

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.

Defendant-Appellant.

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

APPELLEE'S ANSWERING BRIEF

Gerald B. Singleton
John C. Lemon
Kimberly S. Trimble
Singleton Schreiber, LLP
591 Camino de la Reina, Suite 1025
San Diego, California 92108
Tel. (760) 697-1330
Fax. (760) 697-1329
gsingleton@singletonschreiber.com
jlemon@singletonschreiber.com
ktrimble@singletonschreiber.com
Attorneys for Plaintiff-Appellee

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
ISSUE PRESENTED	3
STATEMENT OF THE CASE.....	3
I. Factual Background: Plaintiff-Appellee Roger Parker is held in pretrial custody for 3 years, 11 months, and 17 days for a murder that he did not commit.....	4
II. Procedural Background: Plaintiff-Appellee Roger Parker files a civil rights lawsuit, and Defendants-Appellants argue that he cannot recover for constitutional violations in his criminal case solely because he was never convicted.....	8
SUMMARY OF THE ARGUMENT	11
STANDARD OF REVIEW	15
ARGUMENT	15
I. In civil cases under § 1983, this Court has already upheld the viability of due process claims implicating the right to a fair trial without requiring proof of a conviction.....	16
A. This Court has already held that a <i>Brady</i> -related § 1983 due process claim based on the government’s withholding exculpatory evidence is legally cognizable when the plaintiff was held in pretrial detention for 27 months even though he was never convicted.	16
B. This Court’s more recent decision in <i>Richards v. County of San Bernardino</i> confirms that a criminal defendant whose constitutional rights were violated during his criminal	

proceeding has a viable a § 1983 claim regardless of whether the constitutional violation caused a conviction.....21

C. This Court’s precedent establishing that a § 1983 claim based on the violation of a criminal defendant’s fundamental right to due process does not require proof that the violation caused a conviction is consistent with the principles behind both *Brady* and § 1983.....23

D. Out-of-Circuit cases are unpersuasive as compared to the well-reasoned decisions of judges in this Circuit who have determined that a *Brady*-based § 1983 claim does not require proof of a conviction.25

II. This result is correct because a criminal defendant’s right to material, exculpatory evidence exists at all stages of a criminal proceeding, not just at the conviction and sentencing stages.....29

III. A *Brady*-based § 1983 due process claim should be evaluated based on the three-factor test from *Mathews v. Eldridge*, which does not require proof that the plaintiff suffered a conviction.34

IV. If Plaintiff-Appellee’s *Brady*-related § 1983 claim cannot proceed, he has not waived any arguments that his § 1983 malicious prosecution claim is viable by waiting to appeal the district court’s ruling until final judgment in his case.....37

CONCLUSION.....40

STATEMENT OF RELATED CASES

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Baker v. McCollan</i> , 443 U.S. 137 (1979).....	24
<i>Becker v. Kroll</i> , 494 F.3d 904 (10th Cir. 2007)	25
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	<i>passim</i>
<i>Bridgeforth v. Superior Court</i> , 214 Cal. App. 4th 1074 (2013)	33
<i>Carrillo v. Cty. of L.A.</i> , 798 F.3d 1210 (9th Cir. 2015)	15
<i>Flores v. Satz</i> , 137 F.3d 1275 (11th Cir. 1998)	25
<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975).....	36
<i>Gutierrez v. Solano</i> , 862 F. Supp. 2d 1037 (C.D. Cal. 2012).....	9, 26-29, 34
<i>Hahn v. Sargent</i> , 523 F.2d 461 (1st Cir. 1975).....	25
<i>Hall v. City of L.A.</i> , 697 F.3d 1059 (9th Cir. 2012)	24
<i>Herrera v. Zumiez, Inc.</i> , 953 F.3d 1063 (9th Cir. 2020)	15

Kyles v. Whitley,
514 U.S. 419 (1995)..... 12, 24, 31

Mathews v. Eldridge,
424 U.S. 319 (1976)..... *passim*

McCune v. City of Grand Rapids,
842 F.2d 903 (6th Cir. 1988).....25

Monell v. Dep’t of Soc. Servs.,
436 U.S. 658 (1978)..... 4, 10, 21

People v. Gutierrez,
214 Cal. App. 4th 343 (2013)..... 12, 32

People v. Hull,
31 Cal. App. 5th 1003 (2019).....33

Richards v. Cty. of San Bernardino,
39 F.4th 562 (9th Cir. 2022)..... *passim*

Russo v. City of Bridgeport,
479 F.3d 196 (2d Cir. 2007)18

Sanchez v. United States,
50 F.3d 1448 (9th Cir. 1995)32

Smith v. Almada,
623 F.3d 1078 (9th Cir. 2010) 13, 25, 26, 29

Smith v. Baldwin,
510 F.3d 1127 (9th Cir. 2007) 12, 32

Strickler v. Greene,
527 U.S. 263 (1999)..... 20, 31, 36

Tatum v. Moody,
768 F.3d 806 (9th Cir. 2014)..... *passim*

United States ex rel. Almeida v. Baldi,
195 F.2d 815 (3d Cir. 1952)30

United States ex rel. Thompson v. Dye,
221 F.2d 763 (3d Cir. 1955)30

United States v. Barton,
995 F.2d 931 (9th Cir. 1993)32

United States v. Gamez-Orduno,
235 F.3d 453 (9th Cir. 2000) 12, 31, 32

United States v. Ruiz,
536 U.S. 622 (2002)..... 14, 35

Statutes

28 U.S.C. § 129138

42 U.S.C § 1983 *passim*

INTRODUCTION

This case arises from an innocent man, Plaintiff-Appellee Roger Parker, spending nearly four years in jail for a murder he did not commit because Defendants-Appellants—the leaders of the Riverside Office of the District Attorney—intentionally withheld material exculpatory evidence for a political purpose. ER77; ER88-89. Now, Defendants-Appellants are attempting to avoid accountability for this constitutional violation by arguing that—even accepting that material, exculpatory evidence was intentionally withheld for political gain—Mr. Parker’s claim is not cognizable as a due process claim in a § 1983 civil rights lawsuit for the sole reason that he did not suffer a conviction.

This Court must now decide whether four years of pretrial detention caused by prosecutors’ intentionally withholding material, exculpatory evidence for a political purpose establishes a viable due process claim pursuant to 42 U.S.C § 1983.

In two related scenarios, this Court has already held that § 1983 due process claims that are based on constitutional violations during prior criminal proceedings are legally cognizable even if the plaintiff was never convicted. In *Tatum v. Moody*, 768 F.3d 806, 814 (9th Cir. 2014), this Court affirmed a verdict based on a *Brady*-related § 1983 due process claim when the plaintiff had been held in pretrial detention for 27 months but had never suffered a conviction. In that case, the

§ 1983 claim was based on the failure of officers to turn over highly exculpatory evidence. *Id.* at 813.

