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Getting *Brady* Right: Why Extending *Brady v. Maryland*'s Trial Right to Plea Negotiations Better Protects a Defendant's Constitutional Rights in the Modern Legal Era

"The stakes are high . . . . [T]he injury to a defendant which can be caused by an unconstitutional suppression of exculpatory evidence is substantial, particularly if the evidence is never uncovered."[1]

I. INTRODUCTION

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[2] Additionally, the accused is guaranteed (1) the "[a]ssistance of [c]ounsel," (2) the ability "to be confronted with the witnesses against him [or her]," and (3) the right "to be informed of the nature and cause of the accusation."[3] Finally, and arguably most importantly, the Sixth Amendment states that the accused may only be publically convicted of a crime "by an impartial jury" of his or her peers[4] unanimously, and under the conclusory determination of guilt "beyond a reasonable doubt."[5] Taken together, these protections and procedures constitute the "gold standard of American justice."[6]

Unfortunately, the American justice gold standard of yesterday is no longer the standard of today. Instead of a justice system of trials and juries guaranteed by the Sixth Amendment, today's American justice system is a "system of pleas."[7] In 1996, roughly ninety-two percent of criminal convictions in federal cases came about by either

1. Imbler v. Pachtman, 424 U.S. 409, 444 (1976) (White, J., concurring).

2. U.S. CONST. amend. VI.

3. *Id*.

4. *Id*.

5. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/archives/2014/11/20/why-innocent-people-plead-guilty/.

6. Lafler v. Cooper, 132 S. Ct. 1376, 1398 (2012) (Scalia, J., dissenting).

7. Michael N. Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3639 (2013) (quoting Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012)).

nolo contendere or guilty plea.[8] In 2010, ninety-seven percent of federal convictions, and ninety-four percent of state convictions were obtained through guilty pleas.[9] Needless to say, plea bargaining has become "central to the administration of the criminal justice system."[10]

This "pleading phenomenon" creates a significant problem: many of the protections guaranteed under the Constitution for defendants *at trial* are not extended to plea bargaining—the phase where the vast majority of criminal cases are being disposed. One manifestation of this problem is the trial-based right originating from *Brady v. Maryland*.[11] Under *Brady*, the Supreme Court of the United States determined that any failure by the prosecution to disclose either (1) *exculpatory* or (2) *impeachment* evidence that is material to either guilt or punishment is a violation of due process under the Fourteenth Amendment.[12] Although *Brady* is a clear and powerful asset for defendants, its reach and ramifications touch only criminal trials—not plea bargaining.[13] In today's criminal justice system, where pleas and plea bargaining are the norm, *Brady*'s promise to defendants rings hollow.

8. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Table 5.22.2010 (2010) [hereinafter SOURCEBOOK], http://www.albany.edu/sourcebook/pdf/t5222010.pdf (last visited Oct. 12, 2016) (noting that of 52,270 defendants convicted in 1996, 48,196 (or 92%) were convicted by nolo contendere or guilty plea). "The Sourcebook of Criminal Justice Statistics brings together data from more than 100 published and unpublished sources about many aspects of criminal justice in the United States. Since 1973, the project has been located at the University at Albany, School of Criminal Justice, and compiled and managed by staff at the Hindelang Criminal Justice Research Center in Albany, New York." *See About Sourcebook*, U. ALBANY, http://www.albany.edu/sourcebook/about.html (last visited Oct. 12, 2016).

9. SOURCEBOOK, *supra* note 8 (showing that of the 89,741 defendants convicted in 2010, 87,418 (or 97%) were convicted by nolo contendere or guilty plea).

10. *Frye*, 132 S. Ct. at 1407.

11. 373 U.S. 83 (1963).

12. *See id*. at 86–88 (focusing *Brady*'s impetus and foundation solely on ensuring every defendant a fair trial).

13. *See* United States v. Bagley, 473 U.S. 667, 675 (1985) ("[U]nless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.") (quoting United States v. Agurs, 427 U.S. 97, 108 (1976)). Furthermore, "to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id*. at 675–76 (quoting *Agurs*, 427 U.S. at 108). *See also* Matthew v. Johnson, 201 F.3d 353, 361 (5th Cir. 2000).

In 2002, the Supreme Court partially addressed this dilemma. The Court held in *United States v. Ruiz* that a guilty plea could *not* be vacated on account of a prosecutor's failure to turn over *impeachment* evidence during plea negotiations.[14] In other words, the Court said that *Brady*'s impeachment-evidence promise for the defense could not be extended to plea bargaining or plea deals.

However, the *Ruiz* court, was silent on whether Brady's *exculpatory evidence* promise extended to plea deals.[15] Despite the Court's conservative conclusion in *Ruiz*, a Circuit split exists on whether a *Brady* violation occurs when the prosecution fails to divulge exculpatory evidence during plea negotiations.[16] And "the Supreme Court has not addressed the question of whether the *Brady* right to *exculpatory* information, in contrast to *impeachment* information, might be extended to the guilty plea context."[17]

The purpose of this Comment is to answer the question the Supreme Court has left unanswered regarding the inclusion of *exculpatory* evidence during plea negotiations. To do so, Part II introduces *Brady v. Maryland* and its progeny, illustrating how the rule has changed over time and how, by declining to extend *Brady*'s holding to plea negotiations, federal courts fail to meet the purposes that motivated *Brady* in the first place: (1) protecting defendants, (2) safeguarding the criminally innocent, and (3) conforming to the Federal Rules of Criminal Procedure. Part III details how the Supreme Court sought to remedy the three problems noted above by answering the question of whether "i*mpeachment* evidence should be disclosed during plea negotiations" in *United States v. Ruiz*. Additionally, Part III introduces the proposition of extending the *exculpatory* evidence rule to plea negotiation—something *United States v. Ruiz* failed to consider. Part IV analyzes how various circuits address the exculpatory evidence debacle after *Ruiz*'s holding. Finally, Part V argues that exculpatory information should be disclosed during plea bargaining in order to safeguard the three

14. United States v. Ruiz, 536 U.S. 622, 625 (2002).

15. *See id.*

16. Petegorsky, s*upra* note 7, at 3602. To articulate the issue more accurately, the issue being decided by the various circuit courts is "whether a defendant may challenge a guilty plea for the prosecution's suppression of material *exculpatory* evidence." *Id.*

17. United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010).

principles noted above and to ensure that guilty pleas are fair and final.

II. THE INCEPTION OF THE *BRADY* RULE AND ITS PROGENY

Before any one person can acquire a fair understanding of the issue at hand—extending the *Brady* rule to plea negotiation or allowing post-plea *Brady* challenges—one must first comprehend the basic rule and premise of *Brady*. This Part introduces the *Brady* rule and shows how the initial rule has developed through subsequent cases. This Part then concludes by highlighting various problems associated with *Brady*'s trial rule that have been the source of considerable debate among federal circuit courts and local state governments.

A. The Premise: Brady v. Maryland

In 1963, the Supreme Court heard the case of *Brady v. Maryland*.[18] The defendant, Brady, was charged and convicted of first-degree murder for killing an individual in the course of a robbery.[19] At his trial, Brady maintained that though he was guilty of the robbery, his partner was the individual who killed the victim—not Brady.[20] Despite these arguments, the jury found Brady guilty of first degree murder.[21]

After final conviction and sentencing, Brady learned of an extrajudicial confession in which his partner admitted to committing the murder.[22] Consequentially, Brady's "counsel requested the prosecution to allow him to examine [his partner's] extrajudicial statements."[23] The prosecution complied in part, but suppressed a handful of the statements.[24] As a result, Brady appealed.[25]

18. Brady v. Maryland, 373 U.S. 83 (1963).

19. *Id.* at 84–85.

