No. 22-55614

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGER WAYNE PARKER,

Plaintiff-Appellee,

v.

COUNTY OF RIVERSIDE, ET AL.

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California, Riverside
No. 5:21-cv-01280-JDB-KK
Hon. Jesus G. Bernal

APPELLANTS' OPENING BRIEF

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INTRODUCTION

More than 7 years after his criminal charges were dismissed, Roger Wayne Parker ("Parker") brought causes of action against those who allegedly prosecuted him without probable cause. However, Parker's criminal case never even made it to a preliminary hearing before the charges were dismissed. Still, Parker alleged that prosecutors committed a *Brady* violation by not informing him of a third-party's confession prior to dismissing his charges.

However, the purpose of *Brady v. Maryland* is to preserve the fairness of criminal *trials*. *Brady* and its progeny hold that a *Brady* violation can *only* occur where the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence *would have produced a different verdict*. Here, Parker cannot demonstrate that the allegedly "suppressed" evidence could have produced a different verdict *because a verdict never occurred*.

Nonetheless, after properly dismissing all of Parker's other claims as time-barred or improper, rulings that Parker never timely challenged, the esteemed District Court found that Parker could proceed on his *Brady*-based § 1983 claim and related pendant *Monell* claims because he had alleged the prejudice of remaining in jail for 6 months after prosecutors discovered the third-party's confession. Regrettably, such finding by the honorable District Court was improper: there is no basis for finding that a *Brady* violation can occur where there

was never an opportunity to present exculpatory evidence before a jury. Parker's right to a fair trial cannot be violated when a trial never occurred. While it is unfortunate if, as he claims, Parker remained in jail for some period of time when prosecutors were in possession of exculpatory evidence, the appropriate cause of action to obtain his desired relief for his allegedly improper jail time was malicious prosecution: which can be brought by those whose criminal charges have been dismissed and believe exculpatory evidence was suppressed. Here, however, because Parker waited over 7 years after dismissal of his criminal charges to bring his complaint, his malicious prosecution is time-barred by the controlling law: and Parker has not timely challenged that decision.

Further, Parker admits that his criminal charges were dismissed and that a preliminary hearing never occurred in his criminal matter. Thus, he cannot establish the requisite prejudice needed to bring a *Brady*-based § 1983 claim: the reasonable probability that, had the evidence been disclosed to the criminal defense, the result of the proceeding (trial) would have been different. Parker's criminal charges were dismissed, so the result of his criminal proceedings would not have been different if prosecutors disclosed the third-party's confession. In sum, as the other Circuit Courts to address this issue have all found, there can be no *Brady* violation without a conviction. Thus, the honorable District Court should have granted judgment for defendant-appellants on Parker's *Brady*-based § 1983

claim and this Court should reverse the District Court's denial of judgment of that claim and pendant *Monell* claims accordingly.

JURISDICTIONAL STATEMENT

This is an appeal from an order of the District Court partially denying the Motion for Judgment on the Pleadings ("MJOP") brought by defendants County of Riverside, Paul E. Zellerbach, Sean Lafferty, Tricia Fransdal, and Jeff Van Wagenen's (collectively the "County defendants") regarding the complaint of Roger Wayne Parker ("Parker"). [1-ER-2–10.] Parker's Complaint was brought under 42 U.S.C. § 1983 and was filed in the United States District Court for the Central District of California. [2-ER-76–92.] It alleged claims for: (1) § 1983 malicious prosecution; (2) § 1983 Brady violation; (4) *Monell* violation by the County defendant; and (5) declaratory and injunctive relief. [2-ER-76–92.]

The County defendants moved the District Court for an order certifying the MJOP for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). [2-ER-16–31.] The honorable District Court granted the County defendants' motion on May 5, 2022. [2-ER-12–15.] The County defendants timely filed Petition for Permission to Appeal under 28 U.S.C. § 1292(b) with this honorable Court. On June 23, 2022, this Court granted the County defendants' petition. The County defendants then perfected their appeal in accordance with Federal Rule of Appellate Procedure 5(d)

and filed a Notice of Appeal with the District Court on June 30, 2022. [3-ER-411–412.]

