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# NOTES

## Applying *United States v. Stein* to New York's Indigent Defense Crisis

### SHOW THE POOR SOME LOVE TOO

#### I. INTRODUCTION

Visualize for a moment that you are a criminal defense attorney at the Legal Aid Society and represent indigent defendants in Queens, New York.<sup>1</sup> Despite the fact that you currently are more than busy working sixty to seventy hours per week<sup>2</sup> to manage your open caseload representing 100 defendants, forty-five of whom have been indicted for felonies,<sup>3</sup> your supervisor hands you a file to represent yet another client. Your new client, Francisco Rodriguez, has been accused of robbing an elderly lady in a busy part of town. Unfortunately, because of your overwhelmingly demanding schedule, you are unable to approach Francisco until the day of his first court

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<sup>1</sup> "Each year, the [Criminal Practice of the Legal Aid Society of New York] represents clients in approximately 220,000 indigent criminal cases in trial, appellate and parole revocation proceedings and serves as the primary public defender in New York City. The Criminal Practice handles criminal cases at the trial level, ranging in seriousness from disorderly conduct to non-capital first degree murder." The Legal Aid Society Criminal Practice, <http://www.legal-aid.org/en/whatwedo/criminalpractice.aspx> (last visited Nov. 7, 2007).

<sup>2</sup> Public defenders in Monroe County, New York, report that on average they work sixty to seventy hours per week, including nights and weekends. THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION 46 (June 16, 2006), available at <http://www.courts.state.ny.us/ip/indigentdefensecommission/SpangenbergGroupReport.pdf> [hereinafter SPANGENBERG REPORT].

<sup>3</sup> In Queens, attorneys at the Legal Aid Criminal Defense Division have on average an open caseload of 90-100 cases. This is in line with the average caseloads of attorneys with other Divisions in New York City, such as Brooklyn and the Bronx. SPANGENBERG REPORT, *supra* note 2, at 131.

appearance.<sup>4</sup> At this meeting, Francisco adamantly denies any wrongdoing, but the fact that he recently emigrated from Mexico and has poor English-speaking ability renders it nearly impossible to effectively communicate and sufficiently understand his side of the story.<sup>5</sup>

As the right to discovery in New York for a criminal proceeding between an arrest and the filing of an indictment is severely limited,<sup>6</sup> the prosecution has denied you significant information concerning the alleged crime. This means being left unaware of the identity of the witnesses who were present at the scene of the incident as well as being denied the opportunity to read the police report. Unfortunately, the lack of such important information prevents you from gaining sufficient knowledge to determine the strength of the prosecution's case.

As much as you want to conduct an independent investigation concerning the facts surrounding this case, you know that with your current overwhelming caseload and your Division's lack of resources to hire private investigators, your access to information concerning this case is at the mercy of the prosecution. In fact, the prosecution has informed you that much of the relevant information necessary to assess your case will not be supplied to you until jury selection of the trial has been completed.<sup>7</sup> You would like to file a motion or ask the court for a pre-trial hearing, but the prosecution has warned you that unless your client agrees to waive this right, the prosecutor's office will refuse to negotiate a plea arrangement with you.<sup>8</sup>

Feeling ill-equipped to eventually go to trial knowing that you will not receive any information concerning the witnesses and other material evidence until after the trial has commenced,<sup>9</sup> you reluctantly counsel your client to agree to a plea in return for a confession of guilt. Later, you learn that it

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<sup>4</sup> "During our site visits, we learned that it is not uncommon for indigent defense attorneys across New York State to meet a client for the first time on the day of court." SPANGENBERG REPORT, *supra* note 2, at 67.

<sup>5</sup> For a discussion of the dearth of available translator options in New York to aid public defenders in communicating with foreign-speaking, indigent defendants, see *infra*, note 36.

<sup>6</sup> See *infra* notes 50-51.

<sup>7</sup> See *infra* notes 44-46 and accompanying text.

<sup>8</sup> See *infra* notes 58-59 and accompanying text.

<sup>9</sup> For a discussion of the statutory requirements concerning mandatory prosecutorial disclosure of relevant information, see *infra* notes 44-47 and accompanying text.

was extremely dark at the time of the crime and that the victim of the robbery now admits that she had been inebriated and had not been wearing her prescription glasses. Moreover, due to her advanced age, she has been suffering from recent bouts of memory loss. The victim is now unsure whether her identification of your client was in fact correct. The prosecution was aware of this, but felt that they did not need to disclose this information until the start of the trial.<sup>10</sup> Unfortunately, as you are aware, your client has no legal recourse. Francisco must abide by the procedure in New York City that as a condition of accepting a guilty plea, one must waive his or her otherwise constitutionally protected absolute right to an appeal.<sup>11</sup>

To an outside observer naive to the criminal justice system, the above facts seemingly could only occur in a work of fiction. In actuality, however, this scenario is very plausible and could occur on any given day. Over the years, a handful of articles have been written and studies commissioned to evaluate the status of indigent criminal defense services in the state of New York.<sup>12</sup> These studies include the report of the *Commission on the Future of Indigent Services*, formed in part to “examine the effectiveness of indigent criminal defense services across the State.”<sup>13</sup> At the conclusion of that study, which was aided in its investigations by criminal defense consulting firm the Spangenberg Group,<sup>14</sup> the Commission

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<sup>10</sup> For the New York statutory law that governs the information prosecutors must disclose, see *supra* note 9. For a discussion of the requirements of such mandatory disclosure under the Constitution, see *infra* Part III.B.

<sup>11</sup> See SPANGENBERG REPORT, *supra* note 2, at 148 (“[I]f a defendant in New York City entered a guilty plea prior to trial, he or she must waive the right to an appeal following the guilty plea, rather than have an absolute right to an appeal. . . . [T]his procedure was developed by the District Attorney’s Office as a condition of accepting a guilty plea and a sentence that was mutually agreed to by the defendant and prosecutor.”).

<sup>12</sup> *E.g.*, Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986-1987); Chester L. Mirsky, *The Political Economy and Indigent Defense: New York City, 1917-1998*, 1997 ANN. SURV. AM. L. 891 (1997); Jane Fritsch & David Rohde, *Two-Tier Justice: Lawyers Often Fail New York’s Poor*, N.Y. TIMES, Apr. 8, 2001, at A1; David Rohde, *Decline Is Seen in Legal Help For City’s Poor*, N.Y. TIMES, Aug. 26, 1998, at B1.

<sup>13</sup> COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2006), available at <http://www.courts.state.ny.us/ip/indigentdefense-commission/index.shtml> [hereinafter REPORT TO CHIEF JUDGE]. The other charge of the Commission was to “consider alternative models of assigning, supervising and financing assigned counsel compatible with New York’s constitutional and fiscal realities.” *Id.*

<sup>14</sup> The Commission retained the Spangenberg Group, which is a “criminal justice research and consulting firm that specializes in research concerning indigent

came to the same conclusion as numerous previous studies: the current indigent defense system in New York is in a state of "crisis."<sup>15</sup>

Given this grim finding, district attorneys' offices throughout the state should bear the responsibility of abiding by their ethical obligations and aid public defenders in order to ensure the most equitable results.<sup>16</sup> Instead, district attorneys' offices often exacerbate the problem by using New York's restrictive discovery procedures to their advantage. Examples of such practices include the refusal to divulge significant discovery information until immediately prior to a hearing or trial<sup>17</sup> and the coercion of "the defense into not filing motions and waiving preliminary hearings by refusing to offer pleas if the defense chooses to litigate."<sup>18</sup> Such actions hinder public defenders in their constitutionally mandated pursuit to provide an adequate defense.

This Note argues that by withholding access to evidence as a concerted strategy to pressure indigent defendants to negotiate unfavorable plea deals and waive rights that are legally available to them, New York state prosecutors violate indigents' constitutional rights to due process and effective counsel. Part II describes the lack of funding that the New York government provides to state public defenders of indigents and how prosecutors commonly and unethically take advantage of this situation by impermissibly violating indigents' constitutionally protected rights. Part III describes how the evolution of recent constitutional litigation concerning indigents' rights gives courts a ripe opportunity to rule that such prosecutorial acts are unconstitutional. Part IV discusses a recent federal court decision from the Southern District of New York, *United States v. Stein*, where Judge Kaplan expanded Fifth and Sixth Amendment rights to rule that federal prosecutors' overzealous conduct towards corporate employee defendants was unconstitutional. Finally, Part V of this Note argues that using the reasoning in *Stein*, as well as other related cases, state courts should rule that state

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defense services," and has been under contract with the American Bar Association for more than 15 years. *Id.* at 2. It is the most exhaustive study of indigent defense representation ever endeavored in the state of New York. *Id.*

<sup>15</sup> JUDITH S. KAYE, THE STATE OF THE JUDICIARY 10 (2006), available at <http://nycourts.gov/admin/stateofjudiciary/soj2006.pdf>.

<sup>16</sup> See ethics discussion *infra* note 39.

<sup>17</sup> See SPANGENBERG REPORT, *supra* note 2, at 77.

<sup>18</sup> *Id.*

prosecutors violate the Constitution by using their advantages in resources to pressure defendants.

## II. QUESTIONABLE PROSECUTORIAL CONDUCT

### A. *The Crisis of the Indigent Defense System*

To fully understand how New York state prosecutors are in a position to take advantage of their overwhelmed indigent defender adversaries by employing tactics of pressure and coercion, one must understand the dire situation in which public defenders find themselves. In June of 2006, at the request of the Chief Judge of the State of New York, Judith S. Kaye, more than twenty legal scholars from varying legal backgrounds<sup>19</sup> released a report on the condition of indigent defense services in the state of New York.<sup>20</sup> The Commission's results, which reiterated the findings of various other studies released over the preceding few years, stated that the current indigent defense system in New York is in a state of "crisis."<sup>21</sup> Among the major causes of the crisis are lack of resources, inadequate funding, ever-increasing caseloads,<sup>22</sup> and, importantly, the fact that many prosecutors manipulate this situation to take advantage of public defenders for their own benefit.<sup>23</sup> The recommendation that followed was blunt and direct: "[T]he existing system needs overhaul."<sup>24</sup>

First, public defenders throughout New York State are "burdened with heavy caseloads."<sup>25</sup> In Monroe County, for example, even the least experienced attorneys must handle 1000 cases in a given year.<sup>26</sup> As one can imagine, and as scholarly articles have confirmed, simultaneously working on so many different cases severely impairs the amount of time one can devote to each defendant, and in turn results in

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<sup>19</sup> Presumably to avoid accusations of self-interest, the vast majority of the members of the Commission were not current public defenders. Many were professors, judges, and partners at large New York law firms. See REPORT TO CHIEF JUDGE, *supra* note 13 (see list of commissioners).

<sup>20</sup> See REPORT TO CHIEF JUDGE, *supra* note 13.

<sup>21</sup> See *supra* notes 12-15 and accompanying text.

<sup>22</sup> For a discussion of the aforementioned problems, see *infra* notes 25-38 and accompanying text.

<sup>23</sup> For a discussion of this problem, see *infra* Part II.B.

<sup>24</sup> See REPORT TO CHIEF JUDGE, *supra* note 13, at 4.

<sup>25</sup> SPANGENBERG REPORT, *supra* note 2, at 43.

