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EXPANDING BRADY TO PLEA DEALS: EFFICIENCY AS A ROADBLOCK TO JUSTICE

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I. INTRODUCTION

In November of 2005, George Alvarez, then a seventeen-year-old ninth-grade special education student, slept the night in a Texas jail.[1] When he was transported to a different cell, he got into a physical altercation with one of the officers, Jesus Arias.[2] In his police report, Arias claimed that Alvarez grabbed his throat and tried to wrestle Arias.[3] However, the altercation was caught on tape and did not corroborate Arias's story.[4] Instead, it showed Arias, unprovoked, grabbing Alvarez and putting him in a headlock before other officers swarmed to bring Alvarez to the ground.[5] Despite the video showing Arias start the altercation and not Alvarez, the department decided not to disclose to Alvarez that the altercation was caught on tape.[6]

Alvarez, charged with assault of a public servant, pled guilty despite knowing he did not assault Arias.[7] He said "I had no [way to win the case]. It's my word against their word, and they're always going to believe them because they're like, the law."[8] Alvarez was

* J.D., UIC School of Law 2023. Thank you to my parents Vicki and Glenn.

1. Alvarez v. City of Brownsville, 904 F.3d 382, 385 (5th Cir. 2018). Alvarez was arrested on suspicion of public intoxication and theft of a motor vehicle.

2. *Id.* at 386.

3. Alvarez v. City of Brownsville, Civil Action no. B: 11-78, 2013 U.S. Dist. LEXIS 194540, at *3 (S.D. Tex. Feb. 25, 2013).

4. *Alvarez*, 904, F.3d at 386.

5. *Id.*

6. *Id.*

7. *Alvarez*, 2013 U.S. Dist. at *3-4.

8. *Id.*

subsequently sentenced to eight years in prison.[9]

Four years into Alvarez's prison sentence, the video of Alvarez's incident with Officer Arias surfaced after discovery of an unrelated § 1983 civil rights lawsuit.[10] After this discovery, Alvarez filed a writ of habeas corpus in Texas state court, which granted the writ and ordered a new trial.[11] In *Brady v. Maryland*, the Supreme Court held that suppression of evidence favorable to the accused is a violation of due process.[12] The State of Texas interpreted *Brady* as requiring the prosecution to turn over exculpatory information to defendants regardless of whether they plead guilty or not guilty.[13] The Texas Court of Criminal Appeals, having viewed the exculpatory video, concluded that Alvarez was "actually innocent" of the assault and his conviction was set aside and all charges were dismissed.[14]

Alvarez then brought his own § 1983 claim against Officer Arias and the Police Department arguing the department violated his *Brady* rights by withholding exculpatory evidence.[15] The district court agreed and awarded Alvarez $2,000,000 in compensatory damages and $300,000 in attorney's fees.[16] However, the appellate court overturned the decision and reversed the judgment,[17] citing Fifth Circuit precedent that a guilty plea precludes a defendant from asserting a *Brady* violation.[18] In this circuit, *Brady* is a *trial*

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9. *Alvarez*, 904 F.3d at 388. Alvarez was originally given a suspended sentence of eight years imprisonment and ten years of community supervision. *Id.* As a condition of his supervision, the court required Alvarez to be confined for treatment in a substance abuse felony punishment facility for a period of 90 days to a year. *Id.* After Alvarez failed to complete the treatment program, the state revoked his suspended sentence and ordered that he be imprisoned for the remainder of his sentence. *Id.*

10. *Id.* at 388; 42 U.S.C. § 1983 (2023). This federal statute allows for individuals to sue state employees acting under color of law for damages when they are deprived of their civil rights. *West v. Atkins*, 487 U.S. 42, 48-50 (1988).

11. *Id.*

12. Brady v. Maryland, 373 U.S. 83, 87 (1963).

13. *See* Ex parte Lewis, 587 S.W.2d 697, 701 (Tex. Crim. App. 1979); Ex parte Johnson, No. AP–76,153, 2009 WL 1396807, at *1 (Tex. Crim. App. May 20, 2009).

14. *Alvarez*, 904, F.3d at 388; *Id.* at 394 (Jones concurring). In his concurring opinion, Judge Edith Jones questions how Alvarez was able to obtain habeas relief in the state appellate court, pointing to his then-attorney Lucio who later became a codefendant in a federal RICO and bribery case against then Cameron County DA Villalobos. *Id.* Jones writes that the video omitted a "crucial" thirty seconds leading up to the altercation and that the DA did not question the video, immediately agreed to a new trial, and apparently offered an agreed set of findings and conclusions. *Id.*

15. *Id.* at 388.

16. *Id.*

17. *Id.* at 392. This case was originally heard by the Fifth Circuit in Alvarez v. City of Brownsville, 860 F.3d 799 (2017). The 2018 case was a rehearing en banc six total concurring and dissenting opinions summarizing the current state of the law on disclosure of evidence for plea negotiations.

18. United States v. Conroy, 567 F.3d 174, 178-79 (5th Cir. 2009); Mathew

right only and does not extend to plea negotiations.[19] Alvarez appealed this decision to the Supreme Court who declined to hear his case.[20]

Why would anyone plead guilty to a crime they did not commit? Defendants are often told by their attorney to either plead guilty and receive a lesser sentence or take their chances at trial, where losing results in a much longer sentence and possibly the death penalty in some states. This is known as the trial penalty and is one of the main reasons why 97% of convictions are obtained through guilty pleas.[21] Under this system, prosecutors are given virtually unfettered power to stack charges and manipulate the system to maximize the amount of leverage they have over defendants.[22] For example, some benefits are only available to those who plead *quickly* resulting in an incentive to plead before properly evaluating the merits of their case.[23]

Numerous scholars have studied the trial penalty issue and estimated anywhere between 1.6% and 27% of defendants who plead guilty are actually innocent of their crimes.[24] The National Registry of Exonerations has identified 359 specific instances where someone convicted based on their guilty plea is later found innocent.[25] However, this number is likely much higher because plea negotiations are off the record and data regarding pleas is largely unavailable, so there is no way to accurately determine how many people fall into the trial penalty trap.[26] Additionally, in circuits holding a guilty plea waives the right to challenge a conviction, attempting to overturn a conviction is likely futile.

Part II of this comment will start by explaining how *Brady* became a trial right and how subsequent Supreme Court cases characterize impeachment and exculpatory evidence. Part II will then provide a brief history of plea agreements in the United States and how the justice system has come to rely on them. Part III will discuss how the Circuit split from other circuits in the Supreme Court case *United States v. Ruiz* holding a guilty plea should waive the right to receive *Brady* evidence . Part III will additionally explain both sides of the circuit split and analyze their rationales

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v. Johnson, 201 F.3d 353, 361-62 (5th Cir. 2000).

19. *Alvarez*, 904 F.3d at 392.

20. Alvarez v. City of Brownsville, 139 S. Ct. 2690 (2019).

21. National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (July 10, 2018), www.nacdl.org/Document/TrialPenaltySixthAmendment RighttoTrialNearExtinct [hereinafter *The Trial Penalty*] [perma.cc/F5S7-5FAV].

22. *Id*. at 25.

23. *Id*; *see* United States v. Ruiz, 536 U.S. 622 (2002) (demonstrating that a "fast track" plea bargain was constitutional).

24. *The Trial Penalty*, *supra* note 21, at 17.

25. *Id*.

26. *Id*.

for how the Supreme Court would likely decide. Finally, Part IV will propose that the most plausible solution to this issue is for Congress to pass a bill expanding *Brady* to guilty pleas and also invalidating any guilty plea obtained by a lack of *Brady* disclosure.

