evidence that "would tend to exculpate" the defendant, the Court noted, puts the government "in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 88.

"*Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation." *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978) (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)). It "protect[s] the due-process rights of criminal defendants," *Banks v. Thaler*, 583 F.3d 295, 310 (5th Cir. 2009), and "rests upon an

abhorrence of the concealment of material arguing for innocence by one arguing for guilt." *United States v. Ramirez*, 513 F.2d 72, 78 (5th Cir. 1975). This due-process right exists "irrespective of the good faith or bad faith of the prosecutor," *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (quoting *Brady*, 373 U.S. at 87), because the government's overriding interest "is not that it shall win a case, but that justice shall be done," *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (quotation marks omitted).

The three components of a due-process violation under *Brady* are well-settled: (1) the evidence at issue must be favorable to the defendant; (2) the evidence must have been suppressed by the government, either willfully or inadvertently; and (3) the evidence must be material. *Strickler*, 527 U.S. at 281-82. Evidence is material if there is "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009); *see also Wearry*, 136 S. Ct. at 1006 (challenger need show only that the non-disclosure "undermine[s] confidence" in the conviction).

Brady and its progeny require the government to disclose material evidence absent any specific request from the defense. *United States v. Agurs*, 427 U.S. 97, 110-11 (1976). The government's disclosure obligation includes "evidence known only to police investigators and not to the prosecutor," because it is the prosecution's "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

In the trial context, *Brady* applies to both impeachment evidence and non-impeachment exculpatory evidence. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972). Impeachment evidence is evidence "offered to 'discredit a witness ... to reduce the effectiveness of [her] testimony by bringing forth evidence which explains why the jury should not put faith in [her] testimony.'" *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5th Cir. 1993) (citation omitted; brackets in original). *Accord* Evidence, *Black's Law Dictionary* (10th ed. 2014). By contrast, exculpatory evidence "tend[s] to establish a criminal defendant's innocence." Evidence, *Black's Law Dictionary*. *See also Chiasson*, 988 F.2d at 517 ("Substantive evidence is that which is offered to establish the truth of a matter to be determined by the trier of fact.").

2. This case concerns whether due process requires the government to disclose non-impeachment exculpatory evidence before a criminal defendant enters a plea agreement. Before this Court first addressed that question, four other circuits and one state supreme court had held that a defendant may challenge the validity of a guilty plea based on the government's pre-plea failure to disclose material exculpatory evidence.[1]

This Court expressly rejected those decisions in *Matthew v. Johnson*, 201 F.3d 353, 358, 362-63 (5th Cir. 2000), which held that the defendant could not challenge his guilty

[1] *See United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *United States v. Wright*, 43 F.3d 491, 495-96 (10th Cir. 1994); *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988); *Gibson v. State*, 514 S.E.2d 320, 323-24 (S.C. 1999).

plea on *Brady* grounds. *Matthew* maintained that *Brady*'s constitutional protections exist only to ensure a fair trial, which defendants waive when they plead guilty. 201 F.3d at 360-62.[2]

3. Two years after this Court's decision in *Matthew*, the Supreme Court decided *United States v. Ruiz*, 536 U.S. 622 (2002), which addressed whether *Brady* requires the pre-plea disclosure of impeachment evidence to a criminal defendant. The defendant there challenged the validity of a plea agreement that waived her right to obtain "impeachment information relating to any informants or other witnesses." *Id.* at 625. The agreement also specified that the government would disclose to the defendant all evidence of factual innocence. *Id.* Thus, as the panel here explained, *Ruiz* "did not address whether the withholding of *exculpatory* evidence during the pretrial plea-bargaining process would violate a defendant's constitutional rights." Panel op. 6.

Ruiz held that criminal defendants do not have a due-process right to obtain impeachment evidence before pleading guilty. 536 U.S. at 625. *Ruiz*'s reasoning centered on distinguishing impeachment evidence from exculpatory evidence. *See id.* at 629-30. The Supreme Court emphasized the "special" nature of impeachment evidence and its limited value to defendants when deciding to plead guilty. *Id.* Because

[2] *Matthew* arguably held only that, for purposes of federal habeas review, a state court sitting when the defendant's conviction became final would not have been compelled to recognize this due-process right. 201 F.3d at 364, 366. But this Court has since consistently viewed *Matthew* as a merits holding on the due-process issue. *See, e.g.*, *Orman v. Cain*, 228 F.3d 616, 617 (5th Cir. 2000); *United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009).

impeachment evidence is tied to a specific witness, the Court observed, it is strategically valuable only if a defendant can predict which witnesses the prosecution will call, *see id.* at 630. Thus, the Court reasoned that impeachment evidence is rarely "critical information" a defendant must have before pleading guilty. *Id.*

The Supreme Court also weighed concerns regarding the efficient administration of justice, determining that the costs of disclosing impeachment evidence would outweigh its benefits to the accused. *Ruiz*, 536 U.S. at 631-33. "[P]remature disclosure of Government witness information" might, the Court explained, disrupt the government's investigations or put potential witnesses at unnecessary risk. *Id.* at 631-32. And disclosing all impeachment evidence could "depriv[e] the plea-bargaining process of its main resource-saving advantages" in exchange for "so comparatively small a constitutional benefit." *Id.* at 632.

4. After *Ruiz*, this Court revisited *Matthew* in *United States v. Conroy*, 567 F.3d 174 (5th Cir. 2009). There, the defendant argued that the government must disclose exculpatory evidence pre-plea because "the limitation of the Court's discussion [in *Ruiz*] to impeachment evidence implies that exculpatory evidence is different and must be turned over." *Id.* at 179. *Conroy* rejected this argument, finding the defendant's challenge to her guilty plea based on a *Brady* violation "foreclosed by" *Matthew*. *Id.* at 178.[3]

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[3] Since *Ruiz*, no other federal circuit or state high court has embraced the view taken by this Court in *Matthew* and *Conroy*, while three state high courts have held that due process requires pre-plea disclosure of exculpatory evidence. *Buffey v. Ballard*, 782

B. The validity of pleas under the Due Process Clause

Due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary. Generally, a criminal defendant advised by competent counsel who enters a voluntary plea may not raise post-conviction claims of constitutional violations. *See, e.g., Tollett v. Henderson*, 411 U.S. 258, 266-69 (1973); *Brady v. United States*, 397 U.S. 742, 748 (1970). But because guilty pleas waive constitutional rights, due process requires that pleas "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. at 748. A plea that does not meet this standard "has been obtained in violation of due process and is therefore void." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). And of particular relevance here, a plea may be invalid if it resulted from "misrepresentation or other impermissible conduct by state agents." *Brady v. United States*, 397 U.S. at 757.

S.E.2d 204, 216 (W. Va. 2015); *State v. Huebler*, 275 P.3d 91, 93, 96-97 (Nev. 2012); *Medel v. State*, 184 P.3d 1226, 1234-35 (Utah 2008). *See also United States v. Dahl*, 597 Fed. Appx. 489, 490 (10th Cir. 2015) (applying pre-*Ruiz* holding in *Wright*); *United States v. Ohiri*, 133 Fed. Appx. 555, 562 (10th Cir. 2005) (distinguishing *Ruiz* and recognizing a pre-plea *Brady* right); *Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007) (en banc) (applying pre-*Ruiz* holding in *Sanchez*); *Hyman v. State*, 723 S.E.2d 375, 380-81 (S.C. 2012) (applying pre-*Ruiz* holding in *Gibson*).

II. Factual background

1. In November 2005, just after his seventeenth birthday, George Alvarez was arrested and jailed by the City of Brownsville for public intoxication and suspicion of vehicle burglary. Panel op. 2; ROA 666.

While he awaited arraignment, an altercation occurred involving Alvarez and three jailers, after which Alvarez was charged in state court with assault on a public servant. Panel op. 2; ROA 1084. A video of the incident later surfaced that, as discussed further below, the Texas Court of Criminal Appeals found established Alvarez's actual innocence. Panel op. 2-3; ROA 1085.