<sup>26</sup> *Id.* at 45.

inadequate representation despite the best ambitions of the attorney.<sup>27</sup>

Often, such large caseloads do not enable Legal Aid Society attorneys to have any substantial client contact.<sup>28</sup> In fact, commonly, indigent defense attorneys across New York do not have the time to meet with a client until that client's initial court appearance,<sup>29</sup> and often, those conversations take place in the presence of other inmates or guards.<sup>30</sup> Besides violating the American Bar Association ("ABA") ethical standards for attorney-client privacy, which require facilities adequate for private conversations,<sup>31</sup> such communications do not allow for the level of privacy requisite to establish the attorney-client privilege.<sup>32</sup> As a consequence, indigent defendants are often not in a position where they can comfortably communicate with

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<sup>27</sup> Various studies over the past decade have reported that such excessive caseloads—which occur in public defenders' offices throughout the nation—have such an extremely detrimental impact on the quality of assistance of counsel that it results in questionably unconstitutional representation even without the examination of prosecutorial conduct. *See, e.g.*, Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 656-62 (1986) (section devoted to the "Underfunding of Defender Offices and the Resulting Inadequate Representation by Counsel"); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 397-410 (1995) (discussing how excessive caseloads results in a "lack of meaningful assistance of counsel in capital litigation"); Rebecca Marcus, Note, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 219-67 (1994) (discussing how "[y]ears of consistently severe underfunding, increased caseloads and inadequate resources have created a serious crisis in this nation's public defender system").

<sup>28</sup> *See, e.g.*, The New York State Commission on The Future of Indigent Defense Services Regarding New York's Criminal Defense System (Feb. 11 2005) (testimony of Donna Lieberman, Executive Director of the New York Civil Liberties Union), available at [www.nyclu.org/node/718](http://www.nyclu.org/node/718) [hereinafter Lieberman Testimony] (claiming that "public defense attorneys fail to visit [their indigent clients] in jail for weeks or even months at a time, fail to accept or return their phone calls, fail to meet with them prior to court appearances . . . and fail to otherwise engage in meaningful communication with them about their case prior to critical stages of criminal proceedings").

<sup>29</sup> *See* SPANGENBERG REPORT, *supra* note 2, at 67.

<sup>30</sup> *Id.* "[W]e observed communications between attorneys and inmates taking place in front of other inmates as well as sheriffs or court guards." *Id.*

<sup>31</sup> *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, standard 4-3.1(b) (3d ed. 1992).

<sup>32</sup> To meet the elements necessary to qualify for attorney-client privilege, a client does not require absolute privacy, but indeed does require a reasonable expectation of privacy. Lisa G. Lerman & Philip G. Schrag, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 170 n.16 (2005) (citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 71, cmt. c, illus. 1 (2000)). When disclosures to one's lawyer are made in the presence of others, the speaker is in effect waiving his or her privilege to confidentiality, and their lawyer thus can be compelled to testify about the specifics of the conversation. *Id.*

their lawyer concerning the details of their alleged crime. This leaves their lawyers uninformed concerning possible defenses and without adequate knowledge to properly assess whether they should advise their client to accept a plea or go to trial.<sup>33</sup>

Another source of consternation for the attorneys of indigent defendants is the disparity of resources available to them as compared to their adversaries, the state prosecutors. Not only do prosecutors receive substantially higher compensation than public defenders,<sup>34</sup> but they also have greater access to resources, such as crime labs, translators, training budgets, FBI personnel, and expert witnesses.<sup>35</sup> Furthermore, in many documented instances, foreign-language interpreters are not available to public defenders, thus making effective attorney-client communication impossible.<sup>36</sup> This prohibits counsel from making adequate decisions about whether the best strategy is to recommend pleading guilty for a lesser sentence or proceeding to trial. Finally, state prosecutors receive a disproportionate number of state and federal grants as compared to state public defenders,<sup>37</sup> which once again results in state prosecutors receiving a substantial advantage.<sup>38</sup>

### B. *Many Prosecutors Manipulate this Situation*

Both the ABA Disciplinary Rules and New York rules of professional conduct state that the role of the prosecutor is not

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<sup>33</sup> SPANGENBERG REPORT, *supra* note 2, at 67.

<sup>34</sup> *Id.* at 83-85.

<sup>35</sup> *See, e.g.*, William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 292-93 [hereinafter Brennan 1963] (discussing the superior resources of district attorneys' offices, which, among other things, have "[l]aboratories, skilled investigators, [and] experts in all areas"); Klein, *supra* note 27, at 656-57 ("Relatively few indigent defendants have the benefit of investigation and other expert assistance in their defense. Their advocates are overburdened, undertrained, and underpaid.") (citation omitted).

<sup>36</sup> *See, e.g.*, Lieberman Testimony, *supra* note 28 (claiming that attorneys for indigent defendants "fail to adequately communicate with [said defendants] if they are limited English speakers"); Lawrence K. Marks & Ronald P. Younkins, *Court Interpreting in New York: A Plan of Action*, at 24 (April 2006), available at [http://www.actnyc.org/pdf/court\\_inter.pdf](http://www.actnyc.org/pdf/court_inter.pdf). ("Justice Courts have no interpreters of their own, no guidelines for interpreter credentials, no training systems, and no coordination to harmonize their independent administration of this important area.")

<sup>37</sup> *See* REPORT TO CHIEF JUDGE, *supra* note 13, at 23.

<sup>38</sup> Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 229 (1964) (discussing the "abundant resources for investigation available to the prosecution").

to convict at all costs, but rather to seek fairness.<sup>39</sup> Therefore, as a result of the severe lack of time and resources available for the public defenders in New York to conduct proper investigations,<sup>40</sup> it is of the utmost importance that prosecutors are cooperative in the disclosure of discovery information that state public defenders regrettably do not have the opportunity to obtain. Unfortunately, the opposite often occurs. Many prosecutors' offices conceal non-exculpatory evidence until as late as possible in the judicial process, employing this lack of open disclosure as a coercive tactic.<sup>41</sup>

The investigators of The Spangenberg Report discovered to their dismay that "many prosecutors across the state routinely fail to disclose important discovery material until hours or minutes before a contested hearing or trial, severely hampering the ability of defenders to prepare an adequate defense."<sup>42</sup> New York State's relatively restrictive discovery statutes,<sup>43</sup> commonly referred to as the *Rosario* rule,<sup>44</sup> permit the prosecution to delay giving out any information concerning witnesses who will testify—which is often the critical issue in a criminal case—until after jury selection at a trial,<sup>45</sup> and until after direct examination in a pre-trial hearing.<sup>46</sup> Moreover, statements of a witness who will not be called to the stand

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<sup>39</sup> See ABA STANDARDS FOR PROSECUTION AND DEFENSE FUNCTION: PROSECUTION FUNCTION, Standard 3-1.2(c) (3d ed. 1992) ("The duty of the prosecutor is to seek justice, not merely to convict."); see also MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.").

<sup>40</sup> See discussion *supra* Part II.A.

<sup>41</sup> See discussion *infra* notes 42-66 and accompanying text.

<sup>42</sup> See SPANGENBERG REPORT, *supra* note 2, at 77.

<sup>43</sup> For a comparison of how New York's discovery statutes are particularly restrictive with respect to other states, the state of Florida allows defense attorneys access to the names of all people known by the government to have relevant information to the offense charged, FLA. R. CRIM. PROC. 3.220(b)(1)(A) (LexisNexis 2007), and New Jersey's discovery procedures allow pre-indictment mandatory discovery in the event of a pre-indictment plea offer, N.J. Ct. R. 3:13-3(a) (2003). The ABA's recommended standards call for a much greater level of open discovery. ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY, Standard 11-1.1 (1995) [hereinafter ABA STANDARDS].

<sup>44</sup> Shortly after the court in *People v. Rosario*, 9 N.Y.2d 286 (1961), laid out these discovery rules via common law, the New York State Legislature codified them in New York Criminal Procedure Law. See N.Y. CRIM. PROC. LAW §§ 240.44, 240.45 (McKinney 2004).

<sup>45</sup> In New York, a prosecutor is not obligated to turn over the names, statements, prior or pending criminal records of witnesses the prosecution intends to call until "after the jury has been sworn." N.Y. CRIM. PROC. LAW § 240.45 (McKinney 2004).

<sup>46</sup> See N.Y. CRIM. PROC. LAW § 240.44 (McKinney 2004).

during a criminal proceeding are often never disclosed.<sup>47</sup> Such tactics, although allowed by statute, are in stark contrast to the ABA criminal justice and New York State ethics standards, which advise fair and early disclosure.<sup>48</sup> A large number of legal scholars have furthermore condemned this conduct.<sup>49</sup>

Another aspect of the law that prosecutors unethically use to their advantage is the limited right to pre-indictment discovery under either the Federal Constitution<sup>50</sup> or New York State law.<sup>51</sup> In the substantial time period between an arrest and the suspect being officially charged,<sup>52</sup> the amount of information prosecutors in New York must disclose is quite restricted.<sup>53</sup> What makes this particularly troubling is that, in

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<sup>47</sup> The New York criminal procedure laws codified pursuant to *Rosario* do not require the prosecution to disclose at any point during a criminal proceeding the statements of a witness who will not be called to testify. See N.Y. CRIM. PROC. LAW §§ 240.44, 240.45 (McKinney 2004); see also, e.g., *People v. Perez*, 788 N.Y.S.2d 428 (App. Div. 2005); *People v. Slade*, 724 N.Y.S.2d 588, 588 (App. Div. 2001); *People v. Marsh*, 669 N.Y.S.2d 707, 707 (App. Div. 1998).

<sup>48</sup> See, e.g., ABA STANDARDS, *supra* note 43, Standard 11-4.1(a) (“The time limits should be such that discovery is initiated as early as practicable in the process. The time limit for completion of discovery should be sufficiently early in the process that each party has sufficient time to use the disclosed information adequately to prepare for trial.”); *Id.* Standard 11-1.1(a)(v) (compelling a prosecutor to “minimize the procedural and substantive inequities among similarly situated defendants”); see also MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1980) (“[T]he prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.”).

<sup>49</sup> See, e.g., William J. Brennan, Jr., *Criminal Prosecution: Sporting Event or Quest For Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 3 (1990) (stating “as a general proposition that the truth-finding function of criminal trial is enhanced when the prosecution is not allowed to surprise the defendant with its evidence . . . but is required to disclose its case in advance of trial so that defense counsel may carefully consider and investigate the evidence and prepare her trial tactics and questions”); Brennan 1963, *supra* note 35, at 282; Traynor, *supra* note 38, at 249 (“The truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise.”).

<sup>50</sup> See, e.g., *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (stating that “[t]here is no general constitutional right to discovery in a criminal case”); *Cicenia v. Le Gay*, 357 U.S. 504, 511 (1958) (describing that refusing to supply pre-trial discovery does not violate due process); *Leland v. Oregon*, 343 U.S. 790, 801-02 (1952). Some federal courts, however, have ruled that the right to pre-trial discovery does exist in certain limited situations. See *infra* notes 109-122.

<sup>51</sup> See, e.g., *Brown v. Appelman*, 672 N.Y.S.2d 373, 375 (App. Div. 1998) (upholding the refusal of a defendant’s request of pre-indictment discovery).

<sup>52</sup> For misdemeanors, prosecutors can withhold discovery information up to ninety days after the defendant initially appears in court, and for felonies, this period of time can last for up to six months. N.Y. CRIM. PROC. LAW § 30.30(1)(a)(b) (McKinney 2004).

<sup>53</sup> See N.Y. CRIM. PROC. LAW § 240.20 (McKinney 2004). When an indictment or information is pending, the prosecution is required to disclose only recorded

light of the fact that an extraordinarily high percentage of criminal cases are settled pursuant to plea deals before reaching court,<sup>54</sup> one would logically assume that this is the period where transparent discovery would be of the utmost importance.

