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Swept under the Rug: the Brady Disclosure Obligation in a Pre-Plea Context

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SWEPT UNDER THE RUG: THE *BRADY* DISCLOSURE OBLIGATION IN A PRE-PLEA CONTEXT

I. INTRODUCTION

Jessica was driving during a heavy rainstorm when she lost control of her automobile, which veered off the road and overturned. One passenger died, and another passenger was seriously injured. Neither alcohol nor drugs were involved. At the time of the accident, Jessica was traveling through a 35-mph speed limit zone. An investigation initially revealed that at the time of the accident, Jessica's speed was 70.84 mph. However, an error was later discovered and her speed was reduced to 44.66 mph. The prosecutor sought to charge Jessica with two felonies: vehicular homicide and serious injury by vehicle. The prosecution's expert later discovered that the revised speed calculation used by the investigators was faulty, and that based on the data available, it was now impossible to accurately calculate Jessica's actual speed. However, the prosecution never informed Jessica's counsel of this new discovery. Soon after, without the knowledge of what actually caused the accident, Jessica pleaded guilty before going to trial. Was there a prosecutorial duty to disclose this critical information to Jessica before allowing her to plead guilty? If the prosecution knows that the defendant is going to waive the right to trial and instead plead guilty, is a prosecutorial disclosure duty still owed?[1]

In 1963, the United States Supreme Court decided *Brady v. Maryland*,[2] a monumental decision leveling the playing field in the discovery process between prosecutors and criminal defendants.[3] *Brady* recognized a seminal constitutional duty for prosecutors to provide

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[1] *See* Carroll v. State, 474 S.E.2d 737 (Ga. Ct. App. 1996). The Court of Appeals of Georgia held that the prosecution failed to perform its duty by purposefully remaining silent, even when there was a "clear opportunity" to disclose this information to the defense. *Id.* at 740. The court found that the prosecution failed to "promote the truth-seeking function on which the judicial process [was] founded." *Id.*; *see also* Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 659-60 (2007) (detailing *Carroll* action as clear and obvious *Brady* violation by prosecutors).

[2] 373 U.S. 83 (1963).

[3] *See* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 643-44 (2002) (detailing *Brady* as critical criminal procedural case decided by United States Supreme Court).

defendants with exculpatory and material evidence in their possession, which ran on the idealistic notion of justice over victory; however, the actual application lacked the practicality originally expected.[4] In a pre-trial context, conflicting court interpretations have exposed the confusion in the judicial system as to whether a trial is necessary to trigger this prosecutorial duty.[5] In the years following *Brady*, a split was created among the circuit courts as to whether a prosecutorial duty to disclose material, exculpatory evidence is owed before a defendant enters a plea.[6] In 2002, the Supreme Court granted certiorari to review *United States v. Ruiz*,[7] which legal commentators expected to settle the dispute, but instead, the ambiguous and incomplete decision rendered has frustrated attorneys on both sides and has caused more confusion among the courts concerning the application of *Brady* in a pre-plea context.[8]

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[4] *See Brady*, 373 U.S. at 87 ("[S]uppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); George E. West II, *A Prosecutor's Duty to Disclose: Beyond* Brady, 73 TEX. B.J. 546, 547 (2010) (describing *Brady* obligation as "one of the central pillars in our criminal justice system"). *But see* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2093-94 (2010) (demonstrating there is little to no disciplinary sanctions for prosecutors found to violate *Brady* obligation); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 487-88 (2009) (laying out issues surrounding scope of evidence required to be disclosed).

[5] *See, e.g.*, Matthew v. Johnson, 201 F.3d 353, 361 (5th Cir. 2000) ("The *Brady* rule's focus on protecting the integrity of trials suggests that where no trial is to occur, there may be no constitutional violation."); Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995) (holding *Brady* obligation continues to exist even if defendant does not go to trial); Smith v. United States, 876 F.2d 655, 657 (8th Cir. 1989) (per curiam) (holding no prosecutorial disclosure duty exists when trial right is waived); *see also* Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 317 (2001) (proposing "various interpretations" as possible reason why prosecutors may fail to disclose).

[6] *See Sanchez*, 50 F.3d at 1453-54 (holding pleas cannot be voluntary and intelligent if material information is withheld); United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994) (holding prosecutorial violation of *Brady* may render pleas involuntary in certain circumstances); White v. United States, 858 F.2d 416, 422 (8th Cir. 1988) (holding courts may evaluate validity of pleas after *Brady* violation is discovered); Miller v. Angliker, 848 F.2d 1312, 1321-22 (2d Cir. 1988) (holding defendants may challenge plea voluntariness due to withheld exculpatory evidence). *But see Matthew*, 201 F.3d at 361-62 (holding defendants may not challenge pleas due to prosecutorial failure to disclose). *See generally* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 440 (2001) (explaining split that existed among the courts).

