

Ninth Circuit Nos. 09-55334, 09-55345, 09-55346 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY W. SMITH and TERESA SMITH,
Plaintiffs - Appellants,

v.

ROBERT ALMADA,
Defendant - Appellee.

*Brief of Amici Curiae National Police Accountability Project
and Human Rights Defense Center To File Brief In Support of Plaintiff-Appellant's
Petition for Rehearing En Banc*

Michael Avery
SUFFOLK LAW SCHOOL
120 Tremont Street
Boston, Massachusetts 02108
(617) 573-8551

John Burton
THE LAW OFFICES OF JOHN BURTON
65 North Raymond Avenue, Suite 300
Pasadena, California 91103
(626) 449-8300

*Counsel for Amici Curiae National Police Accountability Project
and Human Rights Defense Center In Support of Plaintiffs-Appellees*

CORPORATE DISCLOSURE STATEMENT

Amici curiae are National Police Accountability Project (NPAP) and Human Rights Defense Center (HRDC). Amici curiae are either not corporate parties or are corporate parties that do not have any parent corporations, and no public company owns 10% or more of their stock.

TABLE OF CONTENTS

Contents	Page
Corporate Disclosure Statement	i
Table of Contents	ii
Table of Authorities	iii
Interests of Amici Curiae	1
I. The Failure to Provide Exculpatory Evidence to a Person Charged with a Crime Violates That Individual’s Rights to Procedural Due Process of Law.	3
II. Whether a Failure to Provide Exculpatory Evidence to a Criminal Defendant in a Given Situation Violates Procedural Due Process must Be Determined by the Balancing Test of <i>Mathews v. Eldridge</i>	7
III. Conclusion	16
Certificate of Compliance with FRAP 32(a)(7)(B)	17
Certificate of Service	18

TABLE OF AUTHORITIES

Authority	Page(s)
<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985)	5
<i>Albright v. Oliver</i> , 510 U.S. 266 (1994)	3,6
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	<i>passim</i>
<i>District Attorney’s Office for Third Judicial District v. Osborne</i> , 129 S. Ct. 2308 (2009)	4
<i>Flores v. Satz</i> , 137 F.3d 1275 (11th Cir. 1998)	9
<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975)	11
<i>Haupt v. Dillard</i> , 17 F.3d 285 (9th Cir. 1994)	14
<i>Jones v. City of Chicago</i> , 856 F.2d 985 (7th Cir. 1988)	12,14
<i>Lee v. City of Los Angeles</i> , 250 F.3d 668 (9th Cir. 2001)	14
<i>Little v. Streater</i> , 452 U.S. 1 (1981)	6
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	<i>passim</i>
<i>McCann v. Mangialardi</i> , 337 F.3d 782 (7th Cir. 2003)	6,9

Authority	Page(s)
<i>McCune v. City of Grand Rapids</i> , 842 F.2d 903 (6th Cir. 1988)	9
<i>Moldowan v. City of Warren</i> , 578 F.3d 351 (6th Cir. 2009)	6
<i>Monell v. Department of Social Services</i> , 436 U.S. 658 (1978)	13
<i>Morgan v. Gertz</i> , 166 F.3d 1307 (10th Cir. 1999)	9
<i>Reid v. State of New Hampshire</i> , 56 F.3d 332 (1st Cir. 1995)	6
<i>Russo v. City of Bridgeport</i> , 479 F.3d 196 (2d Cir. 2007)	13
<i>Sanders v. English</i> , 950 F.2d 1152 (5th Cir. 1992)	12,14
<i>Tennison v. City and County of San Francisco</i> , 570 F.3d 1078 (9th Cir. 2009)	14
<i>United States v. Gamez-Orduno</i> , 235 F.3d 453 (9th Cir. 2000)	9,15
<i>United States v. Marion</i> , 404 U.S. 307 (1971)	11
<i>United States v. Ruiz</i> , 536 U.S. 622 (2002)	5,8,9
<i>White v. McKinley</i> , 519 F.3d 806 (8th Cir. 2008)	6

Other Authorities	Page(s)
42 U.S.C. §1983	<i>passim</i>
Michael Avery, <i>Paying for Silence: the Liability of Police Officers Under Section 1983 For Suppressing Exculpatory Evidence</i> , 13 Temple Pol. & Civ. Rts. Law Rev. 1 (2003)	4

INTERESTS OF AMICI CURIAE

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law enforcement and corrections officers by coordinating and assisting civil rights lawyers. The project presently has more than four hundred attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues related to misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as amicus curiae in cases, such as this one, which present issues of particular importance for the clients of its lawyers, who are sometimes incarcerated and prosecuted as a result of the suppression of exculpatory evidence by police officers or detectives.