II. BACKGROUND

A. Constitutional Rights of Due Process

The Constitution states only one command twice.[27] Both the Fifth and Fourteenth Amendments state that no one shall be "deprived of life, liberty or property without due process of law."[28] In a criminal trial, the prosecution must not infringe on these rights.[29] The prosecutor's duty in a criminal trial is to seek justice.[30] Therefore, the prosecutor cannot use "improper methods calculated to produce a wrongful conviction."[31] When the prosecution violates a defendant's right to due process, it justifies a mistrial or a conviction to be overturned.[32]

For most of this nation's history, the provisions in the Bill of Rights only applied to the federal system.[33] However, the Supreme Court repeatedly held that the Fourteenth Amendment's Due Process Clause had a content clause that was independent of the Bill of Rights.[34] This clause demanded "fundamental fairness," which overlapped with some protections found in the Fourth, Fifth, Sixth, and Eighth Amendments.[35] Before the 1960s, the Supreme Court started to answer the question of how far this overlap extended but did so only on a case by case basis.[36] Then, during the Warren era, the Supreme Court started to heavily utilize "selective incorporation" to apply almost all the criminal procedure elements of the Bill of Rights to the states by way of the Fourteenth Amendment.[37]

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27. Peter Strauss, *Due Process*, LEGAL INFORMATION INST., www.law.cornell.edu/wex/due_process [perma.cc/TU5K-W4W2] (last visited Jan. 4, 2022).

28. U.S. CONST. amend. V; U.S. CONST. amend XIV, § 1.

29. *Id*.

30. Berger v. United States, 295 U.S. 78, 88 (1935).

31. *Id*.

32. Darden v. Wainwright, 477 U.S. 168, 181 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

33. Jerold H. Israel, *Childress Lecture: Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS L.J. 303, 304 (2001).

34. *Id*.

35. *Id*.

36. *Id*.

37. *Id*; Justin F. Marceau, *Criminal Law: Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1240 (2008); *Incorporation Doctrine*, LEGAL INFORMATION INST., www.law.cornell.edu/wex/incorporation_doctrine [perma.cc/4259-97M5]

B. Brady v. Maryland as a Trial Right

One of these incorporations came in the 1963 Supreme Court case *Brady v. Maryland*.[38] There, the Court addressed whether it was a violation of due process for the prosecution to withhold evidence favorable to the defense upon request.[39]Id. In that case, Brady and Boblit both participated in a murder.[40] Brady admitted to participating in the murder but claimed that Boblit did the actual killing.[41] Before the trial, Brady requested to examine Boblit's extrajudicial statements, and some were shown to Brady.[42] However, the prosecution hid from Brady a statement where Boblit confessed to the actual murder.[43] Brady did not learn of this until after he was convicted, sentenced, and had his conviction affirmed.[44] Brady then moved for a new trial based on the newly discovered evidence that was suppressed by the prosecution.[45]

The Supreme Court held that it is a constitutional violation for the prosecution to suppress evidence favorable to an accused upon request, irrespective of good or bad faith.[46] The Court reasoned that "society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfair."[47] The Court also added that "the United States wins its point whenever justice is done its citizens in the courts."[48] However, the Court limited the scope of its ruling to where the accused requests discovery and the evidence

(last visited Oct. 31, 2021). Short overview of incorporation doctrine as well as a list of cases that utilized the doctrine.

38. *Brady*, 373 U.S. at 87 (1963).

39. *Id.*

40. *Id*. at 84.

41. *Id*.

42. *Id*.

43. *Id*.

44. Brady v. State, 226 Md. 422, 426 (1961).

45. *Id*.

46. *Brady*, 373 U.S. at 87. The Court points to its decision in Mooney v. Holohan, 294 U.S. 103, 112 (1935) where they held that nondisclosure by a prosecutor violates due process. There, the Court said, "[I]t is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Mooney*, 294 U.S. at 112. The Court extended this principle in Napue v. Illinois, 360 U.S. 264, 269 (1959) holding it is a denial of due process "when the state, although not soliciting false evidence, allows it to go uncorrected when it appears."

47. *Brady*, 373 U.S. at 87.

48. *Id*.

would tend to exculpate or reduce the penalty that they face.[49] The Supreme Court later squarely refused to interpret *Brady* as creating a broad rule of pretrial discovery, which led to some appellate courts rationale that *Brady* disclosures shouldn't be required for a plea agreement to be valid.[50]

C. Cases After Brady v. Maryland and Defining Materiality

Brady says that it is a denial of due process when the prosecution withholds favorable evidence material to culpability or sentencing after a request.[51] However, the Court did not define what evidence was "material." About ten years after *Brady*, the Supreme Court heard *Giglio v. United States*.[52] In that case, Giglio and Taliento were both accused of forgery and the prosecution offered Taliento immunity if he would testify against Giglio.[53] After Giglio was convicted and sentenced, he learned of Taliento's deal with the prosecutors and challenged his conviction.[54]

The Court here held that impeachment evidence falls within the *Brady* rule, but only when the reliability of the witness is determinative of guilt or innocence.[55] For a new trial to be required, the false testimony must create a reasonable likelihood that it affected the judgment of the jury.[56] In this case, the Supreme Court found that the evidence was material and ordered a new trial.[57]

In 1976, the Supreme Court, in *United States v. Agurs,* started to refine the materiality requirement of *Brady*.[58] There, Linda Agurs was convicted for the killing of James Sewell, her estranged husband.[59] Agurs claimed that she acted only in self-defense but

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49. *Id*.

50. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987); DA's Office v. Osborne, 557 U.S. 52, 68-69 (2009).

51. *Brady*, 373 U.S. at 87.

52. Giglio v. United States, 405 U.S. 150 (1972). A 7-0 decision where Justices Rehnquist and Powell did not participate. *Id.*

53. *Id*.

54. *Id*.

55. *Id*. at 154 (quoting *Napue*, 360 U.S. at 269).

56. *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 269).

57. *Giglio*, 405 U.S. at 154; *see also* Van de Kamp v. Goldstein, 555 U.S. 335, 346-348 (2009) (holding that prosecutors are given *absolute* immunity for failing to provide *Giglio* impeachment evidence).

58. United States v. Agurs, 427 U.S. 97 (1976); 25 *Moore's Federal Practice*, § 616.06 (Matthew Bender 3d ed.). This was a 7-2 decision with Justice Marshall writing a dissent joined by Justice Brennan. *Agurs*, 427 U.S. at 100. Marshall opined that one of the most basic tenants of fairness in a criminal trial is that all available evidence tending to show a defendant's guilt or innocence must be shown to a jury. *Id*. The only way the prosecution can ensure justice is to disclose all relevant evidence in their possession. *Id.*

59. *Agurs*, 427 U.S. at 100. It took the jury only twenty-five minutes to elect a foreman and return a guilty verdict.

offered little other than her own testimony to prove this.[60] It was not until months after she was convicted that her counsel discovered that Sewell had a criminal past,[61]-impeachment information that would have supported her theory of self-defense.[62] Because of this discovery, the D.C. Appellate Court overturned her conviction and ordered a new trial, concluding that the evidence withheld was material, and that had the jury known of Sewell's criminal history, it may have returned a different verdict.[63]

In *Brady*, the Court ruled the prosecution must turn over favorable evidence *upon request*.[64] However, Agurs did not request impeachment evidence, as she did not know that it existed.[65] The Supreme Court agreed with the trial court's analysis that there are situations where evidence is of such substantial and obvious value to the defendant, and fundamental fairness requires its disclosure.[66]

So, the Court reasoned "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request it made."[67]However, the Court also held prosecutors should not be required to turn over their entire file every time they are uncertain of its materiality.[68] The Court determined that "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."[69] In this case, the Court held that Sewell's criminal history did not contradict any of the evidence at trial and would probably not have affected the jury's verdict.[70] So, while the Court did not overturn Agurs' conviction, it nonetheless expanded *Brady* to require discovery of exculpatory evidence regardless of whether a request was made for that information.[71]

In 1985, the Supreme Court heard another case addressing *Brady* rights in *United States v. Bagley*.[72] In that case, a promise

60. *Id*.