[7] 536 U.S. 622 (2002).

[8] *See* Peter A. Joy & Kevin C. McMunigal, *Prosecutorial Disclosure of Exculpatory Information in the Guilty Plea Context: Current Law*, CRIM. JUST., Fall 2007, at 50, 50 (recognizing *Ruiz* restriction and its limitation to resolving split); Ellen Yaroshefsky, *Ethics and Plea Bargaining, What's Discovery Got to Do With It?*, CRIM. JUST., Fall 2008, at 28, 31 (demonstrating *Ruiz* limitation to *Brady* scope and failure to answer further evidentiary issues). *Compare* McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) (holding *Ruiz* created distinction between impeachment information and exculpatory evidence), *with* United States v.

This Note illustrates the failures within the criminal justice system by identifying the vast disparity between prosecutors and criminal defendants pre-plea and the need for rule modification in the ethical and/or procedural arenas.[9] Part II discusses the background of the constitutional duties created by *Brady* and its progeny, the recently revised prosecutorial ethical duties, and the procedural rules surrounding the withdrawal of an entered guilty plea.[10] Part III analyzes the initial unsettled circuit split, the *Ruiz* decision, and the subsequent circuit split that currently exists.[11] Part IV examines the mistakes that courts make in interpreting *Ruiz*, suggests the imposition of procedural rules, and recommends revisions to ethical rules in order to classify the application of *Brady* in a plea context.[12] Finally, Part V concludes by discussing the need for new legislation or the modification of existing rules, which will settle this dispute, and most importantly, prevent convictions of innocent defendants.[13]

II. BACKGROUND

A. Brady *Disclosure and Due Process*

For over seventy years, the Supreme Court has recognized the importance of the prosecutor's role in the criminal justice system and their power over vulnerable defendants.[14] In *Brady v. Maryland*, the Court held that the Fourteenth Amendment's due process clause creates a prosecutorial duty to disclose evidence that is "favorable" for the defendant, as it is

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Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (holding *Ruiz* does not create distinction between impeachment information and exculpatory evidence).

[9] *See infra* Part IV (presenting alterations and arguments that go beyond *Ruiz* which would resolve issues among courts).

[10] *See infra* Part II (reviewing constitutional and ethical duties imposed on prosecutors and procedural rules of plea withdrawals).

[11] *See infra* Part III (discussing conflicting court rulings in examining *Brady* and its progeny and voluntariness of guilty pleas).

[12] *See infra* Part IV (analyzing *Ruiz* limitation and displaying lack of disciplinary rules against prosecutors).

[13] *See infra* Part V (proposing rules clarifying plea involuntariness and need for strict disciplinary actions against *Brady* violators).

[14] *See, e.g.*, Pyle v. Kansas, 317 U.S. 213, 215-16 (1942) (finding deliberate prosecutorial suppression of favorable evidence and utilization of perjured testimony is unconstitutional); Berger v. United States, 295 U.S. 78, 88 (1935) ("[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (finding prosecutors act "inconsistent[ly] with the rudimentary demands of justice" when known perjured testimony is submitted).

"material either to guilt or punishment."[15] Legal theorists suspected *Brady* to have a swift and radical change to the criminal law arena; however, problems soon became apparent.[16] *Brady* was monumental in the creation of the ethical duties imposed upon prosecutors by the American Bar Association ("ABA").[17] Conversely, *Brady* had little procedural effect on criminal courts and the Federal Rules of Criminal Procedure due to the vague protective authority it provides defendants.[18]

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[15] Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding prosecutorial suppression of certain evidence to be unconstitutional). In *Brady*, the defendant, John L. Brady, and a companion, Boblit, were being charged with first degree murder in separate cases. *Id.* at 84. During his trial, Brady admitted that he was guilty of murder, however, he claimed that Boblit was the individual who actually carried out the killing of the victim, and Brady requested a verdict "without capital punishment." *Id.* However, with very little evidence of innocence brought by Brady, the jury rendered a guilty verdict of first degree murder and sentenced him to death. *Id.* Prior to this ruling, Brady had made a request to the prosecution to provide the statements that Boblit had made to the police. *Id.* Although the prosecution provided documentation, excluded was Boblit's statement admitting that he undertook the actual homicide, and it was withheld until after Brady's conviction and sentencing. *Id.* The Court found this statement to be "favorable" evidence that was "material . . . to [Brady's] . . . punishment," and, therefore, its suppression violated Brady's due process rights. *Id.* at 87. Additionally, the Court found the nondisclosure to be fundamentally unfair to the defendant, as it "d[id] not comport with standards of justice." *Id.* at 88. The Court affirmed the Maryland Court of Appeals ruling, and the action was remanded for a retrial regarding punishment, but not guilt. *Id.* at 88-89; *see also* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 694 (2006) (discussing *Brady*'s importance and challenges courts have interpreting its prosecutorial duty). Professor Gershman outlines the *Brady* Court's severe limitations of not defining "suppression" and "favorable" and, thus, the decision leaves courts with the responsibility to determine the scope of this prosecutorial duty. *Id.*