ISSUE PRESENTED

Whether a criminal defendant can allege a valid Section 1983 claim for *Brady* violation for failure to disclose potentially exculpatory evidence when that defendant was not convicted of any crime?

STATEMENT OF THE CASE

On or about March 18, 2010, Roger Wayne Parker ("Parker") was detained and questioned by the police regarding a murder that occurred in Parker's home. [2-ER-78.] Parker ultimately confessed to the murder, but he now alleges that the confession was sarcastic and due to coercion by the police. [2-ER-78.] The charges against Parker were then dismissed by the prosecutors on March 6, 2014 due to insufficient evidence, and prior to the preliminary hearing (which had been continued on multiple occasions) taking place. [2-ER-81 at fn.15, 82.]

Over 7 years after those charges were dismissed, on July 29, 2021, Parker brought a Complaint against the County of Riverside and several prosecuting attorneys: Paul E. Zellerbach (a former District Attorney), Sean Lafferty (a former supervising prosecutor in the District Attorney's Office), Tricia Fransdal (a prosecutor in the District Attorney's Office), and Jeff Van Wagenen (another senior prosecutor in the District Attorney's Office) (collectively the "County

defendants"). [2-ER-76, 82.] In his Complaint, Parker alleged causes of action for: (1) malicious prosecution under 42 U.S.C. § 1983; (2) violation of the Fifth Amendment right to due process by withholding exculpatory evidence under 42 U.S.C. § 1983 (also known as a *Brady*-based claim); (3) unconstitutional custom, practice, or policy under 42 U.S.C. § 1983 (a *Monell* claim); and (4) declaratory and injunctive relief. [2-ER-76–92.]

These causes of action were based on Parker's allegations that the Riverside County District Attorney's Office was aware that he was being held without probable cause and had obtained in September or October 2013 recorded jail calls where another individual admitted to the murder, but did not dismiss Parker's criminal charges until March 6, 2014. [2-ER-79–82.]

On January 19, 2022, the County defendants brought a motion for judgment on the pleadings ("MJOP") seeking to dismiss all of Parker's claims on grounds of the operative time-bar of the statute of limitations and Parker's failure to state a valid claim. [2-ER-59–74.] This motion included authority showing that Parker's *Brady*-based § 1983 claim (and associated, pendant *Monell* claims) failed because Parker was unable to establish that he was prejudiced by the alleged nondisclosure of the third-party jail call confession, since he could not show that such disclosure would have produced a different verdict where no trial, not even a preliminary

hearing, occurred in his criminal matter. [2-ER-43–44, 69–70.] Parker timely opposed the MJOP, and the matter was fully briefed. [2-ER-33–58.]

On February 23, 2022, the District Court issued its Order granting-in-part and denying-in-part the County defendants' MJOP. [1-ER-2–10.] The honorable District Court granted judgment on the pleadings without leave to amend as to Parker's claim for malicious prosecution for being time-barred and claim for declaratory and injunctive relief, as well as the associated portions of the *Monell* claim, for failure to state a claim. [1-ER-5–7, 9.] However, the honorable District Court found that, even though Parker's criminal charges were dismissed before trial, it could not rule—as a matter of law—that Parker's *Brady*-based § 1983 claim must be dismissed: because of his allegation that he remained in jail for months after the third-party jail call confession was obtained by the prosecutors. [1-ER-7–8.] Because this *Brady* claim remained valid, in the District Court's assessment, judgment on the pleadings was also denied as to that part of Parker's pendant *Monell* claim: while judgment was granted to the County defendants on all other claims. [1-ER-2–10.]

The County defendants then sought certification for interlocutory appeal of the District Court's order partially denying their MJOP; and the honorable District Court granted such certification; and the County defendants then requested and

obtained leave from this honorable Court to pursue the associated interlocutory appeal on this important question of law. [ER-2–10.]

SUMMARY OF THE ARGUMENT

I. *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny require that an individual must have been convicted in order to bring a *Brady*-based § 1983 claim. The threshold prejudice prong of *Brady* claims is only satisfied where, if the suppressed evidence had been disclosed, there is a reasonable probability there would have been a different verdict. Parker was never convicted, there was no verdict against him, and so he cannot establish a *Brady*-based § 1983 claim.