More recently, in *Richards v. County of San Bernardino*, this Court explained that “under *Brady* and its progeny, it is the suppression of material evidence—and not the plaintiff’s ultimate conviction—that deprives the plaintiff of their liberty interest in a fair trial.” 39 F.4th 562, 573 (9th Cir. 2022) (analyzing a fabrication of evidence claim). Accordingly, this Court held that a plaintiff’s ability to pursue a § 1983 claim based on the violation of his fundamental due process right to a fair trial during prior criminal proceedings should not be conditioned on proof that the violation caused a conviction. *Id.*

There is no reason to deviate from the well-established rule that a plaintiff need not have suffered a conviction to have a legally cognizable § 1983 claim based on a constitutional violation during the plaintiff’s prior criminal proceedings. Indeed, when there is ultimately no conviction, only a civil remedy pursuant to § 1983 can provide accountability for these types of constitutional violations. There is no reason to create an anomalous exception to the well-established rule that such claims are legally cognizable even without a conviction in order to protect prosecutors from accountability for their *Brady*-related violations.

This Court should accordingly reject Defendants’-Appellants’ arguments and allow Plaintiff-Appellee’s case to proceed. The due process right to material,

exculpatory evidence in the government’s possession exists throughout a criminal proceeding, not just at trial. When that right is violated, § 1983 provides a means by which the aggrieved person can vindicate his rights. Accordingly, Plaintiff-Appellee Parker urges this Court to affirm the district court’s holding that Mr. Parker has stated a legally viable §1983 due process claim by alleging that he “experienced an additional, prolonged period of pretrial confinement” caused by “the government’s non-disclosure of material, exculpatory evidence.” ER8.

ISSUE PRESENTED

Is a § 1983 due process claim based on the prosecution’s intentionally withholding exculpatory evidence in a criminal case viable when the plaintiff suffered prejudice other than a criminal conviction, or is a conviction always required for such a claim to be legally cognizable?

STATEMENT OF THE CASE

Plaintiff-Appellee Roger Parker was held in custody for nearly four years—from March 18, 2010 until March 6, 2014—while he was being prosecuted “for a murder that the [Riverside County] District Attorney knew Parker did not commit.” ER77. Trial lawyers assigned to Mr. Parker’s case in the Riverside County District Attorney’s office repeatedly implored their supervisors to dismiss the case because investigation revealed that Mr. Parker was innocent. ER77. Defendants-Appellants “disregarded those recommendations, as well as their

ethical obligations, for a political purpose: because [District Attorney] Zellerbach believed that dismissing high-profile cases weakened him as a political candidate.” ER77.

Plaintiff-Appellee Roger Parker filed a civil rights complaint against Defendants-Appellants, raising claims about the violation of his constitutional rights during his criminal prosecution. Defendants-Appellants filed a motion for judgment on the pleadings, which the district court granted in part and denied in part. As is relevant to this appeal, the district court held that Mr. Parker’s due process claims against all Defendants-Appellants that relate to Defendants-Appellants withholding exculpatory information could proceed even though the charges against Mr. Parker were eventually dismissed and he therefore never suffered a conviction.¹

I. Factual Background: Plaintiff-Appellee Roger Parker is held in pretrial custody for 3 years, 11 months, and 17 days for a murder that he did not commit.

Brandon Stevenson was murdered on March 18, 2010, in the home of Willie Womack. ER78. Willie Womack’s roommate was Plaintiff-Appellee Roger Parker. ER78. The homicide detectives initially focused their investigation on both Mr. Womack and Mr. Parker but were “convinced after speaking with

¹ These claims include a due process claim against the individual Defendants-Appellants as well as a due process claim against the County of Riverside pursuant to *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694-95 (1978). ER8.

Womack that he was not the killer.” ER78. The detectives then focused exclusively on Mr. Parker, “detaining him and interrogating him for over 15 hours—all the time encouraging him to admit that he had killed Stevenson in self-defense.” ER78. “[Mr.] Parker, who is developmentally delayed, denied killing Stevenson for several hours before ultimately confessing ‘very sarcastically’ because ‘the detectives had told him [that] self-defense was legal and denial only landed him in jail.’” ER78 (footnotes omitted). Mr. Parker was held in custody from the time of this interrogation until the charges against him were dismissed on March 6, 2014—a total of 3 years, 11 months, and 17 days. ER52.

But Roger Parker did not murder Brandon Stevenson. Indeed, the Superior Court for the County of Riverside granted Mr. Parker’s Petition to Seal and Destroy Arrest Records pursuant to Penal Code § 851.8, finding that Mr. Parker was factually innocent of the murder charges that were based on Mr. Bryan Stevenson’s death. ER50. A representative from the District Attorney’s Office was present at that hearing, and he did not object to that result. ER50.

Internal memoranda from the Office of the District Attorney (attached as exhibits to the complaint in this case) also reveal that the prosecutors assigned to Mr. Parker’s case strongly suspected that Mr. Parker was factually innocent from within two weeks of his arrest. In the very first paragraph of a memorandum dated July 22, 2011, Senior Deputy District Attorney Lisa DiMaria stated, “As I

expressed at the initial staffing in March, 2010, I have serious concerns about his guilt (if we have the right person).” ER93. In other words, Ms. DiMaria first expressed her concerns that Mr. Parker was factually innocent at an initial staffing that must have been held within two weeks of the murder.

Ms. DiMaria’s July 22, 2011 memorandum then states that she “received the results from all of the Department of Justice’s analysis of the physical evidence which has reinforced [her] concern for the actual guilt of the defendant.” ER93. The rest of the memorandum summarizes her concerns about the way evidence was gathered in the case. In particular, she expressed her concerns about the way the police conducted their interviews with Mr. Parker, leading to his obviously false confession. Ms. DiMaria notes, “At the time of the staffing [in March 2010], all [her] concerns that this was a false confession were voiced.” ER95. Apparently, the decision was made at that time to reinterview Mr. Parker and to test the physical evidence. ER95.

The July 22, 2011 memorandum explains that Mr. Parker was reinterviewed, at which time Mr. Parker told the detective that he “made the whole thing up because they kept pressuring him to say something.” ER95. It then notes that the testing of physical evidence eliminated Mr. Parker as a donor on the victim’s sweatshirt and the knife, and that the victim was eliminated as a donor on Roger’s shorts. ER95. In other words, all evidence gathered due to a concern that

Mr. Parker was factually innocent supported the conclusion that Mr. Parker was indeed innocent.

The case was re-assigned from Ms. DiMaria to Deputy District Attorney Christopher Ross. ER79. After reviewing the file, Mr. Ross came to the same conclusion—that Mr. Parker was factually innocent and was being held in custody and prosecuted for a murder that he did not commit. ER80-82. Mr. Ross repeatedly expressed these concerns to his supervisors. ER80-82. He also obtained recorded jail calls during which Willie Womack—Mr. Parker’s roommate at the time of the murder—confessed that he had killed Mr. Stevenson. ER82.