[16] *See* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531-34 (2007) (detailing issues surrounding prosecutorial disclosure duty and its ineffectiveness); *see also* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 415 (2010) (describing *Brady* rule as "one of the most unenforced constitutional mandates in criminal law").

[17] *See* Gershman, *supra* note 16, at 531 (describing *Brady* as "core" of ethical obligations prosecutors owe); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (1983) ("A public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."). Commentators have found that the ABA imposed a more demanding disclosure obligation than *Brady* had established, because the ABA required disclosure even without a defendant's request. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009) [hereinafter Formal Opinion 09-454], *available at* http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17373 (discussing impact *Brady* had on past and current prosecutorial ethical obligations).

[18] *See* FED. R. CRIM. P. 16. Upon request, the government must disclose any oral, written or recorded statements made by the defendant within the government's possession, control or custody. *See* FED. R. CRIM. P. 16(a)(1). Furthermore, if requested, the prosecutor must reveal the defendant's prior criminal record and allow inspection and copying of documents and tangible objects that are either intended to be used by the government at trial, or are material to the defendant's defense. *See id.* Additionally, if requested, the prosecution must supply summaries

Brady did not articulate a standard for determining "favorable" or "material" evidence, causing much difficulty for prosecutors and courts in determining which evidence triggers the duty to disclose.[19] After *Brady*, the Supreme Court attempted to refine the scope of *Brady* by granting certiorari in a number of criminal cases involving prosecutorial disclosure.[20] The Supreme Court gradually expanded the prosecutorial disclosure duty to include additional evidence: evidence useful in impeaching government witnesses;[21] all material evidence, even if not requested by the defendant;[22] and all material evidence not known by the prosecutor, although he or she should have known of it.[23] Throughout

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of any expert testimony that they intend to offer in its case-in-chief. *See id.* However, the prosecution is not required to disclose "reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." FED. R. CRIM. P. 16(a)(2); *see also* FED. R. CRIM. P. 16 advisory committee's note (1974 Amendment) (detailing distinction between *Brady* and Rule 16). The Advisory Committee specifically opted "not to codify the *Brady* Rule" in order to give broader discovery to both parties in a federal case. *See id. But see* Robert W. Tarun, Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 102 (2004) (stating Rule 16 does not require disclosure of exculpatory evidence). The American College of Trial Lawyers seeks an amendment to the rules that codifies *Brady* and clarifies "the nature and scope of favorable information." *Id.* at 95.

[19] *See* Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 394-95 (1984) (noting serious impracticalities facing prosecutors in determining which evidence is within duty to disclose). Professor Capra points out that discrepancies between defense counsel and prosecutors may exist as to the importance or favorability of certain evidence. *See id.* at 395.

[20] *See* Gershman, *supra* note 15, at 708 (discussing "illusory" effects that arose from *Brady* and Supreme Court's attempt to refine).

[21] *See* Giglio v. United States, 405 U.S. 150, 153-55 (1972) (holding prosecutors must disclose agreement witness made with government). In *Giglio*, the defendant was convicted of passing forged money orders. *Id.* at 150. Following trial, the defendant discovered evidence that the government had failed to disclose a promise of immunity made to the defendant's co-conspirator, the only witness to the crime. *Id.* at 150-51. Holding that the government's case "depended almost entirely" on this witness's testimony, the Court reversed the defendant's conviction because "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 154-55; *see also* United States v. Bagley, 473 U.S. 667, 676-77 (1985) (affirming *Giglio* and holding impeachment evidence is subject to *Brady* disclosure).

[22] *See Bagley*, 473 U.S. at 682 (holding prosecutorial disclosure duty is owed even when defendant makes no request).