The video shows Alvarez standing in the jail booking area with jailers pointing him toward a doorway. Alvarez shrugs. One of the jailers, Officer Jesus Arias, then grabs Alvarez by the arm. The officer then wraps his arm around Alvarez's neck, spinning him into a chokehold. Alvarez attempts to squirm out of the officer's grasp while another jailer circles behind the pair and takes hold of Alvarez's arm. The other jailers lower the struggling pair to the floor, and the group blocks the camera's view of Alvarez for several seconds. Alvarez is then seen squirming in the chokehold, his wrists grasped by a jailer as Alvarez attempts to keep his arms braced. The jailers handcuff Alvarez, shackle his feet, and carry him face-down through a doorway. *See* Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. B, Dist. Ct. Dkt. 29, Nov. 30, 2012 (video); ROA 666-67.

Officer Arias then contacted a patrol officer at the Brownsville Police Department (BPD). ROA 3731-32. Arias told the BPD officer that he wished to press charges

against Alvarez "for assaulting him and causing him pain," claiming that Alvarez had grabbed his throat, choked him, and grabbed his groin area. Panel op. 2; ROA 667, 3731-32. The BPD officer took statements from the jailers and filed the charge against Alvarez. ROA 3731-32. An officer from BPD's Criminal Investigations Division (CID) would then collect evidence related to the charge to present to the prosecutor. ROA 669.

Because the incident involved a jailer's use of force, a separate BPD sergeant who supervised the jail reviewed the video of the incident, completed an internal use-of-force investigation and submitted a report, which acknowledged the video, to the Chief of Police. ROA 668, 2595-96 (report). Under BPD's policies, the Chief is finally responsible for reviewing internal use-of-force investigations. ROA 2721-23, 2806-07. The Chief testified that, in that role, after his review he is required to disclose to CID evidence revealed during internal use-of-force investigations. ROA 2717-19, 2753-54. Here, the Chief testified that he never reviewed the report or the video. ROA 2720-23. As a result, neither CID nor Alvarez learned that the police possessed video of the incident. ROA 669, 1094, 2684, 3179.

Based on Officer Arias's accusations, Alvarez was charged in Texas state court with assault on a public servant. Panel op. 2. If convicted, he faced up to ten years in prison. ROA 1578. Alvarez took his lawyer's advice and entered a plea agreement that provided he would serve no prison time. ROA 254, 1577-81. Alvarez agreed because he believed "I'm not going to win. It's my word against their word, and they're always going to

believe them because they're like the law." ROA 2684. The agreement suspended an eight-year prison sentence on the condition that Alvarez complete a substance abuse treatment program and ten years of community supervision. ROA 254, 1582-87. The Texas state court entered judgment consistent with the agreement. ROA 1582-87.

Alvarez did not complete the treatment program. Panel op. 2. As a result, the state court revoked the suspended sentence in November 2006, and Alvarez began serving the eight-year sentence. *Id.*

2. Three years later, in a separate suit filed by another detainee against the same officer (Arias) and the City of Brownsville, video of the altercation between Alvarez and Arias surfaced. Panel op. 2; ROA 670. The video "indicates that the assault alleged by Arias did not occur." Brief for the United States as Amicus Curiae (U.S. Br.) 3. Alvarez therefore sought habeas relief in Texas state court on three grounds: (1) that the newly discovered video evidence showed he was "actually innocent" of the crime for which he was imprisoned; (2) that police withheld the exculpatory evidence, thereby violating Alvarez's due-process rights; and (3) that Alvarez's plea should be set aside because it could not have been made knowingly and voluntarily. ROA 1630-41.

Two Texas courts reviewed the video and agreed. Panel op. 2-3; ROA 3853. The trial court that had originally convicted Alvarez found that the new evidence "supports the defense theory that [Alvarez] did not assault the Jailer" and recommended that relief be granted and a new trial ordered. ROA 1017.

The Texas Court of Criminal Appeals then reviewed the trial court's findings and, based on its own "independent examination of the record," declared Alvarez "actually innocent" and granted a writ of habeas corpus. Panel op. 3; ROA 3853-54. The court cited *Ex parte Tuley*, 109 S.W.3d 388, 394 (Tex. Crim. App. 2002), which held that habeas relief may be granted, notwithstanding a guilty plea, when the applicant presents "new evidence" that "unquestionably establishe[s] an applicant's innocence." This showing requires "clear and convincing evidence that no rational jury would convict the applicant in light of the new evidence." *Id.* at 397. *See also State v. Wilson*, 324 S.W.3d 595, 598 (Tex. Crim. App. 2010) (holding that "the term 'actual innocence'" applies "only in circumstances in which an accused did not, in fact, commit the charged offense or any of the lesser-included offenses."). The appellate court then remanded Alvarez to the custody of the Cameron County Sheriff, and the state later dismissed all charges. ROA 670.

After four years in prison, Alvarez was released unconditionally. Panel op. 3. The state never sought to retry him.

III. Procedural background

1.a. In April 2011, Alvarez sued the City of Brownsville, Officer Arias, and other officials under 42 U.S.C. § 1983, alleging, as relevant here, that they had violated his constitutional rights by failing to disclose the video before Alvarez entered the plea agreement. Panel op. 3; ROA 39, 49.

The defendants moved for summary judgment. They argued, among other things, that no policymaker authorized or created a policy that caused Alvarez's injuries and that the individual defendants had qualified immunity. *See* ROA 219-34.

Adopting recommendations of the magistrate judge, the district court granted summary judgment on qualified-immunity grounds for all individual defendants except Officer Arias. ROA 721.[4] The court denied summary judgment to the City on Alvarez's claim relating to the non-disclosure of exculpatory evidence. ROA 696-97. Alvarez could bring a *Brady* claim, the court explained, distinguishing a Section 1983 suit from this Court's holdings in *Matthew* and *Conroy* that defendants cannot use a *Brady* violation to collaterally attack the voluntariness of a plea. ROA 682-84. Because the Texas Court of Criminal Appeals had already found Alvarez "actually innocent," the government's interest in finality of convictions and other "policy considerations that prevent a criminal defendant from attacking his conviction on *Brady* grounds are not present." ROA 683-84. The court also found that the Chief of Police was a final municipal policymaker for purposes of municipal liability. ROA 687-88.

The district court then identified three remaining issues: whether (1) BPD had a policy of not disclosing internal-affairs material, (2) BPD's failure to disclose the video constituted a due-process violation, and (3) BPD's policy caused the violation. ROA 957-58. After briefing, the district court granted summary judgment to Alvarez as to

[4] The parties later stipulated to dismissal of the claim against Arias. ROA 733.

the City's liability. ROA 1099-1100. The court concluded that a *Brady* violation had occurred because the video was favorable to Alvarez, the government failed to disclose it, and it was material to the outcome of the proceeding—that is, "Alvarez was ultimately found actually innocent of the offense based on the video recording." ROA 1091-93.

The district court then found the City liable based on an unconstitutional action by a final municipal policymaker, the Chief of Police. ROA 1093-94. The court held that, according to BPD's policy, no information revealed in internal investigations is disclosed to CID except through the Chief, and, here, the Chief failed to review the internal use-of-force report and disclose the exculpatory video. ROA 1096-99. The court further held that, given the kinds of incidents that generate internal use-of-force investigations, files generated during these investigations likely contain *Brady* information. *Id.* Thus, the Chief acted with deliberate indifference to the obvious consequence that a *Brady* violation could result when he failed to review the internal use-of-force report. *Id.* This failure was therefore the "moving force" behind the violation of Alvarez's constitutional rights. ROA 1099 (citing *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978)).

b. The district court held a jury trial on damages. Alvarez testified about the deprivations of his four years in prison, beginning when he was seventeen, including riots, violence, constant fear, sleep deprivation, and family loss. ROA 4078-81, 4089-95. The jury was instructed: "What sum of money, if any, would compensate Alvarez

for damages proximately caused by the violation of his due process rights, that is, withholding of the video?" ROA 2541. The jury awarded Alvarez $2 million. Panel op. 3; ROA 1297. The district court denied the City's post-trial motions. ROA 2086.

2. The City appealed to this Court, arguing that Alvarez's guilty plea precluded his *Brady* claim and, for various reasons, that any *Brady* violation could not be imputed to the City. The City also sought a new trial on damages or remittitur.