Despite serious concerns that Mr. Parker was factually innocent weeks of his arrest on March 18, 2010, and despite a recorded confession by the real murderer that was discovered in the fall of 2013, Mr. Parker remained in custody. The recorded calls of the real killer confessing to the murder were not immediately disclosed to Mr. Parker’s defense attorney. Instead, Mr. Ross—the Deputy District Attorney who discovered the recorded confession—was instructed not to turn them over and was taken off of Mr. Parker’s case. ER82.

Several months passed after the recorded confession had been discovered before Mr. Parker was finally released from jail. Specifically, the charges against Mr. Parker were not dismissed until March 6, 2014. ER82. In total, Mr. Parker spent 3 years, 11 months, and 17 days in custody for a crime he did not commit.

“Parker was unaware of the existence of Womack’s recorded confession until October 2020.” ER82. That is because Defendants took actions to conceal facts that would have led Mr. Parker to discover his potential cause of action—such as directing the prosecutor assigned to Plaintiff’s case not to turn over Womack’s recorded confession even though that evidence established Mr. Parker’s innocence. ER82.

II. Procedural Background: Plaintiff-Appellee Roger Parker files a civil rights lawsuit, and Defendants-Appellants argue that he cannot recover for constitutional violations in his criminal case solely because he was never convicted.

Roger Parker filed the present lawsuit on July 29, 2021, ER76, which was less than ten months after he learned of Womack’s confession and was thus aware of the facts that were essential to his claims, ER82. As is relevant to this interlocutory appeal, the second claim in his complaint was entitled “violation of the Fifth Amendment right to due process and exculpatory evidence,” which was brought against Defendants-Appellants the County of Riverside, Paul Zellerbach, Sean Lafferty, Tricia Fransdal, and Jeff Van Wagenen. ER88. The basis of this claim incorporated facts explained above, including that Defendants-Appellants intentionally withheld the exculpatory evidence (Womack’s recorded confessions) for a political purpose. ER88. It also referenced the Supreme Court’s decision in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), as authority for the rule “that a

prosecutor must disclose evidence favorable to the accused, where evidence is material to either guilt or punishment.” ER89.

Defendants-Appellants filed a motion for judgment on the pleadings. ER59. In relevant part, they argued that Plaintiff-Appellee Parker’s claims based on Defendants’-Appellants’ withholding exculpatory evidence fails because Mr. Parker was never convicted. ER59. In other words, they argued that “a conviction is required to establish prejudice for a § 1983 claim based on a *Brady* violation.” ER69 (formatting removed).

Plaintiff-Appellee Parker filed an opposition. ER48. With respect to the argument that a conviction is required to state a legally cognizable due process claim based on withholding exculpatory evidence, he pointed out that the “issue has not yet been definitely resolved in the Ninth Circuit.” ER55 (quoting *Gutierrez v. Solano*, 862 F. Supp. 2d 1037, 1041 (C.D. Cal. 2012)). Citing caselaw, he argued that this due process claim should be governed by the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), and urged the district court to deny the motion as to those due process claims. ER56. In the alternative, he asked the district court to grant him leave to amend his complaint to re-frame the claim. ER56.

The district court denied the motion for judgment on the pleadings as to the due process claims based on Defendants’-Appellants’ withholding exculpatory

evidence. ER8. The district court explained that “the Ninth Circuit has held that Brady obligations do not attach only to trial: ‘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.’” ER8 (quoting *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (emphasis added by district court)).

Ultimately, the district court held that “Under the circumstances, where Mr. Parker experienced an additional, prolonged period of pretrial confinement seemingly but-for the government’s non-disclosure of material, exculpatory evidence, the [district court] finds that it cannot rule—as a matter of law—that Mr. Parker’s Brady-related claim must be dismissed.” ER8. The district court also held that the related *Monell* claim against the County of Riverside could also proceed. ER8.

Defendants-Appellants filed a motion to certify the district court’s order for interlocutory appeal, ER16, which was granted, ER12. The district court certified the order on Defendants’-Appellants’ motion for judgment on the pleadings “on the issue of whether a conviction is required to establish prejudice for a Brady-based § 1983 claim.” ER15. This Court granted Defendants-Appellants permission to appeal on this limited issue.

SUMMARY OF THE ARGUMENT

This Court’s decision in *Tatum v. Moody* establishes that a due process claim based on the suppression of material evidence does not require a conviction to be viable in a § 1983 lawsuit. 768 F.3d 806 (9th Cir. 2014). In that case, this Court affirmed a verdict in favor of a § 1983 plaintiff who brought a *Brady*-related due process claim, even though the plaintiff was never convicted. 768 F.3d 806, 813 (9th Cir. 2014) (noting plaintiff had served 27 months in pretrial detention before the criminal charges were dismissed).

This Court more recently confirmed that a plaintiff’s ability to pursue a § 1983 claim based on the violation of his fundamental right to a fair trial should not be conditioned on proof that the violation caused a conviction in *Richards v. Cty. of San Bernardino*, 39 F.4th 562, 573 (9th Cir. 2022). Although in the context of a claim regarding the deliberate fabrication of evidence rather than the suppression of exculpatory evidence, this Court reasoned that it would be “anomalous to turn away a plaintiff who has been injured” by the violation of the right to a fair trial simply because that violation was not the but-for cause of a conviction given that “the right to a fair trial is impinged either way.” *Id.* In reaching this result, this Court pointed out that, “[u]nder *Brady* and its progeny, it is the suppression of material evidence—and not the plaintiff’s ultimate conviction—that deprives the plaintiff of their liberty interest in a fair trial.” *Id.*

This precedent is consistent with Congress’s purpose for enacting § 1983, which was to “provide[] a method for vindicating federal rights elsewhere conferred.” *Tatum*, 768 F.3d at 814. When a criminal defendant’s constitutional rights were violated during criminal proceedings but he never suffered a conviction, this Court has correctly held that he can still bring a § 1983 claim to vindicate his rights.

This result is also consistent with the historical understanding of the due process discussed in *Brady*. The right to be provided material, exculpatory evidence in the government’s possession exists during all stages of a criminal proceeding—including pretrial proceedings, *see, e.g., Tatum*, 768 F.3d at 806 (pretrial detention); *People v. Gutierrez*, 214 Cal. App. 4th 343 (2013) (preliminary hearings), during motions practice, *see, e.g., Gamez-Orduno*, 235 F.3d at 461 (suppression motion), at the guilty plea stage, *see, e.g., Smith v. Baldwin*, 510 F.3d 1127 (9th Cir. 2007), and at trial and sentencing, *see Brady*, 373 U.S. at 83. Thus, the right should be protected at all stages of a criminal proceeding.

But *Brady* itself only protects this right in criminal appellate proceedings or collateral attacks, and only if the defendant can demonstrate that the suppression of exculpatory evidence undermines confidence in the outcome of the criminal proceeding. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995). That is because *Brady*’s purpose is “not punishment of society for the misdeeds of a prosecutor but

avoidance of an unfair trial to the accused.” *Brady*, 373 U.S. at 87 (emphasis added). Society would suffer if a guilty person went unpunished for his crime merely because a prosecutor engaged in bad acts.