For example, for a defense attorney to make an informed recommendation to his client on whether to attempt to plea or go to trial, that attorney must have adequate information to ascertain the strength of the prosecution's case.<sup>55</sup> The ABA Disciplinary Rules reiterate the importance of sufficient prosecutorial disclosure during the plea bargaining stage by stating that a prosecutor has a duty to "provide the defendant with sufficient information to make an informed plea."<sup>56</sup> While one may argue that this delayed discovery strategy is merely an example of a prosecutor admirably performing his duties in a zealous manner, the ABA Disciplinary Rules and New York State Bar Association's Lawyer's Code of Professional Responsibility suggest otherwise.<sup>57</sup>

Through this lack of disclosure, prosecutors know that public defenders are often kept in the dark concerning critical portions of their indigent defendant's case. Unfortunately, many state prosecutors use this knowledge to their benefit. Defenders of indigents are at an extreme disadvantage when they commit to litigating in court without important information, such as police reports and witness statements.<sup>58</sup> As a result, it is common for prosecutors to pressure defendants by threatening to refuse to offer any pleas if the defense takes

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statements of the defendant, photographs, the property of the defendant, and scientific tests of evidence. *Id.*

<sup>54</sup> Of the 103,919 felony convictions in New York State in 2005, only 1,861 reportedly came as a result of a court verdict, while 101,552 came as a result of a plea and the judicial reason for 506 is unknown. New York State Div. of Criminal Justice Services, *Disposition of Felony Arrests: New York State (2006)*, available at <http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nys.htm>.

<sup>55</sup> See *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) ("The government's obligation to make [discovery] disclosures is pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty.").

<sup>56</sup> ABA STANDARDS, *supra* note 43, Standard 11-1.1(a)(ii).

<sup>57</sup> See *supra* note 48 and accompanying text.

<sup>58</sup> See David C. Anderson, U.S. Dep't of Justice, *Public Defenders in the Neighborhood: A Harlem Law Office Stresses Teamwork, Early Investigation*, NAT'L INST. JUST. PROGRAM FOCUS 2, 8 (March 1997) (discussing how prosecutors have the option to give attorneys who represent indigents a great deal of discovery information, but choose not to, which causes public defenders to often argue ineffectively in front of a judge, without adequate information on the case at hand).

advantage of its right to file motions or initiate pre-trial hearing.<sup>59</sup>

Other prosecutors presumably know that with the constant pressure to improve judicial economy by limiting the number of in-court proceedings,<sup>60</sup> such threats to refuse plea offers will ring hollow. Often, these prosecutors instead attempt to coerce a defendant into waiving his or her right to a pre-trial hearing by threatening to make a defendant's access to earlier discovery contingent on such a waiver.<sup>61</sup> Because of the importance of pre-trial motions in the course of many criminal cases, such a concession could be potentially fatal to the defendant's opportunity for a fair trial.<sup>62</sup>

The Spangenberg Report learned of additional methods that district attorneys' offices employ to coerce defendants to waive other rights as well. One such example is pressuring a defendant to waive his or her right to a grand jury.<sup>63</sup> The consequence for a defendant refusing to waive this right is that the defendant will otherwise be charged with the most serious crime permissible.<sup>64</sup> If the indigent defendant chooses to accept such a coerced waiver, however, the defendant must wait in police custody while his or her attorney either works out a plea agreement or decides to litigate without the benefit of knowing all of the critical information pertaining to the case. Also, in New York, defendants have the right to appeal their conviction, even if that conviction resulted from a guilty plea.<sup>65</sup> Some district attorneys' offices, however, have a procedure whereby

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<sup>59</sup> See SPANGENBERG REPORT, *supra* note 2, at 77.

<sup>60</sup> Bruce A. Green, *Criminal Neglect: Indigent Defense From a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1193 (2003) (stating that prosecutors often face pressure themselves to enter plea agreements to conserve time and resources).

<sup>61</sup> See SPANGENBERG REPORT, *supra* note 2, at 147.

<sup>62</sup> See, e.g., Herman J. F. Hoying, *To File or Not to File: The Practical and Ethical Implications of Motion Practice on Sentence Negotiations in Capital Cases*, 15 CAP. DEF. J. 49, 52-53 (2002) ("An essential part of an attorney's representation of a criminal defendant is the filing of pretrial motions for such purposes as obtaining discovery, obtaining more specific information on the charges, challenging the sufficiency of the indictment and challenging the state's evidence."); Steve Schulhofer, *Effective Assistance On The Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 146 (1986) (discussing how pre-trial hearings aid criminal defense attorneys by providing insight into the prosecution's case and by narrowing the focus of further investigation).

<sup>63</sup> See SPANGENBERG REPORT, *supra* note 2, at 147.

<sup>64</sup> *Id.*

<sup>65</sup> See N.Y. CRIM. PROC. LAW § 450.10 (McKinney 1996).

prosecutors will only offer plea deals if the defendant agrees to waive this right to an appeal.<sup>66</sup>

Thus, instead of mitigating the detrimental effects of the under-funded state public defender system, many state prosecutors in New York ignore their ethical obligations. Sadly, these prosecutors do practically all that they can within the bounds of the law to make the situation as inequitable as possible. In light of these circumstances, many New York state prosecutors may be in danger of violating indigent defendants' protected rights under the United States Constitution.

### III. RIGHT TO ADEQUATE REPRESENTATION AND RIGHT TO DISCOVERY

Through the Sixth Amendment, the Framers ensured that every citizen of the United States of America had the right to "the Assistance of Counsel for his defence."<sup>67</sup> Similarly, under the Fourteenth Amendment, each citizen in the United States has been given the constitutionally protected right to due process under the law.<sup>68</sup> Since the adoption of these Amendments, courts have often struggled to determine how these two clauses should be interpreted and applied.<sup>69</sup>

Over the past fifty years of constitutional jurisprudence, however, courts have increasingly become more liberal in their interpretations of these two clauses to protect the rights of defendants to a fair trial, particularly those defendants who

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<sup>66</sup> See SPANGENBERG REPORT, *supra* note 2, at 147-48. The power of state prosecutors to negotiate such plea arrangements is not absolute, however, as some issues are unwaivable, such as the right to a speedy trial, *Barker v. Wingo*, 407 U.S. 514, 519 (1972), competency to stand trial, *Godinez v. Moran*, 509 U.S. 389, 396 (1993), and whether the plea agreement was unconscionable because it was not voluntarily entered into, *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

<sup>67</sup> U.S. CONST. amend. VI. This right also is supplied to all citizens of New York under the New York Constitution. N.Y. CONST. art. I, § 6.

<sup>68</sup> U.S. CONST. amend XIV, § 1. The Due Process Clause of the Fourteenth Amendment has been used by the Supreme Court to apply nearly all of the Bill of Rights to the states, including the right to assistance of counsel. 16A AM. JUR. 2D *Constitutional Law* § 405 (2007).

<sup>69</sup> See, e.g., Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 26 (2005) (discussing "evolving Sixth Amendment jurisprudence"); Douglas L. Colbert, *Connecting Theory and Reality: Teaching Gideon and Indigent Defendants' Non-Right to Counsel at Bail*, 4 OHIO ST. J. CRIM. L. 167, 180 (2006) (discussing the Fifth Amendment's "evolving balance between individual rights and law enforcement interests"); See generally Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV 923 (2006).

cannot afford counsel.<sup>70</sup> Federal courts throughout the country, at every level, have shown the courage to utilize their constitutionally mandated power to act as a check on excessive government power, especially in criminal cases. In light of this commendable trend, the inappropriate attempts by New York's state prosecutors to limit the likelihood of a fair criminal proceeding<sup>71</sup> are desirable candidates for courts to prohibit next. To fully understand why the time is ripe for judicial intervention, it is instructive to look back at some of the cases over the past fifty years addressing the constitutionally protected right to adequate representation as well as the increasingly liberally constructed right to discovery in a criminal proceeding.

#### A. *The Right to Adequate Representation*

In 1932, the Supreme Court ruled that indigent defendants in state courts have a due process right to counsel, as applied to the states through the Fourteenth Amendment.<sup>72</sup> Over thirty years later, in the seminal case, *Gideon v. Wainwright*, this right to counsel was finally applied to state courts as an independent Sixth Amendment right as well.<sup>73</sup> While *Gideon* clearly established the right to counsel only when a suspect is indicted for a felony,<sup>74</sup> the Court has subsequently continued to extend this right to apply to nearly every type of offense or violation that could potentially lead to jail time, so long as the defendant has been formally charged during a judicial proceeding.<sup>75</sup>

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<sup>70</sup> See discussion *infra* Part III.A. and Part III.B.

<sup>71</sup> See discussion *supra* Part II.B.

<sup>72</sup> *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

<sup>73</sup> *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). The Court ruled that like the Fifth Amendment's Due Process Clause, the Sixth Amendment also attaches to the states through the Fourteenth Amendment. *Id.* This ruling occurred twenty-three years after the Sixth Amendment right to counsel was first established in federal court in *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). The Court has also ruled that this right attaches at the time when judicial proceedings have been initiated against the defendant, "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

<sup>74</sup> *Gideon*, 372 U.S. at 343-45.

<sup>75</sup> For a few classes of offenses that the courts have extended this right to counsel under the Sixth Amendment, see, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (the right to an attorney for an offense that could result in *any* type of incarceration, including a misdemeanor); *In re Gault*, 387 U.S. 1, 41 (1967) (the right to an attorney in juvenile court); *Douglas v. California*, 372 U.S. 353, 355, 357-58 (1963) (the right of criminal defendants to an attorney on the first appeal).

The Supreme Court has decided two different types of cases where a defendant is exposed to ineffectiveness of counsel under the Sixth Amendment. One set of cases focuses on the ineptness of the attorney.<sup>76</sup> In the other set of cases, the focus is on the unfairness of the system as a whole.<sup>77</sup>

*McMann v. Richardson*,<sup>78</sup> decided in 1970, was arguably the first case in which the Supreme Court held that the incompetence of a defense attorney was a critical constitutional issue. In *McMann*, the Court extended a defendant's Sixth Amendment right, beyond considerations of the nature of the offense, to require the right to "effective assistance of counsel."<sup>79</sup> Fourteen years later, the Court in *Strickland v. Washington* established the standard of review by which to judge whether a defense attorney's representation failed to meet adequate legal assistance standards under the Sixth Amendment.<sup>80</sup>

In *Strickland*, the Court ruled that a defendant appealing under Sixth Amendment grounds must overcome a "strong presumption" that representation was constitutionally adequate.<sup>81</sup> To meet this burden, the indigent defendant must prove first that his or her counsel's quality of performance "fell below an objective standard of reasonableness."<sup>82</sup> This dubious feat will be met, for instance, when attorneys do not conduct a sufficient investigation to put themselves in a position where they are able to make informed decisions on behalf of their clients.<sup>83</sup> Once the defense counsel's inadequacy is sufficiently proved, the defendant next must prove prejudice. This means that, but for the substandard representation, a "reasonable probability" exists that the defendant would have reached a more favorable result.<sup>84</sup> In *Strickland*, the Court's "strong presumption" proved too heavy of a burden, as the Court ruled that the attorney's representation was not poor enough to violate the Sixth Amendment.<sup>85</sup> In fact, the Court refused to

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<sup>76</sup> For a discussion of Supreme Court cases establishing this right, see *infra* notes 78-89 and accompanying text.

<sup>77</sup> *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

<sup>78</sup> 397 U.S. 759 (1970).

<sup>79</sup> *Id.* at 771 n.14 (emphasis added).

<sup>80</sup> 466 U.S. 668, 689 (1984).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 688.