20. *Id.* at 84. It should be noted that Brady asserted that his partner "did the actual killing" but conceded on the murder charge, asking to not receive the death penalty. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

The Maryland Court of Appeals held that by suppressing the evidence of the confession, the prosecution had denied Brady his due process rights.[26] The Court remanded the case for retrial for the limited purpose of determining whether Brady should be subject to capital punishment.[27] The prosecution appealed and the Supreme Court granted certiorari.[28]

Ultimately, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violate[d] due process where the evidence [was] material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[29] Thus, the prosecution had a *duty to disclose* the partner's confession to Brady.[30] By withholding this information, the government violated the Fourteenth Amendment.[31]

Because of the Supreme Court's holding in *Brady*, prosecutors in any criminal trial now have a duty to disclose evidence that is favorable to the defense and material to questions of guilt or punishment.[32] This rule reinforces the understanding that the purpose of the trial is "not purely adversarial, because the prosecutor 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"[33] Furthermore, the *Brady* rule solidifies the important principle of guaranteeing that no criminal defendant be deprived of "life, liberty, or property without due process of law."[34]

In subsequent case law, the Supreme Court has further established the contours of the *Brady* rule. The next section discusses

26. *Id*. at 85.

27. *Id*.

28. *Id*.

29. *Id*. at 87.

30. *See id*.

31. *Id*. at 86.

32. *See id*. at 87.

33. Petegorsky, *supra* note 7, at 3603 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

34. U.S. CONST. amends. V, XIV § 1; *see Brady*, 373 U.S. at 87.

these cases, detailing the types of evidence that must be disclosed, the standard of materiality, and when *Brady* claims may be raised.[35]

B. Brady*'s Progeny*

1. Giglio v. United States *(1972).*

After *Brady*, the Supreme Court extended the obligation to share exculpatory information to information concerning the credibility of government witnesses.[36] In *Giglio*, the defendant was convicted of forgery.[37] This conviction was primarily achieved through the testimony and cooperation of a co-conspirator who remained unindicted.[38] At trial, defense counsel attempted to discredit and impeach the co-conspirator's testimony by showing that the witness's desire for leniency made him biased.[39] The co-conspirator stated that the prosecution had not promised any sort of leniency in exchange for his testimony.[40]

The co-conspirator lied—he did in fact receive a promise of non-prosecution in exchange for his testimony in front of the grand jury.[41] This promise came before the matter was handed over to the prosecutor who brought the case to trial.[42] The trial prosecutor had been told "no promise of immunity" existed and was, apparently, completely unaware of the agreement.[43] The Court, however, was unimpressed with the trial prosecutor's claims of innocence,[44] holding that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence

35. *See*, *e.g.*, Giglio v. United States, 405 U.S. 150 (1972); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985).

36. *Giglio*, 405 U.S. at 154–55.

37. *Id.* at 150.

38. *Id.* at 151.

39. *Id.* at 151–52.

40. *Id.*

41. *Id.* at 152–53.

42. *Id.*

43. *Id.*

44. *Id.* at 154 ("[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.").

affecting credibility falls within [the *Brady*] rule."[45] Stated simply, the prosecution is required[46] to disclose material evidence of its witnesses' credibility before trial when the testimony could "in any reasonable likelihood . . . affect[ ] the judgment of the jury."[47]

2. United States v. Agurs *(1976)*

The Court further expanded the *Brady* rule by recognizing a prosecutorial duty to divulge exculpatory information—even in the absence of a specific request.[48] In *Agurs*, a female defendant was convicted of second-degree murder for stabbing a male acquaintance to death.[49] The female defendant claimed self-defense.[50]

After the trial, the defendant learned that the prosecutor had failed to disclose the victim's previous guilty pleas to assault and weapon-possession charges, which would have helped support the self-defense claim.[51] In considering the defendant's appeal, the Court held that prosecutors who fail to voluntarily disclose material-exculpatory evidence, which creates a reasonable doubt as to the defendant's guilt, violate the Due Process Clause of the Constitution.[52]

3. United States v. Bagley *(1985)*

Bagley[53] was primarily concerned with the definition of "material evidence" for purposes of the *Brady* rule, which could then be

45. *Id.* (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

46. The Court established the requirement of disclosure by explaining that a failure to disclose credibility information, which would have likely changed the verdict, will result in a "new trial." *Id.* at 154.

47. *Id.* (quoting *Napue*, 360 U.S. at 271).

48. *See* United States v. Agurs, 427 U.S. 97, 112 (1976) ("[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.").

49. *Id.* at 98.

50. *Id.* at 100.

51. *Id.* at 100–01.

52. *See id.* at 112–14.

53. The facts of *Bagley* are quite similar to the *Brady* cases that preceded it: the government failed to disclose contracts it had made with confidential informants who later testified against the defendant at trial. The contracts at issue promised that the United States would pay its witnesses for the information they provided. The Court determined that the defense attorney could have used the contracts to discredit the government's witnesses. This might have had a reasonable probability of changing the result of the proceeding in the

applied to all criminal cases where *Brady* questions would later arise.[54] As a result, the Court defined "material evidence" as information that would have created a "reasonable probability" that "the result of the proceeding would have been different" had that information been disclosed.[55]

Further, *Bagley* solidified *Giglio*'s holding that the government must provide the defense with impeachment evidence regarding its witnesses.[56] In particular, the *Bagley* Court declared that such important *Giglio* evidence, like exculpatory evidence, "falls within the *Brady* rule."[57]

4. Kyles v. Whitley *(1995)*

In *Kyles,* the Court imposed on prosecutors a two-part affirmative duty. The first part required all prosecutors "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[58] The second part required the affirmative disclosure of that evidence to the defense.[59] This two-part duty changed the contours of the *Brady* standard.

Unlike the original *Brady* standard, which excused prosecutors who failed to disclose *Brady* evidence in good faith, *Kyles* imposed a stricter disclosure requirement.[60] In particular, the Court declared that "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is

defense's favor. Therefore, the government should have turned over the informant contracts. *See* United States v. Bagley, 473 U.S. 667, 669–72 (1985).

54. *See Bagley*, 473 U.S. at 670.

55. *Id*. at 682 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). The Court also quotes *Strickland* in defining reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id*. It should be noted here that the Court once again confirmed that Agurs' flexible test and duty for the prosecutor to disclose favorable evidence included situations of (1) "no request," (2) "general request," and (3) "specific request" for evidence. *Id*.

56. *Id*. at 676.

57. *Id*. (citing Giglio v. United States, 405 U.S. 150, 154 (1972)).

58. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

59. *Id*.

60. *Id*. at 437–38 (discussing Brady v. Maryland, 373 U.S. 83, 87 (1963)).

inescapable."[61] Thus, neglecting to disclose in "good faith" is no excuse when dealing with material evidence.

This restrictive holding against the prosecution may have been motivated by the fact that *Kyles* involved a defendant sentenced to death for first-degree murder.[62] Following the conviction, the defense discovered that it never received certain favorable evidence that it could have used during trial.[63] Although the prosecution maintained "there was no exculpatory evidence of any nature,"[64] it was later discovered that the police wrongfully withheld evidence from the prosecution.[65] The Court held that even if a prosecutor is ignorant of exculpatory evidence, "procedures and regulations can be established to carry [the prosecutor's] burden and to insure [sic] communication of all relevant information on each case to every lawyer who deals with it."[66] Moreover, since the prosecution has the power to ensure *Brady* rule compliance, "any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."[67] In short, the Court was finished with excuses for not meeting *Brady*'s obligations and would not tolerate prosecutorial "wiggle room" any longer.

C. Why Brady *Doesn't Work*

Section C explains the difficulty that practically invalidates *Brady*: *Brady*'s obligations affect only trials, not plea bargaining. In other words, defendants at the plea-bargaining stage of the judicial process

61. *Id*. at 438.

62. *Id*. at 421–22. The Court proclaimed that *Kyles* received such a scrupulous review because it was the duty of the Court "to search for constitutional error with painstaking care" since it is a "capital case." *Id*. at 422 (quoting Burger v. Kemp, 483 U.S. 776, 785 (1987)).

63. *Id*. at 422. The favorable evidence discovered included (1) favorable eyewitness statements taken by the police during investigation, (2) statements made to the police by a particular, known informant that was never called to testify, and (3) a list of license plate numbers belonging to cars parked at the crime scene on the night of the murder, which did not include the license plate number of the defendant's car. *See id*. at 447–51.

64. *Id*. at 428.

65. *See id*. at 438, 445–51.