61. *Id*. Sewell's prior record included a guilty plea to a charge of assault and carrying a deadly weapon (a knife) in 1963, and another guilty plea for carrying a deadly weapon (again a knife) in 1971. *Id*. The night he was killed, Sewell had a knife in his belt. *Id*.

62. *Id*.

63. United States v. Agurs, 510 F.2d 1249, 1254 (D.C. Cir. 1975).

64. *Brady v. Maryland*, 373 U.S. at 87.

65. *Agurs*, 427 U.S. at 100.

66. Moore, *supra* note 58. The district court judge gave an example saying that fingerprint evidence demonstrating the defendant did not fire the fatal shot must be given to the defendant with or without request. *Agurs*, 427 U.S. at 100.

67. *Id*. at 107.

68. *Id*. at 106-107.

69. *Id*.

70. *Id*. at 113-114. The Jury's verdict was cumulative and showed that Sewell was wearing a bowie knife in a sheath and carrying a second knife in his pocket the night of his death. *Id*.

71. *Id*. at 107, 112.

72. United States v. Bagley, 473 U.S. 667 (1985). This was a 5-3 decision

was made that a key government witness would not be prosecuted in exchange for the witness's testimony.[73] The defendant (Bagley) made pretrial discovery requests for this type of evidence, but there was no disclosure of the agreements.[74] When this impeachment evidence was discovered post-conviction, Bagley moved to vacate his sentence.[75] The district court refused to, but the Ninth Circuit reversed, holding that failure to disclose impeachment evidence is "even more egregious" than failure to disclose exculpatory evidence because it "threatens the right to confront adverse witnesses,"[76] and thus requires an automatic reversal.[77]

The Supreme Court disagreed with the Ninth Circuit and reversed.[78] First, it rejected the idea that suppression of impeachment evidence was of greater concern than suppression of exculpatory evidence.[79] Second, it made clear that suppression of impeachment evidence does not automatically restrict the scope of cross-examination.[80] Instead, the prosecutor's failure to disclose impeachment evidence is only a constitutional violation if it deprives the defendant of a fair trial, which the Court did not find here.[81] While the Court was unable to reach a majority in determining the materiality standard, five justices in two separate opinions concluded that evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[82]

In the 1988 case *Arizona v. Youngblood*, the defendant Youngblood was accused of molesting a young boy.[83] Two years after

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with Marshall, Brennan, and Stevens dissenting. *Id*. Marshall's dissent opines that the Court is attempting to erode *Brady*. *Id*. Marshall once again asks for a rule requiring disclosure of all favorable evidence to the accused. *Id*. The "reasonable probability" standard is complicated and invites speculation by prosecutors. *Id*. Failure to turn over favorable evidence should result in a new trial unless the prosecution can show the failure was a harmless error. *Id*.

73. *Id*. at 670-71.

74. *Id*.

75. *Id*. at 669.

76. Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983).

77. *Id*. at 1464 (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974) ("the denial of the 'right of effective cross-examination' was 'constitutional error of the first magnitude' requiring automatic reversal") (quoting Brookhart v. Janis, 384 U.S. 1, 3 (1965))).

78. *Bagley*, 473 U.S. at 667.

79. *Id*. at 676.

80. *Id*. at 678.

81. *Id*. at 675 ("*Brady's* purpose is 'to ensure that a miscarriage of justice does not occur.'").

82. *Id*. at 682. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id*. The court later clarified in *Kyles v. Whitley*, that whether the prosecution is obligated to turn over evidence that is favorable to the defense depends on the cumulative effect of all the withheld evidence. 514 U.S. 419 at 437 (1994).

83. Arizona v. Youngblood, 488 U.S. 51 (1988). This was a 6-3 decision with Rehnquist writing the majority opinion, and Blackmun writing a dissenting

the assault, police attempted to test some of the boy's clothing for semen but since the sample was not refrigerated, the tests were inconclusive.[84] The Court here said that the failure of the prosecution to preserve physical evidence that could be useful to a criminal defendant is *not* a violation of due process outside a showing of bad faith.[85] Since the police in this case followed department protocols by not refrigerating the sample, due process was not violated.[86]

D. History of Plea Agreements

While most convictions today are secured through guilty pleas, it was not long ago that the practice was unconstitutional.[87] In the early days of the republic, judges were often surprised to see defendants plead guilty and would often attempt to persuade them to take their chances at trial instead.[88] When cases involving guilty pleas started to make it to appellate courts in the 1860s, those judges expressed the same surprise that trial court judges had and sometimes reversed convictions that were based on plea bargains, solely based on the method they were obtained.[89]

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opinion. *Id.* In his dissent, Blackmun argues that police action that results in a defendant's failure to receive a fair trial represents a denial of due process, regardless of their intent. *Id*. at 61 (Blackmun, J., dissenting).

84. *Id*. at 54.

85. *Id*. at 58. The court reasoned that "requiring a defendant to show bad faith on the part of the police limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.* those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Id*.

86. *Id*. The Court here recognized that *Brady* requires the prosecution to disclose exculpatory evidence regardless of good or bad faith. *Id*. However, they are able to distinguish this ruling from that in *Brady* by holding that the standard is different when it comes to preserving evidence. *Id*. The Court still acknowledges that due process requires police to preserve evidence where it reasonable to do so where justice requires because it could exonerate the defendant. *Id*. For some reason though, they thought it was reasonable for the police to not preserve this specific piece of evidence that could have exonerated Youngblood with proper storage. *Id*. Instead of holding up the *Brady* rule that could have proved someone's innocence, they chose to limit its application.

87. Jon'a F. Meyer, *Plea Bargaining*, ENCYC. BRITANNICA, www.britannica.com/topic/plea-bargaining [perma.cc/WNJ3-HMJ7] (last visited Sept. 21, 2023); Walker v. Johnston, 312 U.S. 275, 279-86 (1941) (determining that the defendant had been "deceived and coerced into pleading guilty"); *see also* United States v. Jackson, 390 U.S. 570, 572 (1968) (holding that the federal kidnapping statute imposed unconstitutional burdens because it called for the death penalty only when defendants are convicted by a jury trial).

88. Meyer, *supra* note 87.

89. *Id*. Albert W. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, at 21-22 (1979); *see* Wight v. Rindskopf, 43 Wis. 344, 354 (1877) (striking down an agreement that gave the defendant a more lenient sentence saying it

Rising crime rates in the early 20th century, largely caused by over-criminalization, resulted in an extremely high caseload.[90] As a way of getting cases through faster, the use of plea bargaining exploded even though the practice was not fully accepted by the courts.[91] Survey's conducted in the 1920s revealed that guilty pleas made up around 70-90% of all convictions.[92] Defendants who accepted deals were often told not to acknowledge their negotiations in court, because it would cast doubt on the voluntariness of their plea.[93] It was not until 1967 that this practice started to receive more judicial acceptance following a report by the President's Commission on Law Enforcement and Administration of Justice, which declared that plea bargains "are important to the administration of justice both at the state and federal level."[94]

Shortly after, the Supreme Court started to lay down the law for guilty pleas.[95] In the 1969 case *Boykin v. Alabama*, the Court reversed the conviction of a man who had received five death sentences after pleading guilty to five counts of robbery because the trial judge had not ensured that the guilty pleas were voluntary.[96] There, the Court held that the plea must be the accused's voluntary and intelligent act.[97] When a guilty plea is valid, the defendant waives three very important constitutional rights: the right to a trial by jury, the right to confront accusers, and the right against self-incrimination.[98]

Only one year later in 1970, the court in *Brady v. United States* laid down the voluntariness requirement saying that a guilty plea that is entered intelligently must stand unless it was induced by threats, misrepresentation, or by a promise that is by its nature improper (e.g. bribes).[99] The Court also added that "waivers of

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was "hardly . . . distinguishable . . . from a direct sale of justice. . . . [s]uch a bargain . . . could not be kept . . . in any court not willing largely to abdicate its proper functions in favor of its officers."); *see also* Griffin v. State, 12 Ga. App. 615, 622-23 (1913) ("a plea of guilty is but a confession of guilt in open court . . . [l]ike a confession out of court, it ought to be scanned with care and received with caution. . . . [a]ffirmative action on the part of the prisoner is required before he will be held to have waived the right of trial.").