<sup>83</sup> *Strickland v. Washington*, 466 U.S.668, 690-91 (1984).

<sup>84</sup> *Id.* at 694.

<sup>85</sup> *Id.* at 699-700.

find representation poor enough to meet this standard for another fourteen years.

Such a decision finally arrived in 2000 with *Williams v. Taylor*, when the Supreme Court used the test laid out in *Strickland* to rule that the attorney of an indigent defendant failed to meet Sixth Amendment standards.<sup>86</sup> The Court ruled that the defendant's counsel was constitutionally inadequate as a result of the counsel's failure to gain ample information through a sufficient investigation, which prohibited him from making qualified recommendations to his client.<sup>87</sup> Only three years later, the Supreme Court, in *Wiggins v. Smith*, once again ruled that an attorney failed to meet the *Strickland* Sixth Amendment test for adequate representation as a result of an inadequate investigation.<sup>88</sup> As one can see, since the turn of the twenty-first century, the Supreme Court has placed a renewed emphasis on the importance of a defense counsel's duty to discover material information concerning his or her client's case.<sup>89</sup> When this duty has been violated, the Court recently has been more willing to rule that a defendant has received representation that is prejudicial, and therefore hold that defense counsel has failed the test of adequate representation.

In addition to the *Strickland* test, which focuses on attorney inadequacies, the Supreme Court has also ruled that a defendant can permissibly claim that his or her Sixth Amendment rights were violated based on a systemic problem or structural defect. This occurs when "although counsel is available to assist the accused during trial, the likelihood that

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<sup>86</sup> 529 U.S. 362, 395-97 (2000) (stating that the defendant's counsel failed to conduct an adequate investigation to present sufficient mitigating evidence at the sentencing stage).

<sup>87</sup> *Id.* at 395-96.

<sup>88</sup> *Wiggins v. Smith*, 539 U.S. 510 (2003).

<sup>89</sup> *See, e.g.*, Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 *FORDHAM URB. L.J.* 1097, 1101 (2004) [hereinafter *Too Little, Too Late*] (stating that "the Supreme Court has given much more vigor to defense counsel's Sixth-Amendment-based duty to investigate."); Christopher E. Smith & Madhavi McCall, *Criminal Justice and the 2002-2003 United States Supreme Court Term*, 32 *CAP. U. L. REV.* 859, 874 (2004) (stating that "*Wiggins v. Smith* . . . may signal a departure from decisions in recent terms where ineffective assistance of counsel claims were greeted with a great deal of skepticism by the Justices"); Victor L. Streib, *Standing Between the Child and the Executioner: The Special Role of Defense Counsel in Juvenile Death Penalty Cases*, 31 *AM. J. CRIM. L.* 67, 85 (2003) (discussing that after *Wiggins v. Smith*, there have been signs showing "the Court's willingness to carefully scrutinize the performance of capital defense counsel at key stages, particularly as to discovery and presentation of mitigating evidence").

any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."<sup>90</sup> It is also critical that the defect's negative consequences are not isolated to one section of the case, but rather affect the possibility of fairness in every aspect of the criminal proceeding.<sup>91</sup> To reach this heavy burden, it is important that this systemic defect occur in a stage of prosecution that is critical in the course of litigation.<sup>92</sup> When this test is met, a court need not even inquire into the defense attorney's level of effectiveness to rule that an indigent defendant was deprived of his Sixth Amendment rights.<sup>93</sup>

The Supreme Court's first case finding that a pre-trial structural defect violated the defendants' constitutional rights came in 1932 with *Powell v. Alabama*.<sup>94</sup> There, the Court pointed to how late in the litigation process the attorney for the indigent defendants was appointed; given this fact, the Court ruled it was unreasonable to expect adequate representation.<sup>95</sup> This allowed the Court, without inquiring into the efforts of the defense attorney, to rule that the defendants did not have the opportunity to receive adequate representation.<sup>96</sup> Significantly, the Court stressed the importance of the lawyer's role in the pre-trial stages of litigation, where the discovery of evidence and informed consultation are critical.<sup>97</sup> Since *Powell*, the Court has found many other "critical" stages of litigation to be so important as to make a defect concerning such stage a per se violation of the Sixth Amendment.<sup>98</sup>

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<sup>90</sup> *United States v. Cronin*, 466 U.S. 648, 658-60 (1984) (quoting and citing as an example *Powell v. Alabama*, 287 U.S. 45 (1932)).

<sup>91</sup> *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).

<sup>92</sup> *See Strickland*, 466 U.S. at 660-62.

<sup>93</sup> *Id.* at 662.

<sup>94</sup> 287 U.S. 45 (1932). Although it had not yet explicated the two separate tests, the Court has in subsequent years stated that *Powell* was the first case to consider a structural defect of the criminal justice system as a controlling constitutional issue. *See Cronin*, 466 U.S. at 658-60.

<sup>95</sup> *Powell*, 287 U.S. at 57-58.

<sup>96</sup> *Cronin*, 466 U.S. at 659-60.

<sup>97</sup> *Powell*, 287 U.S. at 59. "Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given." *Id.*

<sup>98</sup> *Chapman v. California*, 386 U.S. 18, 23 (1967) ("[T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . ."). *See, e.g., Vasquez v. Hillery*, 474 U.S. 254, 254, 263-64 (1986) (discriminatory exclusion of members of the accused's race from a grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 168, 177-78, 177 n.8 (1984) (right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (right to public

### B. *The Right to Discovery for Indigent Defendants*

In addition to ensuring that indigent defendants are afforded the right to sufficient attorney representation, the Supreme Court has also invoked the Sixth Amendment to ensure that government prosecutors cannot take advantage of attorneys representing indigents by refusing to give them important information through discovery.<sup>99</sup> Considering the great disadvantage public defenders are exposed to as a result of the dearth of resources provided for them, especially when compared to prosecutors' offices,<sup>100</sup> such Supreme Court intervention has been essential to maintain any semblance of fairness.

Modern common law concerning the prosecutor's duty to disclose information dates back to 1935, when the Court stated in dictum that the government's knowing use of perjury violates the constitutional right to due process.<sup>101</sup> This ruling was later expanded upon when the Court increased the reach of due process violations to include the act of state authorities purposefully suppressing evidence that is favorable to the defendant.<sup>102</sup>

The Supreme Court, in the 1963 benchmark case *Brady v. Maryland*, continued to focus on the permissible manner in which prosecutors may handle and disclose evidence following an indictment.<sup>103</sup> The Court ruled that a prosecutor violates due process when he or she suppresses exculpatory evidence, or in other words, material information that is requested by the defendant and is favorable to the defendant's claim.<sup>104</sup> After

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trial); *Payne v. Arkansas*, 356 U.S. 560, 560, 567-68 (1958) (right against coerced confession); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (right to an impartial judge).

<sup>99</sup> See *infra* notes 101-108 and accompanying text.

<sup>100</sup> See discussion *supra* Part II.A.

<sup>101</sup> See *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935).

<sup>102</sup> *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942).

<sup>103</sup> 373 U.S. 83, 86 (1963).

<sup>104</sup> *Id.* at 87. The Court later more concretely defined "exculpatory evidence" as information, which if suppressed by the government, would "undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Over the years, the *Brady* Rule has evolved to mean that prosecutors are not obligated to supply a defendant's counsel with exculpatory information that the prosecution does not know exists. See 35 GEO. L.J. REV. CRIM. PROC. 324, 330-31 (2006). However, the prosecution may not purposely avoid discovering exculpatory evidence as a means to avoid the mandatory disclosure of such damaging information if it does exist. See Shane M. Cahill, NOTE, *United States v. Ruiz: Are Plea Agreements Conditioned on Brady Waivers Unconstitutional?*, 32 GOLDEN GATE U. L. REV. 1, 6 (citing 21A AM. JUR. 2D § 1271 (1998)).

this decision, though, many questions remained as to what type of evidence fits the description of "material" and "exculpatory."<sup>105</sup>

In *Giglio v. United States*, the Court ruled that such exculpatory evidence includes information concerning the credibility of witnesses who are important enough in the case as to be a reliable indication of whether the defendant is guilty or innocent.<sup>106</sup> Soon thereafter, the Court broadened the *Brady* Rule by holding that in order to promote the concept of the right to a fair trial, the prosecution has a due process duty to disclose evidence that is clearly favorable to the defendant, even without the defendant's precise request.<sup>107</sup> More than two decades after *Brady*, in *Kimmelman v. Morrison*, the Court once again re-emphasized the defense's need to rely on the government for discovery when it ruled that a defense attorney violated his client's right to due process by refusing to demand that prosecutors disclose material evidence.<sup>108</sup>

Later, in 1998, the Second Circuit extended this discovery right to all stages of litigation—including the pre-trial plea bargaining stage.<sup>109</sup> "The government's obligation [to hand over material evidence to the defendant] is pertinent not only to an accused's preparation for trial," the Second Circuit wrote, "but also to his determination of whether or not to plead guilty."<sup>110</sup> The court continued that "the validity of the plea must be reassessed if it resulted from 'impermissible conduct by state agents.'"<sup>111</sup> Therefore, according to the Second Circuit,

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<sup>105</sup> See H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1102-03 (1991).

<sup>106</sup> *Giglio v. United States*, 405 U.S. 150, 153-54 (1972).

<sup>107</sup> *United States v. Agurs*, 427 U.S. 97, 110 (1976). Despite this rule, the Court did not overturn the defendant's conviction, because the prosecution's error was not so significant, given the facts of the case, to be considered prejudicial. *Id.* at 114.

<sup>108</sup> *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986). Although the Court's inquiry focused on the inadequacies of the defense attorney, the Court could not have ruled that the defense counsel's errors were so significantly egregious if not for the Court's belief that access to evidence through the prosecutor's office was required to comport with notions of a fair trial.

<sup>109</sup> *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998).

<sup>110</sup> *Id.* The court wrote, "The defendant is entitled to make that decision with full awareness of favorable material evidence known to the government." *Id.*; see also *United States v. Persico*, 164 F.3d 796, 804-05 (2d Cir. 1999) ("The Government's obligation to disclose *Brady* materials is pertinent to the accused's decision to plead guilty; the defendant is entitled to make that decision with full awareness of favorable . . . evidence known to the Government.").

<sup>111</sup> *Avellino*, 136 F.3d at 255 (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970)).

due process also prohibits the prosecution's refusal to turn over evidence that is materially favorable to a defendant prior to that defendant's plea of guilty.<sup>112</sup>

In *United States v. Ruiz*, the Supreme Court put the Second Circuit's holding in doubt, however, by ruling that federal prosecutors are not required to disclose "impeachment information relating to any informants or other witnesses" before entering into a binding plea agreement.<sup>113</sup> The Court ruled that *Brady* material did not apply to a plea agreement because, in such a case, the defendant's confession is "voluntary."<sup>114</sup> Further, the Court noted, it is too uncertain whether impeachment information would actually aid the defendant significantly enough to justify categorizing plea-bargaining as a "critical" stage of litigation that traditionally deserves stricter judicial scrutiny.<sup>115</sup> Therefore, the *Ruiz* Court held that, prior to entering a plea agreement, the principles of due process do not require that a defendant be made aware of information that undermines the credibility of witnesses whom the defendant was told might testify at trial.<sup>116</sup>

Subsequently, however, various state and district courts throughout the country have found several grounds to distinguish *Ruiz* from other cases involving the lack of disclosure given to defendants prior to plea bargain agreements.<sup>117</sup> Courts have interpreted *Ruiz* narrowly to hold that the permissible suppression of material information prior to a plea bargain applies exclusively to the impeachment of witnesses.<sup>118</sup> Therefore, even after *Ruiz*, prosecutorial suppression of non-impeachment exculpatory information prior to a plea bargain would be unconstitutional.<sup>119</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> *United States v. Ruiz*, 536 U.S. 622, 625 (2002) (internal citations omitted).