66. *Id*. at 438 (alterations in original) (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)).

67. *Id*.

traditionally do not receive the same constitutional protections that *Brady* mandates at trial. Such a disparity is grossly problematic when considered against the ever-increasing percentage of cases that resolve at the plea bargaining stage.

1. Brady *is ineffective due to the plea system*

Since *Kyles*, it is now well established that prosecutors have a duty to disclose material exculpatory and impeachment evidence to the defense before trial, regardless of whether they are actually aware of such information.[68] According to the Supreme Court, the constitutional right of criminal due process is better secured because of these new prosecutorial duties.[69]

However, the *Brady* rule is ineffective for the defense. This is due to the fact that an overwhelming number of cases never reach trial. Thus, *Brady* cannot help the supermajority of defendants whose cases are resolved at the plea bargaining stage.[70]

When *Brady* was first decided over fifty years ago, somewhere between 90 and 95% of all criminal convictions and about 70 to 85% of felony convictions were obtained by guilty pleas.[71] Though this statistic is somewhat outdated, the trend it reveals is not—only a miniscule number of cases actually go to trial.[72] In 1990, 84% of all federal-criminal cases were resolved by guilty plea.[73] By 2011, that number rose to 97%.[74]

The increase in guilty pleas is at least partially attributable to the introduction of the U.S. Sentencing Guidelines, which may have

68. *See supra* Sections I.A–B.

69. It should be noted that it was the goal of the Supreme Court to ensure fair trials under the auspice of the Due Process Clause of the Fourteenth Amendment. *See* Brady v. Maryland 373 U.S. 83, 86 (1963).

70. Remember, the *Brady* rule only applies to defendants at trial. *See id.* at 87.

71. Brady v. United States, 397 U.S. 742, 752 n.10 (1970) (citing DONALD J. NEWMAN, CONVICTION, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 n.1 (1966).

72. Gary Fields & John R. Emshwiller, Federal Guilty Pleas Soar As Bargains Trump Trials, WALL ST. J. (Sept. 23, 2012), http://online.wsj.com/article/SB10000872396390443589304577637610097206808.html.

73. *Id.*

74. *Id.*

shifted the power of punishment from judges to prosecutors.[75] Instead of courts using "judge-determined sentencing parameters" to resolve criminal cases, prosecutors now hold the power to set ranges of punishments based on the U.S Sentencing Guidelines.[76] Under such circumstances, defendants are highly motivated to accept a prosecutor's deal, especially when prosecutors threaten to pursue heavier sentences.[77]

Another cause of the increase may be the practice of overcharging.[78] Rather than face a slew of charges stemming from one or multiple criminal episodes, a defendant is more likely to plead guilty when the prosecutor promises to drop certain harsher charges in exchange for a guilty plea.[79]

Whatever the reason, the rights promised by *Brady* go unfulfilled ninety-seven percent of the time. In de facto terms, *Brady* and its progeny are practically swallowed up and ultimately do not protect defendants in the modern criminal system of pleas.

2. As presently constituted, Brady *fails to protect the innocent defendant*[80]

In what can only be considered a failure of the American criminal justice system, innocent individuals plead guilty to crimes they did not commit. Indeed, a host of evidence now provides proof that the assumption that "only guilty people plead guilty" is false.[81] Since 1992, there have been over 340 DNA-based exonerations, twenty of which were for prisoners sentenced to death.[82] Altogether,

75. *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1475 (1993). ("Today it is the sentencing guidelines, rather than judge-determined sentences, that supply the parameters of plea bargaining.").

76. *Id.*

77. *See id.*

78. Petegorsky, *supra* note 7, at 3611 (referencing STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 1036, 1051 (7th ed. 2004)).

79. *See Id.*

80. Because punishing individuals for crimes they never commit is a violation of the highest order, a special section is permitted within this article to further establish the inadequacy of the *Brady* rule.

81. *See* Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, 23 CRIM. JUST., no.3 (2008), at 1.

82. *Exonerate the Innocent*, INNOCENCE PROJECT, http://www.innocenceproject.org/exonerate/ (last visited Dec. 29, 2015). The year of 1992 is determined because it is the year

considering both DNA and non-DNA exonerations, over 600 wrongful convictions have been discovered,[83] 155 of which involved individuals who had been sentenced to death.[84] Obviously, this is not merely a "passing phenomenon."[85] Much of the blame can be assigned to the legal system's failure to give defendants meaningful access to exculpatory evidence; or, in other words, "a one-sided investigatory process in which exculpatory proof is simply ignored."[86]

A classic example of an innocent man who pled guilty is Christopher Ochoa, who falsely confessed to a crime after hours of severe police coercion.[87]

At an Austin, Texas Pizza Hut in 1988, Christopher was arrested for the rape and murder of a Pizza Hut employee.[88] According to Ochoa, the police threatened him with the death penalty while in custody.[89] Fearing that he could very well die, and wanting to save his mother from grief, Ochoa eventually buckled and wrote out a "confession" in exchange for a life sentence.[90] Despite his innocence, Ochoa believed pleading guilty was better than the threat of death.[91]

the Innocence Project was founded. *See About*, INNOCENCE PROJECT, http://www.innocenceproject.org/about/ (last visited Dec. 29, 2015) (stating that "[t]he Innocence Project, founded in 1992 by Peter Neufeld and Barry Scheck at Cardozo School of Law, exonerates the wrongly convicted through DNA testing and reforms the criminal justice system to prevent future injustice").

83. Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 176 (2008) (indicating that there are "perhaps 600 to 700 exonerations of all types from across the country over a period of 35 years").

84. *The Innocence List*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last updated Oct. 12, 2015).

85. Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 142 (2012).

86. Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1301 n.234 (2001).

87. *Editorial: Legislation a Starting Place for Justice Reform*, DALL. MORNING NEWS (Dec. 06, 2012), http://www.dallasnews.com/opinion/editorials/20121206-editorial-legislation-a-starting-place-for-justice-reform.ece.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

Thirteen years of incarceration passed before Ochoa, was exonerated by DNA evidence.[92]

Ochoa's story is just one of many examples that illustrate the reality that innocent people plead guilty to crimes they do not commit. This is a reality that cannot be ignored any longer. One of the most important ends of the criminal justice system is to protect the innocent.[93] The fact that innocent individuals are not fully protected in the system of pleas demonstrates that weaknesses exist that need to be addressed.

3. Rule 11 and Brady*'s failure to satisfy*

Rule 11 of the Federal Rules of Criminal Procedure provides that before a guilty plea can be accepted, the defendant must understand his rights and the consequences of entering a guilty plea.[94] This requires that a guilty plea be entered into knowingly[95] and voluntarily[96]. Once these two requirements have been met, a court may then accept a guilty plea.[97]

Many pro-defendant activists argue that a plea is not truly voluntary unless it is made with full knowledge of the exculpatory and impeachment evidence possessed by the prosecution.[98] In other words, how can anyone "voluntarily" plead guilty when they do not have a complete knowledge of all relevant circumstances?[99] Isn't the lack of full knowledge a violation of the due process guaranteed under the *Brady* rule?[100] Shouldn't the government be obligated to disclose all evidence in order to satisfy Rule 11?[101]

These questions, coupled with the empirical evidence of innocent individuals being criminally convicted, as discussed above, prompted

92. *Id*.; *see also Christopher Ochoa*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/christopher-ochoa/ (last visited Nov. 19, 2016).

93. *See* Susan A. Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 413 (2009).

94. FED. R. CRIM. P. 11(b)(1).

95. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 248 (1969).

96. FED. R. CRIM. P. 11(b)(2).

97. *Id*. at 11(c)(3).

98. *See* United States v. Ruiz, 536 U.S. 622, 629 (2002).

99. *See id*. at 633.

100. *See id*. at 631.