The panel reversed on the *Brady* issue alone. Viewing itself bound by *Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000), and *United States v. Conroy*, 567 F.3d 174 (5th Cir. 2009), the Court held that Alvarez had no pre-plea constitutional right to obtain non-impeachment exculpatory evidence. The panel acknowledged, however, that the Supreme Court in *United States v. Ruiz*, 536 U.S. 622 (2002), left open that question. Panel op. 5-6. Indeed, it noted the Seventh Circuit's observation that "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea." Panel op. 6 (quoting *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003)).

This Court then granted Alvarez's petition for rehearing en banc.

SUMMARY OF ARGUMENT

The City's failure to disclose the exculpatory video before Alvarez accepted a plea agreement violated his due-process rights. A criminal defendant's due-process right to

receive exculpatory evidence under *Brady v. Maryland* is based on the government's obligation to seek truth rather than a conviction. Although the *Brady* disclosure right is often viewed as a trial right, it is not *only* that, and the principles motivating *Brady* apply equally to the government's role in the plea-bargaining process. As the Supreme Court has recognized in holding that plea-bargaining defendants have a constitutional right to effective counsel, the plea-bargaining process is the critical stage for nearly every criminal defendant. *See, e.g.*, *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Due process therefore demands that the right to receive exculpatory evidence applies during plea bargaining.

The due-process-balancing approach taken in *United States v. Ruiz*, 536 U.S. 622 (2002), also supports Alvarez's pre-plea right to have received the exculpatory video. Unlike the *impeachment* evidence at issue in *Ruiz*, each balancing factor—a presumptively innocent defendant's interest in liberty, the value to all involved in pre-plea disclosure of material exculpatory evidence, and any impacts on the government—favors a pre-plea duty to disclose non-impeachment *exculpatory* evidence.

The City's failure to disclose the exculpatory video also rendered Alvarez's guilty plea invalid because it prevented Alvarez from considering the government's plea deal knowingly, intelligently, and with sufficient awareness of the relevant circumstances, as due process demands. *See Brady v. United States*, 397 U.S. 742, 748, 758 (1970); *Tollett v. Henderson*, 411 U.S. 258, 264 (1973).

This Court should affirm the district court's finding that the City violated Alvarez's due-process rights and remand to the panel to decide the remaining issues in the first instance. The constitutional-avoidance canon does not apply here. Most importantly, because this Court has had binding precedent on the due-process issue for nearly two decades, declining to address the issue would avoid nothing, and instead would effectively reaffirm the earlier precedent.

If this Court reaches the other issues, it should affirm. The district court granted summary judgment to Alvarez on the City's liability based on evidence demonstrating the police department's policy and practice of relying on the Chief of Police to disclose exculpatory evidence generated during internal investigations of jailer misconduct. The Chief's failure to do so here was an act of a policymaker that caused Alvarez's injuries, and the City's arguments do not show disputes of material fact on these issues. Moreover, the district court did not err in its evidentiary rulings, and even if it did, any error would be harmless in light of Alvarez's testimony and other trial evidence supporting the jury's verdict. Finally, the jury's award—compensating Alvarez for four years of complete and unconstitutional deprivation of his liberty—was not excessive.

ARGUMENT

I. The City's failure to disclose the exculpatory evidence prior to Alvarez's guilty plea violated his due-process rights.

A. Alvarez was entitled to pre-plea disclosure of material exculpatory evidence under the principles of *Brady v. Maryland*.

The City's failure to disclose material exculpatory evidence prior to Alvarez's plea ran afoul of the due-process principles underlying *Brady v. Maryland*. Far from shutting the door to the right to pre-plea disclosure of exculpatory evidence, the Supreme Court's decision in *United States v. Ruiz* "implicitly draw[s] a line," 536 U.S. 622, 633 (2002) (Thomas, J., concurring in judgment), between non-impeachment exculpatory evidence, which must be disclosed before a plea agreement, and impeachment evidence, which need not. As the Seventh Circuit has observed, "*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence" and "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea." Panel op. 6 (quoting *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003)). This Court's decision in *United States v. Conroy*, 567 F.3d 174 (5th Cir. 2009), pushes aside this "significant distinction" and should be abrogated.

1. *Brady*'s rationale applies pre-plea to exculpatory evidence.

The right to disclosure of material exculpatory evidence is not limited to the trial phase. *Brady*'s disclosure requirements are based on the "special role" played by the government in "the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The government's legitimate objective "is not to achieve victory but to establish justice." *Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963). "This special status" in the "search for truth" reflects an "obligation to govern impartially" and supports a "broad duty of disclosure." *Strickler*, 527 U.S. at 281.

a. Now more than ever, this search for truth ends at the plea-bargaining table. As recently as 1980, nearly a quarter of all federal criminal cases were resolved by trial.[5] Today, pleas account for ninety-seven percent of federal convictions and ninety-four percent of state convictions. *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Plea bargaining, the Supreme Court has explained, is thus "not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id.* at 144 (quoting Robert Scott & William Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)).

Because "plea bargains have become so central to the administration of the criminal justice system," the "negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Frye*, 566 U.S. at 143-44. Carving

[5] Ronald Wright, Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background, Wake Forest Univ. Legal Studies Paper (Sept. 2005), Appendix 1 (Disposition of Federal Criminal Cases and Defendants, 1871-2002), 3, https://perma.cc/5JUK-6TWV.

exculpatory evidence out of *Brady* pre-plea would thus strip an essential due-process protection from nearly every person convicted of a crime in the United States. *Id. See also Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

b. To be sure, as this Court observed in *Matthew v. Johnson*, 201 F.3d 353, 361-62 (5th Cir. 2000), the Supreme Court has viewed *Brady* disclosures as part of the right to a fair trial. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 675-76 (1985). *See also* U.S. Br. 6-10, 11-12. But it is not *only* that.

Since *Matthew*, the Supreme Court has emphasized that other protections rooted in "the accused's right to a fair trial" apply with equal force at the plea-bargaining stage. *Lafler*, 566 U.S. at 165; *accord Frye*, 566 U.S. at 143-44. In *Lafler*, the Court expressly rejected the "Solicitor General['s] claim that the sole purpose of the Sixth Amendment is to protect the right to a fair trial" and thus that "[e]rrors before trial … are not cognizable" unless "they affect the fairness of the trial itself." 566 U.S. at 164-65. The Court there confirmed that a defendant's right to effective assistance of counsel can be violated when a lawyer's deficient advice causes her client to reject a favorable plea and proceed to trial. 566 U.S. at 168. "The constitutional guarantee," the Court observed, "applies to pretrial critical stages that are part of the whole course of a criminal proceeding." *Id.* at 165. Because "criminal justice today is for the most part a system of pleas, not a system of trials," "trial" rights "cannot be defined or enforced without taking account" of plea bargaining's "central role." *Id.* at 170. *See also Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010) (noting that "negotiation of a plea bargain is a critical phase

of litigation" and holding that counsel's failure to advise a criminal defendant that his guilty plea carried a risk of deportation renders counsel constitutionally deficient).

c. The United States' and the City's assertion that the Supreme Court has limited *Brady* to the trial context is wrong. *See* U.S. Br. 6-10; City of Brownsville's Supplemental En Banc Brief (City Br.) 34-35. The cases they cite concern pre-trial *Brady* disclosures simply because they arose in that context. *See, e.g., United States v. Bagley*, 473 U.S. 667, 675, 678 (1985); *United States v. Agurs*, 427 U.S. 97, 98-99, 108 (1976). Thus, these decisions involved issues having nothing to do with whether due process requires disclosure of exculpatory information at the plea-bargaining phase. *See, e.g.*, *Bagley*, 473 U.S. at 675 & n.7 (addressing *Brady*'s materiality requirement).

The suggestion that these precedents impliedly reject Alvarez's position because *Brady*'s materiality requirement "cannot be divorced" from the trial setting is similarly misguided. U.S. Br. 9. At the trial stage, the question is whether there is "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). At the plea-bargaining stage, the question is functionally identical: "whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial." *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir.1995). Adopting Alvarez's position would create no incompatibility with Supreme Court precedent.