90. *The Trial Penalty*, *supra* note 21, at 21.

91. *Id.*

92. Alschuler, *supra* note 89, at 26. A sharp increase from around 25-50%. *Id.*

93. Meyer, *supra* note 87.

94. *Id*; *see* Santobello v. New York, 404 U.S. 257, 264 (1971) (holding that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled").

95. Meyer, *supra* note 87.

96. *Id*; Boykin v. Alabama, 395 U.S. 238 (1969). The defendant Boykin was not asked any questions by the judge at trial, nor did the defendant make any statements into the record. *Id.* at 239-40.

97. *Id.* at 242.

98. *Id.* at 243.

99. Brady v. United States, 397 U.S. 742, 755 (1970). The defendant, Brady,

constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[100]

These opinions established that for a plea to be made intelligently, the defendant must have "a full understanding of what the plea connotes and of its consequences."[101] This includes knowledge of the rights an accused waives by entering a guilty plea.[102] A guilty plea is entered intelligently when the defendant miscalculates the strength of the case against them,[103] or if it was based off an erroneous conclusion that a piece of evidence would be admissible as evidence at trial.[104] However, a guilty plea entered by a defendant who received constitutionally ineffective counsel is not entered intelligently.[105] While it seems like the Supreme Court was attempting to constrain unrelenting plea bargaining, these opinions reversed over a century of skepticism allowing for a system dominated by plea bargaining.[106]

III. ANALYSIS

A. United States v. Ruiz

In the 2002 case *United States v. Ruiz*, the Supreme Court addressed the issue of whether prosecutors are required to disclose impeachment information to a defendant before entering into a plea agreement.[107] Ruiz was caught with 30 kilograms of cannabis, and prosecutors offered her a "fast track" plea bargain requiring her to waive certain rights, including the right to receive impeachment information if the case went to trial.[108] Ruiz rejected this offer because she believed it contained an unconstitutional waiver of *Brady* rights.[109] However, Ruiz plead guilty and at sentencing, the

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was charged with kidnapping and faced a possible death penalty. *Id.* at 743. After he learned that his co-defendant might testify against him, Brady wanted to change his guilty plea to a not guilty plea. *Id.* However, the trial judge accepted his guilty plea, and he was sentenced to 50 years imprisonment. *Id.*

100. *Id.* at 748.

101. *Boykin*, 395 U.S. at 244.

102. Henderson v. Morgan, 426 U.S. 637, 645 (1976); s*ee also Brady*, 397 U.S. at 748 n.6 (finding that "[t]he importance of assuring that a defendant does not plead guilty except with a full understanding of the charges against him and the possible consequences of his plea was at the heart of our recent decisions in *McCarthy v. United States* . . . and *Boykin v. Alabama*.").

103. *Id.* at 757.

104. McMann v. Richardson, 397 U.S. 759, 770 (1970); Parker v. North Carolina, 397 U.S. 790, 796-98 (1970).

105. Hill v. Lockhart, 474 U.S. 52, 56-57 (1985); Tollett v. Henderson, 411 U.S. 258, 267 (1973).

106. *The Trial Penalty*, *supra* note 21, at 20.

107. *Ruiz*, 536 U.S. 622, 625 (2002).

108. *Id.* at 625.

109. *Id.* at 625-26.

judge rejected her request to impose the lighter sentence that she would have had under the "fast track" plea..[110] Ruiz appealed to the Ninth Circuit, which vacated the judgment, holding that the Constitution requires prosecutors to make certain impeachment information available to defendants before trial and that this obligation is extended to plea negotiations.[111]

In a unanimous verdict, the Supreme Court overturned the appellate decision.[112] The Court held that the right to receive *Brady* evidence, particularly impeachment material, only applies to a defendant's right to a fair trial.[113] When a defendant pleads guilty, they waive their right to impeachment evidence under *Brady*.[114] While the ruling is in line with the idea that *Brady v. Maryland* is a trial right, it fails to properly combine *Brady v. Maryland's* ruling and its hegemony with that of *Brady v. United States* and other Supreme Court cases on guilty pleas.[115] The Ninth Circuit simply combined the two *Brady* line of cases concluding that a guilty plea is not voluntary when the government withholds material impeachment evidence (the same type of evidence withheld in *Brady v. Maryland*).[116]

The *Ruiz* Court rejected the Ninth Circuit's conclusion that a guilty plea is not voluntary unless prosecutors disclose material information on the basis that "the Constitution does not require the prosecution to share all useful information with a defendant."[117] Impeachment evidence, according to the Court, is not critical enough to require prosecutors to provide defendants with it before entering a plea deal.[118] However, the Ninth Circuit did not require that the prosecution hand over all useful information.[119] It required

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110. *Id.*

111. United States v. Ruiz, 241 F.3d 1157, 1165 (9th Cir. 2000).

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

113. *Id.*

114. *Id.* at 628-633; *see also* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (holding that "there is no general constitutional right to discovery in a criminal case"). The *Ruiz* Court also stated that the law ordinarily considered a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances. *Ruiz*, 536 U.S. at 629. They compared it to someone's right to waive their right to remain silent, or their right to trial by jury, or even counsel. *See* Colorado v. Spring, 479 U.S. 564, 573-575 (1987) (holding that Fifth amendment privilege against self-incrimination were waived when defendant received standard *Miranda* warnings regarding the nature of the right but not told the specific interrogation questions to be asked).

115. *Brady v. United States*, 397 U.S. at 755. The Court held that a defendant's guilty plea is not invalid under the Fifth Amendment if it is voluntary, knowing, and intelligent and done to avoid the risk of a harsher penalty. *Id.*

116. *Ruiz*, 241 F.3d at 1164.

117. *Ruiz*, 536 U.S. at 629; *Weatherford*, 429 U.S. at 559.

118. *Ruiz*, 536 U.S. at 630.

119. *Ruiz*, 241 F.3d at 1164 (quoting Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995) ("guilty pleas cannot be deemed intelligent and voluntary if

them to turn over evidence *material of guilt or innocence*[120]— The same type of evidence required by *Brady*.[121] If *Brady* does not create blanket discovery, neither does the Ninth Circuit in *Ruiz*.

The Ruiz Court says impeachment information is only required if the case makes it to trial.[122] Meaning that the prosecution can withhold evidence from the defense so long as it induces the defendant into pleading guilty.[123] If the defendant decided not to plead guilty and wanted to proceed to trial, impeachment information is now required to be turned over.[124] Surely, withholding evidence to induce a guilty plea is an improper method "calculated to produce a wrongful conviction."[125] This due process violation should require a conviction to be overturned.[126]

With regards to due process concerns, the Supreme Court says that *Brady* and *Giglio* actually stand against the creation of the "right" that the Ninth Circuit found.[127] Other Supreme Court cases have held that due process considerations include analyzing the value of an additional safeguard and the adverse impact of the requirement upon the Government's interest.[128]

In *Ruiz*, the proposed plea agreement by the government specifies that the government will "provide any information establishing the factual innocence of the defendant."[129] The Court found that this requirement would diminish the concern that the absence of impeachment evidence alone will convince innocent people not to pleading guilty.[130] While this may be true, it does not

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entered without knowledge of material information withheld by the prosecution…If a defendant may not raise a *Brady* claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas").