The Human Rights Defense Center (HRDC) is a Washington State non-profit, charitable corporation based in Vermont that publishes a nationally distributed monthly journal called Prison Legal News (PLN). Since 1990, PLN has reported on news, recent court decisions, and other developments relating to the civil and human rights of prisoners in the United States and abroad. PLN has the most comprehensive coverage of detention facility litigation of any publication. In addition to reporting on the human and civil rights of prisoners, PLN also reports on the rights of crime victims, prison and jail employees, and prison and jail visitors. PLN has approximately 6,800

subscribers in all fifty states and abroad and eight times as many readers.

Approximately sixty-five percent of PLN subscribers are state and federal prisoners. The remainder are attorneys, judges, advocates, journalists, academics and concerned citizens. PLN's website, www.prisonlegalnews.org, receives approximately 100,000 visitors per month.

In addition to publishing PLN and non-fiction reference books, HRDC has regularly filed litigation under the First Amendment in federal courts nationwide, challenging prison officials who censor PLN, seeking public records from government agencies and also providing representation in select prisoner cases. HRDC is concerned with the incarceration and prosecution of pretrial detainees based on police officers and detectives suppressing or failing to disclose exculpatory information to the prosecuting authorities.

I. THE FAILURE TO PROVIDE EXCULPATORY EVIDENCE TO A PERSON CHARGED WITH A CRIME VIOLATES THAT INDIVIDUAL'S RIGHTS TO PROCEDURAL DUE PROCESS OF LAW.

The 2-1 panel opinion and vigorous dissent in this case raise the important question of whether a criminal defendant deprived of his liberty because a police officer deliberately suppressed or failed to provide the prosecutor with exculpatory evidence is entitled to bring a claim as a plaintiff for a violation of his constitutional rights under 42 U.S.C. § 1983, where he was never convicted of the criminal charges against him. To answer this question, it is imperative to begin with a clear identification of what constitutional right is violated by the officer's failure to disclose exculpatory evidence to the prosecutor. As the Supreme Court explained in *Albright v. Oliver*, 510 U.S. 266, 271 (1994), "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' The first step in any such claim is to identify the specific constitutional right allegedly infringed." (Citations omitted).

Despite these clear instructions from the Supreme Court that the analysis of Section 1983 claims must begin with identification of the specific constitutional right allegedly infringed, the lower federal courts have frequently not identified with any precision what constitutional right is violated when police officers and detectives fail to furnish prosecutors with exculpatory evidence in criminal cases. The fact that the panel did not do so in this case fatally compromised its analysis and led to the doctrinally incorrect conclusion that there is no such Section 1983 claim for a person who was held

in jail as a result of the failure to disclose exculpatory evidence, but then was ultimately acquitted. Amici therefore request this Court to order rehearing en banc in order to reconsider this significant constitutional issue.

Although the Supreme Court has never considered the substantive scope of a Section 1983 claim for the failure to disclose exculpatory evidence, it is clear from its decisions following *Brady v. Maryland*, 373 U.S. 83 (1963), that such a failure violates the procedural due process rights of a criminal defendant, who in these cases is the civil rights plaintiff.¹ Although *Brady* identified the suppression of exculpatory evidence simply as a “due process” violation, *id.* at 87, without specifying whether substantive or procedural due process was at stake, subsequent cases have clarified the issue. The right of a criminal defendant to receive exculpatory evidence derives from concerns about the fairness of the procedures by which a defendant may be prosecuted and convicted, not from concerns about whether there is sufficient governmental interest in punishing convicted criminals.