II. The honorable District Court erred in analyzing the prejudice prong for a *Brady*-based § 1983 claim by improperly considering prejudice in the context of *Brady* obligations unrelated to trial. However, the District Court's determination that Parker could plead prejudice without a conviction is not based on prevailing or applicable case law: as the prevailing cases show that a conviction is required before a claim can be brought for a failure to make required disclosures of potentially exculpatory evidence under *Brady*. Parker's criminal charges were dismissed before any proceeding against him (before any trial, and before even any preliminary hearing): so the result of his *proceeding* would not have changed if the third-party jail call confession was disclosed, and he therefore cannot establish the requisite prejudice for his *Brady*-based § 1983 claim. Where a defendant was not

convicted, but evidence was suppressed, the proper cause of action is for malicious prosecution, *not* a *Brady*-based § 1983 claim: and Parker failed to timely make his malicious prosecution claim.

III. Parker's only remaining claims are for *Brady*-based § 1983 and *Monell* liability. Because *Monell* liability is dependent on an underlying constitutional violation, and because judgment should have been granted for County defendants on Parker's *Brady*-based § 1983 claim, it should also have been granted on the remaining portions of his pendant *Monell* liability claim.

STANDARD OF REVIEW

An order regarding a motion for judgment on the pleadings is reviewed *de novo*. *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1131 (9th Cir. 2012); *see Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1201 (9th Cir. 2021). "A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Dunlap v. Credit Protection Ass'n LP*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005) (per curiam) (internal quotation marks and citation omitted); *see also Marshall Naify Revocable Trust v. United States*, 672 F.3d 620, 623 (9th Cir. 2012).

ARGUMENT

I. IN ORDER TO BRING A *BRADY*-BASED § 1983 CLAIM, AN INDIVIDUAL MUST HAVE BEEN CONVICTED AT TRIAL.

As the prevailing case law precedent makes clear, a *Brady* violation claim does not accrue unless the alleged failure to disclose potentially exculpatory evidence has resulted in the prejudice of conviction at trial.

A. The Supreme Court Has Held That A *Brady* Claim is Intended to Vindicate A *Conviction* Resulting From Improperly Withheld Exculpatory Evidence.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The context of this holding was that the prosecution in a murder trial withheld another individual's confession until *after* trial, conviction, sentencing, and affirmation of conviction. *Id.* at 84. Thus, the purpose of the *Brady* Court's holding that the suppression of evidence is a violation of due process was to avoid unfair *trials*. *Id.* at 87.

Brady's progeny further indicates this purpose. Thirty-six years after *Brady*, the Supreme Court discussed that "the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence – that is, to any suppression of so-called '*Brady* material' – although, strictly speaking,

there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence *would have produced a different verdict*." *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (emphasis added); *see also Kyles v. Whitley*, 514 U.S. 419, 435 (1995) ("One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light *as to undermine confidence in the verdict*.") (emphasis added); *United States v. Bagley*, 473 U.S. 667, 678 (1985) ("[S]uppression of evidence amounts to a constitutional violation *only* if it deprives the defendant of a *fair trial*.") (emphasis added).

Based on Supreme Court precedent, a *Brady* violation can occur only where there was a trial, the defendant was convicted, and there was suppressed evidence that, if used at trial, would have produced a different verdict.

B. Other Circuit Courts Addressing the Issue Have All Held that A Criminal Conviction Is Required Before A *Brady* Claim Accrues.

Moreover, this Court's sister circuits agree that an acquittal or absence of conviction extinguishes a Section 1983 plaintiff's due process claim for nondisclosure of *Brady* material. For example, the Tenth Circuit has held that "[a] plaintiff cannot establish materiality unless the case goes to trial and the suppression of exculpatory evidence affects the outcome." *See Becker v. Kroll*, 494 F.3d 904, 924 (10th Cir. 2007). Similarly, the Eleventh Circuit has held that

"Plaintiff . . . was never convicted and, therefore, did not suffer the effects of an unfair trial. As such, the facts of this case do not implicate the protection of *Brady*." *Flores v. Satz*, 137 F.3d 1275, 1278 (11th Cir. 1998).