101. *See id*. at 629.

the Supreme Court to take up the issue of *Brady* and plea bargaining.[102]

III. THE FIRST SHOT AT *BRADY* AND PLEA BARGAINING: *UNITED STATES V. RUIZ*

With the problems caused by the *Brady* rule mounting, all that was needed was a case with the proper fact pattern to address and correct *Brady*'s weaknesses. In 2002, the Supreme Court was able to address the concerns about (1) the supermajority of criminal cases resolving in pleas, (2) the innocent defendants pleading guilty, and (3) the constitutional breaches occurring in violation of Rule 11 through the case of *United States v. Ruiz*.[103]

A. United States v. Ruiz

The main issue on appeal in *Ruiz* was whether the Fifth and Sixth Amendments require prosecutors, "before entering into a binding plea agreement with a criminal defendant, to disclose *impeachment information* relating to any informants or other witnesses."[104] The facts, conclusion, and analysis are described below.

1. The facts

Angela Ruiz was arrested for importing marijuana from Mexico to the United States via California.[105] The prosecution offered Ruiz a deal that required a waiver of indictment, trial, and appeal in exchange for a recommendation to the sentencing judge for a two-level reduction from the "otherwise applicable United States Sentencing Guidelines."[106] This meant that if Ruiz accepted the deal, the prosecution would recommend that the minimum sentence be reduced from eighteen-to-twenty-four months to twelve-to-eighteen months.[107] The deal also included two important provisions: (1)

102. *See id*. at 629, 631.

103. *Id*. at 631.

104. *Id*. at 625 (emphasis added) (internal quotations omitted).

105. *See id*. (where immigration agents found 30 kilograms of marijuana in Angela Ruiz's luggage in the Southern District of California.

106. *Id*.

107. *Id*.

"[A]ny [known] information establishing the factual innocence of the defendant" must have already been disclosed to the defendant,[108] and (2) the defendant must "waiv[e] the right to receive impeachment information relating to any informants or other witnesses" and information supporting any possible affirmative defenses.[109] Ruiz rejected the offer and was subsequently indicted for unlawful drug possession.[110]

After the indictment was ratified, and in the absence of any plea agreement, Ruiz decided to plead guilty anyway.[111] At sentencing, Ruiz petitioned the judge to reinstate the offer she received before her indictment.[112] The government objected, and the district court followed the standard guideline sentence.[113] On appeal, the Ninth Circuit vacated Ruiz's sentence, indicating that "the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial."[114] The government petitioned for a writ of certiorari, and the Supreme Court granted the government's petition.[115]

2. The final conclusion and analyses

Writing for the majority, Justice Breyer declared that the Court disagreed with the Ninth Circuit's holding.[116]

Referring to *Brady*, the Court scrutinized both the Fifth Amendment right to due process and the Sixth Amendment right to a fair trial.[117] In particular, the Court concluded that the Constitution only requires that a guilty plea be entered knowingly and voluntarily, with "sufficient awareness of the relevant circumstances and likely consequences."[118] The Ninth Circuit's

108. Meaning exculpatory *Brady* material.

109. *Id*. (internal quotations omitted). This second provision refers to impeachment *Brady* material, as established by *Giglio*. *See supra* text accompanying notes 31–42.

110. *Ruiz*, 536 U.S. at 625.

111. *Id*. at 625–26.

112. *Id*. at 626.

113. *Id*.

114. *Id*. (quoting U.S. v. Ruiz, 241 F.3d 1157, 1166 (2001)).

115. *Id*.

116. *Id*. at 629.

117. *Id*. at 628–29.

118. *Id*. at 629 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

conclusion, on the other hand, essentially held that a guilty plea cannot be voluntary unless the prosecution discloses material impeachment evidence.[119] This, the Supreme Court declared, was overreaching.[120]

The Supreme Court unanimously disagreed with this Ninth Circuit logic, holding that the Constitution does not require prosecutors to disclose impeachment information in order to effectuate a proper, voluntary guilty plea for several reasons.[121] First, the Court held that impeachment information is not significant for purposes of determining whether a guilty plea was made knowingly or voluntarily, even though such information is important to the fairness of the trial.[122] Moreover, this evidence is not "critical information of which the defendant must always be aware prior to pleading guilty," since it inconsistently aides the defendant in securing the desired outcome.[123]

Second, the Constitution does not bestow a general right to criminal discovery.[124] In particular, a plea would ordinarily be valid "if the defendant fully underst[ood] the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it."[125] Not only is there no constitutional right to criminal discovery, but the Constitution also does not require the government to share "all useful information with the defendant."[126]

Third, the Constitution does not require a defendant to have complete knowledge of all relevant circumstances before entering a

119. *Id*.

120. *See id*.

121. *Id*.

122. *Id*.

123. *Id*. at 630. The Court noted on this point:

> It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant. The degree of help that impeachment information can provide will depend upon the defendant's own independent knowledge of the prosecution's potential case—a matter that the Constitution does not require prosecutors to disclose.

Id.

124. *Id*. at 629.

125. *Id*. (emphasis in original).

126. *Id*. at 630.

plea.[127] Specifically, "the due process considerations" imbedded in *Brady* failed to support a "right" for the disclosure of impeachment evidence before pleading guilty, since the added value for such a right was "often limited."[128]

Fourth, the risk of innocent individuals pleading guilty did not warrant the creation of such a pretrial right.[129]

Fifth, and finally, a constitutional right to impeachment information before a guilty plea could "seriously interfere with the [g]overnment's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice."[130] The comparatively small constitutional benefit of disclosing impeachment information, the Court noted, did not justify "so radical a change in the criminal justice process."[131]

B. Post United States v. Ruiz

After *Ruiz*, the law was finally clear—*Ruiz* clarified that neither the *Brady* rule, nor the Constitution, required *impeachment* information to be disclosed before entering a guilty plea.

Figuratively, *Ruiz* firmly closed the door on *Brady* claims regarding disclosure of *impeachment* evidence during pretrial plea negotiations. However, by answering only the question of *impeachment* information, *Ruiz* closed only one of two *Brady* doors—it never answered whether *exculpatory* information must be provided at the plea bargaining stage. Parts III and IV advocate that the Supreme Court should open this final *Brady* door by extending *Brady*'s exculpatory evidence rule to plea bargaining.

IV. ANSWERING THE EXCULPATORY QUESTION: A CURRENT SPLIT

The Supreme Court in *Ruiz* made it abundantly clear that defendants do not have a constitutional right to *impeachment*

127. *Id.*

128. *Id.* at 631.

129. *Id.* The Court appears to believe that the combination of the justice system and guilty-plea safeguards would prevent an innocent person from pleading guilty. *But see supra* Section I.C.2.

130. *Ruiz*, 536 U.S. at 631.

131. *Id.* at 632.

evidence during plea negotiation.[132] However, *Ruiz* leaves the question of how to treat *exculpatory* evidence at plea negotiation unclear.[133] The Supreme Court has yet to analyze this particular issue,[134] and courts are left to interpret whether the *Brady* rule of exculpatory evidence applies to plea negotiations in light of *Ruiz*.[135]

State and federal courts are divided on this issue. Some courts—including the Seventh, Ninth, and Tenth Circuits—interpret *Ruiz* as intimating that the *Brady* rule applies to exculpatory evidence prior to a guilty plea.[136] Others—including the Second, Fourth, and Fifth Circuits—understand *Ruiz* to indicate a more encompassing rule that does not entail a duty to disclose any *Brady* material during plea bargaining.[137] State courts divide in a similar fashion.[138]

The following Section outlines the current spilt between courts that require exculpatory material during plea negotiations and those that do not. The first two subsections outline this split within the federal court system. The third addresses the split at the state level, as well as what states are implementing to resolve the division.

A. Circuits that Interpret Ruiz *to Require Disclosure of Exculpatory Material Prior to Entry of a Guilty Plea*

At least three circuits hold that the disclosure of *Brady* exculpatory material is required before a guilty plea can be deemed knowingly and voluntarily valid—ultimately extending the *Brady* rule

132. *See supra* Part II; *see also Ruiz*, 563 U.S. at 628–33.

133. Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 273 (2006).

134. *Id*. The Supreme Court has laid out the general rule that *only* when prosecutors withhold information which would deprive the defendant his right to trial is there a violation of the prosecutors' duty to disclose. There has been no determination of what information that might be.