Procedural due process was identified as the relevant constitutional right at stake in *District Attorney’s Office for Third Judicial District v. Osborne*, 129 S. Ct. 2308 (2009), where the Court began its analysis of pre- and post-conviction entitlements to

¹This analysis is set forth in greater detail in Michael Avery, *Paying for Silence: the Liability of Police Officers Under Section 1983 For Suppressing Exculpatory Evidence*, 13 Temple Pol. & Civ. Rts. Law Rev. 1, 24-29 (2003). The article comprehensively explores the issues raised by section 1983 claims for the failure by police officers to disclose exculpatory evidence to prosecutors.

exculpatory evidence by noting that the Due Process Clause of the Fourteenth Amendment “imposes procedural limitations on a State’s power to take away protected entitlements.” *Id.* at 2319. The *Osborne* Court’s discussion of a potential right to post-conviction access to DNA evidence is framed in terms of what *procedures* are required by the Constitution. Chief Justice Roberts specifically distinguished the Court’s conclusion that the Due Process Clause does not require post-conviction access to DNA evidence from “the principles of *Brady v. Maryland*,” where the Court “held that due process requires a prosecutor to disclose material exculpatory evidence to the defendant before trial.” *Id.*

That the right to be furnished exculpatory evidence is a procedural due process right was most clearly established by *United States v. Ruiz*, 536 U.S. 622 (2002). The Court employed the traditional procedural due process analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976), holding that a prosecutor has no constitutional duty to furnish material that might impeach government witnesses before entering into a plea agreement, or before the defendant pleads guilty.² The Court identified the following factors as determining the due process issue: “(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.” *Mathews*, 536 U.S. at 631.

²As authority for the appropriate test, the Court cited *Ake v. Oklahoma*, 470 U.S. 68 (1985) (procedural due process requires state to provide psychiatrist to criminal defendant who makes a showing that his sanity at time of offense is likely to be a significant factor at trial). *Ake* in turn relied on *Mathews*. 470 U.S. at 77.

For other Supreme Court decisions indicating that *Brady* involves a procedural due process right, see *Albright v. Oliver* (Chief Justice Rehnquist, joined by Justices O'Connor, Scalia and Ginsburg, suggesting that the *Brady* line of cases protected procedural due process rights), 510 U.S. at 273, n. 6, and *Little v. Streater*, 452 U.S. 1 (1981) (violation of procedural due process for state to refuse to bear cost of blood grouping tests for indigent defendant in civil paternity action brought by state welfare department). See also, e.g., *White v. McKinley*, 519 F.3d 806, 813-14 (8th Cir. 2008) (failure to disclose exculpatory evidence analyzed as procedural due process claim); *Moldowan v. City of Warren*, 578 F.3d 351, 377, n. 6 (6th Cir. 2009) (failure to furnish exculpatory evidence is a procedural due process violation); *McCann v. Mangialardi*, 337 F.3d 782, 787 (7th Cir. 2003) (failure to disclose exculpatory evidence is a procedural due process violation); *Reid v. State of New Hampshire*, 56 F.3d 332, 341 (1st Cir. 1995) (because New Hampshire law provided no remedy for procedural due process violation of failing to disclose exculpatory evidence, plaintiff had federal claim under Section 1983).

II. WHETHER A FAILURE TO PROVIDE EXCULPATORY EVIDENCE TO A CRIMINAL DEFENDANT IN A GIVEN SITUATION VIOLATES PROCEDURAL DUE PROCESS MUST BE DETERMINED BY THE BALANCING TEST OF *MATHEWS V. ELDRIDGE*.

The identification of the failure to provide exculpatory evidence as a procedural due process violation dictates the analysis that must be conducted to determine whether such a violation has occurred under any given set of circumstances. That analysis was set forth by the Supreme Court in *Mathews v. Eldridge*, as follows:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 334-35.

In *Brady*, the Supreme Court determined that it always violates this procedural due process right when the government withholds material exculpatory evidence and a criminal defendant is convicted. In effect there is a standing rule that the liberty interest that is dispossessed by a conviction outweighs the government's interest in suppressing exculpatory evidence, and the materiality requirement guarantees that the procedural safeguard of furnishing such evidence is justified by the value it has in avoiding erroneous deprivations.