So too have the Sixth Circuit and the First Circuit so held: reaching essentially the same conclusion without making direct reference to the *Brady* rule or to the Due Process Clause. *See McCune v. City of Grand Rapids*, 842 F.3d 903, 907 (6th Cir. 1988) ("Because the underlying criminal proceeding terminated in appellant's favor, he has not been injured by . . . wrongful suppression of exculpatory evidence[and t]herefore . . . has failed to state an independent claim based on this act of suppression"); *Hahn v. Sargent*, 523 F.2d 461, 467 (1st Cir. 1975) ("The tardy and reluctant disclosure of exculpatory evidence establishes no triable issue, for . . . appellant suffered no prejudice as a consequence of the late disclosure. The material was made available in time to aid the defense in its cross-examination . . ., and appellant was acquitted.").

If an acquittal extinguishes a *Brady*-based § 1983 claim, then certainly the dismissal of criminal charges, as occurred here, which also avoids a conviction, extinguishes such a claim. [2-ER-81 at fn.15.]

C. This Circuit Has Previously Implied That It Agrees With Its Sister Circuits That Conviction Is A Threshold Requirement For A *Brady* Claim.

Additionally, while this Court has not published a precedential decision that addresses whether an individual whose case results in dismissal of the criminal charges or acquittal can bring a Section 1983 claim for *Brady* violations before conviction, this Court has strongly implied that a conviction *is* a necessary threshold requirement to bring a valid *Brady* claim, observing that: "A *Brady* violation is 'material only if there is reasonable probability that, had the evidence been disclosed to the defense, *the result of the proceeding would have been different*. A "reasonable probability" is a probability sufficient to *undermine confidence in the outcome*.'" *Benson v. Chappell*, 958 F.3d 801, 837 (9th Cir. 2020) (quoting *Armando v. Gonzalez*, 758 F.3d 119, 1139 (9th Cir. 2014)) (emphasis added); *see also United States v. Bruce*, 984 F.3d 884, 894 (9th Cir. 2021).

Further, in *Smith v. Almada*, 623 F.3d 1078, 1088 (9th Cir. 2010), *withdrawn and superseded by* 640 F.3d 931 (9th Cir. 2011), this Court held that a defendant who is ultimately acquitted could not bring Section 1983 claims for alleged *Brady* violations. Though that opinion was withdrawn and in a superseding opinion the court declined to reach the issue, the concurring opinions indicated agreement with the original holding that a conviction is required to bring

a *Brady*-based § 1983 claim. *Smith v. Almada*, 640 F.3d 931, 940-45 (9th Cir. 2011) (Gould J., Gwin J., concurring opinions). Moreover, in an unpublished opinion, this Court indicated skepticism that an individual whose criminal charges are dismissed can assert a Section 1983 claim for alleged *Brady* violations. *See Puccetti v. Spencer*, 476 Fed. Appx. 658, 660-61 (9th Cir. 2011).

D. Parker Had No Trial, And No Conviction, And Thus Cannot Allege a Valid *Brady* Violation Claim.

Here, there was not a trial or a conviction; there was not even a preliminary hearing. [2-ER-81 at fn.15.] Thus, Parker cannot demonstrate that the alleged third-party jail call confession would have produced a different verdict (outcome at trial) or deprived him of a fair trial where *no* verdict and *no* trial occurred. [*See* 2-ER-81 at fn.15.] This Court is required to follow the precedent of the Supreme Court establishing that Parker cannot bring a *Brady*-based § 1983 claim when he was never tried in the underlying criminal matter.

Parker's claim that the recorded jail calls were suppressed has no legal bearing when the criminal charges against him were ultimately dismissed before his criminal trial proceedings were ever begun, let alone completed. [2-ER-81 at fn.15, 2-ER-82.] As stated above, the purpose of *Brady* and its progeny is to protect the right to a fair *trial* – "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a

verdict worthy of confidence" – and Parker's right was so protected because the charges were dismissed before trial. *See Kyles*, 514 U.S. at 435. Thus, this Court should follow Supreme Court precedent and the persuasive opinions of its sister circuits and issue a precedential opinion stating that an individual whose case results in dismissal of the criminal charges cannot bring a Section 1983 claim for *Brady* violations and reverse the honorable District Court's order denying the County defendants' judgment on Parker's *Brady*-based § 1983 claim.