135. As shown by the current circuit split. *See infra* Section III.A–B.

136. See *infra* Section III.A.

137. See *infra* Section III.B.

138. *See supra* notes 136–137.

to the plea negotiation stage.[139] This Section discusses these circuits, their reasoning, and application.

1. The Seventh Circuit

In 2003, only a year after *Ruiz*, the Seventh Circuit heard the case of *McCann v. Mangialardi*.[140] Here, the court formally addressed "whether a criminal defendant's guilty plea can ever be 'voluntary' when the government possesse[d] evidence that would exonerate the defendant of any criminal wrongdoing but fail[ed] to disclose such evidence during plea negotiations or before the entry of the plea."[141]

Before delving into its analysis, the court unequivocally declared that *Ruiz* "strongly suggest[ed]" that, under these circumstances—when the prosecution was in possession of the exculpatory information—the government had an obligation to reveal such information prior to a plea of guilty.[142] To support its conclusion, the court found several valuable distinctions between the information withheld in *Ruiz* and the information withheld in *McCann*.[143]

First, in *Ruiz*, the Supreme Court only dealt with impeachment evidence and did not address the question of exculpatory evidence.[144] The Seventh Circuit opined that the two *Brady* principles were separate in nature and therefore deserving of separate treatment.[145]

Second, the court held that *impeachment* information was only "special in relation to the *fairness of the trial*, not in respect to whether a plea is *voluntary*."[146] *Exculpatory* information, on the other hand, was *critical information* for a valid, voluntary plea.[147] Were that not the case, the Court in *Ruiz* would not have stressed the promise that the government would provide material exculpatory

139. *See* United States v. Ohiri, 133 F. App'x 555 (10th Cir. 2005); McCann v. Mangialardi, 337 F. 3d 782 (7th Cir. 2003); Sanchez v. United States, 50 F. 3d 1448 (9th Cir. 1995).

140. 337 F.3d 782 (7th Cir. 2003).

141. *Id*. at 787.

142. *Id*.

143. *Id*. at 787–88.

144. *Id*.

145. *See id*. The actual wording used was "entirely different."

146. *Id*.; *see also* United States v. Ruiz, 536 U.S. 622, 629 (2002).

147. McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003).

evidence to obtain a valid plea.[148] Thus, the court concluded that "it [was] highly likely that the Supreme Court would find a violation of the Due Process Clause if . . . [the] government . . . [had] knowledge of a criminal defendant's factual innocence but fail[ed] to disclose such information to a defendant before he enter[ed] into a guilty plea."[149]

2. The Ninth Circuit

The Ninth Circuit has adopted an even broader perspective on a defendant's *Brady* rights before trial and during plea bargaining.[150] Instead of merely granting defendants the opportunity to challenge their pleas when exculpatory evidence is discovered, the Ninth Circuit has declared, in *Sanchez v. United States*, that withheld *Brady*-exculpatory material "automatically render[s] a guilty plea[] unknowing and involuntary."[151]

To support its conclusion, the Ninth Circuit notes that three other circuits have previously held that a "defendant can argue that his guilty plea was not voluntary and intelligent because it was made in the absence of withheld Brady material."[152] Like these other circuits, the Ninth Circuit opined that since "a defendant who pleads guilty generally cannot later raise independent claims of constitutional violations," post-*plea Brady* challenges should be permitted.[153] This conclusion is "sensible" since "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case."[154]

Additionally, the Ninth Circuit feared what might result if defendants were not permitted to challenge their pleas based on

148. *Id*.

149. *Id*. at 788. It should be noted here, however, that the Seventh Circuit felt that it did not have to resolve this question of exculpatory evidence during plea bargaining because the defendant did not present any evidence to substantiate or answer the matter.

150. Petegorsky *supra* note 7, at 3620.

151. *See id*. The court more formally states that "a waiver cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution." Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) (internal quotation marks omitted).

152. *Id*.

153. *Id*. Most notably the Second, Sixth, and Eighth Circuits.

154. *Id*. (quoting Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988)).

undisclosed *Brady* material.[155] Specifically, the court was concerned that if defendants were not permitted to raise *Brady* claims at the plea negotiation stage, "prosecutors [would] be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas."[156] Thus, the court established a defendant-friendly rule: whenever exculpatory material is withheld by the prosecution, a guilty plea is automatically determined to be involuntary and unknowing.[157]

3. The Tenth Circuit

The issue brought before the Tenth Circuit to answer the *Brady* issue following *Ruiz* was whether a defendant could raise a *Brady* challenge after pleading guilty.[158] The Tenth Circuit gave its answer in *United States v. Ohiri*.[159]

In *Ohiri*, relying on *Ruiz*, the district court held that "the government is not required to produce all *Brady* material when a defendant pleads guilty."[160] Under this logic, defendants would not be allowed to challenge their guilty pleas by bringing *Brady* claims.[161]

On appeal, the Tenth Circuit held that the government did have a duty to disclose *Brady* exculpatory information prior to accepting a guilty plea.[162] The court supported its decision with Supreme Court dicta from *Ruiz*: "impeachment evidence is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary."[163] Moreover, impeachment evidence "differs from exculpatory evidence in that it is not 'critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular

155. *See id*.

156. *Id*.

157. Peregorsky *supra* note 7 at 3620. *See Sanchez*, 50 F.3d at 1453; *see also* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2039–40 (2000) (calling the Ninth Circuit's copious rule a "per se rule").

158. United States v. Ohiri, 133 F. App'x 555, 560 (10th Cir. 2005).

159. *Id*.

160. *Id*. at 561.

161. *See id*. at 560.

162. *Id*. at 562.

163. *Ohiri*, 133 F. App'x at 560 (quoting United States v. Ruiz, 536 U.S. 622, 629 (2002)) (internal quotation marks omitted) (emphasis omitted).

defendant.'"[164] Thus, the Tenth Circuit, like the Seventh Circuit in *McCann*,[165] created a distinction between impeachment evidence and exculpatory evidence—where exculpatory evidence was "critical information of which the defendant must always be aware prior to pleading guilty,"[166] impeachment evidence was simply not enough to warrant a *Brady* claim post guilty plea.[167]

Finally, the Tenth Circuit distinguished *Ohiri* from *Ruiz* in two significant respects. First, the evidence withheld in *Ohiri*, unlike in *Ruiz*, was exculpatory information.[168] Second, the plea agreement between the state and the defendant "was executed the day jury selection was to begin,"[169] whereas in *Ruiz*, the plea agreement was signed before the indictment was ratified.[170]

Based on these findings, the Tenth Circuit interpreted *Ruiz* narrowly:

> [Although] the government committed no due process violation by requiring a defendant to waive her right to impeachment evidence before indictment . . . the Supreme Court did not imply that the government may avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government's possession.[171]

Thus, the *Ohiri* court held that post guilty pleas may be challenged under the tenets of a *Brady* exculpatory claim.[172]

B. Circuits that Interpret Ruiz *to Bar All* Brady *Material During Plea Negotiations*

The following section discusses the circuits that oppose extending exculpatory obligations to plea negotiations. These courts,

164. *Id*. (quoting *Ruiz*, 536 U.S. at 630).

165. *See supra* Section III.A.1.

166. *Ohiri*, 133 F. App'x at 560 (quoting *Ruiz*, 536 U.S. at 630).

167. *See id*.

168. *Id*.

169. *Id*.

170. *Id*.

171. *Id*. It is important to remember that in *Ruiz*, the offer was issued and accepted before the indictment. This is why it was called a "fast track" plea. *Ruiz*, 536 U.S. at 630. However, in *Ohiri*, the plea was offered on the same day as jury selection, *Ohiri*, 133 F. App'x at 560, thus making it the eleventh hour.

172. *Ohiri*, 133 F. App'x at 561–62.

including the Second, Fourth, and Fifth Circuits, would also bar *Brady* challenges to guilty pleas.