The Supreme Court has had only one opportunity to determine whether procedural due process is violated where non-disclosure of exculpatory evidence leads to

something other than a conviction following a trial, namely, *United States v. Ruiz*, discussed in Section I. The question was whether it was necessary to disclose information in the government's possession that could have been used to impeach a witness before the witness entered a plea of guilty. The Court first determined that the defendant's ignorance of the impeaching information did not prohibit him from making a voluntary waiver of his right to stand trial or to waive the constitutional rights he would have had at trial. It then turned to the procedural due process question and conducted a *Mathews v. Eldridge* analysis. Balancing those factors, the Court reasoned that impeachment information would not provide great value as a safeguard against innocent people pleading guilty to crimes, but requiring the government to furnish it prior to a guilty pleas could seriously interfere with a number of government interests.³ Significantly, although it would have resolved the case, the Court did not rule that the "fair trial" protection afforded by the *Brady* rule has no general application in the pre-trial context, nor did it rule that a conviction after trial is required for a violation of the right of access to exculpatory information.⁴

³*Id.* at 631-32. The Court referred to the government's interests in not disclosing their witnesses prematurely: protecting ongoing investigations and avoiding exposing witnesses to the risk of harm; protecting the identity of confidential sources; conserving its resources rather than devoting substantial resources to preparation for pleas; and relying heavily on plea bargaining to dispose of more than ninety percent of criminal cases.

⁴Only Justice Thomas would have held that the "fair trial" rights protected by *Brady* do not apply at the plea stage. 536 U.S. at 634 (Thomas, J., concurring).

Ruiz involved only impeachment information, which may tend to exculpate a defendant but is generally not exonerating, and the Court had no occasion to rule with respect to any failure to disclose exculpatory evidence which might establish actual innocence. On the contrary, the Court noted that *Ruiz*'s plea agreement required the government to disclose any evidence it might have of actual innocence. 536 U.S. at 631. In *McCann v. Mangialardi*, the Seventh Circuit concluded that *Ruiz* "strongly suggests that a *Brady*-type disclosure might be required" prior to a plea where the government has "exculpatory evidence of actual innocence." 337 F.3d at 787.

The lower federal courts that have ruled that a *Brady*-based §1983 claim requires a conviction after trial have not followed the Supreme Court's methodology in *Ruiz*. They have drawn hasty and mechanical conclusions from the "fair trial" language in *Brady* and related cases, without conducting a careful analysis of the constitutional violation as a procedural due process violation.⁵

⁵This is true of the cases cited by the panel, which were brief opinions that engaged in no serious analysis of the nature of the exculpatory evidence claim. *Morgan v. Gertz*, 166 F.3d 1307 (10th Cir. 1999), mistakenly characterized the claim as one for substantive due process, noted the Supreme Court's unwillingness to expand the doctrine of substantive due process and limited *Brady* to protecting only a fair trial. *Flores v. Satz*, 137 F.3d 1275 (11th Cir. 1998), characterized *Brady* as providing only protection from conviction at an unfair trial – a position rejected in this Circuit by *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) – without discussing what constitutional right was involved. *McCune v. City of Grand Rapids*, 842 F.2d 903 (6th Cir. 1988), merely asserted that because there was no conviction plaintiff had suffered no injury, ignoring his lengthy pre-trial incarceration.

Failures to disclose exculpatory evidence in situations where a criminal defendant suffers a deprivation of a liberty interest other than as a result of conviction after trial should be analyzed in the same way the Supreme Court analyzed the guilty plea in *Ruiz*. That is, they should be analyzed as potential procedural due process violations under the *Mathews v. Eldridge* factors.

This conclusion is required by the fact that the Constitution does not explicitly or merely provide a right to a “fair trial.” The Fourteenth Amendment provides that the state may not deprive a person of his liberty without due process of law. Our rich procedural due-process jurisprudence establishes that no protected liberty interest may be invaded without due process. In each case, of course, it is necessary to decide what process is due, which is what the *Mathews v. Eldridge* factors determine. When a criminal proceeding terminates without a conviction, whether police officers or detectives are liable for deprivations of liberty caused by their failure to furnish exculpatory evidence requires a particularized analysis, not the broad brush strokes of the panel majority in this case. The failure of the lower federal courts to explicitly employ a *Mathews v. Eldridge* analysis to determine when exculpatory evidence must be furnished prior to trial has largely resulted from their failure to identify the right to exculpatory evidence as a procedural due process right.