<sup>114</sup> *Id.* at 629.

<sup>115</sup> *Id.* at 629-30. For a further analysis of the importance of identifying a stage of litigation as critical for due process and Sixth Amendment analysis, see *supra* notes 90-93 and accompanying text.

<sup>116</sup> *Ruiz*, 536 U.S. at 633.

<sup>117</sup> See *infra* notes 119-123 and accompanying text; see also *infra* note 188 for further analysis distinguishing *United States v. Ruiz*.

<sup>118</sup> See, e.g., *McCann v. Mangialardi*, 337 F.3d 782, 787 (7th Cir. 2003); *United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005); *Garrett v. United States*, Civil No. 2:05cv323, Crim. No. 2:03cr59, 2006 WL 1647314, at \*4-5 (E.D. Va. June 13, 2006); *State v. Harris*, 680 N.W.2d 737, 750 n.15 (Wis. 2004).

<sup>119</sup> *McCann*, 337 F.3d at 788 (stating that, given the distinction in *Ruiz* between impeachment information and exculpatory evidence, "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors . . .

Additionally, courts have ruled that evidence directly related to the character of the charge against the defendant is critical to the point where the information must be disclosed to the defendant during the plea bargaining stage.<sup>120</sup> If this information is suppressed, the actions will lead a court to doubt the voluntariness of the defendant's admission of guilt.<sup>121</sup> Furthermore, even in the context of suppressing impeachment information, courts have ruled that a defendant's confession is "involuntary" and therefore inadmissible if it was caused by the prosecutor's failure to disclose a witness's material statements.<sup>122</sup>

#### IV. *UNITED STATES V. STEIN*

During the past century, courts have struggled to establish concrete rules that strike the most equitable balance between prosecutors' legitimate interest in zealously prosecuting criminals and the rights of defendants to a fair criminal proceeding.<sup>123</sup> In the summer of 2006, Judge Kaplan reignited this debate when he wrote an opinion in the district court case *United States v. Stein* that extended defendants' Fifth and Sixth Amendment rights, while substantially limiting strategic prosecutorial pre-trial and pre-indictment actions.<sup>124</sup> Because the defendants in this case—all of whom were employees of the accounting firm KPMG, which the government was investigating concurrently with the employees—are wealthy, white-collar corporate employees

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have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea").

<sup>120</sup> *United States v. Villalobos*, 333 F.3d 1070, 1076 (9th Cir. 2003) (before plea, a defendant who is charged in a drug-related offense must be informed of the amount of drugs to be used as evidence when the quantity of drugs is an element of the defendant's sentence). This case followed a similar ruling in *United States v. Minore*, 292 F.3d 109, 117 (9th Cir. 2002).

<sup>121</sup> *Villalobos*, 333 F.3d at 1076.

<sup>122</sup> *See Ferrara v. United States*, 456 F.3d 278, 290 (1st Cir. 2006) (holding that the defendant's admission of guilt may not be legally considered voluntary because the government failed to disclose that a key witness had recanted a prior statement made which implicated the defendant in a crime). "[B]efore entering a guilty plea[, a defendant] must make two showings in order to set that plea aside as involuntary. First, he must show that some egregiously impermissible conduct . . . antedated the entry of his plea. Second, he must show that the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice." *Id.* (citations omitted).

<sup>123</sup> See discussion *supra* Part III.B.

<sup>124</sup> *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

involved in a tax-shelter scheme,<sup>125</sup> *Stein*, at first blush, may seem as far removed from state prosecutors' actions towards indigent defendants as possible. A closer examination, however, shows that if Judge Kaplan's reasoning is applied to other contexts, the consequences of the case could be significantly more far-reaching than one would think.

#### A. *Background of the Case*

*United States v. Stein* considered whether federal prosecutors violated the Constitution by their conduct during the pre-trial investigative stage of a criminal proceeding.<sup>126</sup> Specifically, the case centered on the validity of the Thompson Memorandum, an internal memorandum obligating Assistant U.S. Attorneys ("AUSAs") to pressure corporations under investigation to refuse to advance legal fees to its employees.<sup>127</sup> As per the instructions of the Thompson Memorandum, federal prosecutors had a duty to inform the directors of companies under investigation that the federal government was considering whether to indict the company.<sup>128</sup>

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<sup>125</sup> See *id.* at 338.

<sup>126</sup> *Id.* at 335-36.

<sup>127</sup> *Id.* at 336-37. The origins of the Thompson Memorandum date back to 1999, when then-U.S. Deputy Attorney General Eric Holder distributed a document entitled "Federal Prosecution of Corporations" (known as the Holder Memorandum), which laid out factors that a prosecutor generally should consider when making a decision whether to indict a corporation. *Id.* Although it clearly expressed that it was not binding, the Holder Memorandum stated that the decision by a business that is under investigation to advance attorneys fees to its personnel might be construed by the government as evidence of protecting guilty employees, and thus it could be a significant factor in a decision whether to indict the company. *Id.*; see Memorandum from Deputy Attorney General, Department of Justice, Bringing Criminal Charges Against Corporations (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>. Following the high-profile investigations of many large companies, such as Enron, Tyco International and ImClone, just to name a few, U.S. Deputy Attorney General Larry D. Thompson, with the intention of modifying the Holder Memorandum, issued a new memorandum, entitled "Principles of Federal Prosecution of Business Organizations" (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf) [hereinafter Thompson Memorandum]. The modification most significant to this Note is that unlike the Holder Memorandum, which was a non-binding suggestion, the Thompson Memorandum is binding, and thus obliges Assistant U.S. Attorneys to consider the advancing of legal fees as a factor in favor of the decision to indict. *Stein I*, 435 F. Supp. at 338.

<sup>128</sup> See Thompson Memorandum, *supra* note 127. In this case, the IRS referred the case to the Department of Justice, which turned it over the U.S. Attorney's Office. *Stein I*, 435 F. Supp. 2d at 339. In the initial meeting between the lawyers representing KPMG and the Assistant U.S. Attorneys involved in the investigation, the government prosecutors pointed specifically to the Thompson Memorandum and made comments which the Court believed were reasonably "understood by both KPMG and government

Federal prosecutors were further obliged to advise the corporate directors of factors that the government would consider indicative of whether the company was cooperating with the government's investigation.<sup>129</sup> Prosecutors would inform them that satisfying these factors may positively contribute to a potential decision not to indict.<sup>130</sup> One such factor was whether the company agreed to refuse to advance legal fees to its employees who are concurrently under investigation, except when such advances are required by law.<sup>131</sup>

In his decision, Judge Kaplan ruled that this practice violated the defendant employees' due process rights under the Fifth Amendment, as well as their right to adequate representation under the Sixth Amendment.<sup>132</sup> Many legal scholars saw this decision as an increase in defendants' rights under the Constitution that exceeded any past established precedent.<sup>133</sup>

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representatives as a reminder that payment of legal fees by KPMG . . . could well count against KPMG in the government's decision whether to indict the firm." *Id.* at 341-44. Ultimately, the government and KPMG agreed that KPMG would cap the advancement of legal fees for their employees at \$400,000, but all monetary advancement would immediately cease if the employee invoked his or her Fifth Amendment right against self-incrimination or if the employee was charged with criminal misconduct. *Id.* at 345-46.

<sup>129</sup> See Thompson Memorandum, *supra* note 127.

<sup>130</sup> See *id.*

<sup>131</sup> *Stein I*, 435 F. Supp. 2d at 345-46. In response to Judge Kaplan's decision, current Deputy Attorney General Paul J. McNulty amended the Thompson Memorandum in a document widely referred to as the "McNulty Memorandum," available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf). Of the changes McNulty made, he stated that except in rare circumstances, when determining whether a company under investigation is cooperating, federal prosecutors may not consider whether that company is advancing legal fees to its employees.

<sup>132</sup> *Stein I*, 435 F. Supp. at 336-37. Judge Kaplan later granted the motions of thirteen of the defendants to dismiss their indictments on the grounds that there was sufficient evidence that showed that KPMG definitively would have paid for the individual defendants' legal fees but for the interference of the USAO and the Thompson Memorandum. *United States v. Stein (Stein II)*, 495 F. Supp. 2d 390, 427 (S.D.N.Y. 2007). The interference was so reprehensible, wrote Kaplan, that it "shocks the conscience." *Id.* at 412-15. A third ground on which Judge Kaplan relied for his 2006 decision that the defendant employees were entitled to the advancement of legal fees was the doctrine of implied contract. *Stein I*, 435 F. Supp. 2d at 336-37. However, as that doctrine falls outside of the scope of this Note, Judge Kaplan's reasoning concerning that area of law will not be discussed.

<sup>133</sup> See, e.g., Rodney Peck, *United States v. Stein: DOJ Policy Threatening Companies with Indictment Based Upon Advancement of Employee Legal Fees Ruled Unconstitutional*, MONDAQ BUS. BRIEFING, Aug. 9, 2006, at 4 ("The ruling . . . is the first major criticism from the bench of tactics that federal prosecutors have adopted since the wave of corporate scandals that erupted after the collapse of Enron."); Stephanie A. Martz, *Report from the Front Lines: The Thompson Memo and the KPMG Tax Shelter Case*, WALL ST. LAWYER, Aug. 2006, available at

### B. Judge Kaplan's Due Process Analysis

In reaching his conclusion that prosecutors' actions violated the defendants' rights to due process, Judge Kaplan ruled that the right to fairness in the pre-trial stage of a criminal proceeding is essential to liberty, and thus subject to the highest judicial standard of review, strict scrutiny.<sup>134</sup> As a result, a defendant's right to a fair proceeding "cannot be infringed by the government unless the infringement is narrowly tailored to serve a compelling state interest."<sup>135</sup> Such an application of strict scrutiny in the context of criminal proceedings is significant, as Kaplan made this assertion despite the fact that even he readily admitted that "[t]he right to fairness in criminal proceedings has not been explicitly so characterized by the [Supreme] Court."<sup>136</sup>

For legal precedent, Judge Kaplan first pointed to various important stages of a criminal proceeding where, the Supreme Court has ruled, the government cannot use its power to unfairly disadvantage the defendant by restricting access to evidence.<sup>137</sup> Next, he claimed that past Supreme Court cases really were decided under the strict scrutiny standard even though the Court never explicitly stated as much.<sup>138</sup> To support this proposition, Kaplan points to language used by the Second Circuit and other lower court opinions,<sup>139</sup> as well commentary by legal scholars.<sup>140</sup>

Under the strict scrutiny test for fairness in a criminal proceeding, Kaplan wrote that the standard of review "not only prevents the prosecution from interfering actively with the

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<http://www.nacdl.org/public.nsf/whitecollar/WCnews042>; David Z. Seide, *Compelled Waivers of the Attorney-Client Privilege*, 39 REV. SEC. & COMMODITIES REG. 235, 239-42 (2006).

<sup>134</sup> *Stein I*, 435 F. Supp. 2d at 356.

<sup>135</sup> *Id.* at 360.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 356-60. Kaplan pointed to "what might loosely be called the area of constitutionally guaranteed access to evidence." *Id.* at 358. To read about this right in detail, see *supra* Part III.B. Kaplan also wrote that prosecutors are required to act fairly, by neither intentionally delaying indictments nor obstructing a defendant's access to a witness. *Id.* at 359.