1. The Second Circuit

Before discussing the Second Circuit's treatment of exculpatory evidence *after Ruiz*, it is important to give some context to the Second Circuit's treatment of *Brady* material prior to *Ruiz*. Before *Ruiz*, the Second Circuit held that post-plea *Brady* challenges were permissible under both impeachment *and* exculpatory contexts[173] because such information, when withheld by the prosecution, was "in violation of [] due process rights" and a defendant was therefore entitled to relief.[174]

After *Ruiz*, however, the Second Circuit revisited its previous decisions in *Friedman v. Rehal*.[175] Although the Second Circuit could not fully decide the issue due to timing constraints, the court suggested that it interpreted *Ruiz* as precluding all post-plea *Brady* challenges.[176] In doing so, the court recognized that *Ruiz* did not expressly abrogate the Second Circuit's preexisting rule that extended *Brady* claims to both impeachment and exculpatory evidence.[177] Nevertheless, the court declared that "the Supreme Court has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial . . . ."[178] Further, "the reasoning underlying *Ruiz* could support a similar ruling for a prosecutor's obligations prior to a guilty plea."[179] Thus, impeachment and exculpatory evidence would be treated the same for purposes of a plea negotiation,[180] and since *Ruiz* found no

173. *See, e.g.*, United States v. Avellino, 136 F.3d 249 (2d Cir. 1998); Tate v. Wood, 963 F.2d 20, 25 (2d Cir. 1992); Miller v. Angiker, 848 F.2d 1312 (2d Cir. 1988).

174. *Miller*, 848 F.2d at 1320. The Second Circuit also noted that the withheld information needed to additionally be "material." *Id*.

175. Friedman v. Rehal, 618 F.3d 142 (2d Cir. 2010).

176. *See id*. at 154 (stating that "the petition must still be denied"); *see also* Petegorsky *supra* note 7, at 3630.

177. *Friedman*, *618 F.3d* at 154.

178. *Id*. (referencing United States v. Bagley, 473 U.S. 667, 676 (1985) and Giglio v. United States, 405 U.S. 150, 153–54 (1972)).

179. *Id*. (referencing WAYNE R. LAFAVE ET AL., 6 CRIMINAL PROCEDURE § 24.3(b), at 369 (3d ed. 2007)).

180. *See id*. at 154.

violation of due process for withholding impeachment evidence at plea agreement, exculpatory evidence should be treated similarly.[181]

2. The Fourth Circuit

The Fourth Circuit has yet to directly answer the question of permitting *Brady* claims for withholding exculpatory evidence post plea deal. However, dicta found in the case of *United States v. Moussaoui*[182] suggest the preclusion of such claims.[183]

First, the Fourth Circuit declares that the *Brady* right is "a *trial* right" whose purpose and existence is to "preserve the fairness of a trial verdict . . . ."[184] Therefore, a court need not concern itself with *Brady* rights during the pre-trial phase where "[the defendant's] guilt is admitted."[185] Second, the Fourth Circuit noted that the Supreme Court has never adequately "addressed the question of whether the *Brady* right to *exculpatory* information, in contrast to *impeachment* information, might be extended to the guilty plea context."[186] Thus, the Fourth Circuit was able to recognize "that due process considerations [did] not require prosecutors to disclose all information that might be of use to a defendant in deciding whether to plead guilty."[187] In other words, courts were permitted to "accept guilty pleas where the defendant lacked knowledge of many different circumstances, including the strength of the government's case."[188]

Finally, the value of disclosure to a defendant was considered to be relatively low "compared to the substantial interference that such a requirement could cause to ongoing criminal investigations and the protection of government witnesses."[189]

181. *Id*. at 153.

182. United States v. Moussaoui 591 F.3d 263 (4th Cir. 2010).

183. *See* Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 994 (2012).

184. Moussaoui 591 F.3d at 285 (citing United States v. Ruiz, 536 U.S. 622, 628 (2002); Brady v. Maryland, 373 U.S. 83, 87 (1963)).

185. *Id*.

186. *Id*. at 286.

187. *Id*.

188. *Id*.

189. *Id*.

Altogether, these clues in the dicta from *Moussaoui* suggest that *Brady*'s right is confined solely to trial situations in the Fourth Circuit.[190]

3. The Fifth Circuit

Within the span of nine years, the Fifth Circuit heard two cases arguing for the extension of *Brady* material to plea bargaining.[191] The first, *Matthew v. Johnson*,[192] was argued and adjudicated before *Ruiz* was decided in 2000. According to *Matthew*, *Brady* was primarily focused on "protecting the integrity of trials" and was thus purely a trial right.[193] The court further stated that "where no trial is to occur, there may be no constitutional violation."[194] Therefore, the court declined to extend *Brady* to plea agreements.[195]

Nine years later, in *United States v. Conroy*,[196] the Fifth Circuit once again refused to extend *Brady* to plea bargaining and denied defendants a post-conviction motion to withdraw their plea based on *Brady*.[197] The court imparted two rationalizations for its decision, relying heavily on *Matthew* and *Ruiz*.[198] Citing to *Matthew* and other Fifth Circuit precedents, the court reaffirmed that *Brady* was purely a trial right, and since the fundamentals of plea bargaining have no direct bearing on a defendant's actual trial, a defendant who pleads guilty waives any sort of *Brady*-trial right to exculpatory evidence.[199]

190. *See* R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1444 n.67 (2011). It should also be noted that shortly after *Ruiz*, the Fourth Circuit declared that a claim by the defendant of the prosecutor's failure to disclose information, potentially relevant as mitigation evidence in the death-penalty phase of defendant's trial served to invalidate his guilty plea, and was foreclosed. *See* Jones v. Cooper, 311 F.3d 306, 315 n.5 (4th Cir. 2002).

191. United States v. Conroy, 567 F.3d 174 (5th Cir. 2009); Matthew v. Johnson, 201 F.3d 353 (5th Cir. 2000).

192. *Matthew*, 201 F.3d at 353.

193. *Id*. at 361.

194. *Id*.

195. *See id*. at 364.

196. Conroy, 567 F.3d 174.

197. *Id*. at 179.

198. *Id*. at 178–79.

199. *See id*. at 178 (citing United States v. Santa Cruz, 297 F. App'x 300 (5th Cir. 2008); United States v. Alvarez-Ocanegra, 180 F. App'x 535 (5th Cir. 2006); Orman v. Cain, 228 F.3d 616 (5th Cir. 2000)).

Additionally, the Fifth Circuit interpreted the Supreme Court's decision in *Ruiz* narrowly.[200] In particular, the court opined that *Ruiz* did not make a distinction between impeachment and exculpatory material—rather, whenever the Supreme Court referred to either of the *Brady* materials, it was really referring to both.[201] Therefore, the Fifth Circuit held that exculpatory *Brady* material would not be extended to plea bargaining.[202] Furthermore, the court did not recognize a post-conviction motion to withdraw a guilty plea based on *Brady*.[203]

C. State Courts' Attempts to Answer the Brady *Exculpatory Question*

While federal jurisdictions follow *Brady* and its progeny to determine appropriate evidence disclosure requirements,[204] state jurisdictions follow local precedents and legislation. These local rules may come as simple adaptions of the federal approach, or as tailored adjustments to meet jurisdictional needs.[205] As stated by Ellen Yaroshefsky:

> State discovery practices vary significantly. The court rules or statutes that govern discovery in most jurisdictions define the categories of evidence subject to discovery and the time lines for disclosure. Some jurisdictions without codification of the prosecutor's disclosure obligations are dependent upon the judiciary's inherent right to grant discovery. About a third of the states have implemented versions of the ABA Standards on discovery rules.[206]

200. *Conroy*, 567 F.3d at 179.

201. *Id.*

202. *See id.*

203. *See id.*

204. Federal prosecutors must also follow Rule 16 of the Federal Rules of Criminal Procedure. However, for purposes of this Comment, Rule 16 is omitted. A brief outline of Rule 16 is as follows for convenience: Rule 16 outlines, *inter alia*, information subject to disclosure for the federal government before trial including defendant's oral, written, and recorded statements; defendant's prior record; specified documents and objects; examinations and tests performed on the defendant; and information relating to expert witnesses. *See generally*, FED. R. CRIM. P. 16.