[23] *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[An] individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Giglio*, 405 U.S. at 154-55 (finding due process violation for prosecutorial failure to disclose actions made by another prosecutor); *see also* United States v. Alvarez, 317 F. Supp. 2d 1163, 1166 (C.D. Cal. 2004) (holding prosecutorial disclosure duty extends to discoverable information outside prosecutorial possession). *But see* United States v. Reyeros, 537 F.3d 270, 279 (3d Cir. 2008) ("[T]he United States government was not obligated to obtain and produce documents that the government had never seen and that were in the

these cases, the Supreme Court made several different standards of materiality, which the Court continually revised.[24] The current standard of materiality is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[25] The Court later held that "reasonable probability" of a different result is found when the suppressed evidence "undermines confidence in the outcome of a trial."[26] Although this materiality standard seems to require a post-hoc analysis, it would be significantly more difficult for prosecutors to use the standard uniformly to guide their pretrial decisions.[27]

If a *Brady* violation is discovered after trial, a new trial is typically granted to the defendant, providing him the opportunity to introduce the suppressed evidence.[28] If a court discovers a pretrial *Brady* violation, it

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possession of a foreign sovereign.").

[24] *See* Burke, *supra* note 4, at 484-88 (describing standard of materiality and the Court's constant modifications); Gershman, *supra* note 15, at 708-15 (detailing modifications Supreme Court made to *Brady* rule). Initially, a broad standard was laid out by Justice Fortas in *Giles v. Maryland*, 386 U.S. 66 (1967), requiring prosecutors to disclose any evidence that is "favorable" for the defendant's case. *Id.* at 101-02 (Fortas, J., concurring). In *Moore v. Illinois*, 408 U.S. 786 (1972), the 5-4 majority used a narrow, restrictive interpretation and held that there is no constitutional duty to "make a complete and detailed accounting to the defense of all police investigatory work on a case." *Id.* at 795. In *United States v. Agurs*, 427 U.S. 97 (1976), the Court analyzes three different contexts in determining when *Brady* will apply: (1) during a trial when the prosecution employs a known perjured testimony; (2) when a defendant makes a request pretrial; or (3) when a very broad or no request at all is made by a defendant. *Id.* at 103-06. The Court held in the first scenario that a *Brady* violation occurs when the prosecution knowingly uses perjured testimony and "there is [a] reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103. In the second scenario, the Court held all pretrial requests for evidence that are capable of "affect[ing] the outcome" of the trial are material. *Id.* at 104-06. In the third scenario, the Court held that the suppression of evidence that "creates a reasonable doubt that did not otherwise exist" is unconstitutional. *Id.* at 112. Nine years later, the Court abrogated the *Agurs* distinction and held that the test for materiality is the same whether the defense makes no request, a general request, or a specific request. *Bagley*, 473 U.S. at 682.

[25] *Bagley*, 473 U.S. at 682; *see* Brian D. Ginsberg, *Always Be Disclosing: The Prosecutor's Constitutional Duty to Divulge Inadmissible Evidence*, 110 W. VA. L. REV. 611, 619-21 (2008) (detailing *Bagley* decision and new materiality standard and its endorsement in subsequent opinions).

[26] *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). The *Kyles* Court added to the *Bagley* standard by holding that once a constitutional error is found under *Bagley*, there is no further review as to whether the error was harmless. *Id.* at 435. Additionally, the Court held that in determining materiality, suppressed evidence is "considered collectively, not item by item." *Id.* at 436.

[27] *See* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 653-54 (2002) (explaining prosecutorial need of "Zen-like" state of mind in determining materiality); Christopher Deal, Note, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1780 (2007) (advocating for new balancing test due to impracticability in pretrial context).

[28] *See* Jones, *supra* note 16, at 443 (detailing scheme and procedure for defendant to make

may compel disclosure and, if necessary, grant a continuance for the defendant to make an effective use of the applicable evidence.[29] The Supreme Court uses the following three components to determine a *Brady* violation: (1) whether the evidence was favorable to the accused because it was exculpatory or impeaching; (2) whether the evidence was actually suppressed by the prosecution; and (3) whether the defendant had been prejudiced by the nondisclosure.[30] The discovery of a *Brady* violation exposes an infringement of the criminal defendant's constitutional rights; however, studies demonstrate that prosecutors are rarely reprimanded for these violations.[31] Legal commentators have argued that because it is unlikely that a defendant will discover what material evidence a prosecutor actually has, state bars should install severe disciplinary procedures to deter any intentional or negligent misconduct by prosecutors.[32]

B. Model Rule 3.8(d): Prosecutor's Ethical Discovery Duty

Rule 3.8(d) of the ABA's Model Rules of Professional Conduct requires prosecutors to

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in

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Brady challenge).