More fundamentally, the due-process principles underlying *Brady*—the government's overriding obligation to act fairly and to pursue justice rather than convictions—speak to the government's role in the criminal justice system generally, not only at trial. Reading a trial-only limitation into these due-process principles would overlook that general obligation and run headlong into the Supreme Court's decisions in *Lafler* and *Frye* applying traditional "trial" protections to plea bargaining.

d. Beginning with *Matthew*, this Court has stood nearly alone in rejecting a pre-plea right to disclosure of exculpatory information. Indeed, since the Supreme Court's decision in *Ruiz*, the Ninth and Tenth Circuits and the South Carolina Supreme Court have reaffirmed, and the high courts of Nevada, Utah, and West Virginia have held, that "a defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage." *Buffey v. Ballard*, 782 S.E.2d 204, 216 (W. Va. 2015); *see supra* at 5-7 & notes 1, 3.

Whatever force *Matthew* may have had when it came down has been lost through subsequent developments. *Matthew* recognized that "[s]ome [Supreme] Court opinions contain language that appears to broaden the reach of *Brady v. Maryland* to encompass all 'proceedings' and 'pretrial' decisions" but found it "highly uncertain whether included within 'pretrial decisions' are decisions regarding whether or not to plead guilty." 201 F.3d at 362 n.13. *Matthew* resolved this ostensible uncertainty by relying on *Strickland v. Washington*, 466 U.S. 668 (1984), which cemented the understanding that the Sixth Amendment's right to counsel in a criminal case includes a right to *effective*

assistance. *Matthew* read *Strickland* as guaranteeing access to effective counsel only in trial proceedings, where "a factfinder [is] responsible for determining a defendant's guilt or innocence." 201 F.3d at 362 n.13. *Matthew* therefore read the *Brady* disclosure right analogously—as applying only to trial proceedings. *Id.*

As it turned out, *Matthew*'s narrow, trial-focused reading of *Strickland* was wrong. The Supreme Court's rulings in *Lafler*, *Frye*, and *Padilla* make clear that the right to effective assistance extends to plea bargaining as well as to trial. Though *Strickland* had recognized that "[t]he benchmark for judging" an ineffective-assistance claim is whether counsel's actions "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," 466 U.S. at 686, *Lafler* clarified that "[t]he goal of a just result is not divorced from the reliability of a conviction," 566 U.S. at 169. Thus, the "fairness and regularity of the processes that precede[]" trial—including plea bargaining—are equally vital to the "goal of a just result" as is the fairness of the trial itself. *Id.*

For all these reasons, the disclosure rights associated with *Brady* apply equally to the plea-bargaining process.

2. Due-process balancing demands pre-plea disclosure of exculpatory evidence.

The traditional due-process considerations that led the Supreme Court in *Ruiz* to reject a right to the pre-plea disclosure of impeachment evidence require the pre-plea disclosure of non-impeachment exculpatory evidence. Applying the familiar due-

process balancing inquiry derived from *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), *Ruiz* considered "(1) the nature of the private interest at stake … , (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests." *Ruiz*, 536 U.S. at 631. As we now show, because "the considerations that led to the decision in *Ruiz* do not lead to the same conclusion when it comes to material exculpatory information," the government must "disclose material exculpatory information before the defendant enters a guilty plea." *State v. Huebler*, 275 P.3d 91, 97-98 (Nev. 2012).

a. Nature of the private interest

The private interest at stake for plea-bargaining defendants is "the most elemental of liberty interests": freedom from unjust and unwarranted "physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). A person considering a plea offer is not a "criminal defendant proved guilty after a fair trial" who has been stripped of the "liberty interests [of] a free man." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). Quite the contrary, a defendant "is presumed innocent until conviction upon trial or guilty plea." *Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016).

The Supreme Court has emphasized the importance of protecting innocent defendants from wrongful convictions, describing the criminal justice system's "great precautions against unsound results" regardless of "whether conviction is by plea or by trial." *Brady v. United States*, 397 U.S. 742, 758 (1970). Anticipating the issues confronting

defendants today, the Court expressed over forty-years ago "serious doubts" about a justice system in which "the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves." *Id.*

b. Value of the additional safeguard

(1) Given the centrality of plea bargaining to the criminal justice system, the added value of pre-plea disclosure of exculpatory evidence is hard to overstate. Absent disclosure requirements, plea negotiations occur under significant informational asymmetry. Without access to exculpatory evidence, defendants may reasonably assume that a claim of innocence will result in nothing more than a credibility dispute with a police officer. Correcting this imbalance, so that defendants learn of exculpatory evidence (like a video proving one's innocence) before pleading, would safeguard against wrongful incarceration.

This asymmetry is magnified by high caseloads, limited resources, and limited access to detention facilities, leaving defense lawyers few opportunities to interview their clients and investigate the facts. *See* Jed Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. Books (Nov. 20, 2014), https://perma.cc/S9XN-KSTX. By contrast, the government's files—typically unavailable to defense counsel—usually include police reports, witness interviews, forensic information, and other evidence. *Id.*; *see also* Daniel McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. Crim. L. & Criminology 1, 15-16 (2017).

The rise of long maximum and mandatory-minimum sentences makes pre-plea disclosure of exculpatory information an especially important safeguard. In particular, statutory minimums give prosecutors "enormous leverage" over defendants who face long, fixed sentences if they decline a plea and are convicted at trial. Jane Campbell Moriarty & Marisa Main, *"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 Hastings Const. L.Q. 1029, 1030 (2011). Turning down "a one-year plea bargain when the prosecutor threatens additional charges that carry a mandatory sentence 10 times as long" is a risk that many defendants are unwilling to take, "[n]o matter how strongly [they] believe they are innocent." Richard Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. Times (Sept. 25, 2011), https://nyti.ms/2oaRVvI. These sentencing disparities impose a "trial penalty" on the accused such that "sentences for people who go to trial have grown harsher relative to sentences for those who agree to a plea." *Id.*; *see also* Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L. J. Ann. Rev. Crim. Proc. iii, xi (2015) (noting "the trend of bringing multiple counts for a single incident—thereby vastly increasing the risk of a life-shattering sentence in case of conviction.").

Perversely, it is in the weakest cases that the government has the strongest incentives to negotiate plea deals without disclosing exculpatory evidence to the defense. Research going back decades shows that the government brings "the greatest pressures to plead guilty to bear on defendants whose conviction at trial is highly

improbable."[6] Where conviction is unlikely, the government may perceive an interest in offering large sentencing discounts, which encourage innocent defendants like Alvarez to plead guilty. Kevin McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651, 661 (2007).

Empowered by these sentencing practices and the informational asymmetry between the government and defendants—along with broad charging discretion, loose constraints on bargaining tactics, and many defendants' pre-trial detention—the government can all but dictate the terms of plea agreements.[7] Rather than being give-and-take deals, plea agreements often resemble one-sided "contract[s] of adhesion." Rakoff, *Why Innocent People Plead Guilty*, *supra*. Thus, guilty pleas are hardly "conclusive proof of guilt," and "[i]f the prosecution offers a take-it-or-leave-it plea bargain before

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[6] Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 Am. J. Crim. L. 223, 244 (2006) (describing research published in 1968); *see also* James Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* 411-12 (2002), https://perma.cc/87ZU-PDCU.

[7] Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 747 (2017) (detained defendants are twenty-five percent more likely to plead guilty than are non-detained defendants); Rakoff, *Why Innocent People Plead Guilty*, *supra*; Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After* Brady v. Maryland, 38 N.Y.U. Rev. L. & Soc. Change 407, 409 (2014); Mike Work, *Creating Constitutional Procedure:* Frye, Lafler*, and Plea Bargaining Reform*, 104 J. Crim. L. & Criminology 457, 461-62 (2014); Ellen Yaroshefsky, *Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 Temp. Pol. & Civ. Rts. L. Rev. 343, 350 (2010); Lee Sheppard, *Disclosure to the Guilty Pleading Defendant:* Brady v. Maryland *and the* Brady *Trilogy*, 72 J. Crim. L. & Criminology 165, 170 (1981).

disclosing exculpatory evidence, the defendant may cave to the pressure, throwing away a good chance of an acquittal." Kozinski, 44 Geo. L. J. Ann. Rev. Crim. Proc. at xi, xii.