The liberty interests that are safeguarded by the disclosure of exculpatory evidence to the prosecutor by the police go beyond assisting the defense in preparing for a criminal trial. Significant liberty deprivations occur in advance of trial. *See, e.g.,*

Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (After arrest, “the suspect’s need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty.”) (citations omitted); *United States v. Marion*, 404 U.S. 307, 320 (1971) (“Arrest is a public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.”).

Whether the Constitution requires disclosure of exculpatory information prior to trial depends upon the constitutional guarantees that are implicated at different stages of a criminal proceeding. The analysis of what disclosure is constitutionally required must relate to the purpose for which the evidence is material. One might have to analyze, for example, whether the failure to disclose exculpatory information to the prosecutor resulted in an erroneously high bail; or whether disclosure of exculpatory information to a prosecutor might have caused a dismissal of a prosecution. In the instant case, the question is in fact much closer to the ordinary *Brady* determination of materiality – would disclosure of the exculpatory information have created a reasonable probability that the result of the first trial might have been an acquittal rather than a hung jury, as noted by Judge Nelson in her dissent from the panel’s decision.

The appropriateness of a *Mathews v. Eldridge* procedural due process analysis has been implicitly recognized in failure to disclose exculpatory evidence cases where liability was found despite the absence of a criminal conviction. Thus in *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992), the court emphasized that a jury could find that if exculpatory evidence had been disclosed to the prosecutor, the plaintiff would have been released from custody and the charges dropped earlier. In other words, there was a risk of erroneous deprivation of liberty in the absence of the procedural protection of furnishing exculpatory evidence, and providing the protection would have had value as a safeguard. Similarly the analysis employed by Judge Posner in *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), was consistent with a constitutional claim on a procedural due process theory. In discussing causation, the court rejected the defense argument that the decision by the state's attorney to prosecute was the sole legal cause of plaintiff's injuries. It concluded that the jury could well have found that the defendants "systematically concealed from the prosecutors, and misrepresented to them, facts highly material to—that is, facts likely to influence—the decision whether to prosecute Jones and whether (that decision having been made) to continue prosecuting him right up to and into the trial." *Id.* at 993. The court concluded that had the prosecutors known of the exculpatory evidence "they would almost certainly have dropped the charges against [plaintiff] before trial," and "he might never have been charged in the first place if the prosecutors had known the facts militating against [plaintiff's] guilt" *Id.* In procedural due process terms,

this is equivalent to a conclusion that there was a significant “risk of an erroneous deprivation” through the procedures that were used, and that there would be significant “probable value . . . of additional or substitute procedural safeguards.” *Mathews v. Eldridge*, 424 U.S. at 334-335. *See also, e.g., Russo v. City of Bridgeport*, 479 F.3d 196 (2d Cir. 2007) (officers may be held liable for failure to disclose exculpatory evidence resulting in lengthy pretrial detention; court analyzes case under Fourth Amendment).⁶

⁶The Seventh Circuit in *Jones* not only affirmed liability against the individual officers even though there was no criminal conviction, it determined that the City was subject to liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

The custom in question is the maintenance of the “street files,” police files withheld from the state’s attorney and therefore unavailable as a source of exculpatory information that might induce him not to prosecute or, failing that, would at least be available to defense counsel under *Brady v. Maryland*. . . . [A]ttempts to circumvent the rule of that case by retaining records in clandestine files deliberately concealed from prosecutors and defense counsel cannot be tolerated. The City sensibly does not attempt to defend such behavior in this court.

There is little doubt that the clandestine character of the street files played a role in [plaintiff]’s misfortunes. . . . If the state’s attorney had had access to them, he would have discovered memos . . . that would have given any prosecutor pause. Alternatively, defense counsel would have obtained them prior to trial and the trial would have ended even sooner than it did.

Id. at 995-96. This passage makes no sense if, as the panel majority holds, a section 1983 claim based on a *Brady* violation requires proof that the detectives’ deliberate suppression and concealment of exonerating evidence caused a wrongful conviction.