120. *Ruiz*, 241 F.3d at 1164.

121. *Brady v. Maryland*, 373 U.S. at 87 ("The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

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

123. *Ruiz*, 241 F.3d at 1164. Part of the reason the Ninth Circuit required prosecutors to disclose impeachment evidence prior to plea deals is because of this fear. *See id.*

124. *Brady*, 373 U.S. 83 at 87.

125. *Berger*, 295 U.S. at 88.

126. *Darden*, 477 U.S. at 181; *Donnelly*, 416 U.S. at 643.

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

128. *Id*; Little v. Streater, 452 U.S. 1, at 6; Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Ake v. Oklahoma, 470 U.S. 68, 77 (1985) The Court held that when the sanity of a defendant is likely to be an issue in criminal proceedings, the constitution requires the state to provide the services of a psychiatrist. *Id.* The court here said that the government has a compelling interest in achieving the fair and accurate disposition of criminal cases. *Id.* at 79. Of note, the court used that case to say that the government's interest in maintaining the guilty plea system now outweighs their interest in achieving a fair and accurate criminal disposition. *Id.*

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

130. *Id*; *see also* FED. RULE CRIM. PROC. 11 *and* McCarthy v. United States,

make sense why the prosecution requires defendants to then sign away the right to impeachment information, or why the Supreme Court here says that prosecutors are not required to turn over material impeachment evidence. Material impeachment evidence is just the type of evidence that could establish the innocence of a defendant.[131]

As to the government interest, the Court held that requiring plea disclosure of all impeachment evidence "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."[132] They added that The Ninth Circuit's rule risks the disclosure of government witnesses, could disrupt ongoing investigations, and expose potential witnesses to "serious harm."[133] Where the higher courts previously did not see plea bargaining as a legitimate practice due to fairness concerns,[134] the Supreme Court is now ruling that the government can condition a lighter sentence in exchange for their surrender of rights, in the name of securing the efficient administration of plea bargaining.[135]

The Court, considering all these factors, concluded that there is nothing in the Constitution r*equiring* that the Government disclose material impeachment evidence to a defendant before entering a plea deal.[136] However, the Court did not address whether this type of disclosure would be required for exculpatory evidence.[137] This indecision has resulted in the circuit split this section aims to address.[138]

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394 U.S. 459, 465-67 (1967) (discussing Rule 11's role in protecting a defendant's constitutional rights).

131. *Bagley*, 473 U.S. at 676. ("Impeachment evidence . . . falls within the *Brady* rule. . . . [s]uch evidence is 'evidence favorable to the accused' . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." (quoiting *Brady*, 373 U.S. at 87)).

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

133. *Id.*

134. Kercheval v. United States, 274 U.S. 220, 223-24 (1927) ("[T]he court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence.").

135. *Ruiz*, 536 U.S. at 632 ("[T]he Ninth Circuit's requirement could lead the government . . . to abandon its heavy reliance upon plea bargaining in a vast number—90% or more—of federal criminal cases. We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit.").

136. *Id.* Furthermore, in his concise concurring opinion, Justice Thomas essentially says that the Court need only consider that the principle supporting *Brady* was "avoidance of an unfair trial to the accused," and that this "concern is not implicated at the plea stage regardless". *Id.* at 633-34 (Thomas, J., concurring) (quoting *Brady v. Maryland*, 373 U.S. at 87).

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

138. *Alvarez*, 904 F.3d at 392-93. The First, Second, and Fourth Circuits all

B. Circuits That Say There is a Brady Violation

Following the decision in *Ruiz*, several circuits find a due process violation where the prosecution withholds exculpatory evidence to the accused before a plea deal is entered.[139] The Seventh Circuit in *McCann v. Mangialardi* and the Tenth Circuit in *United States v. Ohiri* both conclude that *Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence.[140] These circuits contend that if the Supreme Court were to hear this issue, they would conclude that *Brady* and due process requires the prosecution to turn over exculpatory evidence before entering of a guilty plea.[141]

In *McCann*, the Seventh Circuit reasoned that because *Ruiz* held that due process does not require the disclosure of impeachment evidence, it did so because it is "particularly difficult to characterize impeachment information as *critical information of which the defendant must always be aware to pleading guilty*."[142] Thus, *Ruiz* indicates a "significant distinction between impeachment information and exculpatory evidence of actual innocence."[143]

These conclusions, however, are off base. Nothing in *Ruiz*

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express doubts that the Constitution requires prosecutors to share *Brady* material with the accused before the entry of a plea deal. *Id.* at 392. On the other hand, the Seventh, Tenth, and Ninth Circuits hold that the Constitution does require these types of disclosures. *Id.* at 393.

139. *See* McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003); United States v. Ohiri, 133 F. App'x 555, 559 (10th Cir. 2005); Smith v. Baldwin, 510 F.3d 1127 (9th Cir. 2007).

140. *McCann*, 337 F.3d at 788. McCann, who worked under a large-scale cocaine dealer, pled guilty after being pulled over with cocaine in his car. *Id* at 783. After serving his time, he learned through testimony in a different trial that a police officer working for his drug-dealing boss had planted the drugs on his car resulting in his arrest. *Id*. at 784. However, the Court decided against McCann because he could not prove that the arrest was false, or that the government withheld evidence that would exculpate him. *Id* at 788. Nothing in the record suggested that the officer expected McCann to be caught in anything other than his normal routine of delivering drugs. *Id*; *Ohiri*, 133 F. App'x at 559. Emmanuel Ohiri pled guilty after being named as a co-conspiracist in a hazardous waste violation. *Id*. at 556-57, 562. Only after he entered his plea deal did he learn that the only person accusing him of participating in the crime later made a statement he had no knowledge of the scheme. *Id* at 557-58. Ohiri claimed that the government's failure to disclose this was a *Brady* violation and he would have plead not guilty had he known of this statement. *Id* at 558-59. The court here agreed with Ohiri, *Id.*, however, his conviction was later upheld and affirmed. *United States v. Ohiri*, No. 03-172 MV/ACT, 2003 U.S. Dist. LEXIS 30867, at *19 (D.N.M. Feb. 14, 2006); *aff'd*, 287 F. App'x 32 (10th Cir. 2008).

141. *McCann*, 337 F.3d at 788; *Ohiri*, 133 F. App'x at 559.

142. *McCann*, 337 F.3d at 787 (quoting *Ruiz*, 536 U.S. at 630 (emphasis added)).

143. *Id*. at 788.

explicitly indicates that the Court would treat exculpatory evidence as any different than impeachment evidence.[144] Not only does this conclusion read into something that is not there, it ignores the holding of *Bagley* that indicates there is no difference between the two as it pertains to *Brady*.[145] If anything, the unanimity of *Ruiz* and the Court's subsequent rightward shift, suggest that the court would make the same ruling regarding exculpatory evidence during plea negotiations.[146] The only thing suggesting otherwise is the Court's silence on the issue, and subsequently not hearing cases that would resolve the issue.[147]

The Ninth Circuit also holds that *Brady* requires pre-plea disclosure of exculpatory evidence. In *Smith v. Baldwin*, the court held that the materiality of the withheld evidence 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."[148] This case, decided before *Ruiz*, essentially applies *Brady* to plea negotiations.[149] A plea is only invalidated by a lack of disclosure if that lack of disclosure affects the decision to go to trial.[150] This ruling, while not *exactly* in line with the idea that *Brady* is *just* a trial right, still attempts to fit as narrowly as possible within the idea that *Brady* is just a trial right while still requiring pre-plea disclosure. If the lack of disclosure affects the decision to go to trial, it is in fact affecting the defendant's right to *Brady* information because it inhibits their right to a fair trial.