But society does not suffer when state actors are held accountable for their misdeeds in a later § 1983 lawsuit. Indeed, allowing a *Brady*-related § 1983 due process claim to proceed even if the plaintiff was never convicted is consistent with *Brady*’s “two interdependent goals” as “a judicially enforced mechanism for *both* protecting the right to a fair trial *and* discouraging misconduct on the part of police and prosecutors.” *Smith v. Almada*, 623 F.3d 1078, 1093 (9th Cir. 2010) (Nelson, J., dissenting) (“It is hard to imagine protecting this right without also discouraging misconduct.”). Without this civil remedy, prosecutors who significantly prolong an innocent person’s time in custody by intentionally suppressing material, exculpatory evidence can escape accountability merely by dismissing the criminal charges before trial. That result is inconsistent with § 1983’s purpose of providing a path for individuals to vindicate the violation of their federal rights.

To vindicate these rights, this type of *Brady*-based § 1983 claim should then be evaluated by the factors the Supreme Court set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). These “due process considerations,” which are “the very considerations that led [the Supreme Court] to find trial-related rights to

exculpatory and impeachment information in *Brady* and *Giglio*” include “(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.” *United States v. Ruiz*, 536 U.S. 622, 631 (2002). When a § 1983 plaintiff can establish that these three factors weigh in favor of finding liability on the part of government actors for suppressing exculpatory evidence during criminal proceedings, he has stated a legally cognizable claim—even if he never suffered a conviction.

In short, when a criminal defendant’s due process right to be provided material, exculpatory evidence in the government’s possession has been violated during criminal proceedings resulting in his prolonged detention, this Court should affirm the district court’s holding (which is consistent with this Court’s precedent) that the person may vindicate his rights by bringing a legally cognizable *Brady*-related § 1983 due process claim. But if the facts underlying this claim instead support a § 1983 malicious prosecution claim, this Court should remand this case to allow the district court to reconsider its ruling on Defendants-Appellants’ motion for judgment on the pleadings with respect to Plaintiff-Appellee’s malicious prosecution claim in light of this Court’s opinion in this case.

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STANDARD OF REVIEW

This Court “review[s] de novo an order on a Rule 12(c) motion for judgment on the pleadings.” *Herrera v. Zumiez, Inc.*, 953 F.3d 1063, 1068 (9th Cir. 2020). It “accept[s] all factual allegations in the complaint as true and construe[s] them in the light most favorable to the non-moving party.” *Id.* “Where disputed issues of material fact exist, we assume the version of the material facts asserted by the non-moving party” and “draw all reasonable inferences in favor of the non-moving party.” *Carrillo v. Cty. of L.A.*, 798 F.3d 1210, 1218 (9th Cir. 2015) (quotations and citation omitted).

ARGUMENT

Defendants-Appellants argue that “a conviction is required before a [§ 1983] claim can be brought for a failure to make required disclosures of potentially exculpatory evidence under *Brady*.” AOB7. That argument is inconsistent with this Court’s decisions in *Tatum v. Moody*, 768 F.3d 806 (9th Cir. 2014), and *Richards v. Cty. of San Bernardino*, 39 F.4th 562 (9th Cir. 2022). Both of these cases establish that a civil plaintiff need not prove that constitutional violations in criminal proceedings against him caused him to suffer a conviction in order to pursue § 1983 claims based on those violations. This result is correct based on other precedent that clearly establishes that the due process right to be provided exculpatory evidence in the government’s possession exists throughout criminal

proceedings, not just at trial or sentencing. This Court should accordingly affirm the district court's holding that Plaintiff-Appellee Roger Parker's § 1983 due process claims based on Defendants'-Appellants' significantly prolonging Mr. Parker's pretrial incarceration by intentionally withholding exculpatory evidence during his criminal proceedings is legally viable and can proceed. But if it does not, it should remand with instructions to allow the district court an opportunity to reconsider its decision to grant judgment on the pleadings as to Mr. Parker's malicious prosecution claims in light of this Court's opinion.

I. In civil cases under § 1983, this Court has already upheld the viability of due process claims implicating the right to a fair trial without requiring proof of a conviction.

The Due Process Clause confers a criminal defendant the right to be provided material, exculpatory evidence in the government's possession throughout his criminal proceedings. When government actors violate that due process right, this Court's precedent establishes that constitutional violation provides a basis for a § 1983 claim regardless of whether the person was ever convicted.

A. This Court has already held that a *Brady*-related § 1983 due process claim based on the government's withholding exculpatory evidence is legally cognizable when the plaintiff was held in pretrial detention for 27 months even though he was never convicted.

In *Tatum v. Moody*, this Court affirmed a damages award for a plaintiff who brought a *Brady*-related § 1983 due process claim based on the suppression of material, exculpatory evidence in pretrial proceedings even though the plaintiff had never been convicted. 768 F.3d at 809. In that case, the plaintiff had been held in pretrial detention for over 27 months before police officers finally turned exculpatory evidence over to the prosecutor, who then decided to dismiss the charges against him. *Id.* at 813. A court later granted his motion for a finding of factual innocence. *Id.*²

This Court held that the plaintiff had proven a legally cognizable §1983 *Brady*-based claim by proving a “detention[] of (1) unusual length, (2) caused by the investigating officers’ failure to disclose highly significant exculpatory evidence to prosecutors, and (3) due to conduct that is culpable in that the officers understood the risks to the plaintiff’s rights from withholding the information or were completely indifferent to those risks.” 768 F.3d at 820-21. In reaching this result, this Court expressly rejected the defendants’ argument “that the right is not

² Notably, these facts are strikingly similar to those alleged by Plaintiff-Appellee Mr. Parker. Mr. Parker was held in pretrial detention for nearly four years. ER77. The charges were ultimately dismissed based on the exculpatory evidence that had been withheld. ER82. And a court later granted Mr. Parker’s petition for a finding of factual innocence. ER80.

implicated where, as here, a defendant never goes to trial, let alone suffers a wrongful conviction.” *Id.* at 816.

In terms of what qualified as an “unusual length” of detention, this Court pointed out that another Circuit had concluded “that a 217-day and even a 68-day detention were lengthy enough to ‘carry constitutional implications.’” *Id.* at 820 (quoting *Russo v. City of Bridgeport*, 479 F.3d 196, 209 (2d Cir. 2007)) (alterations accepted). This Court suggested that the determination of whether the length of detention “is sufficiently lengthy to trigger the narrow due process right at issue here” will depend on whether the procedures provided by the State “offered [the criminal defendant] protection from [the state actors’] misconduct.” *Id.*

This Court explained that the second requirement (of proving that the harm was caused by the investigating officers’ failure to disclose highly significant exculpatory evidence to prosecutors) would protect criminal defendants from the wrongful deprivation of liberty because “[p]rosecutors....wield authority to secure a suspect’s release by dismissing pending charges” and “have a global perspective on the case and a rigorous understanding of the applicable law, attributes that minimize the danger they will weigh the evidence incorrectly.” *Id.* at 818. In other words, this Court expects prosecutors to exercise their discretion appropriately

when presented with “evidence that is not merely material but strongly indicative of the plaintiff’s innocence.” *Id.* at 820.³

As to the third requirement that the state actors “understood the risks to the plaintiff’s rights from withholding the information or were completely indifferent to those risks,” this Court explained that “the decision whether to disclose or withhold exculpatory evidence is a situation in which actual deliberation is practical, such that deliberate indifference to individual rights—rather than intent to injure—is enough.” *Id.* (quotations and citations omitted). This subjective mens rea requires “the conscious or reckless disregard of the consequences of one’s acts of omissions,” which is “something more than negligence but...something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. *Id.* (quotations and citations omitted).