These concerns are anything but theoretical. Here, with nothing but his word against the testimony of the jailers and the prospect of a ten-year sentence hanging over his head, Alvarez tried to avoid prison by following his attorney's advice to plead guilty. Panel op. 2; ROA 1579. Alvarez's case is not unique. A growing body of research demonstrates that many innocent people plead guilty. Even before pleas became so dominant, an analysis of convictions in twenty-nine federal district courts concluded that almost one-third of defendants who entered guilty pleas would have been found innocent at trial. Michael Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 Harv. L. Rev. 293, 309 (1975). And forty-five percent of people exonerated in 2016 had pleaded guilty to crimes they did not commit. Nat'l Registry of Exonerations, U.C. Irvine Newkirk Cent. for Science & Soc., *Exonerations in 2016* 7 (2017), https://perma.cc/S544-WAPK.

This reality belies the United States' argument that pre-plea disclosure would "undermine the solemnity and significance of the plea itself" by focusing the plea process on the weight of the government's case rather than on the defendant's guilt. U.S. Br. 15. This view that, "barring unusual circumstances," a defendant's plea decision "does not depend on the evidence in the government's possession" is out of touch with the modern reality of plea negotiations. As just explained, a host of factors—including

the evidence in the government's possession—encourage innocent defendants to accept plea deals.

Access to exculpatory evidence prior to entering a plea acts as a counterweight to these factors and is therefore especially important for factually innocent defendants. *See* McConkie, 107 J. Crim. L. & Criminology at 12. Of the forty-two percent of 2016 exonerations in which official misconduct contributed to conviction, the most common transgression was concealment of exculpatory evidence. Nat'l Registry of Exonerations, *Exonerations in 2016* at 6, *supra*. Disclosure, this data indicates, could prevent innocent people from pleading guilty.

(2) The scope of this problem is significant but impossible to quantify precisely. It is, after all, a problem of *non-disclosure*. Defendants do not typically uncover evidence that has been suppressed after entering a plea and exiting the adjudicatory process, and therefore much of the problem remains hidden.

Exculpatory evidence often is discovered only by happenstance. Alvarez, for instance, learned of the exculpatory video because an attorney found it while representing another Brownsville jail detainee. *See* Panel op. 2. And in *Gibson v. State*, 14 S.E.2d 320, 322 (S.C. 1999), where the South Carolina Supreme Court held that defendants may challenge the validity of a guilty plea based on the government's pre-plea failure to disclose, the exculpatory evidence came to light because the victim's family sued to recover on a life insurance policy. These cases are a reminder that other innocent defendants plead guilty under the pressures of plea negotiations and are never

exonerated because exculpatory evidence stays buried forever. Thus, the United States' characterization of this case as "exceptional," U.S. Br. 13—accurate or not—does nothing to show that pre-plea disclosure is unnecessary.

The United States' faith in the prospect of post-conviction relief rather than pre-plea disclosure is seriously misguided. U.S. Br. 13-14. There is no reliable post-conviction mechanism for an innocent person who pleads guilty to unearth exculpatory evidence. More fundamentally, post-conviction remedies do not, by their very nature, avoid wrongful convictions and the loss of liberty that due process is intended to prevent in the first place. Alvarez languished in jail for four years before he was exonerated. As his example demonstrates, "disclosure of *Brady* material in the guilty plea context is just as crucial to an accurate determination of criminal liability as it is in the trial context." McMunigal, 57 Case W. Res. L. Rev. at 660.

(3) Exculpatory evidence is likely to be "critical information" that, if disclosed, would make it less likely that "innocent individuals accused of crimes will plead guilty." *Ruiz*, 536 U.S. at 631; *see Huebler*, 275 P.3d at 98. Simply stated, without a pre-plea right to exculpatory evidence, innocent defendants such as Alvarez will continue to accept plea agreements for crimes they did not commit. *See* Sheppard, 72 J. Crim. L. & Criminology at 170.

The situation here is thus a far cry from the impeachment evidence considered in *Ruiz*. There, the Court observed that impeachment evidence is unique "given the random way in which such information may, or may not, help a particular defendant,"

and that the "degree of help" offered by impeachment evidence may "depend upon the defendant's own independent knowledge of the prosecution's potential case." *Ruiz*, 536 U.S. at 630. That is so because impeachment evidence, by definition, is tied to a specific witness and is valuable only if a defendant can divine whether the prosecution will call that witness, how much the evidence will undermine the witness's testimony, and the importance of the testimony to the prosecution's overall case. *See id.* Thus, the Court reasoned that impeachment evidence is rarely "critical information" a defendant must have before pleading guilty. *Id.*

But "the same cannot be said of exculpatory information, which is special not just in relation to the fairness of a trial but also in relation to whether a guilty plea is valid and accurate." *Huebler*, 275 P.3d at 97-98. Recall that, in *Ruiz*, the plea agreement specified that the government would disclose "any information establishing the factual innocence of the defendant." *Ruiz*, 536 U.S. at 631. The Supreme Court found that this "safeguard[] … diminishe[d] the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty." *Id.* Interpreting the Due Process Clause to offer no similar safeguard here would ignore, as just discussed, the great value of pre-plea disclosure of exculpatory evidence. Exculpatory evidence tends to "establish the truth of a matter to be determined by the trier of fact" rather than merely "discredit a witness," *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5th Cir. 1993), and thus will consistently aid "particular defendant[s]" in entering pleas that are truly "knowing, intelligent, and sufficiently

aware," *Ruiz*, 536 U.S. at 629-30 (internal alterations and quotation marks omitted). *Cf. White v. Maggio*, 556 F.2d 1352, 1357-58 (5th Cir. 1977) ("'Critical evidence,' for purposes of the due process clause, is evidence that, when developed by skilled counsel and experts, could induce a reasonable doubt in the minds of enough jurors to avoid a conviction.").

c. Adverse impact of the right on the government's interests

(1) The right to pre-plea disclosure of exculpatory evidence does not "seriously interfere" with the government's interest in "securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." *Ruiz*, 536 U.S. at 631. As the United States acknowledges, "[n]o participant in the criminal justice system has an interest in an actually innocent defendant pleading guilty." U.S. Br. 17.

The United States nonetheless maintains that pre-plea disclosure of exculpatory evidence would "remove[] a substantial component of the value to the government of plea bargaining" by requiring prosecutors to "search the files" and assess evidence "[e]ven where it is clear that a defendant wishes to plead." *Id.* at 16. But disclosure would not impose any significant new burden on prosecutors.

In all cases, a prosecutor must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." ABA Model R. Prof. Conduct 3.8(a). The United States recognizes that this rule "serve[s] to discourage the prosecution of cases where directly exculpatory evidence exists." U.S. Br. 13. It is hard

to see how a prosecutor can meet this ethical obligation without reviewing exculpatory evidence the government possesses. The United States itself trumpets this rule as a "[m]echanism[]" that currently "minimize[s] the likelihood" of "an actually innocent defendant pleading guilty." *Id.* at 17. But that can be correct only if prosecutors already analyze exculpatory evidence prior to entering a plea agreement. The rule we urge, therefore, does not appear to impose any burden beyond what the United States acknowledges that ethical rules require. In any event, nothing suggests that any added effort is so burdensome that it outweighs the value of disclosure to the criminal justice system. *See Lafler*, 566 U.S. at 172 (rejecting similar burden argument).