The Sixth Circuit also decided this issue before *Ruiz*, in *Campbell v. Marshall*. There, it held that "the Supreme Court did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was followed

144. *Ruiz*, 536 U.S. at 625; Connick v. Thompson, 563 U.S. 51, 99 (2011) (characterizing *Bagley's* holding that there is no constitutional distinction between impeachment and exculpatory evidence as a "significant development" in the court's *Brady* jurisprudence).

145. *Bagley*, 473 U.S. at 676. ("This court has rejected any such distinction between impeachment evidence and exculpatory evidence.").

146. Nina Totenberg & Sarah McCammon, *Supreme Court Overturns Roe v. Wade, Ending Right to Abortion Upheld for Decades*, (June 24, 2022, 10:43 AM), www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn [perma.cc/6ZXN-HCKV].

147. *Baldwin*, 510 F.3d at 1127, *cert denied*, Smith v. Mills, 555 U.S. 830 (2008); *Ohiri*, 133 F. App'x 555, *cert denied*, 555 U.S. 1143 (2009); *Mathew*, 201 F.3d at 353, *cert denied*, 531 U.S. 830 (2000); *Conroy*, 567 F.3d at 176, *cert denied*, 559 U.S. 941 (2010); *Alvarez*, 904 F.3d at 393, *cert denied*, 139 S. Ct. 2690 (2019).

148. *Baldwin*, 510 F.3d at 1148 (quoting *Sanchez*, 50 F.3d at 1454).

149. *Baldwin*, 510 F.3d at 1148. The court here denied petitioner's request for habeas relief based off a *Brady* violation because the alleged evidence withheld was immaterial and inadmissible polygraph examination results and not because the petitioner waived their right to appeal by pleading guilty. *See Id.*

150. *Baldwin*, 510 F.3d at 1148.

by a plea which otherwise passes constitutional muster as knowing and intelligent."[151] The court held that the proper approach is to evaluate the validity of the plea under all attendant circumstances including "the assistance of counsel, a plea-taking procedure compliant with *Boykin*… and a factual basis for the plea."[152] While the court did not accept that *Brady* is strictly a trial right, it at least interpreted *Brady* as providing a right of the accused to obtain information material to their defense.[153] Additionally, the court analyzed both *Brady v. United States* and *Boykin* to determine whether the plea was entered voluntarily and knowingly.[154]

While these courts may have good intentions in treating *Brady* as a case about fairness instead of strictly a trial right, their conclusions of *Ruiz* ignored *Bagley*.[155] However, the next section will show that the courts that uphold *Brady* as strictly a trial right face constitutional dilemmas of their own.

C. More Limited Interpretations of Brady

Several circuits have a more limited interpretation of *Brady*, and generally do not require prosecutors to hand over exculpatory evidence prior to the entry of a guilty plea.[156] The First Circuit in

151. Campbell v. Marshall, 769 F.2d 314, 321 (6th Cir. 1985). In this case, petitioner Campbell plead guilty to a double murder. *Id.* at 316. Before pleading guilty, his counsel made a *Brady* request for any evidence material to guilt or punishment. *Id.* During the investigation, the police found a pistol on one of the victims but did not disclose this information to Campbell or his counsel. *Id.*

152. *Id.*

153. *Id.* at 324. The court reasoned that a plea decision is not made with any "perfect knowledge" of what the results will be at trial. *Id.* Additionally, the court noted that the state's conduct in suppressing information favorable to the petitioner would have violated the Fourteenth Amendment right to due process if it had been convicted after a trial without the benefit of that information. *Id.* at 315.

154. *Id.* at 317-319.

155. *Ruiz*, 536 U.S. at 625; *Bagley*, 473 U.S. at 676. ("This court has rejected any such distinction between impeachment evidence and exculpatory evidence.").

156. *See* United States v. Mathur, 624 F.3d 498 (2010). This case "involves a kaleidoscopic stream of misrepresentations and misappropriation" of millions of dollars in client funds. *Id.* at 500. The defendant here claimed that the government failed to disclose *Brady*-like evidence that was exculpatory in nature. *Id.* Specifically, the withheld evidence indicated one of the alleged victims was in on the scheme and helped cast blame on the defendant. *Id.* at 505; United States v. Moussaoui, 591 F.3d 263, 285 (2010). The defendant in this case plead guilty to a role he allegedly played in the attacks on 9/11 after repeated questions of his competency and multiple attempts to proceed *pro se*, as the court refused to appoint him Muslim counsel. *Id.* at 285. While the defendant requested exculpatory evidence, he was advised that it was not yet available due to its confidential nature. *Id* at 286. Defendant later claimed that he pled guilty because he did not think that he was capable of receiving a fair trial in the American system due to his religion and heritage. *Id.* Only afterwards did he gain this confidence. *Id*; Matthew v. Johnson, 201 F.3d 353,

United States v. Mathur, the Fourth Circuit in *United States v. Moussaoui*, and the Fifth Circuit in *Matthew v. Johnson* all conclude that *Brady* is strictly a trial right and that when defendants plead guilty, they waive the right to challenge their conviction.[157] These courts view the decision in *Ruiz* as an endorsement of the strict trial right theory, unlike the Seventh and Tenth Circuits.[158] While these circuits may be correct that the Court in *Brady* held the right was a "trial right," the Court has never explicitly held exculpatory evidence is not required at the plea deal stage.[159]

Additionally, the Second and Fifth Circuits found that *Ruiz* does not make a distinction between exculpatory and impeachment evidence, and it cannot be implied from the Supreme Court's discussion.[160] The *Alvarez*, court then concludes that because of *Bagley's* holding that there is no distinction between exculpatory and impeachment evidence, then *Ruiz*'s decision must mean that all of *Brady* does not apply to guilty pleas.[161] This is the logical conclusion to make under all of the Supreme Court's precedent on *Brady*.

The only other thing that could invalidate a guilty plea for violating due process is if the plea was not entered *knowingly* or *voluntarily*.[162] However, these circuits often gloss over these requirements,[163] or leave it out entirely.[164] For example, the First Circuit in *Mathur* holds that "*Brady* does not protect against the possible prejudice that may ensue from the loss of opportunity to plea bargain."[165] "When a defendant chooses to admit his guilt, *Brady* concerns subside."[166] This conclusion does not appear to account for guilty plea requirements and due process. These concerns cannot subside because the concerns can be a reason to invalidate a guilty pleaas not being made knowingly or voluntarily.

361-62 (5th Cir. 2000). Defendant was accused of raping his step-daughter. *Id.* at 356. He later learned of court documents where the victim said that the defendant had never actually touched her inappropriately. *Id.*

157. *See* cases cited *supra* note 156.

158. *Alvarez*, 904 F.3d at 393-94.

159. *Brady v. Maryland*, 373 U.S. at 88.

160. Friedman v. Rehal, 618 F.3d 142, 154 (2d Cir. 2010); *Conroy*, 567 F.3d at 179.

161. *Alvarez*, 904 F.3d at 393-94.

162. *Brady*, 397 U.S. at 748; *Boykin*, 395 U.S. at 244.

163. *Moussaoui*, 591 F.3d at 295.