There are admittedly some differences between the facts of *Tatum* and the facts supporting Plaintiff-Appellee Mr. Parker’s § 1983 *Brady*-related claim. Perhaps most significantly, the bad actors in *Tatum* were police officers whereas the bad actors in Mr. Parker’s case—Defendants-Appellants—were supervisors in the Riverside County Office of the District Attorney—the very people who had a special duty based on their role as prosecutors to ensure that justice was done in his

³ While this more difficult standard of materiality was not given to the jury in *Tatum*’s case, this Court assumed it was required for the sake of his appeal. *Id.*

case. See *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (discussing the “special role of the American prosecutor in the search for truth in criminal trials”). For that reason, the second *Tatum* requirement is an imperfect fit for Mr. Parker’s case. But the facts in the complaint (which must be accepted as true at this stage of proceedings) show that Defendants-Appellants intentionally withheld exculpatory evidence for a political purpose. ER77; ER88-89. In other words, their decision not to turn over the exculpatory evidence was not based on their global perspective on the case” or “a rigorous understanding of the applicable law.” *Tatum*, 768 F.3d at 818. If *Tatum* can be successful in a § 1983 *Brady*-related claim against police officers who fail to turn over significantly exculpatory evidence to prosecutors based on the reasoning that prosecutors will faithfully fulfill their special duty of ensuring that justice is done in a criminal case, then Defendants’-Appellants’ intentional decision to disregard that duty for a political purpose should also present a legally cognizable claim. A different result would protect prosecutors from liability for actions that are more culpable than those that police officers can be liable for.

But this Court need not decide whether Mr. Parker’s factual allegations suffice to satisfy a *Tatum*-like standard at this stage of the case, before any discovery has been completed. Instead, this Court should rely on *Tatum* to resolve the sole issue presented in this appeal: can a criminal defendant allege a valid

§ 1983 claim based on a *Brady* violation for failure to disclose exculpatory evidence when that defendant was not convicted of any crime? AOB4. The answer, as revealed by *Tatum*, is yes—significantly prolonged pretrial detention is sufficient prejudice to support a *Brady*-related § 1983 due process claim in this Circuit.

B. This Court’s more recent decision in *Richards v. County of San Bernardino* confirms that a criminal defendant whose constitutional rights were violated during his criminal proceeding has a viable § 1983 claim regardless of whether the constitutional violation caused a conviction.

The conclusion that a person whose constitutional rights were violated during criminal proceedings has a viable § 1983 claim even if that constitutional violation did not cause a conviction is also supported by this Court’s more recent decision in *Richards*, 39 F.4th at 573.

The plaintiff in *Richards* had been convicted of first-degree murder, but that conviction was later vacated when the court found it was “based on false evidence.” *Id.* at 566 (citation omitted). He then filed a § 1983 action against the County and various law enforcement officers. *Id.* The district court granted summary judgment for all Defendants, but this Court reversed as to his claims related to the deliberate fabrication of evidence. *Id.* at 566, 568. These claims (both against individual defendants and the municipality pursuant to *Monell*) were based on plaintiff’s allegation that an officer had planted blue fibers from the shirt

plaintiff was wearing on the night of the murder under the fingernails of the victim. *Id.* at 567.

In holding that plaintiff's claim could proceed, this Court noted that "[t]he constitutional right at issue in this case is the fundamental due process right to a fair trial," which is "the very same constitutional right that is implicated when the prosecution suppresses evidence under *Brady v. Maryland*." *Id.* at 572 (citations omitted). It pointed out that, "under *Brady* and its progeny, it is the suppression of material evidence—and not the plaintiff's ultimate conviction—that deprives the plaintiff of their liberty interest in a fair trial." *Id.* (citation omitted). The Court explained that the deliberate fabrication of evidence similarly "implicates a plaintiff's fundamental right to a fair trial...whenever the state deliberately fabricates evidence, regardless of the plaintiff's innocence or guilt." *Id.*

The Court reasoned that "a plaintiff's due process right to a fair trial should not be conditioned on his ability to demonstrate that he *would* or even *probably would* prevail at trial if the evidence had not been deliberately fabricated." *Id.* That was because "[i]t would be anomalous to turn away a plaintiff who has been injured by deliberately fabricated evidence simply because that evidence alone was not sufficient to cause the conviction—the right to a fair trial is impinged either way." *Id.* This reasoning justified applying *Brady*'s materiality standard to a deliberate fabrication claim rather than a but-for causation standard. *Id.*

Richards supports the conclusion that Defendants-Appellants’ argument that a conviction is required for a § 1983 *Brady*-related claim to be legally cognizable is wrong. As this Court explicitly stated, “under *Brady* and its progeny, it is the suppression of material evidence—and not the plaintiff’s ultimate conviction—that deprives the plaintiff of their liberty interest in a fair trial.” *Id.* (citation omitted). Just as “[i]t would be anomalous to turn away a plaintiff who has been injured by deliberately fabricated evidence simply because that evidence alone was not sufficient to cause the conviction,” it would be anomalous to turn away a plaintiff who has been injured by intentionally suppressed material, exculpatory evidence simply because that constitutional violation did not cause a conviction. *Id.* In both scenarios, “the right to a fair trial is impinged either way.” *Id.*

C. This Court’s precedent establishing that a § 1983 claim based on the violation of a criminal defendant’s fundamental right to due process does not require proof that the violation caused a conviction is consistent with the principles behind both *Brady* and § 1983.

In *Brady*, the Supreme Court explained that principle behind providing a remedy in a criminal case when the government suppressed material, exculpatory evidence “is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused.” 373 U.S. at 87 (emphasis added). “Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated

unfairly.” *Id.* But it would punish society to vacate the conviction of a guilty person if—despite a due process violation—his criminal proceedings were not actually unfair. For that reason, a *Brady* violation—which results in reversal of a conviction or sentence—has only been established if the criminal defendant proves that the suppression of the exculpatory evidence undermines confidence in the outcome of the proceeding. *Kyles*, 514 U.S. at 434.