[29] *See id.* (describing pretrial procedure to make a *Brady* challenge); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 1148 (5th ed. 2009) (detailing process and courts' reluctance in pretrial review of *Brady* requests).

[30] *See* Strickler v. Greene, 527 U.S. 263, 281-82 (1999) (setting out three components necessary to establish *Brady* claim); *see also* Banks v. Dretke, 540 U.S. 668, 691 (2004) (using *Strickler* components in finding a *Brady* violation). In *Banks*, the defendant was convicted of murder and sentenced to death. *Banks*, 540 U.S. at 674. Approximately sixteen years later, information revealed that the prosecutors used a paid informant, which had not been disclosed to the defendant. *See id.* at 683-85. The Court used the *Strickler* analysis and found that a *Brady* violation had occurred because the prosecutor knew of the informant's arrangement with the police, he assured the defendant that all *Brady* materials had been disclosed before trial and he continued to hide the informant's status upon discovery. *See id.* at 693.

[31] *See* Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, CRIM. JUST., Spring 2008, at 24, 37 (describing study where virtually no reprimands were found in 11,000 cases of alleged prosecutorial misconduct); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 730 (1987) (analyzing five-year study of *Brady* violations and finding only nine disciplinary actions taken).

[32] *See* Barkow, *supra* note 4, at 2093-94 (setting out practical issues concerning lack of discipline against *Brady* violators); Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 317-18 (2010) (discussing lack of deterrence and call for reform).

> connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.[33]

The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 09-454 in July 2009 in response to the difficulty in finding the distinction between this ethical obligation and the constitutional obligation imposed by *Brady* and its progeny.[34] The ABA points out that this ethical obligation to disclose is much broader than the constitutional obligation created by the Supreme Court.[35] The scope is expanded in the ethics field due to the prosecutor's role and responsibility in establishing justice "and [to make sure] that special precautions are taken to prevent and to rectify the conviction of innocent persons."[36]

Rule 3.8(d) abandons the high threshold "material" evidence standard established by the Supreme Court, settling the issue of requiring prosecutors to decide what evidence has "reasonable probability" to produce a different verdict.[37] Rule 3.8(d) further separates itself from the constitutional obligation by specifically including the requirement to disclose favorable "information" as well, and not just "evidence."[38] Furthermore, the ABA notes that Rule 3.8(d)'s "timely disclosure" requirement is designed for the defendant to get the most effective use out of evidence and, therefore, once a prosecutor knows of its existence, the

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[33] MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009) (laying out prosecutorial ethical duty in discovery process); *see* West, *supra* note 4, at 547 (detailing Rule 3.8(d) and disparity from *Brady*'s constitutional disclosure requirement).

[34] *See* Peter A. Joy & Kevin C. McMunigal, *ABA Explains Prosecutor's Ethical Disclosure Duty*, CRIM. JUST., Winter 2010, at 41, 42-43 (recognizing *Ruiz* limitation and continued split); *see also* Formal Opinion 09-454, *supra* note 17, at 3-5 (clarifying applicability of prosecutorial ethical obligation versus constitutional obligation).

[35] *See* Formal Opinion 09-454, *supra* note 17, at 4 (stating "Rule 3.8(d) to be more demanding than the constitutional case law").

[36] MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009) (discussing prosecutorial role as "minister of justice" that carries broad ethical obligations); *see* Formal Opinion 09-454, *supra* note 17, at 2-3 (reasoning heightened obligation is necessary in criminal proceedings).

[37] *See* Formal Opinion 09-454, *supra* note 17, at 2, 4 n.16 (establishing lack of "materiality" standard and alleviation of any outcome determinative issue created by *Brady*); *see also* Joy & McMunigal, *supra* note 34, at 42 (discussing lack of materiality limitation in Rule 3.8(d)).

[38] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009) (setting out disclosure requirement to "evidence or information"); *see also* Formal Opinion 09-454, *supra* note 17, at 5 (noting addition of "information" in Rule 3.8(d)). The ABA notes that favorable information must be disclosed because it can help the defendant in several different ways—for example, plea negotiations. Formal Opinion 09-454, *supra* note 17, at 4. Even inadmissible, favorable information should be disclosed to the defendant. *Id.* The ABA uses an example of a hearsay statement and held that it should be disclosed because a defendant may use the information to build a defense. *Id.* at 4 n.23.

information must be disclosed "as soon as reasonably practical."[39] In contrast to the decisions by the Supreme Court, the ABA explicitly states disclosure must be made pre-plea, because one of the "most significant purposes" for the disclosure requirement is to assist the defendant in determining whether to plead guilty.[40]