II. PARKER CANNOT ESTABLISH THE REQUISITE PREJUDICE NECESSARY TO PLEAD A *BRADY*-BASED § 1983 CLAIM BECAUSE HIS CRIMINAL CHARGES WERE DISMISSED PRIOR TO A PRELIMINARY HEARING.

In California, for felony charges (such as murder), a criminal defendant is entitled to a court proceeding known as a preliminary hearing (or "prelim"): at this hearing, both the prosecution and defense are entitled to call and preliminarily examine key witnesses to allow the judge to determine if there is sufficient evidence to establish probable cause that the defendant has committed the crime(s) charged – at which point, upon such a finding, the defendant would then be bound and set for a criminal trial. *See* Cal. Penal Code §§ 187, 859b, 995; *see generally People v. Slaughter*, 35 Cal. 3d 629, 637-638 (1984); *People v. Orin*, 13 Cal. 3d 937, 947 (1975); Judicial Council of Cal., *How Criminal Cases Work*, www.courts.ca.gov/1069.htm (last visited Aug. 19, 2022).

Here, all criminal charges against Parker were dismissed before his prelim or other evidentiary proceeding.

A. In Determining that Parker's *Brady*-Based § 1983 Claim Could Not Be Dismissed, the District Court Improperly Analyzed the Prejudice Element.

"There are three components of a true *Brady* violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler*, 527 U.S. at 281-82. Taking the facts in a light most favorable to Parker, the first two elements of his *Brady*-based § 1983 claim might be satisfied: another individual's confession to the crime could be favorable to Parker, and Parker alleges he did not know about the confession until October 2020 – six years after the charges against him were dismissed – and thereby he alleges that such was suppressed. [2-ER-82.]

However, the prejudice prong of a claimed *Brady* violation asks "whether petitioner has established the prejudice necessary to satisfy the 'materiality' inquiry[.]" *Strickler*, 527 U.S. at 282. "[T]he materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence *in the verdict*.'" *Banks v. Dretke*, 540 U.S. 668, 698-99 (2004) (quoting *Kyles*, 514 U.S. 419 (1995)) (emphasis added).

Unfortunately, here, the honorable District Court in its underlying opinion ignored that the standard is based *on a trial resulting in conviction*; and the District Court based its erroneous ruling on the *absence* of binding authority in this Circuit holding that a conviction is required to establish prejudice for a *Brady*-based § 1983 claim. [1-ER-7–8.] Instead, without any applicable, controlling authority supporting such a position, the District Court improperly determined that Parker could plead a *Brady*-based § 1983 claim by inappropriately analyzing the prejudice prong beyond the confines of a verdict (contrary to all prevailing precedent): whereby the District Court improperly found that this Circuit Court has held that *Brady* obligations do not attach only to trial and that the Supreme Court has not ruled that *Brady* has no application in the pre-trial context. [1-ER-8.]

In support of its decision, the District Court cited *United States v. Gamez-Orduno*, 235 F.3d 453 (9th Cir. 2000), to prove the notion that a *Brady* violation can be actionable before a conviction at trial. [1-ER-8.] In so doing, the District Court noted that *Gamez-Orduno* specifically held that "[t]he 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." *Gamez-Oduno*, 235 F.3d 453, 461 (9th Cir. 2000) (emphasis added). [*See* 1-ER-8.] However, the District Court seems to have missed that the *Gamez-Orduno* Court

also stated that "the government violated due process by 'depriving [appellants] of liberty through a deliberate deception of court *and jury* . . . [which is] as inconsistent with the rudimentary demands of justice as is the obtaining of a like *result* by intimidation.'" *Id.* at 462 (quoting *Brady*, 373 U.S. at 86) (modifications in original) (emphasis added). *Gamez-Oduno* does *not* hold that a *Brady* violation can occur at any point in the pre-trial context; rather, that case holds that a *Brady* violation can occur where evidence is suppressed and such suppression could change the *result of an evidentiary proceeding* before court or jury.