A variety of pre-plea disclosure policies can be implemented without great burden. As with other constitutional protections, due process sets a floor on which to build an approach that works best. The United States touts its current policy that, to ease compliance costs, "errs on the side of disclosure" and "requires disclosure of exculpatory information 'reasonably promptly after it is discovered,'" sometimes "prior to entry of a guilty plea by a defendant," U.S. Br. 7 n.2, 14, and so any additional cost of complying with a pre-plea disclosure requirement would be small. A recent study comparing two different pre-plea disclosure policies found that 90.6% of prosecutors in "open-file" jurisdictions, where the government discloses nearly everything in its files to the defense, were satisfied with the policy, with many defending the policy in "strong and unequivocal terms." Jenia Turner & Allison Redlich, *Two Models of Pre-plea Discovery in Criminal Cases: An Empirical Comparison*, 73 Wash. & Lee L. Rev. 284, 354 (2016). Judge

Rakoff of the Southern District of New York has implemented his own *Brady* rules, which require pre-plea disclosure of both exculpatory and impeachment evidence. Individual Rules of Practice 10-12 (Feb. 13, 2017), https://perma.cc/UHQ2-B7EN.

Contrary to the United States' speculation, U.S. Br. 16-17, by reducing wrongful convictions to begin with, pre-plea disclosure could lower costs by reducing reliance on post-conviction litigation to exonerate wrongfully convicted defendants. In the capital context, for example, "[t]he failure of police and prosecutors to disclose evidence of innocence and mitigation is the second or third leading reason state post-conviction and federal habeas judges overturn capital verdicts." Liebman et al., *supra* at 27 note 6, at 411. If, moreover, the government's obligation to disclose exculpatory evidence prompted changes in charging decisions that "properly lessen[ed] its sentencing position," the defense may be more willing to "compromise—to plead and receive the benefit of acceptance or responsibility" during sentencing. American College of Trial Lawyers, Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16, 41 Am. Crim. L. Rev. 93, 116-17 (2004). "Prompt disclosure may well foster an earlier exchange of favorable information and guilty plea decisions." *Id.* And because the ruling sought here would reduce the number

of wrongful convictions, it would correspondingly reduce the number of Section 1983 actions premised on those convictions.[8]

(2) Requiring pre-plea disclosure of exculpatory evidence does not implicate the same concerns identified by the Supreme Court in *Ruiz*. In contrast to impeachment evidence—which implicates only a witness—exculpatory evidence is substantially less likely to "expose prospective witnesses to serious harm" or reveal the identities of "cooperating informants, undercover investigators, or other cooperating witnesses." *Ruiz*, 536 U.S. at 632. The video withheld by the City here, for instance, put no witness at risk. The same was true for the exonerating DNA evidence withheld in *Buffey v. Ballard*, 782 S.E.2d 204, 208 (W. Va. 2015). And in the rare circumstance where disclosure of exculpatory evidence may raise real risks, courts can take measures to mitigate any risk while protecting the due-process rights of plea-bargaining defendants. *See, e.g.*, *Hyman v. State*, 723 S.E.2d 375, 381 (S.C. 2012) (permitting disclosure to defense counsel but not to defendant); *United States v. Moussaoui*, 591 F.3d 263, 289 (4th Cir. 2010) (same).

At the end of the day, it is important to remember that although this Court has rejected the right to pre-plea disclosure of exculpatory evidence, other circuits and state high courts have recognized the right over the last two decades, *see supra* notes 1 and 3,

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[8] Only the rare person who has successfully challenged his wrongful conviction in post-conviction proceedings may bring a Section 1983 suit premised on the wrongful conviction. *See Heck v. Humphrey*, 512 U.S. 477 (1994).

and neither the City nor the United States has suggested that law enforcement or prosecutors in those jurisdictions have incurred great costs or administrative difficulties.

B. The failure to disclose exculpatory evidence rendered Alvarez's plea unknowing and unintelligent and therefore constitutionally invalid.

The right to pre-plea disclosure is supported not only by the principles animating *Brady v. Maryland* but also by the due-process requirement that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970).

Alvarez's guilty plea, which waived his constitutional right to trial, was neither knowing nor intelligent. Alvarez pleaded guilty without knowing about evidence that led the Texas courts to declare him actually innocent. If "sufficient awareness of the relevant circumstances" means anything, *Brady v. United States*, 397 U.S. at 748, it means knowledge of evidence in the government's possession showing that the charged crime never occurred. Although Alvarez knew he was innocent, he did not know that he could prove it. Alvarez and his attorney were kept in the dark about the most relevant circumstance of the case. Withholding the video deprived him of the ability to choose, with sufficient awareness, whether to plead guilty or go to trial. Put simply, his "waiver cannot be deemed 'intelligent and voluntary' [because it was] 'entered without knowledge of material information withheld by the prosecution.'" *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (citation omitted).

For the same reasons, Alvarez's plea was invalid under the Supreme Court's decision in *Tollett v. Henderson*, 411 U.S. 258, 264, 266-67 (1973). It was impossible for Alvarez's attorney to give advice "within the range of competence demanded of attorneys in criminal cases." *Id.* Absent significant countervailing considerations, a competent attorney who knew of strongly exculpatory evidence like the video here would almost certainly advise a client to plead not guilty—and indeed would seek to have the charges dropped. But when kept in the dark about the evidence, a competent attorney could rationally see little hope of acquittal and advise the client to plead guilty. That is what happened here. *See* ROA 1932-36. By keeping the video from Alvarez's attorney, the government deprived Alvarez of the competent advice to which he was entitled, rendering his plea invalid. *See Tollett*, 411 U.S. at 264, 266-67.

C. The City's failure to disclose exculpatory evidence resulted in a constitutional violation that gives rise to Alvarez's Section 1983 claim.

The City's failure to disclose the exculpatory video violated Alvarez's constitutional rights in two ways, each of which supports his Section 1983 claim. Moreover, Alvarez's guilty plea did not waive his constitutional rights.

1. In granting summary judgment to Alvarez on the City's liability, the district court held that the City's "failure to disclose the video recording was a violation of Alvarez's constitutional rights under *Brady [v. Maryland]*." ROA 1093. The parties agree that the exculpatory video was not disclosed to Alvarez, and the district court held that the video

was "obviously favorable" to Alvarez and material to his guilty plea. ROA 1092-93. The City's attacks on the latter two holdings lack merit.

First, the City asserts that the video cannot be viewed as favorable to Alvarez because it demonstrates that Officer Arias's "use of force was justified." City Br. 28, 36-38, 43. But whether Arias properly used force has nothing to do with whether Alvarez assaulted the officer, which was the charge against Alvarez. Even the City acknowledges that the video does not conclusively show Alvarez assaulting Arias, City Br. 36, and every court that has considered the video has found it exculpatory, *see* ROA 1092. The evidence is "obviously favorable" to Alvarez. *Id.*

Second, the City says the video was not "material" when BPD officers first viewed it because Alvarez had not yet been indicted, and so the officers could not have recognized the video's importance. City Br. 27-28, 33. But that is not how materiality works under *Brady*. The question is solely whether "had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). So, here, the relevant question is whether, had the video been disclosed, Alvarez would not have pleaded guilty after his indictment. *See Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir.1995). Alvarez's testimony that he would not have pleaded guilty had he known about the video, ROA 2684, undermines confidence in his conviction and establishes materiality, *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam). *See also* ROA 1093 (district court's materiality finding).

The City acknowledges Alvarez's testimony, but asserts it "is not controlling" because the video "is not exculpating" and prosecutors "would have proceeded" with the case had they seen the video. City Br. 44. Again, the City misses the point: materiality is judged by whether Alvarez would have decided to go to trial had the video been disclosed, not by whether the government would have. (And, even on its own terms, the City's argument is more than a little ironic given that, after Alvarez's release from prison, the state could have sought to retry him, but did not. *See* ROA 4145-46.)

Third, the City maintains that the video was not "suppressed" under *Brady* because the internal investigators who knew about the video were not "part of the prosecution team," and the criminal investigator in Alvarez's case was never made aware of the video. City Br. 25, 33-34, 43. This attempt to limit its *Brady* obligations is at odds with controlling precedents. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court explained that, because the duty to disclose stems from the government's obligation to seek justice, it applies beyond the prosecutor to "others acting on the government's behalf in the case, including the police." *Id.* at 437-38. "As far as the Constitution is concerned, a criminal defendant is equally deprived of his or her due process rights when the police rather than the prosecutor suppresses exculpatory evidence." *Moldowan v. City of Warren*, 578 F.3d 351, 379 (6th Cir. 2009).