The Ninth Circuit has cited both *Sanders v. English* and *Jones v. City of Chicago* with approval on related grounds. *Tennison v. City and County of San Francisco*, 570 F.3d 1078, 1088 (9th Cir. 2009) (citing *Jones* on the state-of-mind requirement for a civil *Brady* claim), *Haupt v. Dillard*, 17 F.3d 285, 290, n. 5 (9th Cir. 1994) (citing *Jones* for the proposition that “[p]robable cause to continue a prosecution may disappear with the discovery of new exculpatory evidence after the preliminary hearing”), and *Lee v. City of Los Angeles*, 250 F.3d 668, 684 (9th Cir. 2001) (citing *Sanders* as “holding that the failure to release a pretrial detainee after police officer knew or should have known that plaintiff had been misidentified gives rise to cause of action under § 1983”).

These cases demonstrate that the *Mathews v. Eldridge* framework is workable in §1983 cases where the failure to disclose exculpatory evidence resulted in a deprivation of liberty other than conviction after trial. Amici respectfully suggest that the panel’s conclusion that *Brady’s* materiality standard is unworkable in the absence of a conviction is a result of its failure to properly analyze the *Brady* right as a procedural due process right. When properly analyzed, it becomes clear that cases involving the question of whether exculpatory evidence was material to a conviction are merely one example of erroneous decisions that might be made during a criminal prosecution as a result of the suppression of exculpatory evidence. Other decisions, such as the setting of bail, or a prosecutor’s decision to continue a prosecution, have to be analyzed on their own terms.

This analysis is consistent with the fact that in *United States v. Gamez-Orduno*, 235 F.3d 453 (9th Cir. 2000), this Court held that *Brady* obligations do not attach only to the trial itself. “The suppression of material evidence helpful to the accused, whether at trial *or on a motion to suppress*, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of *the proceeding* would have been different.” *Id.* at 461 (emphases added).

The panel’s concern that there might be a “potentially unlimited number” of claims at other states of the criminal process is not realistic. There are in fact a relatively small number of decision points in the criminal process that might be affected by the failure to disclose exculpatory evidence and they are all capable of analysis under a *Mathews v. Eldridge* framework. The legitimate claims that do exist, however, result from the deprivation of protected liberty interests without procedural due process. Whether such claims should be recognized has already been determined by the drafters of the Fourteenth Amendment.

It should be emphasized that a cause of action for deprivations of liberty in addition to convictions caused by the failure to disclose exculpatory evidence imposes only a slight burden on police officers and detectives. All officers are required to do is inform the public prosecutor of any exculpatory evidence they acquire in a timely fashion so that the prosecutor may consider all the evidence when making decisions that affect the liberty of the accused. Once officers and detectives do so, they have no

exposure to liability based on the existence of exculpatory evidence. Determinations of materiality, and the decision whether to advise the court or defense counsel of such evidence remains in the hands of the prosecutor, who is protected by absolute immunity for any errors in judgment.

III. CONCLUSION

For the foregoing reasons, Amici request this Court to grant en banc rehearing of this case and vacate the panel's opinion. Allowing the panel decision to stand would create a conflict in this Circuit and among the Circuits and would sow confusion in the trial courts. Amici respectfully urge that the Court hold that the Fourteenth Amendment's guarantee of procedural due process requires recognition of *Brady*-based § 1983 claims against police officers and defendants who have withheld or concealed exculpatory information from prosecutors and caused the wrongful imprisonment or prosecution of a civil-rights plaintiff.

Respectfully submitted,

Dated: November 12, 2010

By: _____ /S/
Michael Avery
John Burton
Attorneys for *Amici Curiae*
National Police Accountability Project
and Human Rights Defense Center

CERTIFICATION OF ELECTRONIC SERVICE

SMITH V. ALMADA

Ninth Circuit Nos. 09-55334, 09-55345, 09-55346 (consolidated)

I, Sandy Leonardis, certify that on November 12, 2010, I electronically filed the foregoing Brief of Amici Curiae National Police Accountability Project and Human Rights Defense Center In Support of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: November 12, 2010

_____/s/_____
Sandy Leonardis