205. Yaroshefsky, *supra* note 81, at 5.

206. *Id.*

V. THE SUPREME COURT SHOULD EXTEND *BRADY*'S RIGHT TO PLEA BARGAIN AND PLEAD GUILTY

Simply put, state and federal discovery rules vary considerably by jurisdiction.[207] With such distinctive variations between the jurisdictions, an imbalance of power and fairness arises between the state and the accused—something *Brady* intended to avoid.[208]

In deciding how to answer the question of *Brady*-exculpatory material during plea bargaining, the Supreme Court should respond in the affirmative—defendants should have the right to exculpatory material before entering a guilty plea. Further, if material exculpatory evidence existed prior to the defendant's plea, and the defendant was denied such formation before formulating his decision, a court should find a per-se constitutional violation and invalidate the plea.

Section IV.A argues that *United States v. Ruiz* and other policy considerations support the application of the exculpatory-evidence right during plea bargaining.[209] These policy considerations include first, that *Ruiz*, as interpreted by several circuit courts, permits the extension; second, by extending this right, better and stronger pleas will result; and third, the likelihood of convicting innocent individuals would significantly decrease.

Section IV.B supports the reasoning and analysis in Section IV.A by showing that many jurisdictions have already begun to recognize a *Brady* right.[210]

Section IV.C argues that the extension of *Brady* makes the judicial system more efficient and cost effective.[211]

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207. *Id.* at 4.

208. *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

> 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*. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: The United States wins its point whenever justice is done its citizens in the courts. A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

Id. (internal quotation omitted) (emphasis added).

209. *See supra* Section IV.A.

210. *See supra* Section IV.B.; Section IV.A.

211. *See supra* Section IV.C.

A. Ruiz *and Public Policy Suggest that* Brady*-Exculpatory Material Should Be Disclosed During Plea Bargaining.*

Brady rights should be extended to plea-bargaining negotiations for a number of reasons. First, as various circuit courts have held, *Ruiz* allows and even supports the extension of *Brady* to plea-bargaining. Second, the extension of *Brady* rights to the plea bargaining stage will result in guilty pleas made with full knowledge and volition. Third, the disclosure of exculpatory evidence prior to a guilty plea will likely reduce convictions of innocent defendants.

1. Ruiz *allows for* Brady*'s extension*

As noted earlier, the Supreme Court in *Ruiz* held that the Constitution does not require disclosure of *impeachment* information in order to effectuate a proper guilty plea.[212] It is important to note that the Court referred specifically to "impeachment evidence," rather than *Brady* evidence as a whole.[213]

The Second Circuit believes that the Supreme Court's specific use of the word "impeachment" is inconsequential because the Court typically treats impeachment evidence and exculpatory evidence equally.[214] However, if this were true, the Supreme Court would likely have expressly identified the prosecutor's duty in more general language—such as "*Brady* material." *Ruiz* does not use general *Brady* terms—it uses incredibly specific language to outline the prosecutor's duty before accepting a guilty plea: "These considerations, taken together, lead us to conclude that the Constitution does not require the Government to disclose material *impeachment* evidence prior to entering a plea agreement with a criminal defendant."[215] Thus, although the Supreme Court denied the right to impeachment evidence during plea bargaining, it did not specifically foreclose a right to exculpatory evidence.[216]

Additional arguments justifying an extension of *Brady*-exculpatory material to guilty pleas stems from the Seventh and

212. United States v. Ruiz, 536 U.S. 622, 629 (2002).
213. *Id.* at 633.
214. *See supra* Section III.B.1.
215. *Ruiz*, 536 U.S. at 633 (emphasis added).
216. *Id.*

Tenth Circuits' interpretation of *Ruiz*. This interpretation highlights a distinction between exculpatory and impeachment evidence: impeachment evidence is important only to the fairness of the trial, whereas exculpatory evidence may be constitutionally imperative to the validity of a guilty plea.[217] Both circuits concluded that exculpatory information was *critical information* to effectuate a valid guilty plea, as noted by *Ruiz*.[218] Further, both circuits understood the immense value of exculpatory evidence over impeachment evidence.[219] Therefore, a defendant's guilty plea would violate due process if he or she lacked the evidence in possession of the prosecution that would establish factual innocence.[220]

2. The disclosure of exculpatory evidence during plea bargaining results in valid guilty pleas

For a valid guilty plea to be entered, a court must ensure that a defendant has "sufficient awareness of the relevant circumstances and likely consequences."[221] In other words, the plea must be entered into knowingly and voluntarily. With this understanding, it is crucial for a defendant to have sufficient "awareness" to appraise the prosecution's case and make an informed decision—for how can a decision be voluntary if important and innocence-making evidence is withheld?[222] This does not mean that a defendant must be aware of every piece of evidence in possession of the prosecution.[223] It does, however, mean that a defendant cannot be "sufficiently aware" to enter a knowing and voluntary guilty plea when the prosecution withholds information that would create doubt as to guilt.

As noted above, both the Tenth and Seventh Circuits concluded that exculpatory information is "critical information" for a knowing and voluntary guilty plea.[224] In particular, these courts held that a

217. *See supra* Section III.A.I; *see also* Section III.A.3.

218. *Ruiz*, 536 U.S. at 633.

219. *See supra* Section III.A.3; *see also supra* notes 139–157.

220. *Id*.

221. *See Ruiz*, 536 U.S. at 629; *supra* note 104 and accompany text.

222. *See supra* Section I.C.3.

223. Remember, *Brady* did not concern itself with *all* evidence, just *material* evidence. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also* United States v. Bagley, 473 U.S. 667, 682 (1985).

224. *See supra* Sections III.A.1, A.3.

waiver of constitutional rights, through a guilty plea, cannot be truly knowing and voluntary if a defendant is unaware of exculpatory evidence possessed by the prosecution.[225] Thus, to make pleas stronger, fairer, and final, *Brady* should be extended to plea bargaining in order to give the defendant fair notice and proper awareness of the case against him. Thus, with fair notice and proper awareness, a defendant would be left with little excuse to argue that his plea was unknowing or involuntary, satisfying the Federal Rules of Criminal Procedure.

3. Brady*'s extension would prevent convicting the innocent*

The truth cannot be denied: innocent individuals sometimes plead guilty.[226] Recall that close to ninety-seven percent of criminal cases pled out in 2011.[227] Although the reason for the high percentage is unclear, commentators suggest prosecutorial overcharging and mandatory minimum sentences are key factors.[228] When these prosecutorial tools are implemented, defendants face a traumatizing choice: take the lower charge, or risk losing much more.[229] Additionally, a defendant must face the stress of litigation, attorney's fees, and the mental and emotional embarrassment of a public trial[230]—trauma that does not evaporate simply because a person is innocent.[231]

Because of this, extending *Brady* to plea bargaining would help reduce the atrocity of innocent convictions. In doing so, the defense would be aware of the weaknesses in the prosecution's case, as well as the strengths in its own case. Further, such knowledge would help the innocent defendant find strength during a criminal investigation or prosecution. Thus, defendants would be emboldened to persevere and be rightfully exonerated.

225. *See id*.
226. *See supra* Section II.C.2.
227. *See supra* note 74 and accompanying text.
228. *See supra* notes 75–79 and accompanying text.
229. *See* Ochoa's story, *supra* notes 89–92 and accompanying text.
230. *See id*.
231. *See id*.

B. Some jurisdictions are already extending Brady *to plea negotiations*

Since the ruling in *Brady*, multiple jurisdictions, both federal and state, have enacted various rules to effectively extend *Brady*'s reach to plea negotiations.[232] One such rule is Rule 16 of the Federal Rules of Criminal Procedure (Rule 16). Rule 16 governs a type of "open-file" discovery process.[233] In essence, Rule 16 makes it mandatory for the government to inspect, copy, and disclose certain information, once requested by the defense.[234]

Rule 16 mimics other discovery policies that have been adopted at the state level. For example, once a request for evidence is made, even prior to a guilty plea, the government must then disclose the evidence according to local procedure.[235] However, these local rules, as well as Rule 16, still lack significant indication that exculpatory evidence should be disclosed, even in the absence of a petition for it.[236] Therefore, all of these rules should be changed to reflect the need for a mandatory disclosure of exculpatory material.