In sum, the ABA clarifies that Rule 3.8(d)—unlike the constitutional disclosure obligation—does not require the prosecutor to use pro-hoc analysis in determining what evidence to disclose, but instead, mandates that he or she must focus on whether the suppression contrasts with the interests of fairness and the ability of a defendant to make an informed decision.[41] The ABA encourages prosecutors to err on the side of disclosure when dealing with information unknown to the defendant.[42] Legal commentators have found that while ABA Formal Opinion 09-454 provides the proper guidance for the courts, prosecutors, and state bar associations, it is too soon to recognize the impact it will have on state ethics authorities.[43] Although rare, some jurisdictions require similar broad disclosure standards and have installed "open-file discovery," which allows a defendant to access the prosecutor's file throughout the entire judicial process.[44]

C. Plea Waivers and Withdrawals

In 2009, more than 96% of all federal criminal convictions were

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[39] *See* Formal Opinion 09-454, *supra* note 17, at 6 (discussing "timely disclosure" requirement set forth in Rule 3.8(d)).

[40] *Id.* (stating ABA's point of view for disclosure in plea context). The ABA reasons that disclosure pre-plea is necessary "[b]ecause the defendant's decision may be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case." *Id.*; *see* Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 HOFSTRA L. REV. 847, 853 (2010) (discussing ABA's concern of non-disclosure pre-plea).

[41] *See* Formal Opinion 09-454, *supra* note 17, at 7 (stating Rule 3.8(d)'s designation is to promote fairness and reliability); *see also* McMunigal, *supra* note 40, at 853-54 (discussing ABA's public policy rationale behind Rule 3.8(d)). Professor McMunigal points out that Rule 3.8(d)'s promotion of fairness and reliability contradicts the waivers prosecutors commonly use in their plea agreements with criminal defendants. McMunigal, *supra* note 40, at 853-54.

[42] *See* Formal Opinion 09-454, *supra* note 17, at 4 ("The rule . . . requires prosecutors to steer clear of the constitutional line, erring on the side of caution.").

[43] *See* Joy & McMunigal, *supra* note 34, at 44 (discussing current application of Rule 3.8(d) after issuance of Formal Opinion 09-454); Theresa A. Newman & James E. Coleman Jr., *The Prosecutor's Duty of Disclosure Under ABA Model Rule 3.8(d)*, CHAMPION, Mar. 2010, at 20, 22 (discussing possible effects of Formal Opinion 09-454 on disciplinary actions against *Brady* violators).

[44] *See* Ellen Yaroshefsky, *Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 343, 351-52 (2010) (discussing jurisdictions' implementation of open-file discovery and opposition it faces).

achieved through guilty pleas.[45] Generally, a guilty plea is entered through an explicit or implicit plea agreement between the defendant and the prosecution.[46] Typically, during these negotiations, the prosecution makes concessions regarding the sentencing, the charged offense, or other circumstances, in return for a guilty plea.[47] Legal commentators have argued contrasting views as to whether plea bargaining is constitutional, or even beneficial, to the criminal justice system.[48] However, due to the Supreme Court's refusal to prohibit such agreements, and because of the creation of rules which regulate those agreements,[49] there is no sign of this procedure vanishing anytime in the near future.[50]

Generally, when a defendant pleads guilty, he waives the right to

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[45] *See* U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2009, at 3 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf (detailing 2009 criminal conviction statistics).

[46] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 3-4 (1979) (discussing definition of plea agreements).

[47] *See id.* (describing compromises prosecutors normally make in exchange for guilty pleas).

[48] *See* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1971 (1992) (describing plea bargaining as fair "compromise"). Judge Frank Easterbrook sees plea bargaining as a mutual agreement between two respective sides that has been reached through negotiation and compromise, and he encourages defendants to enter into such discussions in order to avoid the uncertainty of trial. *Id.*; *see also* Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 610-15 (2005) (detailing failures encountered upon abolishment of bargaining and noting its cost effectiveness); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1138 (1998) (stating plea bargaining is justified by "notion[] of efficiency or resource preservation"). *But see* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 934 (1983) (arguing for plea bargaining abolishment because it "has undercut the goals of legal doctrines"); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992) (claiming plea bargaining is unconstitutional and against public policy); Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 771 (1998) ("[Plea bargaining] may result in innocent defendants being faced with a choice where the cost of pleading guilty outweighs the risk of going to trial.").