<sup>138</sup> *Id.* at 360. ("[M]any of the Supreme Court's criminal due process decisions . . . can be understood in modern terms most readily in the substantive due process and strict scrutiny framework.")

<sup>139</sup> *Id.* at 361 nn.154-55. Kaplan depends on an extensive list of cases, but it is worth noting that none of them explicitly and definitively state that the entire criminal process should be judged under the standard of strict scrutiny.

<sup>140</sup> *Id.* at 361 n.156.

defense, but also from passively hampering the defendant's efforts."<sup>141</sup> By pressuring KPMG to refuse to advance sufficient legal fees to its employees who were concurrently being personally investigated, the U.S. Attorney's Office ("USAO"), in Kaplan's estimation, clearly did not abide by this standard. Thus, the federal prosecutors abrogated KPMG's employees' right to a fair trial.

Legal fees for corporate employees in similar past lawsuits have accrued well into the millions of dollars. This is a sum of money that these employees naturally did not possess. Judge Kaplan therefore ruled that without a company commitment to advance its employees' legal fees, the employees would be left without funds sufficient to mount an adequate defense, thereby denying them their constitutionally protected right to due process.<sup>142</sup> Thus, if the government's acts did not consist of active interference, at the very least this conduct passively but impermissibly impeded the employee defendants' efforts to defend themselves.

In essence, Kaplan ruled that the government failed the strict scrutiny test because the government's stated reasons for its actions were not narrowly tailored to meet a compelling state interest. The USAO claimed that its compelling interests were to assess KPMG's level of cooperation, increase the government's capability to successfully investigate and prosecute white-collar crime by ensuring that the company was not paying "hush money,"<sup>143</sup> and to punish those whom prosecutors believed were guilty.<sup>144</sup>

Kaplan struck down the government's first two alleged compelling interests because they could be accomplished more narrowly and just as effectively by undergoing a case-by-case analysis of which specific companies under investigation need to have pressure exerted upon them.<sup>145</sup> By contrast, the Thompson Memorandum broadly compelled such acts of

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<sup>141</sup> *Stein I*, 435 F. Supp. 2d at 358.

<sup>142</sup> *Id.* at 362.

<sup>143</sup> "Hush money" in this context refers to the government's concern that companies will bribe its employees by paying their legal fees in return for the employees' implicit promise of less-than-full disclosure when discussing with the government the possible condemnable actions by directors. This worry stems from the fact that the employees will have a great need for this money, as the alternative of paying their own legal fees is quite formidable. For an example of the expenses required for an employee to pay for his own litigation expenses, see *infra* note 165.

<sup>144</sup> *Stein I*, 435 F. Supp. 2d at 363.

<sup>145</sup> *Id.* at 363-64.

indiscriminate pressure on *all* companies and their employees, even when there was no sound reason to believe such obstruction of justice schemes would occur.<sup>146</sup> Kaplan ruled that the third reason was impermissible as well because the discretion to punish is exclusively in the realm of Congress and the judiciary. Any attempt by the prosecutors to punish before the defendant is found guilty is an “abuse of power” and thus not a legitimate government interest.<sup>147</sup> As a result, the prosecutors’ acts were not narrowly tailored and therefore violated the newly created strict scrutiny due process standard of review for fairness in a criminal proceeding.

### C. *Judge Kaplan’s Sixth Amendment Analysis*

Judge Kaplan was not content to stop at raising the due process standard the government must meet to justify impinging upon a defendant’s rights in the pre-trial stage of a criminal proceeding.<sup>148</sup> Kaplan extended defendants’ Sixth Amendment rights as well by stating that defendant employees who are not advanced legal fees by their employer are consequently being denied their right to “adequate assistance of counsel.”<sup>149</sup> To reach this conclusion, Kaplan continued extending defendants’ rights by making assertions that courts in the past have been hesitant to make.<sup>150</sup>

First, to the vexation of the government, Kaplan ruled that a defendant’s Sixth Amendment rights commence not at the start of an official judicial proceeding,<sup>151</sup> but rather may be implicated when the government limits a defendant’s access to resources that may be required to adequately defend him- or herself.<sup>152</sup> There was little precedent for the idea that a

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<sup>146</sup> *Id.* “[T]he Thompson Memorandum does not say that payment of legal fees may cut in favor of indictment *only if* it is used as a means to obstruct an investigation. Indeed, the text strongly suggests that advancement of defenses [sic] costs weighs against an organization independent of whether there is any [obstruction scheme].” *Id.* at 363. See generally Petra M. Reinecke & Douglas R. Schwartz, *The Perils, Pitfalls and Possible Demise of the Joint Defense Agreement in the Context of Shipboard Criminal Investigations and Prosecutions*, 17 U.S.F. MAR. L.J. 29 (2005); Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111 (2003).

<sup>147</sup> *Stein I*, 435 F. Supp. 2d at 363.

<sup>148</sup> See *supra* Part IV.B.

<sup>149</sup> *Stein I*, 435 F. Supp. 2d at 365-67.

<sup>150</sup> See *infra* notes 151-162

<sup>151</sup> See *supra* note 73.

<sup>152</sup> *Stein I*, 435 F. Supp. 2d at 366. The government’s argument that gave rise to this issue is that the USAO claimed that the pressuring of KPMG to refuse to

defendant's Sixth Amendment rights attach so early in the adversarial process.<sup>153</sup> As the government argued, such reasoning will certainly "open up the door" for future defendants to argue that they have a right to pre-indictment "adequate representation," particularly in the context of the denial to resources.<sup>154</sup>

Next, Judge Kaplan rejected the government's insistence that the court rely on the rationale of *Strickland v. Washington*<sup>155</sup> to determine, as an initial inquiry, whether the alleged wrongful conduct was prejudicial to the defendant.<sup>156</sup> Kaplan rejected this argument because the government's conduct resulted in a "structural defect" that negatively affected the entire criminal proceeding.<sup>157</sup> As a result, prejudice was presumed, and the defendant did not have the burden to prove the reasonable probability that the outcome would have been different but for the USAO's wrongful conduct.<sup>158</sup> As a structural defect can only occur during a critical stage of a criminal proceeding,<sup>159</sup> by implication, Kaplan's ruling makes clear that the pre-trial stage must fit under this category.<sup>160</sup>

Moreover, Kaplan ruled that the government may not pressure a defendant to refrain from pursuing a legal strategy in the course of litigation that the defendant is legally allowed to pursue.<sup>161</sup> Denying the KPMG employees the right to receive their employers' advancement of legal fees, Kaplan wrote, will

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advance legal fees to its employees took place prior to any tribunal proceeding, and precedent shows that Sixth Amendment rights do not attach until such a proceeding begins. *Id.*

<sup>153</sup> For support, Kaplan pointed to only one Ninth Circuit case, although it did not involve wrongful government conduct. *Id.* at 366 n.176 (citing *United States v. Harrison*, 213 F.3d 1206, 1207 (9th Cir. 2000)).

<sup>154</sup> *Id.* at 366.

<sup>155</sup> For a discussion of *Strickland* and its two-prong test, see *supra* notes 81-85.

<sup>156</sup> *Stein I*, 435 F. Supp. 2d at 369.

<sup>157</sup> *Id.* at 370. For a discussion of the history and standard of review of a "structural defect," see *supra* notes 90-97.

<sup>158</sup> Kaplan ruled that the actions of the government caused a "structural defect" because by being denied unlimited legal fee advancement, the KPMG employees would be unable to defend themselves adequately during every stage of litigation, thus infecting their entire defense. *Id.* at 370-72.

<sup>159</sup> See *supra* notes 92-93.

<sup>160</sup> *Stein I*, 435 F. Supp. 2d at 371-72 ("[A]ssessing the impact of *pretrial* omissions and errors could require extensive evidentiary proceedings. In consequence, it is difficult to imagine circumstances in which an error more properly could be said to threaten to taint an entire proceeding.") (emphasis added).

<sup>161</sup> *Id.* at 372 ("[G]overnment interference with those resources that a defendant does have or legally may obtain fundamentally alters the structure of the adversary process.").

have the ultimate result of denying the employees the right to defend themselves.<sup>162</sup>

Such government interference is particularly harmful in light of the gross disparity in resources available between the prosecution and defendants, especially if defendants are forced to litigate without the aid of their employer. Without the monetary assistance from their employers, corporate employees will not be able to pay their lawyers to perform many of the tasks essential to adequately represent their clients.<sup>163</sup> For instance, without assistance from KPMG, the defendants in *Stein* were left unable to pay the substantial legal fees required for their lawyers to review the millions of pages of documents, interview more than a small percentage of the witnesses, or consult with tax experts.<sup>164</sup>

Independently, this likely would not implicate any Sixth Amendment issues. When one considers, however, that the government directly caused this predicament by its acts of pressure and coercion, coupled with the USAO's superior access to resources,<sup>165</sup> Judge Kaplan ruled that the result was an uneven playing field where the government wrongfully manipulated the criminal proceeding. This infringement on the defendants' Sixth Amendment rights caused the prosecution to be at a severe advantage in comparison to its adversary, the KPMG employees. As Kaplan wrote, the government's actions "create an appearance of impropriety that diminished faith in the fairness of the criminal justice system in general."<sup>166</sup> As a result, Judge Kaplan ruled that the government, through its wrongful conduct, was responsible for creating a structural defect that violated the Sixth Amendment.

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<sup>162</sup> *Id.* at 368.

<sup>163</sup> *Id.* at 371 ("Properly defending this case, in all its complexity, has required, and will continue to require, substantial financial resources.").

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 371 n.205 (2006) ("At the time of this decision, the government already had utilized their abundant resources to produce 'at least 5 to 6 million pages of documents plus transcripts of 335 depositions and 195 income tax returns.'") (internal citations omitted). Common sense dictates that an individual defending him or herself will be unable to pay the legal fees to parse through even a small fraction of those documents.

<sup>166</sup> *Id.* at 372 (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987)).

V. APPLYING THE *STEIN* ANALYSIS TO INDIGENT DEFENSE

When examining Judge Kaplan's ambitious analysis in *United States v. Stein*, one must wonder if his groundbreaking constitutional interpretation can also be used in other areas of law where prosecutors are currently abusing their power to the detriment of defendants. For example, when scrutinizing the manner in which state prosecutors use their substantial power to coerce indigent defendants, one cannot help but see a parallel between the conduct of the AUSAs and that of many state prosecutors.

Some may say that New York state prosecutors should not be held accountable for withholding discovery information and coercing as many plea deals as is possible, for they are simply following the orders of their superiors, as well as the laws laid out in the governing state statutes.<sup>167</sup> However, the same also could have been said about the AUSAs who were following the orders of the Thompson Memorandum to pressure corporations under investigation not to advance legal fees to their employees. Similar to how state prosecutors in New York might not realize that their actions infringe on the rights of indigent defendants, the federal prosecutors who were following the Thompson Memorandum also likely were unaware that their conduct was wrongful before Judge Kaplan put an end to their practice by ruling that it was unconstitutional. Therefore, if applying the rationale and standards of review employed in *Stein*, another court could certainly follow in Judge Kaplan's footsteps and rule that much of the aforementioned conduct of state prosecutors is unconstitutional as well.

As a result of Judge Kaplan's ruling, employees of large companies—at least those in New York—can sleep easier at night knowing that there is legal precedent under the Fifth and Sixth Amendments compelling federal prosecutors to treat them fairly in the event of an investigation.<sup>168</sup> Unfortunately, the thousands of indigents in the state of New York enjoy no such comfort. Those individuals in New York who are not fortunate enough to possess the funds necessary to pay the

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<sup>167</sup> For a discussion of the relevant rules from the New York Criminal Penal Law, see *supra* notes 43-47 and accompanying text.