As for states, only a handful have codified tenets of the *Brady* rule to plea negotiations. These codified rules are known as "open-file discovery" procedures. States, such as North Carolina, Florida, Colorado, New Jersey, and Arizona, have already implemented these "open-file" policies and procedures. Some of their achievements include the granting of (1) "pre-trial access to the prosecution's files including police reports and witness statements" (North Carolina);[237] (2) the "right to be present during a deposition performed by the state to be submitted as evidence against the defense" later in trial

232. *See supra* Sections III.A, C.

233. I use term "type-of" because nowhere within the Rule itself, or within the committee or judiciary notes does it state "open-file." However, Rule 16 is often interpreted broadly to achieve the same results as an open-file system. *See* United States v. Griggs, 111 F. Supp. 2d 551 (M.D. Pa. 2000); *see also* FED. R. CRIM. P. 16, note to 1974 amendment ("[B]road discovery contributes to the fair and efficient administration of criminal justice . . . .").

234. *See* FED. R. CRIM. P., 16; *see also* United States v. Jeffers, 570 F.3d 557, 572 (4th Cir. 2009).

235. EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW, THE JUSTICE PROJECT 15–17 (2007), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty _reform /expanded20discovery20policy20briefpdf.pdf [hereinafter JUSTICE PROJECT].

236. *See id.*; *see also* FED. R, CRIM. P. 16.

237. JUSTICE PROJECT, *supra* note 235, at 15.

(Florida);[238] (3) "a continuing mandatory obligation to disclose evidence it secures" (Colorado);[239] (4) the ability "to request to inspect and copy or photograph relevant evidence that would otherwise have been discoverable had the case gone to trial" (New Jersey);[240] and (5) "automatic discovery of all reports from law enforcement related to the defendant's crime and names and addresses of experts used by the prosecution" (Arizona).[241]

In North Carolina, Ohio, and cities like Milwaukee, the criminal justice system has "found that [open-file] policies make prosecutions fairer and convictions less prone to error."[242] These results have initiated a call to reform criminal discovery procedures and bring more oversight in criminal prosecutions.[243] In other words, due to the major success of open-file policies, many supporters have advocated for its adoption in every jurisdiction.[244]

However, some remain unconvinced that an open-file policy is the right course of action for the criminal justice system and for solving the *Brady* pretrial problem.[245] Those opposed argue that open-file discovery would do nothing to alleviate the biggest problem—"prosecutors and police who affirmatively act to withhold exonerating evidence from defendants."[246] Critics further argue that open-file discovery would provide additional tools for prosecutors

238. *Id*.

239. *Id*. at 16; *see also* COLO. R. CRIM. P. 16.3(b).

240. *Id*.

241. *Id*.; *see also* ARIZ. R. CRIM. P. 15.1(a)–(b).

242. Editorial, *Justice and Open Files*, N.Y. TIMES, Feb. 28, 2012, at A18, http://www.nytimes.com/2012/02/27/opinion/justice-and-open-files.html?_r=2&src=rechp.

243. *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 272–76 (2008); Abby L. Dennis, Note, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 132–34 (2007).

244. *See, e.g.*, Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2126 (2010); James E. Coleman, Jr. et al., *The Phases and Faces of the Duke Lacrosse Controversy: A Conversation*, 19 SETON HALL J. SPORTS & ENT. L. 181, 206–07 (2009) (statements of K.C. Johnson & Angela Davis); Robert P. Mosteller, *supra* note 243, at 272–76; Andrew Smith, Note, *Brady Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1960–64 (2008).

245. *See, e.g.*, Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 427 (2013).

246. *Id*. at 443 ("Even if all of the prosecution's files are available to a defendant, a prosecutor seeking to hide evidence could still take affirmative steps to conceal pieces of favorable information.").

"seeking to obstruct a defendant's counsel,"[247] and that such policies "may lead prosecutors acting with the best of intentions to unwittingly burden defendants' counsel with too much information."[248]

Despite these concerns, evidence from several states shows that open-file policies are the best practice when executed properly.[249] Specifically, adopting open-file discovery policies for criminal trials allows for "the full and open exchange of all evidence in the possession, custody, or control of the state."[250] This process would minimize pretrial *Brady* issues by (1) creating more balance "on which the quality of evidence can be challenged and tested," and (2) reducing the "arbitrary nature of disparate discovery policies between jurisdictions."[251]

Ultimately, a proper defense as envisioned by *Brady* requires "access to all material evidence in the possession of the prosecution or any third party investigatory agencies, both to ensure a fair outcome and to protect the defendant's right to due process."[252] A handful of states, as well as the federal government, have made strides to accomplish this through enacting Rule 16 and open-file polices.[253] Already, there appears to be a trend in favor of extending *Brady*–a trend that the American Bar Association calls a "necessity."[254]

C. Extending Brady *Will Make the Justice System More Efficient*

With public policy and recent trends pointing toward the extension of *Brady*, the only remaining questions are those of feasibility and efficacy—does the benefit outweigh the burden? Some commentators argue that extending *Brady* results in higher costs and

247. *Id*. ("Open-file discovery paves the way for new types of prosecutorial gamesmanship in which prosecutors can use mandatory information disclosure to gain additional advantages over defendants.").

248. *Id*.

249. *See* JUSTICE PROJECT, *supra* note 235, at 15–17.

250. *Id*. at 3.

251. *Id*. at 4.

252. *Id*. at 19.

253. *See supra* Sections III.A, C and accompanying text.

254. *See* JUSTICE PROJECT, *supra* note 235, at 1.

less efficiency.[255] At least one scholar has argued that such practices create a greater workload on already overworked public defenders and prosecutors, leading to the abandonment of plea bargaining, and resulting in an increase in the number of post-conviction appeals for ineffective assistance of counsel.[256] Most of these arguments are speculative—there is little data supporting these assertions.[257] However, what is *not* speculative is the research and information on the benefits of extending *Brady*.[258]

By requiring the disclosure of exculpatory evidence before the entry of a guilty plea—for example, through open-file discovery policies—not only are guilty pleas fairer, but judicial costs decrease as well.[259] For example, one area of serious cost reduction is criminal appeals.[260] In particular, the "expanded criminal discovery laws . . . ensure[d] . . . fewer reversals and retrials, and . . . enhance[d] judicial efficiency."[261] It also "reduce[d] inefficient practices," like "time-consuming discovery motions," that would allow for greater allocation of time in matters that are more important.[262]

Finally, the requirement of early disclosure of exculpatory information "avoid[ed] pretrial debates and hearings on whether particular evidence should be disclosed."[263]

In short, when comparing the benefits with the burdens, the calculus favors extending *Brady*. Not only does efficiency improve within the criminal justice system, but monetary savings result as well.[264]

VI. CONCLUSION

The majority of criminal cases plead out. With the nature of the criminal justice system as it is today, innocent defendants succumb to

255. *See* Fox, *supra* note 245.

256. *Id*. at 437–43.

257. *See id*. Most of these arguments and conclusions are made based on assumptions and hypotheticals.

258. *See* JUSTICE PROJECT, *supra* note 235THE JUSTICE PROJECT, *supra* note 235, at 9.

259. *See id*.

260. *See id*.

261. *Id*. at 1.

262. *Id*. at 4.

263. *Id*.

264. *See id*.

prosecutorial pressure and plead guilty to crimes they do not commit. This cannot continue.

To correct this issue, the Supreme Court should extend *Brady*'s exculpatory evidence rule to plea bargaining. Specifically, the Court should recognize a defendant's right to exculpatory evidence prior to entering a guilty plea or allow a *Brady* challenge if, after a guilty plea, it is discovered that exculpatory evidence was withheld. The Court should also establish that where the prosecution withholds such vital exculpatory information, that plea is automatically withdrawn because it was not made voluntarily and knowingly.

In so doing, the Court will not only reduce the atrocity of innocent convictions, but also make guilty pleas fairer and more final. Moreover, the criminal system itself will become more efficient and cost-effective.

The trend of the justice system is already pointing toward the adoption of *Brady* in plea negotiation stages. All that remains is the Supreme Court's endorsement. By extending *Brady*, the Court will ensure that defendants finally receive the constitutional protections *Brady* was created to safeguard.

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