164. *See Alvarez*, 904 F.3d 382. The court's majority opinion does not mention *Brady v. United States*, or *Boykin v. Alabama*. *Id. Conroy*, 567 F.3d. 174, does not refer to *Brady v. United States* or *Boykin*. Orman v. Cain, 228 F.3d 616, 621 (5th Cir. 2000) does not consider *Boykin* or *Brady v. United States*, but instead cites to North Carolina v. Alford, 400 U.S. 25, 38 (1970) (requiring that courts ensure a factual basis for the plea of guilty is accompanied by a claim of innocence); however, that is not the main issue in most of these cases. *Mathur*, 624 F.3d 498 (2010), fails to discuss *Brady v. United States*, *Boykin*, or *Alford*.

165. *Mathur*, 624 F.3d at 507.

166. *Id.*

While these circuits may have a stronger argument for how *Ruiz* would apply *Brady* rights to cases where the government withholds exculpatory evidence, the argument is derived from a case that ignored Supreme Court precedent on guilty pleas and put judicial fairness on the backburner.[167] Early Supreme Court cases held that "the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence."[168] Yet now, under *Ruiz*, prosecutors can systematically withhold exculpatory evidence from the accused to entice them into pleading guilty.[169] The trial penalty often induces defendants to enter into these agreements under *fear* that they will receive a stiffer sentence if they go to trial.[170] In George Alvarez's case, his guilty plea was entered due to his ignorance that the exculpatory evidence existed.[171] Yet, the Fifth Circuit found that he still entered into the agreement knowingly and voluntarily.[172]

These courts apply *Brady v. Maryland* which was decided at a time when the courts were applying the Bill of Rights to the states.[173] The Court was trying to expand these protections for individuals from the government.[174] Now, they are attempting to use that ruling to justify securing questionable convictions.[175] Additionally, these courts focus on the words "at trial" but ignore the "fairness" aspect, as well as future interpretations citing fairness.[176] *Brady* was about fairness in the criminal process in general.[177] It was decided right at the same time guilty pleas were coming into the limelight.[178] Its failure to explicitly say "fairness in the criminal process" was likely an oversight, not due to a lack of desire for procedural fairness.[179] The Court simply could not reasonably predict that guilty pleas would come to dominate criminal procedure.[180]

One of the dissents from *Alvarez* sums up how these circuits are misguided in their interpretation. Judge Costa argues that the common framing of the rights in *Brady* relates to "innocence or guilt," however the evidence withheld in *Brady* didn't actually affect

167. *Ruiz*, 536 U.S. at 629.
168. *Kercheval*, 274 U.S. at 223-24.
169. *Ruiz*, 536 U.S. at 625.
170. *The Trial Penalty*, *supra* note 21, at 7.
171. *Alvarez*, 904 F.3d at 388.
172. *Id.* at 392.
173. *Israel*, *supra* note 33, at 304; *Brady*, 397 U.S. at 755.
174. *Israel*, *supra* note 33, at 304.
175. *Ruiz*, 536 U.S. at 629.
176. *Bagley*, 473 U.S. at 675 ("The *Brady* rule is based on the requirement of due process. Its purpose is . . . to ensure that a miscarriage of justice does not occur.").
177. *Brady*, 373 U.S. at 87 ("Our system . . . of justice suffers when any accused is treated unfairly.").
178. Meyer, *supra* note 87; *Santobello*, 404 U.S. at 264.
179. *Alvarez*, 904 F.3d at 407 (Costa, J., dissenting).
180. *The Trial Penalty*, *supra* note 21, at 20.

innocence or guilt, just their sentence.[181] However, because a plea hearing is all about the defendant's guilt or innocence, it "more strongly implicates *Brady's* overriding concern with the justice of the finding of guilt.[182] He adds quoting *Bagley*, that the "*Brady* rule seeks 'to ensure that a miscarriage of justice does not occur',[183] a risk that we know exists not just for trial convictions but also guilty pleas."[184]

IV. PROPOSAL

A. The Supreme Court Will Not Expand Brady

Ruiz has left the circuits in a difficult position because it implies that *Brady* does not require pre-plea disclosure of exculpatory evidence.[185] This requires courts that think *Brady* should apply to plea deals to put their heads in the sand.[186] It conversely allowed the other circuits to ignore the Court's jurisprudence on guilty pleas.[187] The likely solution is to say that the Supreme Court should correct its error in *Ruiz* and properly apply *Brady* to plea deals. However, the Court is unlikely to do so.[188] *Ruiz* was decided only twenty years ago, and by a unanimous verdict.[189] The Supreme Court has declined several opportunities to hear a case to decide whether exculpatory evidence should be extended to guilty pleas.[190] If the Court had any desire to extend *Brady* to plea deals, it would have done so.

Furthermore, any decision that would extend *Brady* to plea negotiations for exculpatory evidence would have to contradict previous cases. *Bagley* suggests that impeachment and exculpatory evidence are treated as the same under *Brady*, but a ruling extending *Brady* for exculpatory evidence pre-plea deal would contradict this ruling.[191] Additionally, if the Court were to hold that prosecutors are not required to disclose exculpatory evidence, it would ignore the *Brady* v. *United States* line of cases and other

181. *Alvarez*, 904 F.3d at 407 (Costa, J., dissenting).

182. *Id.*

183. *Id.* (quoting *Agurs*, 427 U.S. at 112).

184. *Id.* (Costa, J., dissenting) (quoting *Brady v. United States*, 397 U.S. at 758). This opinion also points out that Fifth Circuit previously recognized that *Brady* extends to suppression motions, yet here they say it is strictly a trial right. *Alvarez*, 904 F.3d at 407 (Costa, J., dissenting); Smith v. Black, 904 F.2d 950, 965-66 (5th Cir. 1990) *vacated on other grounds*, 503 U.S. 930 (1992).

185. *Ruiz*, 536 U.S. at 631; *Bagley*, 473 U.S. at 667; *Connick*, 563 U.S. at 99.

186. *McCann*, 337 F.3d at 788; *Ohiri*, 133 F. App'x at 559.

187. *Bagley*, 473 U.S. at 675. ("*Brady* seeks to ensure that miscarriage of justice does not occur").

188. *See* cases cited *supra* note 144.

189. *Ruiz*, 536 U.S. at 622.

190. *See* cases cited *supra* note 144.

191. *Bagley*, 473 U.S. at 667.

Supreme Court cases concerning the fairness of plea deals.[192] Since *Ruiz* is itself so contradictory of other Supreme Court cases, any other ruling on this issue is also bound to be contradictory.

Another possible solution other than a Supreme Court ruling would be to amend Rules 11 and 16 of the Federal Rules of Criminal Procedure. Rule 11 governs plea deals in general and could be amended to invalidate any guilty plea induced by a lack of *Brady* disclosure as not being made knowingly.[193] Rule 16 governs discovery and could be amended to expand *Brady* to guilty pleas.[194] However, the process of amending these rules is long and cumbersome and ultimately requires the Supreme Court's approval, meaning this mechanism for change is probably less likely than a Supreme Court ruling.[195]

However, a Congressional bill is the most logical way to resolve the issue. In 2012, Congress considered adopting a bill entitled "Ensuring that Federal Prosecutors Meet Discovery Obligations" ("The Bill").[196] The Bill, proposed by Senator Lisa Murkowski, would have required prosecutors to disclose to the accused favorable information which they were aware of "without delay after arraignment and before the entry of any guilty plea" as well as favorable information they discover later "as soon as is reasonably practicable."[197] A judiciary committee hearing was held to consider the Bill, where competing interests in procedural fairness were weighed against public safety considerations.[198] Ultimately, the Bill stalled in the judiciary committee and never made it to the Senate floor for a vote.[199]

While it did not pass before, Congress should reconsider this issue and pass a bill that would require *Brady* disclosures to be

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192. *See generally Brady*, 397 U.S. at 743; *Boykin*, 395 U.S. at 244; *Kercheval*, 274 U.S. at 223-24; *Santobello*, 404 U.S. at 260 ("'[P]lea bargaining' . . . *[p]roperly administered* . . . is to be encouraged.") (emphasis added). Courts that find *Brady* disclosures are not required before plea deals do not consider this statement from *Santobello*. While guilty pleas do save time and resources, the value only exists if the defendant is *actually* the person that committed the crime.