The principle behind 42 U.S.C. § 1983 is complimentary, but different. “Section 1983 creates a private right of action against individuals who, acting under color of state law, violate federal constitutional or statutory rights.” *Tatum*, 768 F.3d at 814 (quoting *Hall v. City of L.A.*, 697 F.3d 1059, 1068 (9th Cir. 2012) (internal quotation marks and citations omitted)). “Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred.” *Id.*; see also *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (“The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right ‘secured by the Constitution and laws.’”). The vindication of these rights in a civil lawsuit would not have any effect on society’s interest in seeing a guilty person convicted. Thus, evaluation of § 1983 claims based on constitutional violations during criminal proceedings does not depend on the guilt or innocence of the plaintiff, nor on the result of the criminal proceeding.

Allowing a *Brady*-related § 1983 due process claim to proceed even if the plaintiff was never convicted is also consistent with *Brady*'s "two interdependent goals" as "a judicially enforced mechanism for both protecting the right to a fair trial and discouraging misconduct on the part of police and prosecutors." *Smith*, 623 F.3d at 1093 (Nelson, J., dissenting) ("It is hard to imagine protecting this right without also discouraging misconduct."). Without this civil remedy, prosecutors who prolong an innocent person's time in custody by intentionally withholding material, exculpatory evidence can escape accountability merely by dismissing the criminal charges before trial. That result is inconsistent with § 1983's purpose of providing a means by which individuals can vindicate the violation of their federal rights.

D. Out-of-Circuit cases are unpersuasive as compared to the well-reasoned decisions of judges in this Circuit who have determined that a *Brady*-based § 1983 claim does not require proof of a conviction.

Defendants-Appellants cite to numerous out-of-Circuit cases that require a conviction to prove a § 1983 *Brady*-related claim. AOB10-11. But the analysis in these cases is limited and their reasoning is unpersuasive. *See Becker v. Kroll*, 494 F.3d 904, 924 (10th Cir. 2007) (limiting analysis to a single paragraph); *Flores v. Satz*, 137 F.3d 1275, 1278-79 (11th Cir. 1998) (same); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988) (limiting analysis to four sentences and citing no authorities); *Hahn v. Sargent*, 523 F.2d 461, 467 (1st Cir. 1975) (rejecting

claim in two sentences). While Defendants-Appellants assert that these cases show “acquittal extinguishes a *Brady*-based § 1983 claim,” AOB11, this Court has expressly reserved that issue in this Circuit on at least two occasions. *See Smith*, 623 F.3d at 1078, withdrawn and superseded by 640 F.3d at 931; *see also Tatum*, 768 F.3d at 816 n.5 (noting that “*Smith v. Almada*... reserved the related question of whether a defendant acquitted at trial can claim under 42 U.S.C. § 1983 a violation of his *Brady* rights,” and “[w]e do not answer that question today.”) (citations omitted).

In fact, the split panel decision in *Smith* was the only published Ninth Circuit opinion to decide this issue, and that opinion was withdrawn and superseded. *See Smith*, 623 F.3d at 1078, withdrawn and superseded by 640 F.3d at 931. Defendants-Appellants urge this Court to look at the “concurring opinions” that “indicated agreement with the original holding that a conviction is required to bring a *Brady*-based § 1983 claim.” AOB12. But they do not even mention Judge Nelson’s persuasive dissent in *Smith*.

This dissent was heavily relied on by a district court judge in a published opinion that allowed the plaintiff’s *Brady*-based claim to survive summary judgment even though he had been acquitted at trial. *Gutierrez v. Solano*, 862 F. Supp. 2d 1037, 1043 (C.D. Cal. 2012) (“Here, in particular, Plaintiff alleges that he spent time in pretrial custody, then suffered the costs imposed by a full

criminal trial threatening additional incarceration. When such a loss of liberty is caused by the government's suppression of exculpatory evidence, it may violate the Constitution. And the government cannot claim 'no harm, no foul' because of the fortuitousness of defendant's ultimate acquittal." In explaining his reasoning, the district court judge quoted from Judge Nelson's persuasive dissent in *Smith*:

'On balance, the precedent in the Supreme Court and in our Circuit cuts against the idea that the right to the disclosure of exculpatory evidence is vitiated simply because a conviction does not result.' [623 F.3d] at 1093. As Judge Nelson also explained, to hold otherwise would ignore *Brady*'s 'two interdependent goals' of 'protecting the right to a fair trial and discouraging misconduct on the part of police and prosecutors,' by limiting the doctrine to 'only the most egregious instances of evidentiary suppression—those that result in a conviction.' *Id.* at 1093-94. Thus, as she concluded: 'The fact that a defendant is fortunate enough to escape conviction does not absolve the state of responsibility for the breach of its *Brady* obligations. The individual's right to a fair trial, mandated by the due process clause of the Fifth Amendment, does not hinge on the outcome of criminal proceedings.' *Id.* at 1094.

Gutierrez, 862 F. Supp. 2d at 1042.

The district court judge further explained that "the Brady doctrine itself is based on procedural due process," so "even if Brady did not directly apply when a defendant is acquitted, the government might still violate the underlying due process right by suppressing evidence." *Id.* The district court judge noted that the claim would "then be governed by the three factors set forth in *Mathews v.*

Eldridge, 424 U.S. 319, 334-35 (1976),” a result that is supported by the Supreme Court’s decision in *United States v. Ruiz*, 536 U.S. 622 (2002), when it considered whether the government must disclose potential impeachment information prior to a plea agreement. *Id.*

The deep reasoning of Judge Nelson’s dissent in *Smith* and the district court judge’s well-reasoned holding in *Gutierrez* are more persuasive than the cursory reasoning in the out-of-Circuit decisions relied on by Defendants-Appellants. Thus, these out-of-Circuit cases should not affect this Court’s decision in this case. In fact, the district court judge in *Gutierrez* was prescient because, as explained above, Judge Smith’s “dissent” is no longer the dissenting view in this Circuit. This year in *Richards*, this Court adopted the same rationale and rule articulated by Judge Smith in the remarkably related context of deliberate falsification claims: “it would be anomalous to turn away a plaintiff who has been injured by deliberately fabricated evidence simply because that evidence alone was not sufficient to cause the conviction—the right to a fair trial is impinged either way.” 39 F.4th at 573. It would be equally anomalous to turn away a plaintiff who has suffered significantly prolonged pretrial detention because of the intentional suppression of material, exculpatory evidence for a political purpose merely because he was fortunate enough to escape conviction.

Accordingly, this Court should agree with Judge Nelson’s dissent and the decision in *Gutierrez* that a due process claim based on withholding material, exculpatory evidence is cognizable as a § 1983 due process claim that does not require proof of a conviction, but instead must be evaluated based on the *Mathews v. Eldridge* factors.

II. This result is correct because a criminal defendant’s right to material, exculpatory evidence exists at all stages of a criminal proceeding, not just at the conviction and sentencing stages.