Though this Court has recognized that it is unclear whether *Brady* extends to certain non-police personnel like a government expert witness, *Avila v. Quarterman*, 560 F.3d 299, 308-09 (5th Cir. 2009), or a jail mental-health counselor, *Pitonyak v. Stephens*, 732

F.3d 525, 533 (5th Cir. 2013), it has not distinguished between the roles of individual police officers within a department, *see Freeman v. Georgia*, 599 F.2d 65, 70 (5th Cir. 1979) ("The duty to disclos[e] is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused."). Such a distinction would make no sense here, where both the internal and criminal investigations concerned the same incident and same statements by Officer Arias.

Finally, the City's assertion that a heightened-culpability requirement applies in Section 1983 cases brought against *individuals* for *Brady* violations, City Br. 29-34, is a non sequitur. The only claim remaining here is against *the City*—and this case turns on unique factual circumstances where the individual who failed to disclose exculpatory evidence, the Chief of Police, was himself a policymaker for *municipal-liability* purposes. *See infra* at 44-48. So, even assuming (incorrectly) that a heightened-culpability requirement exists for showing that an individual violated *Brady*, that requirement would be inapplicable here. *See Moldowan*, 578 F.3d at 383-89, 392-95 (considering a heightened-culpability requirement for claims against individual officers, but not for claims against the municipality).

In any event, the district court *did* find that Chief Garcia, himself a policymaker, acted with deliberate indifference. That is because "there was a well-established policy" that the internal investigators were "not to provide information or evidence to" the criminal investigators, and instead the Chief of Police was to act as the conduit of

information between these entities. ROA 1098. Despite this, "Garcia then chose not to review all of those files, including the file at issue here." *Id.* This was "a purposeful policy decision" that was "made despite the obvious risks," thus "support[ing] a finding of deliberate indifference to the risk of a constitutional violation." *Id.* The court also reiterated that "the evidence establishes that Garcia's action in failing to review the [internal investigation] file and ensure disclosure of the video recording was deliberately indifferent to the highly predictable consequence of a *Brady* violation." *Id. See also infra* at 44-48.

2. As explained above (at 36-37), the City's failure to disclose the exculpatory video rendered Alvarez's guilty plea unknowing and involuntary, resulting in a due-process violation. This constitutional violation also supports Alvarez's Section 1983 claim.

To be sure, not every invalid plea would give rise to a Section 1983 claim. For example, a defendant whose plea was involuntary because of his mental incapacity may not have a Section 1983 claim because no government official would have caused the plea to be unknowing or involuntary. But here, Alvarez's loss of liberty stemmed from a plea agreement entered without sufficient knowledge of the relevant circumstances because the City had withheld exculpatory information. And when government conduct deprives a defendant of the chance to plead knowingly, intelligently, and voluntarily, Section 1983 applies.

3. Even if Alvarez's plea were construed (incorrectly) as waiving his right to challenge his conviction through federal post-conviction processes, his plea would not

have eliminated the pre-plea constitutional violation that serves as the basis of his Section 1983 claim. The plea therefore had no effect on his suit here.

In *Tollett v. Henderson*, 411 U.S. 258 (1973), the Court held that a prisoner who has pleaded guilty is "not automatically entitled to federal collateral relief" based on a pre-plea constitutional violation, but, in the same breath, recognized the "*existence* of such an antecedent constitutional injury." *Id.* at 266 (emphasis added). Because the "focus of federal habeas inquiry is [often] the nature of [counsel's] advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity," a defendant must show more than the existence of a pre-plea constitutional violation to invalidate a guilty plea on federal post-conviction review. *Id.* Here, by contrast, Alvarez does not seek to overturn the plea or the resulting conviction. Rather, this civil case turns on the existence of the underlying constitutional injury, which Alvarez's guilty plea did not extinguish. *Id.*

II. The City's other arguments should not be reached by the en banc Court, but if they are, this Court should affirm.

The Court ordered the parties to address how the principles of constitutional avoidance apply to the due-process issue briefed above. We do not believe those principles apply and respectfully ask the Court to address only the due-process issue.

First, the constitutional-avoidance canon does not apply here because no genuine avoidance is possible. When properly invoked, the canon allows a court to avoid establishing a precedent on a constitutional issue. *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22,

62 (1932). But, here, this Court has had controlling precedent on the constitutional issue ever since its decision in *Matthew* nearly two decades ago, as panels of this Court have repeatedly recognized. A decision that declined to reach the due-process issue therefore would avoid nothing, but rather would preserve this Court's controlling precedent—the same result a simple denial of rehearing would have accomplished.

Second, even assuming that avoidance was possible, it would be inappropriate here because the constitutional validity of a statute is not at issue. The constitutional-avoidance canon generally is "a tool for choosing between competing plausible interpretations of a statutory text," *Milavetz, Ballop & Milavetz, P.A. v. United States*, 559 U.S. 229, 239 (2010) (citation omitted), that "directs courts to prefer the interpretation of a statute that preserves its validity." *Va. Office for Prot. and Advocacy v. Stewart*, 563 U.S. 247, 265 (2011) (Kennedy, J., concurring). The canon is a "means of giving effect to congressional intent" and permitting a litigant "to vindicate his own *statutory* rights." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). No interpretation of statutory text is sought here by anyone, and especially not by Alvarez. He wants the constitutional issue decided.

Finally, other than the due-process issue on which rehearing was sought, no issue is en banc worthy. Each involves application of settled law to the particular facts. Indeed, some of them—involving the conduct of the damages trial and the jury award—presuppose that the City violated Alvarez's due-process rights.

For these reasons, the en banc Court should address the due-process issue. If, as we urge, the Court affirms on that issue, it should remand for panel determinations on the other issues. *See, e.g.*, *Soffar v. Cockrell*, 300 F.3d 588, 590 n.1 (5th Cir. 2002) (en banc). Nonetheless, as the Court ordered, this supplemental brief discusses those issues below. Our panel brief also addresses those issues, and we adopt the arguments made there as well.

A. Alvarez was entitled to summary judgment on the City's liability.

To establish municipal liability in a Section 1983 case, the plaintiff must show "proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose moving force is the policy or custom." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 166 (5th Cir. 2010) (discussing *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978)). The City does not deny that Chief Garcia was a policymaker and disputes only the other two elements.

1. Official policy

For purposes of establishing municipal liability, "the term 'policy' encompasses a range of municipal behavior," including a "practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Brown v. Bryan Cty.*, 219 F.3d 450, 457 & n.9 (5th Cir. 2000). A policymaker's act in "a particular situation," even if "not intended to control decisions in later situations," may give rise to liability where the particular act "was taken with 'deliberate indifference'" to the

"known or obvious consequence" that the act could result in a constitutional violation. *Id.* at 457.

Here, the only BPD officer to acknowledge an obligation to disclose exculpatory evidence revealed during internal use-of-force investigations was Chief Garcia. *See* ROA 2717-18. The other officers involved in investigating Officer Arias's use of force and subsequent criminal charge against Alvarez testified that it was not their responsibility to seek out or disclose exculpatory evidence. ROA 2929, 3012 (Arias); 2815-16 (BPD jail supervisor); 3178-81 (CID investigator); *see also* 3155-56, 3166 (BPD commander).

This testimony reflects the City's written policy for internal investigations, which imbues the Chief of Police with final responsibility for reviewing use-of-force reports. ROA 2806-07; *see also* ROA 2715. For example, Sergeant Infante—the BPD jail supervisor who investigated Officer Arias's use of force—acknowledged that he would have disclosed the video to CID if asked, but that his only job was to pass the video "up my chain of command, not [to] criminal investigations." ROA 2814-16, 2828-29. Lieutenant Etheridge, who supervised BPD's internal-affairs investigations, testified that any evidence revealed in internal investigations went "to the chief, who, I would assume, would disclose it" to criminal investigations "if it needed to be disclosed." ROA 3274. Chief Garcia suggested that other BPD officers involved in the case *should* have disclosed the video, but acknowledged that no explicit policy *required* anyone do so. *See* ROA 2704-07, 2712. Rather, regular practice at BPD was to send any evidence collected

during internal investigations only to Chief Garcia via the "strictly administrative" chain of command, and not to criminal investigators. ROA 2814-16.