193. FED. R. CRIM. P. 11.

194. FED. R. CRIM. P. 16.

195. *See* Scott Dodson, *The Making of Supreme Court Rules*, 90 GEO. WASH. L. REV. 866, 876 (2022) (citing *Rules & Policies: How the Rulemaking Process Works*, U.S. CTS., www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [perma.cc/KL39-HVLM] (last visited Feb. 25, 2022)).

196. Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639 (2013).

197. *Id*; Fairness in Disclosure of Evidence Act of 2012, S.2197, 112th Cong. § 2 (2d Sess. 2012).

198. Green, *supra* note 196 at 654.

199. Marc L. Greenwald & James Meehan, *Still in Its Infancy, the Due Process Protections Act Begins to Show Promise*, N.Y.L.J. (Feb. 2, 2021, 11:00 AM), www.law.com/newyorklawjournal/2021/02/02/still-in-its-infancy-the-due-process-protections-act-begins-to-show-promise/ [perma.cc/8PFK-3CGA].

made before the entry of a guilty plea. Additionally, the bill should add that a guilty plea cannot be made voluntarily and knowingly when induced by a non-disclosure of material evidence. If the prosecution withholds material evidence and the defendant pleads guilty, that decision is not based on all available knowledge and is not made knowingly. This would correct the *Ruiz* Court's error in not applying the Supreme Court's guilty plea case jurisprudence to *Brady*. It would also give people like George Alvarez a remedy by invalidating his guilty plea which previously precluded his § 1983 case. These changes would limit future prosecutorial misconduct and provide a remedy for those wrongly convicted by this type of disclosure.

B. Enforcing the Law is not Radical

The arguments against the Bill, conveyed by then-Deputy Attorney General James Cole, were that the current law was optimal and that *Brady* reflected "a careful reconciling" of competing interests.[200] The Bill, according to Cole, would "radically alter the balance between ensuring the protection of a defendant's constitutional rights and… safeguarding the important public interest in a criminal trial process that reaches timely and justly results, safeguarding victims and witnesses from retaliation or intimidation, protecting criminal investigations from undue interference, and recognizing critical national security interests."[201] Cole also added that the Department of Justice's internal policy already encouraged prosecutors to disclose more than was constitutionally required and that instances of federal misconduct were "infinitesimally small."[202]

However, prosecutorial misconduct is not "infinitesimally" small. A recent study by the National Registry of Exonerations found that prosecutors concealing exculpatory evidence were responsible for 44% of exonerations and for concealing evidence in 73% of exonerations.[203] The data shows that the Department of Justice's internal policy of disclosing more than is constitutionally required is ineffective, and they are actually disclosing less than what is constitutionally required. Additionally, if the Department's policy is supposedly to disclose more than is required, it should not be against a law that would require it to conform to its own policy.

While the public policy argument of protecting witnesses from

200. Green, *supra* note 196, at 655.

201. *Id.*

202. *Id.*

203. Samuel R. Gross et al. *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police, and Other Law Enforcement*, NATIONAL REGISTRY OF EXONERATIONS (Sept. 1, 2020) www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [perma.cc/3JZ3-LE5D].

intimidation seems strong, it is based on faulty premises. First, exposing impeachment evidence would not increase the risk to witnesses who are already known to the defense.[204] Second, the argument relies on the idea that if the defense does not get the information from the prosecution, they will not get it at all.[205] While the defense could find a witness from their own investigation, the prosecution knows that the defense often has less resources and is less likely to find witnesses.[206] Third, the department put forward no proof that broader pretrial discovery would lead to increased witness intimidation.[207] Finally. when the prosecution is worried about a witness's safety, it can apply for a protective order to delay turning over sensitive information.[208]

In *Ruiz*, the Court's main argument against expanding *Brady* to guilty pleas was it would slow the courts down with more appeals.[209] However, these concerns are unfounded because most guilty pleas are obtained willingly and knowingly.[210] This proposed change should only affect guilty pleas that are or are obtained by the prosecution withholding material evidence. If invalidating guilty pleas obtained through prosecutorial misconduct would grind the justice system to a halt, then maybe the Court should reconsider its position on guilty pleas entirely. The goal here is not to completely do away with plea bargaining, as its efficiency does have value. Instead, the goal is to prevent prosecutorial misconduct that leads to wrongful convictions. Increasing discovery obligations for prosecutors will only lead to more informed guilty pleas.

Additionally, many countries besides the United States employ similar "trial waiver" systems where a defendant gives up their right to a trial, however, the "trial penalty" appears to be unique to the United States.[211] Also, trial waiver systems have not dominated criminal procedure in other countries the same way as in the United States.[212] Most of the other countries that use trial waiver systems require pre-plea disclosures of exculpatory evidence very similar to the recommendations made earlier in this section.[213]

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204. Green, *supra* note 196, at 648.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Ruiz*, 536 U.S. at 632. The Court said that the Ninth Circuit's disclosure rule could lead to the government abandoning its heavy reliance on plea bargaining in a vast number. *Id.* They use this as a reason *against* the Ninth Circuit rule requiring disclosure and also say that the rule brings a comparatively small constitutional benefit. *Id.*

210. *The Trial Penalty*, *supra* note 21, at 21.

211. Rebecca Shaeffer, *The Trial Penalty: An International Perspective*, 31 FED. SENT. R. 321, 322 (April/June 2019). The Number of trial waiver systems has increased nearly 300 percent since 1990. *Id.*

212. *Id.*

213. *Id.* at 326. These countries include Australia, Austria, Belgium, Bulgaria, Canada, Chile, Croatia, England and Wales, Estonia, Finland,

While there is a natural efficiency cost to requiring these disclosures, these other examples show that change is possible.[214] Furthermore, loss of some efficiency should be welcomed in exchange for a fairer criminal justice system.

This proposed bill would resolve the circuit split stemming from *Ruiz*, and effectively overturn it by requiring all *Brady* evidence, including impeachment evidence, to be disclosed prior to the entry of a guilty plea. Critics of these changes might say that it would interfere with the system of plea deals, an issue brought up by the Supreme Court in *Ruiz*.[215] However, an individual's right to freedom should overwhelmingly outweigh the government's interest in maintaining an efficient plea deal system, especially when the system convicts those who are innocent. The justice system should work efficiency into justice, not work justice into efficiency.

V. CONCLUSION

The *Ruiz* case has put all the circuits in a tricky position in interpreting *Brady*. If a circuit follows the *Ruiz* and *Bagley* logic, then entering a guilty plea prevents defendants from questioning their conviction even when the state withheld evidence that would have exculpated them. However, the circuits that do this often leave out general guilty plea requirements established by the Supreme Court. On the other hand, circuits that find a *Brady* violation when prosecutors fail to make pre-plea disclosures are also ignoring Supreme Court precedent that establishes virtually no difference between exculpatory and impeachment evidence with regards to plea deals. No matter what courts do, it seems they will be breaking precedent. This confusion should not persist. Since the Supreme Court is unlikely to expand *Brady* to plea deals, Congress should pass a law that would extend all *Brady* rights to guilty pleas and invalidate guilty pleas obtained by *Brady* violations.

France, Germany, Italy, Lithuania, Luxembourg, the Netherlands, New Zealand, Russia, Spain, and Switzerland. *Id.*

214. *Id.*

215. *Ruiz*, 536 U.S. at 632.