Allowing a § 1983 claim based on the government withholding material, exculpatory evidence in its possession even when no conviction was obtained is consistent with precedent that reveals that, contrary to Defendants-Appellants’ assertions, the due process right at issue exists throughout all stages of a criminal case. In *Brady*, 373 U.S. at 83, 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.” *Id.* at 87; *see also* AOB9 (quoting same). Notably, this holding is not limited to the trial stage of a criminal proceeding, nor does it condition the finding of a due process violation on the prosecution’s obtaining a conviction. “[U]nder *Brady* and its progeny, it is the suppression of material evidence—and not the plaintiff’s ultimate conviction—that deprives the plaintiff of their liberty interest in a fair trial.” *Richards* at 573.

Indeed, the prosecution’s suppression of material evidence violates due process at any stage of a criminal proceeding, including (but not limited to) sentencing, plea bargaining, and even pretrial proceedings—even if the case never makes it to trial or results in a conviction.

Defendants-Appellants appear to agree that the due process right to exculpatory evidence in the government’s possession exists at both the trial and sentencing stages of a criminal proceeding. AOB10. The Supreme Court’s seminal *Brady* case was, in fact, a sentencing case. 373 U.S. at 86, 91 (holding that the “suppression of [petitioner’s companion’s] confession was a violation of the Due Process Clause of the Fourteenth Amendment” but affirming the state appellate court’s decision to grant a retrial only on the issue of punishment); *see also United States ex rel. Almeida v. Baldi*, 195 F.2d 815, 820-21 (3d Cir. 1952) (holding that “[th]e suppression of evidence favorable to [the habeas petitioner] was a denial of due process” even though “under all evidence, old and new, there can be no doubt that [petitioner] was guilty of murder in the first degree” because “the issue of fundamental fairness” was “one of due process.”); *United States ex rel. Thompson v. Dye*, 221 F.2d 763, 765 (3d Cir. 1955) (“The suppression of evidence may be a denial of due process when it is vital evidence, material to the issues of guilt or penalty.” *Id.* at 765 (quotations and citations omitted)).

But contrary to Defendants-Appellants’ insistence that this “*Brady*-related” due process right exists only at trial, caselaw confirms that the prosecution’s duty to disclose exculpatory evidence exists throughout a criminal case. As explained by the Supreme Court, the prosecution has a “broad obligation to disclose exculpatory evidence,” based in part on the “special role of the American prosecutor in the search for truth in criminal trials.” *Strickler*, 527 U.S. at 281. It is true that “not every violation of that duty necessarily establishes that the outcome was unjust,” *id.*, which is why a criminal defendant seeking to vacate his conviction or sentence based on this type of due process violation must demonstrate that he did not “receive[] a fair trial, understood as a trial resulting in verdict worthy of confidence.” *Id.* at 290 (quoting *Kyles*, 514 U.S. at 434). But caselaw makes clear that the prosecution’s “broad duty of disclosure” exists throughout the criminal proceeding, in line with the prosecutor’s “special role” of ensuring “that justice shall be done” in criminal cases. *Id.* at 281.

Consistent with this understanding, this Court has held that a criminal defendant has a due process right to be given exculpatory evidence in the government’s possession in pretrial proceedings. For example, in *Gamez-Orduno*, 235 F.3d at 461, this Court held, “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 (citing *Brady*, 373 U.S. at 87; *United States v. Barton*, 995 F.2d 931, 933-34 (9th Cir. 1993)) (emphasis added).

Later in *Smith v. Baldwin*, 510 F.3d 1127 (9th Cir. 2007), this Court held that the suppression of exculpatory evidence violated due process in the context of a guilty plea. While the effect of the suppressed evidence at trial could not be evaluated because no trial happened, that did not preclude a remedy in the criminal case for the constitutional violation. This Court merely explained a new materiality test in this context: “When the accused enters a plea rather than proceeding to trial, however, materiality is determined by ‘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.’” *Id.* at 1148 (quoting *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995)). Both *Gamez-Orduno* and *Smith* show that this Court looks to the probable effect of the withheld exculpatory evidence on the relevant stage of the proceeding to determine if there has been a due process violation that undermines confidence in the criminal proceedings, even if that is a pretrial stage.

California state court decisions support the conclusion that the due process right to exculpatory evidence exists at all stages of a criminal proceeding, including pretrial stages. For example, in *People v. Gutierrez*, 214 Cal. App. 4th

343 (2013), the court held that “defendants have a due process right under the United States Constitution to *Brady* disclosures in connection with preliminary hearings.” *Id.* at 355 n.5. And in *Bridgeforth v. Superior Court*, 214 Cal. App. 4th 1074 (2013), the court held that “a defendant has a due process right under the California Constitution and the United States Constitution to disclosure prior to the preliminary hearing of evidence that is both favorable and material, in that its disclosure creates a reasonable probability of a different outcome at the preliminary hearing.” *Id.* at 1081 (emphasis added). This holding was more recently endorsed in *People v. Hull*, 31 Cal. App. 5th 1003, 1034 (2019) (quoting *Bridgeforth*).

And as discussed above, this Court has already recognized that the government violates a criminal defendant’s due process rights if it does not provide him material, exculpatory evidence in the government’s possession during the pretrial stages of a criminal case even if that case never results in a conviction. *Tatum*, 768 F.3d at 809. As previously explained, the plaintiff in *Tatum* was a former criminal defendant who spent over 27 months in pretrial detention before his case was dismissed when exculpatory evidence in the government’s possession was finally disclosed. *Id.*. This Court affirmed the jury’s verdict awarding him monetary damages pursuant to § 1983 for that *Brady*-related due process violation during pretrial proceedings. *Id.* at 821.

Together, these cases establish that a criminal defendant’s due process right to material, exculpatory evidence in the government’s possession exists throughout criminal proceedings, not just at the conviction or sentencing stage. It therefore makes sense that a plaintiff can seek vindication for the violation of this right through a § 1983 lawsuit regardless of whether he suffered a conviction. This result is consistent with this Court’s decisions in *Tatum* and *Richards*, so the remaining question is how to analyze a *Brady*-related § 1983 due process claim. Although that question need not be answered in this limited appeal, the proper test has already been suggested by a prior published district court decision in this Circuit—and that test does not require proof of a conviction. *See Gutierrez*, 862 F. Supp. 2d at 1042 (citing *Eldridge*, 424 U.S. at 319).

III. A *Brady*-based § 1983 due process claim should be evaluated based on the three-factor test from *Mathews v. Eldridge*, which does not require proof that the plaintiff suffered a conviction.

The *Mathews v. Eldridge* “factor test” sets forth the proper “totality of the circumstances” legal standard for establishing a civil claim under Due Process. *See Gutierrez*, 862 F. Supp. 2d at 1042 (citing *Eldridge*, 424 U.S. at 319). In *Eldridge*, the Supreme Court identified three factors that must be considered when evaluating a due process claim. *Id.* at 335. This test was used again by the Supreme Court in *Ruiz* when deciding whether the government must disclose potential impeachment information prior to a plea agreement. 536 U.S. at 631. Those factors are: “(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.” *Id.*

Applying these factors in *Ruiz*, the Supreme Court ultimately held that “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.” *Id.* at 633 (emphasis added). But notably, that result was driven by “guilty-plea safeguards” such as the government’s assurance that it “will provide any information establishing the factual innocence of the defendant regardless.” *Id.* at 631 (quotations omitted). This assurance diminished the “private interest at stake” and “the value of the additional safeguard” in these circumstances. *Id.* And the Supreme Court found that a requirement to disclose impeachment information prior to a plea agreement “could 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.” *Id.* at 631. Considered together, the factors weighed against finding a due process violation at the plea-bargaining stage based on withholding only impeachment evidence.