<sup>168</sup> See *supra* Part IV.B-C.

astronomical fees of a private attorney<sup>169</sup> must expose themselves to the “crisis” of the New York indigent defense system.

In short, such an indigent defendant will likely be represented by an attorney who barely has time to communicate with the defendant or investigate on his or her behalf.<sup>170</sup> This defense attorney will also be advocating against a state prosecutor who is probably under orders to refuse to supply the defense attorney with crucial discovery information until as late in the litigation process as is possible.<sup>171</sup> Furthermore, the state prosecutor will be prone to use his or her superior bargaining power, resulting from having greater resources and access to information, to pressure the defendant to waive pre-trial hearings and plead guilty.<sup>172</sup> It seems inherently unfair for Fifth and Sixth Amendment rights to be extended to wealthy corporate employees, but not equally extended to these indigent defendants who are so poor that they cannot afford to pay for their own defense. *Stein*, if ambitiously and creatively analyzed, lays the constitutional groundwork to put a stop to much of this unfortunate conduct employed against indigent defendants.

A. *Applying Judge Kaplan’s Due Process Standard of Review*

When Judge Kaplan ruled, for one of the first times in judicial history,<sup>173</sup> that a defendant’s right to a fair criminal proceeding is fundamental, he did not constrain the scope of this ruling to any specific class of criminal litigation.<sup>174</sup> Rather, this strict scrutiny standard of review, which requires that the prosecution’s acts be narrowly tailored to meet a compelling state interest, must be applied regardless of the occupations of

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<sup>169</sup> A private lawyer in New York who specializes in criminal defense of felony crimes will typically charge an up-front fee upwards of \$5,000 to \$10,000, which will rapidly increase the longer the criminal proceeding lasts. *See, e.g.*, Hopkins & Kopilow, <http://www.lawinfo.com/expert/gardencitycriminallawyer> (last visited Sept. 7, 2007); Warren Redlich, <http://www.redlichlaw.com/crim> (last visited Sept. 7, 2007). Hourly fees of criminal defense attorneys can cost up to hundreds of dollars per hour. *See generally* Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 588-90 (2005).

<sup>170</sup> For a more in-depth discussion, see *supra* Part II.A.

<sup>171</sup> For a more in-depth discussion, see *supra* Part II.B.

<sup>172</sup> For a more in-depth discussion, see *supra* Part II.B.

<sup>173</sup> *See supra* notes 135-136 and accompanying text.

<sup>174</sup> *See supra* notes 134-136 and accompanying text.

the two adverse participants.<sup>175</sup> This test not only “prevents the prosecution from interfering actively with the defense, but also from passively hampering the defendant’s efforts.”<sup>176</sup> Kaplan applied this strict standard of review in the context of white-collar corporate employees, but there is no reason why this should be any different when applied in the context of state government officials litigating against public defenders.

As per the convincing conclusions of the various reports on the indigent defense system, as the system currently stands, state prosecutors are not allowing for fair criminal proceedings.<sup>177</sup> Whether one classifies New York state prosecutors’ acts of ignoring the discovery standards plainly laid out by both New York and ABA ethics rules<sup>178</sup> as active interference or passive hindrance of indigent defendants’ ability to most effectively defend themselves, the standard of fairness in the state criminal justice system is unquestionably crumbling.<sup>179</sup> Because a lack of resources already impedes a public defender’s ability to investigate,<sup>180</sup> prosecutors should be under a heavier burden to disclose evidence.<sup>181</sup> While prosecutors might be able to justify nondisclosure under a less scrutinized standard of review, such conduct will likely not pass muster under Kaplan’s pedestal of strict scrutiny.

Despite many possible claims used to justify prosecutors’ nondisclosure conduct, none of the policy reasons that sympathizers often invoke to defend the suppression of evidence against indigent defendants as a mechanism to pressure plea deals is narrowly tailored enough to pass a strict scrutiny test. To prove this, it is informative to look at three of the most common justifications for the conduct.

One popular justification for using the *Rosario* rule<sup>182</sup> to avoid disclosing lists of material witnesses and information pertaining to those witnesses until the last possible second is

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<sup>175</sup> See *supra* notes 134-136 and accompanying text.

<sup>176</sup> *Stein I*, 435 F. Supp. 2d at 358.

<sup>177</sup> See discussion *supra* Part II.B (regarding the conclusions of the Spangenberg Report and Judge Kaye’s Commission).

<sup>178</sup> See *supra* note 48.

<sup>179</sup> For an analysis of the current state of the indigent defense system in New York, see discussion *supra* Part II.A.

<sup>180</sup> See Part II.A.

<sup>181</sup> Prosecutors have an ethical obligation to act in the interest of justice, and not merely with the goal to convict. See *supra* note 39.

<sup>182</sup> For a description of the *Rosario* rule, see *supra* notes 44-47 and accompanying text.

the state's legitimate interest in protecting witnesses from being victims of obstruction of justice.<sup>183</sup> In other words, prosecutors supposedly are concerned that defendants, if privy to every witness willing to testify against them, would threaten to injure the witnesses in an effort to silence them.<sup>184</sup> While such a concern certainly has merit, it is not as narrowly tailored as possible.

In *Stein*, Judge Kaplan used a strict scrutiny standard of review for fairness in a criminal proceeding to invalidate the Justice Department's conduct of pressuring corporations under investigation to refrain from paying their employees' legal fees. The Justice Department's claimed that such a broad approach was necessary to prevent company directors from paying their employees "hush money."<sup>185</sup> Judge Kaplan wrote that this could be accomplished in a more narrowly tailored case-by-case fashion, however, and found that the tactics demanded by the Thompson Memorandum are permissible only if the fear that company directors are paying "hush money" is reasonable given the circumstances.<sup>186</sup>

Similarly, in the state prosecution context, a more narrowly tailored approach could be employed to decide obstruction of justice issues on a case-by-case basis. Under such a narrowly tailored analysis, prosecutors would be permitted to withhold witness information only from the specific defendants who pose a reasonable threat to intimidate a witness, rather than an entire class of defendants.<sup>187</sup> Thus, while withholding witness information until moments before a trial might be permitted under a lesser standard of review, if a judge adopted Judge Kaplan's analysis, a broad application of this practice of

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<sup>183</sup> See *Too Little, Too Late*, *supra* note 89, at 1148 ("The most common argument against broad discovery is that allowing the defendant access to information about witnesses will lead to interference with those witnesses. The claim is that the defendant will try to convince potential prosecution witnesses to either change their testimony or not testify at all, by bribing, threatening, physically injuring, or even killing them.").

<sup>184</sup> Besides making it more difficult for the prosecution to present a case, this would also put witnesses in jeopardy of being put in harm's way.

<sup>185</sup> See *supra* notes 143-144 and accompanying text.

<sup>186</sup> See *supra* note 147 and accompanying text.

<sup>187</sup> To take an extreme hypothetical example to make the point, a defendant with a documented history of threatening witnesses, or even with a violent history, would reasonably pose a threat to obstruct justice if given a witness list. However, a defendant who was arrested for simply jumping a turnstile could not objectively be considered a danger in this area.

withholding information would not be likely to pass strict scrutiny muster.<sup>188</sup>

A broader claim commonly used to justify the prosecutors' acts is the state's interest in avoiding judicial waste.<sup>189</sup> By suppressing non-exculpatory evidence, but offering more favorable plea deals or earlier access to discovery only upon a waiver of pre-trial hearings and motions,<sup>190</sup> prosecutors arguably are achieving the state interest of limiting the extraneous use of judicial resources.<sup>191</sup> In analyzing this conduct under a rational or intermediate standard of review, such conduct perhaps would be permissible because judicial waste is a legitimate concern that overburdens New York's state courts.<sup>192</sup> However, if one applies Judge Kaplan's analysis, which considers the right to fairness in the criminal process to be a fundamental liberty interest, a higher level of scrutiny would be required. Under this heightened scrutiny, the defendant's fundamental interest in the fairness of his or her

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<sup>188</sup> The government could point to *United States v. Ruiz*, 536 U.S. 622 (2002), for an alternative proposition that at least concerning the impeachment of witnesses, the Supreme Court has already ruled that such impeachment information need not be disclosed, especially prior to a pre-trial plea deal. *See supra* notes 113-116 and accompanying text. However, in addition to the other acceptable exceptions already discussed (*see supra* notes 117-122 and accompanying text), the argument refuting the involuntariness of a plea bargain under such circumstances is especially worrisome to indigent defendants in state court who do not receive adequate discovery information. *Ruiz* is distinguishable on its facts because it was litigated by federal defenders, who have lighter case loads and greater resources, and whose opportunity to investigate is much greater, than their state public defender counterparts. *See generally* Inga L. Parsons, "Making It a Federal Case": A Model For Indigent Representation, 1997 ANN. SURV. AM. L. 837 (1997). Therefore, the defendant in *Ruiz* had relatively substantial resources available compared to a typical indigent defendant in state court. Unlike indigent defendants in federal court, such defendants in state court often will find themselves in a predicament where they must plea, even if innocent, because the lack of investigation at their disposal renders them unable to adequately calculate the risk of a guilty verdict if the case were to proceed to trial.

<sup>189</sup> *See Green, supra* note 60, at 1193; *see also* Eli. J. Richardson, *Taking Issue with Issue Preclusion: Reinventing Collateral Estoppel*, 65 MISS. L.J. 41, 41 n.3 (1995) ("Excessive litigation is becoming a greater concern with each passing year . . .").

<sup>190</sup> *See supra* notes 43-62 and accompanying text.

<sup>191</sup> For the purposes of this Note, the author assumes that such actions will achieve the desired goal of creating a lesser caseload. However, no study has proven that disclosing material evidence at an earlier stage will lead to more courtroom litigation. To the contrary, it is quite possible that the same percentage of pleas would occur if there were broader discovery, but the results would be more equitable because defendants would have more information, allowing them to make better-informed decisions.

<sup>192</sup> *See* Mike McConville & Chester L. Mirsky, *Guilty Plea Courts: A Social Disciplinary Model of Criminal Justice*, 42 SOC. PROBS. 216, 224 (1995) (describing the pressures put on judges in New York City to effectuate guilty pleas as a means to decrease the number of cases); *see also* Green, *supra* note 60, at 1193.

criminal proceeding outweighs the state's interest in effectuating fewer cases.<sup>193</sup>

Finally, a third legitimate state interest put forth to justify the prosecutors' conduct is the desire to simultaneously prosecute and deter crime, effectively punishing the accused by making the criminal process as difficult and as trying as possible. However, under Judge Kaplan's rationale, any government conduct having the purpose of punishing the defendant before that defendant is found guilty is analogous to the federal prosecutors' unconstitutional use of the Thompson Memorandum as a mechanism to punish the accused.<sup>194</sup> Such a desire is an impermissible "abuse of power" that does not pass a strict scrutiny analysis.

Even if the government's goal is the efficient prosecution of crime without any desire of punishment, common sense dictates that under strict scrutiny analysis, the most narrowly tailored approach to put those who commit crimes behind bars is to do so with as great a degree of accuracy as possible, ensuring that those who plead guilty are in fact guilty. Violating ethical standards that have been put in place by both the ABA and the New York State Disciplinary Board does not most narrowly accomplish this objective.<sup>195</sup>

Despite the presumption of innocence that is the credo in the United States, an indigent defendant who has a criminal background and who faces potentially biased witnesses, a potentially biased jury, and counsel who lacks the time or resources necessary to investigate the credibility of those witnesses might reasonably believe that the cards are stacked so high against him that the best strategy is to plead guilty to a lesser sentence despite his innocence.<sup>196</sup> Nevertheless, if state prosecutors were made to be more forthcoming in their discovery disclosure procedures, an indigent's counsel might learn important information, such as evidence concerning a

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<sup>193</sup> See E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 42 (1992-93) ("[I]ntermediate judicial scrutiny is enacted . . . so that a needless waste of resources is avoided.") (emphasis added).