Such holding is inapplicable to this matter, where there was no evidentiary proceeding before dismissal as Parker's charges were dismissed before the preliminary hearing occurred, which he concedes in his pleading. [2-ER-81 at fn.15.] Thus, even under *Gamez-Oduno*, Parker cannot allege he was prejudiced in such a way as to support a *Brady*-based § 1983 claim: even if the broader (and contrary to Supreme Court precedent) *Gamez-Oduno* standard somehow allowed a *Brady* violation claim to accrue before a conviction at trial.

Additionally, in furtherance of its improper analysis of the prejudice required to establish a *Brady*-based § 1983 claim, the District Court cited to a Ninth Circuit amici curiae brief that was filed to support the en banc rehearing of *Smith v. Almada*, in which the amicus claims that the Supreme Court chose not to rule that the fair trial protection afforded by *Brady* has no general application in the

pre-trial context even when the ruling would have resolved the case. [1-ER-8.] However, the District Court's reference to the case that purportedly supports this claim – *United States v. Ruiz*, 536 U.S. 622 (2002) – is relegated to a footnote. [1-ER-8, fn. 5.] One of the issues in *Ruiz* was a constitutional question concerning "a federal defendant's waiver of the right to receive from prosecutors exculpatory material – a right that the Constitution provides as part of its basic 'fair trial' guarantee," specifically in the context of "whether the Constitution requires . . . preguilty plea disclosure of impeachment information." *Ruiz*, 536 U.S. at 628-29.

Nevertheless, like *Gamez-Oduno*, the *Ruiz* case also does not change the analysis. Even if *Ruiz* could be interpreted to expand the ability to bring a *Brady* violation claim beyond the strict confines imposed by the Supreme Court to include where material evidence has been allegedly suppressed and a conviction does not occur, which it cannot, *Ruiz* would not save Parker's claim here based on the pled facts that, even construed in the light most favorable to him, the allegedly suppressed exonerating evidence was not discovered until after Parker had the opportunity to enter a plea.[1] [2-ER-81–82, 81, fn.15.] Thus, even under the questionable *Ruiz* standard, Parker cannot establish the prejudice necessary to bring a § 1983 *Brady* violation claim.

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[1] It is also worth noting that the alleged suppressed information does not deal with impeachment, but exoneration. [*See* 2-ER-89.]

The fact that the Supreme Court chose not to resolve *Ruiz* in a certain manner has no bearing on whether Parker successfully alleged prejudice to support his *Brady*-based § 1983 claim; and it was thus improper for the District Court to use *Ruiz* to support its analysis of the prejudice element required for Parker to plead such a claim.

Although the honorable District Court went to great lengths to allow Parker to maintain his *Brady*-based § 1983 claim, such lengths are contrary to precedent and proper legal analysis. The proper analysis here is this: "A *Brady* violation is 'material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the *proceeding* would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.'" *Benson*, 958 F.3d at 837 (9th Cir. 2020) (emphasis added). The disclosure of the third-party jail call confession would not have changed the result of Parker's criminal proceeding because the charges were dismissed before any relevant proceeding occurred between the time of the confession and the dismissal, and certainly before the prelim or trial.

As discussed above, "[t]he animating purpose of *Brady* is to preserve the fairness of criminal trials." *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006), *cert denied*, 549 U.S. 1125, 1126 (2007). This is why prosecutors are given the ability to cure *Brady* violations. *See Tennison v. City & Cnty. of San Francisco*, 570 F.3d

1078, 1093 (9th Cir. 2009) ("It is true that a *Brady* violation may be cured by belated disclosure of evidence, so long as the disclosure occurs at a time when disclosure would be of value to the accused.") (cleaned up). Here, there was no need to cure a *Brady* violation because one did not yet occur.[2] As the charges were dismissed before even a preliminary hearing, there was no opportunity for any party to present evidence, exculpatory or otherwise, and, thus, no ability for a *Brady* violation to occur. [2-ER-81 at fn.15.] As a result, Parker cannot maintain his *Brady*-based § 1983 claim, and the District Court should not have ruled to the contrary.