In contrast, all three factors weigh heavily in favor of finding a viable § 1983 claim when the due process violation at issue is the intentional withholding of material, exculpatory evidence of factual innocence by prosecutors for a political purpose, even at the pretrial stage and even if no conviction was ever obtained.

The nature of the private interest at stake is high even at the pretrial stage. The Supreme Court has recognized the potentially severe impact of “prolonged detention,” observing that “[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships.” *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

As to the second factor, the absence of the additional safeguard of civil liability for intentionally withholding evidence of factual innocence during the pretrial stages may cause individuals like Mr. Parker to be subjected to prolonged pretrial detention. That is because even a criminal defendant who knows he is innocent will not want to rush to trial when he lacks evidence of his innocence.

And the third factor does not change this result because there is no adverse impact on the government for requiring it to turn over material, exculpatory evidence during the pretrial stages of a criminal proceeding. Indeed, the impact of this requirement is consistent with the government’s purported goal to ensure “that justice shall be done” in criminal cases. *Strickler*, 527 U.S. at 281.

Using the *Mathews v. Eldridge* test does not require a § 1983 plaintiff to prove that he suffered a conviction in order to pursue a *Brady*-related due process claim. Of course, a conviction would be sufficient to show that the privacy interest at stake was great. But other deprivations of liberty, such as prolonged pretrial detention, would also be sufficient to support this type of claim—as this Court has

already held in *Tatum* and implied by its reasoning in *Richards*. Accordingly, this Court should affirm the district court's holding that a *Brady*-based § 1983 claim alleging that plaintiff suffered significantly prolonged pretrial detention as a result of prosecutors' intentionally withholding material, exculpatory evidence for a political purpose may proceed even though Mr. Parker was not convicted.

IV. If Plaintiff-Appellee's *Brady*-related § 1983 claim cannot proceed, he has not waived any arguments that his § 1983 malicious prosecution claim is viable by waiting to appeal the district court's ruling until final judgment in his case.

Perhaps understanding that it would be undesirable to provide no way for a criminal defendant to vindicate his rights when prosecutors significantly prolonged his pretrial detention by intentionally suppressing exculpatory evidence for a political purpose, Defendants-Appellants argue that "the appropriate cause of action to obtain [Mr. Parker's] desired relief for his allegedly improper jail time was malicious prosecution." AOB2. But Defendants-Appellants also assert that he is time-barred from pursuing a malicious prosecution claim on these facts. AOB2. Defendants-Appellants even assert that Mr. Parker "has never timely challenged" the district court's decision that his malicious prosecution claim was time-barred and "cannot now do so." AOB22.

This repeated argument is without merit. AOB1, AOB22. The normal rule is that an appellate court should not review a district court's ruling until after the entry of final judgment. *See* 28 U.S.C. § 1291. Plaintiff-Appellee opposed

Defendants'-Appellants' motion for judgment on the pleadings as to all claims and has thereby preserved his right to challenge the district court's rulings in any future appellate proceedings in this case.

It is also worth noting that Mr. Parker has never alleged that the murder charges against him were brought without probable cause or initiated with malice. Rather, his complaint alleges that material, exculpatory evidence was discovered after criminal charges were already pending and withheld for a political purpose while Defendants-Appellants persisted in prosecuting him, despite knowing he was innocent. ER77, ER88-89. Thus, the facts of Mr. Parker's case fit most neatly within a *Brady*-related § 1983 due process claim, as explained above.

But if this Court determines that these facts are better suited for a § 1983 malicious prosecution claim, then Mr. Parker adequately pleaded such a claim in his complaint. Specifically, his malicious prosecution claim alleged that Defendant-Appellant Zellerbach "directed his supervisory attorneys to persist in this prosecution of an innocent man for political advantage." ER87 (emphasis added). And while the district court rejected Plaintiff-Appellee Parker's argument that his malicious prosecution claim was timely based on California's delayed discovery rule, its analysis of that rule's applicability was focused on when Mr. Parker knew that he had been prosecuted despite his innocence. ER6-7. The district court expressly rejected Parker's argument that Defendants'-Appellants'

suppression of Womack’s confession until October 2020 justified the delay in filing. ER6-7. But the district court’s conclusion was based on its reasoning that Mr. Parker’s discovery of Womack’s confession (which was delayed because Defendants fraudulently concealed it) “went only to the strength of his malicious prosecution claim—not to whether he had inquiry notice of it.” ER7. That reasoning would not stand if the suppression of that exculpatory evidence is now the basis of the malicious prosecution claim. Rather, Mr. Parker would first have inquiry notice of his claim at the time he learned of Womack’s recorded confession in October 2020.

So if this Court determines that the factual allegations regarding Defendants’-Appellants’ intentionally withholding material, exculpatory evidence for a political purpose support only a § 1983 malicious prosecution claim (not a *Brady*-based due process claim), then it should remand this case with instructions for the district court to reconsider its decision to grant judgment on the pleadings on the malicious prosecution claim. Specifically, it should give the district court the first opportunity to determine whether the delayed discovery rule applies to Mr. Parker’s malicious prosecution claim that is based on the intentional withholding of exculpatory evidence in light of this Court’s decision on this appeal. This process will allow the district court to first consider whether the delayed discovery rule should apply to a malicious prosecution claim that is based

on Defendants'-Appellants' withholding material, exculpatory evidence that Plaintiff-Appellee did not know existed until October 2020 due to Defendants'-Appellants wrongfully concealing those facts.

CONCLUSION

For the foregoing reasons, the factual allegations in support of Plaintiff-Appellee Roger Parker's § 1983 due process claims that are based on Defendants'-Appellants' withholding exculpatory evidence are legally sufficient to proceed in the Ninth Circuit even though Mr. Parker was never convicted. Accordingly, this Court should affirm the judgment of the District Court denying judgment as to Plaintiff-Appellee Roger Parker's § 1983 claims based on Defendants'-Appellants' withholding exculpatory evidence during his criminal case and remand this case to the District Court for further proceedings. If this Court concludes otherwise, it should remand with instructions for the District Court to reconsider its decision as to Mr. Parker's malicious prosecution claim in light of this Court's opinion.

Date: December 27, 2022

Singleton Schreiber, LLP

/s/ Kimberly S. Trimble

Gerald B. Singleton

John C. Lemon

Kimberly S. Trimble

Singleton Schreiber, LLP

Attorneys for Plaintiff-Appellee

Roger Wayne Parker

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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