Taken together, the policy and practices of the BPD gave Chief Garcia sole responsibility to disclose exculpatory material revealed in internal use-of-force investigations like the one in this case. Here, the Chief acknowledged that he received but did not review the relevant report, so the video was never disclosed. ROA 2720-23, 2727. He further testified that, based on his experience, it is foreseeable that a jailer injured during a use-of-force incident will file a police report seeking charges against the detainee. ROA 2743. "Because the policy in place to ensure disclosure within the BPD was Garcia's review of the" internal use-of-force reports, "Garcia should have known that the 'highly predictable' consequence of his failure to review those files would be a *Brady* violation." ROA 1097. The district court therefore held that Chief Garcia's failure to review the report here "constitute[d] an official policy or custom of the City of Brownsville for which the City may be held liable under § 1983." ROA 1098.

The City argues that the district court mistakenly assumed the exculpatory video was part of a separate, internal-affairs process subject to stricter non-disclosure policies than the use-of-force investigation here. City Br. 23. The City notes that Sergeant Infante said he would have disclosed the video to criminal investigators if asked, which, the City asserts, undermines the district court's analysis. City Br. 24-25 Not so. That analysis rests on the testimony, discussed immediately above, of Sergeant Infante and other BPD officers describing their practices in this specific use-of-force investigation

and similar investigations; in other words, the district court did not rely on any policy or practice unique to internal-affairs investigations that did not also apply to the investigation here. ROA 1093-98.

Rather, the district court's reference to the use-of-force investigation here as an internal-affairs matter, and Sergeant Infante as "an IAD officer," reflected the BPD officers' own testimony loosely describing any investigations that were not criminal investigations as "internal affairs" investigations. *See, e.g.*, ROA 3248 (BPD officer's testimony that "[w]hen I say 'administrative investigation,' and when I say 'internal affairs investigation,' and when I say 'workplace investigation,' to me, they mean the same thing."); *see also* ROA 3306-12 (explaining that the "same [disclosure] rules" apply to all internal investigations, regardless of type). Indeed, the City made no distinction in the district court between Internal Affairs Division (IAD) officers and the BPD officers who conducted the use-of-force investigation here. *See, e.g.*, ROA 966-67 (City's summary-judgment motion). For purposes of this case, it is a distinction that made no difference.

Finally, the City's claim that Chief Garcia reasonably relied on other officers to disclose the video, City Br. 25-27, is flatly contradicted by Garcia's own testimony that his reliance on City officers will result, and had resulted, in procedural failures similar to failure in this case and that he had an independent obligation to disclose the exculpatory video himself. ROA 2716-18. The City has not shown a genuine dispute as to the existence of a policy here, and summary judgment on this element was proper.

2. Causation

The final element is "a violation of constitutional rights whose moving force is the policy or custom." *Zarnow*, 614 F.3d at 166. The district court correctly found that Chief Garcia's failure to review the internal use-of-force report caused the violation of Alvarez's due-process rights. ROA 1098-99. The City's responses all fail.

The City again argues that the video was neither material nor favorable under *Brady*. City Br. 27-28. As explained above (at 38-39), those arguments are incorrect.

The City also asserts that there was insufficient evidence to establish that the constitutional violation proximately caused Alvarez's damages because "the only 'evidence' of damages causation admitted at trial" was the Texas Court of Criminal Appeals decision declaring Alvarez actually innocent, which, the City claims, was inadmissible. City Br. 39. The issue of proximate cause was ultimately tried to the jury, ROA 2108, 2535, as the City acknowledges, City Br. 38. Therefore, any error as to the causal relationship between the constitutional violation and Alvarez's damages should be reviewed under a deferential, substantial-evidence standard. *See Dougherty v. Santa Fe Marine, Inc.*, 698 F.2d 232, 235 (5th Cir. 1983).

The evidence easily supports a finding that the City's failure to disclose the video caused Alvarez to plead guilty. As explained below (at 49-50), the Texas Court of Criminal Appeals decision was admissible. But even without the Texas decision, Alvarez's testimony that he pleaded guilty—not knowing about the exculpatory video—only because it was his word against the jailers' is sufficient to show causation. ROA

2467. *See also* ROA 2092-94 (describing Alvarez's trial testimony on causation). Substantial evidence therefore supports the finding that the City's failure to disclose was the "moving force" behind the violation of Alvarez's due-process rights.

B. The district court did not abuse its discretion in denying the City's motions for new trial and remittitur.

This Court reviews the district court's denial of a new trial and remittitur for an abuse of discretion. *See Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995).

1. Motion for new trial

Each of the City's claims for a new damages trial is misguided. City Br. 44-45.

First, the district court held, alternatively, that the City forfeited its hearsay objection to admission of the Texas Court of Criminal Appeals' decision by failing to comply with a local rule that required the City to submit all evidentiary objections seven days before trial. ROA 2109-10. *See* S.D. Tex. Civ. R. 46. That is reason alone to reject the City's contention.

In any case, the decision was admissible to show the legal effect of the Texas decision (Alvarez's release from prison), as opposed to the truth of the matter asserted (Alvarez's innocence). *See United States v. Stinson*, 647 F.3d 1196, 1210 (9th Cir. 2011) (a judgment is "not hearsay, to the extent that it is offered as legally operative verbal conduct that determined the rights and duties of the parties.") (internal edits omitted); *United States v. Dupree*, 706 F.3d 131, 137 (2d Cir. 2013) (same).

Second, the district court did not abuse its "broad discretion in controlling the extent of direct and cross-examination," *United States v. James*, 510 F.2d 546, 551 (5th Cir. 1975), by denying the City's requests to recall a witness to ask questions it forgot to ask during direct examination, ROA 2497-98, or to call a new non-fact witness: a former prosecutor who would testify that, in her opinion, the video is not exculpatory. ROA 2496-97. The district court properly found the prosecutor's testimony irrelevant to assessing damages. ROA 2111.

Finally, any error in admitting the Texas decision or denying the City's witness requests would have been harmless in light of other trial evidence. The City claims that the Texas decision was "the only 'evidence' of damages causation," City Br. 39, but that is not true. The district court reviewed in detail other causation evidence, ROA 2092-94, including Alvarez's testimony, and then "assuming, arguendo, that the CCA opinion was not admitted," found that "substantial evidence supports the jury verdict." ROA 2093. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984).

2. Remittitur

Remittitur is proper only when the verdict exceeds "any rational appraisal or estimate of the damages that could be based upon the evidence before the jury." *Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 178 (5th Cir. 1992). The City says Alvarez's testimony was "vague, conclusory, and largely uncorroborated" and that compensation available under a Texas statute and purported independent causes of Alvarez's injuries show that the jury award was excessive. City Br. 47. But Alvarez testified extensively

about the difficulties of being in prison while only seventeen, including his fear of being raped, killed, and drawn into gang violence. ROA 4088-4110, 2092-94. "There is a strong presumption in favor of affirming a jury award of damages," *Eiland*, 58 F.3d at 183, and neither the existence of the Texas compensation statue nor the City's arguments about alternative causes for Alvarez's injuries are sufficient to unsettle the jury's award—$500,000 for each year of an unconstitutional and total deprivation of liberty. The district court properly noted that the verdict was not excessive given that the jury awarded Alvarez less per year of wrongful imprisonment than in a comparable case. ROA 2111-12. The district court did not abuse its discretion in denying remittitur.

CONCLUSION

This Court should affirm the judgment of the district court in its entirety or affirm the district court's holding that due process requires disclosure of exculpatory evidence before a defendant enters a plea agreement—the only issue reached by the panel—and remand to the panel to address the City's other arguments.

Respectfully submitted,*

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CERTIFICATE OF SERVICE

I certify that all counsel of record have been served a copy of this Supplemental Brief of Appellee George Alvarez on Rehearing En Banc through the CM/ECF System on January 3, 2018.

/s/Brian Wolfman
Counsel for appellee

January 3, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,899 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Garamond.

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