This Court should thus now remedy such error by directing judgment to be entered for the County defendants on Parker's *Brady*-based § 1983 claim, and associated pendant *Monell* claims, for failure to state a claim.

B. Parker's Proper Remedy for His Alleged Prejudice Was To Plead A Malicious Prosecution Cause of Action, Which Was Properly Dismissed As Untimely.

Establishing that an individual cannot bring a *Brady*-based § 1983 claim where his criminal charges were dismissed does not prevent an individual from

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[2] While Defendant-Appellants recognize that *Brady* disclosures of exculpatory evidence must be disclosed reasonably promptly after such evidence is discovered, the timing of the disclosure is irrelevant for purposes of a civil *Brady* violation claim where, as here, no trial or evidentiary hearing – and no conviction – has occurred. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003).

seeking relief for damages like those pled by Parker. Specifically, Parker alleged that the prejudice that ensued from the State's alleged non-disclosure of exculpatory evidence was that he remained in jail for six months after the exculpatory confession was acquired and prior to the criminal charges being dismissed. [1-ER-8, 2-ER-89.] Like a *Brady*-based § 1983 claim, a malicious prosecution cause of action can constitute a due process right violation. *Freeman v. Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). In fact, maintaining a successful malicious prosecution claim requires that the defendant be acquitted, or at least that the criminal proceedings did not result in his conviction. *See Heck v. Humphrey*, 512 U.S. 477, 484 (1994) ("One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused."). Thus, a damaged defendant can obtain a remedy for the non-disclosure of evidence irrespective of his conviction, his acquittal, or, as here, the dismissal of his criminal charges *if* that criminal defendant brings a *valid* malicious prosecution claim. A successful malicious prosecution plaintiff can even recover "in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society." *Heck*, 512 U.S. at 484 (internal quotations omitted).

Here, for whatever reason, Parker failed to bring a valid malicious prosecution claim because Parker filed his claim for malicious prosecution over 5 years too late: a correctly-decided time-bar ruling that Parker has never timely challenged, and cannot now do so. [1-ER-5–7.]

As a result, by sleeping on his malicious prosecution rights, Parker is no longer able to seek this remedy for his claim that the County defendants suppressed evidence that left him in jail for months after the County allegedly should have discovered that there was no probable cause to continue to keep him in pre-trial detention awaiting criminal proceedings. [2-ER-5–7.] However, if Parker had timely advanced this claim, it would likely have been the appropriate cause of action to seek relief for pre-conviction wrongdoing associated with non-disclosure of exculpatory evidence based on his allegations, not a *Brady*-based § 1983 claim because, as indicated above, he has no basis to bring such a claim where his criminal charges were dismissed before a criminal proceeding resulted in his conviction.

III. BECAUSE PARKER CANNOT PLEAD A *BRADY*-BASED § 1983 CLAIM, HIS REMAINING *MONELL* CLAIM FAILS HERE.

Due to the honorable District Court's erroneous denial of judgment on Parker's *Brady*-based § 1983 claim, it also denied judgment as to Parker's associated *Monell* claim. [1-ER-8.] The liability of municipalities "is contingent on a[n underlying] violation of constitutional rights." *Scott v. Henrich*, 39 F.3d

912, 916 (9th Cir. 1994). "If no constitutional violation occurred, the municipality cannot be held liable . . ." *Long v. City & Cnty. of Honolulu*, 511 F.3d 901, 907 (9th Cir. 2007). In other words, as a pendant claim, if there is no viable underlying constitutional violation claim, there cannot be a viable *Monell* claim. *See id.* Here, the only underlying constitutional claim to survive judgment on the pleadings was Parker's § 1983 *Brady* claim. Therefore, because Parker's *Monell* claim is solely based on the underlying constitutional violation pled in his *Brady*-based § 1983, this Court should also reverse the District Court's denial of judgment as to Parker's *Monell* claim.

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CONCLUSION

For the foregoing reasons, the judgment of the District Court denying judgment as to Parker's *Brady*-based § 1983 and *Monell* claims should be reversed, and the Court should thus order that judgment be entered for the County defendants on all of Parker's remaining operative claims.

Date: August 24, 2022

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
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