[49] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) ("[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."); Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("[A] guilty plea and the . . . concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."); Santobello v. New York, 404 U.S. 257, 260 (1971) (justifying plea bargaining and referring to it as "an essential component of the administration of justice"); *see also* FED. R. CRIM. P. 11(c) (allowing use of those plea agreements disclosed to and accepted by the court); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1060 (1976) (discussing initial implementation of plea agreements in Federal Rules of Criminal Procedure).

[50] *See* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008) ("[P]lea bargaining seems to be growing only more entrenched over time.").

trial, the right to confront his accuser, and the right against self-incrimination.[51] When a defendant enters a guilty plea, the Federal Rules of Criminal Procedure require federal judges to notify and question the defendant regarding whether he knows and understands the rights being waived, including, but not limited to, the right to plead not guilty, the right to be represented by counsel, the right against self-incrimination, and the right to confront accusers.[52] Additionally, federal courts must determine whether a defendant has entered the guilty plea on his or her own volition, or if the defendant has instead entered the plea through a coerced agreement with the prosecution.[53] Generally, prosecutors may include an explicit waiver in a plea agreement that waives the defendant's statutory right to appeal or attack the sentence that may be imposed.[54] Some prosecutors have placed explicit "*Brady* waiver" provisions into plea agreements, which call upon defendants to waive their protective rights to *Brady* materials after they have entered their guilty plea.[55] Courts have held that because defendants may waive such important constitutional rights, a waiver in a plea agreement will only be constitutionally enforceable if the defendant was consciously aware of the rights he or she had relinquished.[56] Additionally, courts have found that public policy may

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[51] *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969) (describing rights waived when defendants enter guilty pleas); Dale E. Ho, *Silent at Sentencing: Waiver Doctrine and a Capital Defendant's Right to Present Mitigating Evidence After* Schriro v. Landrigan, 62 FLA. L. REV. 721, 743 (2010) (detailing general rights defendants waive when opting to plead guilty).

[52] *See* FED. R. CRIM. P. 11(b)(1) (laying out court procedure in affirming whether defendant is knowingly waiving constitutional rights); *see also* Ho, *supra* note 51, at 743 (establishing rights lost when defendants plead guilty). Dale E. Ho notes that this waiver "carries special significance" due to the punishment being applied and the implication of the defendant's constitutional rights. *Id.*

[53] *See* FED. R. CRIM. P. 11(b)(2) (setting requirement for courts to determine defendant's voluntariness in plea entry).

[54] *See* 1A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 180 (4th ed. 2008) (describing government's use of waivers in bargaining with defendants); *see also* United States v. Guillen, 561 F.3d 527, 529 (D.C. Cir. 2009) (holding appeal waiver to sentence not yet given is generally valid); United States v. Felix, 561 F.3d 1036, 1040 (9th Cir. 2009) (holding appeal waivers are generally valid).

[55] *See* Douglass, *supra* note 6, at 509-16 (detailing use of "*Brady* waivers" in plea agreements and issues surrounding it); Yaroshefsky, *supra* note 8, at 31 (detailing prosecutors use of express waivers of *Brady* rights in plea agreements); *see also* Shane M. Cahill, Note, United States v. Ruiz*: Are Plea Agreements Conditioned on* Brady *Waivers Unconstitutional?*, 32 GOLDEN GATE U. L. REV. 1, 28-31 (2002) (analyzing constitutionality of "*Brady* waivers").

[56] *See* United States v. Brady, 397 U.S. 742, 748 (1970) ("[Due process requires waivers be] voluntary[,] . . . knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 875 (2010) (discussing constitutional requirement that defendants know what they are waiving when pleading guilty); *see also* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (holding waivers must be knowing, intelligent

limit the rights that prosecutors seek defendants to waive when pleading guilty, whether the guilty plea is through an agreement or not.[57]

Courts generally allow defendants to withdraw guilty pleas with ease prior to sentencing.[58] Due to the rights waived when a defendant enters a guilty plea, due process requires that the defendant enter the plea knowingly, intelligently, and voluntarily.[59] Generally, courts find that a plea has been made "intelligently" and "knowingly" if the defendant had proper advice of counsel, understood the charge, and knows the basic consequence of the plea, while a plea will be deemed "voluntary" if it is not a product of actual harm, mental coercion, or overbearance of the defendant's will.[60] Additionally, the Supreme Court has noted that courts

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and voluntary); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

[57] *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2046-48 (2000) (detailing waiver limits courts have established in guilty pleas); *see e.g.*, United States v. Mezzanatto, 513 U.S. 196, 204 (1995) ("There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discredit[ing] the federal courts.'" (quoting 21 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5039, at 207-08 (1977))); Wheat v. United States, 486 U.S. 153, 162 (1988) (holding defendant cannot waive right to conflict-free counsel); United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996) ("[Defendants cannot waive] claims involving a breach of the plea agreement, racial disparity in sentencing among codefendants or an illegal sentence imposed in excess of a maximum statutory penalty.").