<sup>194</sup> See *supra* note 147 and accompanying text.

<sup>195</sup> See *supra* note 48 and accompanying text.

<sup>196</sup> As stated earlier, agreeing to a plea bargain under such dire circumstances, where the defendant does not have access to various forms of material information cannot truly be considered "voluntary." See *supra* notes 117-122 and accompanying text.

witness's background suggesting the witness lacks credibility. Therefore, coercing all defendants to plead guilty regardless of the social cost is not the most narrowly tailored approach to prosecuting crime.

*B. Applying the Sixth Amendment Standard of Review*

In *United States v. Stein*, Judge Kaplan was not content to state that the USAO was only violating the KPMG employees' due process rights.<sup>197</sup> Kaplan continued his constitutional analysis and ruled that the defendants' Sixth Amendment right to adequate counsel was also denied.<sup>198</sup> Despite the fact that Sixth Amendment rights typically attach upon indictment,<sup>199</sup> Kaplan not only extended this right to attach pre-indictment,<sup>200</sup> but also impliedly included the pre-trial stage of litigation as a critical stage where prejudice could be presumed.<sup>201</sup> As a result, the federal prosecutors' acts of denying the KPMG employees access to the resources necessary to provide for an adequate defense was a Sixth Amendment violation. Similarly, indigent defendants under the current system in New York face an analogous predicament, as the government denies them access to the resources needed for sufficient representation during the newly anointed "critical" pre-trial stage of litigation. Therefore, under Kaplan's line of reasoning, indigent defendants in New York are having their Sixth Amendment rights violated as well.

After *Stein*, judges in New York may reasonably follow Judge Kaplan's rationale by holding that Sixth Amendment rights apply to indigent defendants regardless of the litigation stage where the harm originally occurs. First, the enormous disparity in resources that New York State gives to prosecutors as compared to public defenders<sup>202</sup> arguably can bring up Sixth Amendment issues even without focusing on the prosecutors' conduct.<sup>203</sup> Second, even though the state prosecutors' acts of

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<sup>197</sup> See *supra* Part IV.B.

<sup>198</sup> See *supra* Part IV.C.

<sup>199</sup> See *supra* note 73.

<sup>200</sup> Although past courts have emphasized the importance of pre-indictment representation, they have been hesitant to rule that Sixth Amendment rights attach at such an early stage. See *supra* notes 151-154 and accompanying text.

<sup>201</sup> See *supra* notes 155-160 and accompanying text.

<sup>202</sup> See *supra* Part IV.C.

<sup>203</sup> One can certainly make a case that the lack of resources provided by New York State to public defender offices denies indigent defendants the right to "adequate

defying ABA and New York State ethics rules—by suppressing material evidence and then coercing defendants to waive their rights to pre-trial hearings<sup>204</sup>—occur prior to indictment, a judge now has precedent holding that this can be a Sixth Amendment violation, even in this earliest stage of litigation.

In *Stein*, Judge Kaplan also ruled that the pre-trial stage of litigation could be a critical point in the adjudicative proceedings where a violation “infects” the entire trial from beginning to end.<sup>205</sup> As a consequence, this results in a structural defect where prejudice need not be proved, but rather is presumed,<sup>206</sup> because the likelihood that any competent lawyer could provide effective aid is so minute that no inquiry into the actual conduct of the trial is necessary.<sup>207</sup> The AUSAs in *Stein* threatened to “contaminate” the case from beginning to end by virtue of their pre-trial acts of obstructing the defendant-employees’ ability to obtain sufficient resources to defend themselves properly.<sup>208</sup>

Similarly, state prosecutors throughout New York, by also denying indigent defendants access to resources—in this

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representation.” See *supra* note 27. In fact, in *New York County Lawyers’ Association v. New York*, Judge Suarez ruled that the inadequate levels of compensation that the State of New York paid its public defenders violated the Sixth Amendment. 745 N.Y.S.2d 376, 383-85 (Sup. Ct. 2002.). In light of this, it is not a stretch to rule that lack of funds to investigate, the inability to meet with clients, and other problems violate the right to “adequate representation” without even focusing on wrongful prosecutorial behavior. See discussion *supra* Part II.A. In a related case, *New York County Lawyers’ Association v. New York*, 763 N.Y.S. 2d 397 (Sup. Ct. 2003), Judge Suarez struck down statutory compensation caps also as a Sixth Amendment violation as applied. As he eloquently opened his decision,

the most vulnerable in our society, children and indigent adults, appear in courts without advocates to champion or defend their causes. The pusillanimous posturing and procrastination of the executive and legislative branches have created the assigned counsel crisis impairing the judiciary’s ability to function. This pillar is essential to the stability of our political system. It should therefore be continually strengthened and not allowed to crumble into the detritus of a constitutional imbalance among the branches of government. Equal access to justice should not be a ceremonial platitude, but a perpetual pledge vigilantly guarded.

*Id.* at 398-99.

<sup>204</sup> See discussion *supra* Part II.B.

<sup>205</sup> See *supra* notes 156-161 and accompanying text.

<sup>206</sup> As stated above, see discussion *supra* Part II.A, public defenders have such little time to devote to each defendant, they often never receive the discovery information helpful to make an informed decision on whether to accept a plea agreement. Furthermore, if they do go to trial, prosecutors supply material evidence to them so late in the game that public defenders are further hindered from using this evidence effectively. See discussion *supra* Part II.B.

<sup>207</sup> See *supra* notes 90-93 and accompanying text.

<sup>208</sup> See *supra* note 157 and accompanying text.

case evidence—at the critical pre-trial stage of a criminal proceeding, create a structural defect that results in the contamination of the entire proceeding. By failing to disclose witness lists and other material evidence, prosecutors render indigent defendants uninformed as to how to best defend themselves. If a defendant agrees to a plea without access to material evidence, the entire criminal proceeding has been irrevocably affected. Similarly, when a defendant is pressured to waive his or her right to important pre-trial hearings, the ramification of such a decision could detrimentally affect the duration of the criminal proceeding as well.

Had the pre-trial stage of litigation never been considered a critical stage, it would be far more difficult for a judge to conclude that a Sixth Amendment violation arose from New York's indigent defense crisis. A judge would have to rule that there existed a "reasonable probability" that the outcome of a given case would have been different had the defect not existed. Judge Kaplan, however, by implicitly ruling that the pre-trial stage could be classified as critical,<sup>209</sup> makes such a ruling much easier. Because the pre-indictment unethical acts by state prosecutors clearly infect the duration of an indigent defendant's criminal proceeding,<sup>210</sup> a judge relying on *Stein's* reasoning could find that the system as it currently operates leads to violations of the Sixth Amendment right to adequate representation.

## VI. CONCLUSION

It is apparent from the research compiled by the Spangenberg Group that the current indigent defense system in New York is in dire need of reform in order to balance the playing field between state prosecutors and public defenders.<sup>211</sup> A system where overworked public defenders have more access to evidence held by state prosecutors is essential to achieve any semblance of fairness. Unfortunately, absent drastic actions on the part of the New York legislature, the burden to improve the current system must fall on the judiciary. Formulating a possible solution to this problem will be quite difficult, however, because even though the prosecutors' conduct is

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<sup>209</sup> See *supra* note 157-160 and accompanying text.

<sup>210</sup> See discussion *supra* Part II.B.

<sup>211</sup> See discussion *supra* Part II.

contrary to their ethical obligations,<sup>212</sup> such acts are nevertheless legal under the governing New York law.<sup>213</sup> The courts, however, have spurred change in New York criminal procedure law in the past. New York judges need to look no further than forty-five years ago, when in *People v. Rosario* a New York state court essentially created new criminal procedure laws, which the legislature subsequently codified.<sup>214</sup> Such judiciary action must take place again.

In *United States v. Stein*, Judge Kaplan used Fifth and Sixth Amendment analysis to strike down a common practice that federal prosecutors used to disadvantage employee defendants.<sup>215</sup> If New York judges use the same rationale, they could put a stop to the unethical conduct employed by state prosecutors to severely disadvantage indigent defendants.<sup>216</sup> Considering the Supreme Court's renewed emphasis on the importance of discovery in criminal cases,<sup>217</sup> as well as *Stein's* extension of Fifth and Sixth Amendment principles, the time is ripe for New York judges to use their power to curb the power of prosecuting attorneys.

An ambitious jurist who finds him- or herself on the bench ruling on a similar situation of institutional unfairness as the hypothetical case of Francisco Rodriguez<sup>218</sup> has a newly minted opportunity. Precedent now exists allowing a court to find that excessive government conduct, although acceptable under New York Criminal Procedure Law, violates Article I, Section 6 of the New York Constitution, as well as the Fifth and Sixth Amendments of the U.S. Constitution. This court would then have the ability, like the court in *Rosario*, to put forward a new set of rules that is more equitable to all parties involved.

While the broader discovery rules one hopes will eventually govern New York criminal law need not go so far as to permit open discovery in all criminal cases, the rules ought to take into account applicable ethical standards, more so than

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<sup>212</sup> For a discussion of the violations of both the ABA Disciplinary Rules and the New York Bar Association Lawyer's Code of Professional Responsibility, see *supra* notes 39 and 48.

<sup>213</sup> See *supra* notes 44-47 and accompanying text.

<sup>214</sup> See *supra* notes 44-47 and accompanying text.

<sup>215</sup> See discussion *supra* Part IV.

<sup>216</sup> See discussion *supra* Part II.B.

<sup>217</sup> See *supra* notes 86-89 and accompanying text.

<sup>218</sup> See *supra* text accompanying notes 1-11.

the restrictive *Rosario* rule currently allows.<sup>219</sup> In fact, an excellent model for discovery rules that are more in line with current ethical standards is located just across the river—the state of New Jersey’s criminal procedure law, which, for example, compels mandatory discovery at the time of a pre-trial plea offer.<sup>220</sup>

Such mandatory discovery rules meet the ABA’s recommendations of providing for discovery at an earlier stage of the criminal proceeding.<sup>221</sup> Such rules would also mitigate the inequitable differences between the prosecution and public defenders.<sup>222</sup> Regardless of the specifics of the rules ultimately settled upon, if a judge following *United States v. Stein* has the vision to create a new set of criminal discovery laws that comport with Judge Kaplan’s notions of fairness under the Fifth and Sixth Amendments of the Constitution, indigents such as Francisco Rodriguez will finally have the opportunity to get a fair shake.

Marc Sackin<sup>†</sup>

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<sup>219</sup> See *supra* notes 44-47.

<sup>220</sup> See N.J. CT. R. 3:13-3(a) (2003) (“Where the prosecutor has made a pre-indictment plea offer, the prosecutor shall upon request permit defense counsel to inspect and copy or photograph any relevant material which would be discoverable following an indictment . . . .”); see also N.J. CT. R. 3:13-3(c)(6) (“The prosecutor shall permit defendant to inspect and copy or photograph . . . names and addresses of any persons whom the prosecutor knows to have relevant evidence or information including a designation by the prosecutor as to which of those persons may be called as witnesses.”).

<sup>221</sup> See ABA STANDARDS, *supra* note 43, Standard 11-4.1(a).

<sup>222</sup> See ABA STANDARDS, *supra* note 43, Standard 11.1.1(a)(v).

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