[58] *See* FED. R. CRIM. P. 11(d) (providing rules of when defendants may withdraw guilty pleas). A guilty plea may be withdrawn for any reason prior to the judge's acceptance of that plea. *Id.* If a guilty plea is agreed to by a judge, but a sentence has yet to be imposed, the defendant may withdraw the plea if they have "a fair and just reason." *Id.*; *see also* Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 869-73 (2004) (discussing federal plea withdrawal rules and relocation of Rule 32(d) to Rule 11(d)); FED R. CRIM. P. 32(d) advisory committee's note (1983 Amendments) (detailing "generous" "fair and just reason" standard). The advisory committee notes that the "fair and just" standard lacks definiteness, but that courts should consider three factors in determining to withdraw a plea: (1) whether the defendant asserts innocence; (2) the reason why the defense was not raised earlier; and (3) the duration since the guilty plea was entered. *Id.*

[59] *See* Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961, 2969-71 (2010) (describing Supreme Court's holding that due process requires defendant's plea to be knowing and voluntary); Anne D. Gooch, Note, *Admitting Guilt by Professing Innocence: When Sentence Enhancements Based on* Alford *Pleas are Unconstitutional*, 63 VAND. L. REV. 1755, 1760 (2010) (stating pleas can only be effective if entered knowingly, voluntarily, and understandingly); *see also* Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005) ("A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" (quoting *Brady*, 397 U.S. at 748)); Commonwealth v. Hiskin, 863 N.E.2d 978, 982-84 (Mass. App. Ct. 2007) ("In the context of a guilty plea, justice is not done when a defendant's plea of guilt is not intelligent and voluntary . . . .").

[60] *See* Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1008-09 (1986) (setting out general definitions used by courts in determining

should recognize whether the applicable plea includes "misrepresentation or other impermissible conduct by state agents" and, if such misconduct is found, the plea could be voidable, even if intelligently and voluntarily entered.[61]

III. FACTS

*A. Pre-*Ruiz *Prosecutorial Disclosure in Guilty Plea Context*

It was not until fourteen years after *Brady* that a court first analyzed the applicability of a prosecutor's disclosure duty in a pre-plea context, finding that intentional prosecutorial suppression during plea negotiations could deprive a defendant of his or her due process rights.[62] Years later, a divisive split formed between the circuit courts regarding whether a prosecutor actually owes a disclosure duty pre-plea.[63] Courts that found no pre-plea disclosure duty focused on the challenges and appeals defendants waive when they plead guilty.[64] Similarly, some courts

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effectiveness of pleas). *See generally* United States v. Marrero-Rivera, 124 F.3d 342, 348 n.7 (1st Cir. 1997) ("[There are] three 'core' Rule 11 concerns: (1) voluntariness—*i.e.*, absence of coercion; (2) understanding of the charge; and (3) knowledge of the consequences of the guilty plea.").

[61] Brady v. United States, 397 U.S. 742, 757 (1970) (stating deceptive conduct by prosecution may invalidate pleas). In *dicta*, the *Brady* Court notes that the prosecutor's case is given significant weight by a defendant when deciding whether to plead guilty. *Id.* at 756. Additionally, the Court separates a defendant's later misapprehension of the state's case, which cannot warrant a plea to be invalid, from the misrepresentation by the prosecutor. *Id.* at 757; *see also* Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727, 734 (2005) ("[W]hen one party misrepresents its case or otherwise engages in impermissible conduct, a plea bargain might be voidable.").

[62] *See* Fambo v. Smith, 433 F. Supp. 590, 598 (W.D.N.Y.), *aff'd*, 565 F.2d 233 (2d Cir. 1977) (holding prosecutorial obligation is owed to defendants during plea negotiations). In *Fambo*, the defendant was indicted for possessing an explosive device. *Id.* at 591. The prosecution discovered that the tube of dynamite in question had its explosive contents removed and repacked with sawdust, a fact unknown to the defendant. *Id.* at 592. The prosecution did not reveal this information until after the defendant entered his guilty plea, and the defendant contends the nondisclosure rendered the guilty plea unknowing and involuntary. *Id.* at 591-92. However, although the district court found that a defendant may raise a constitutional claim in this scenario, it upheld the defendant's conviction by finding the constitutional error harmless beyond a reasonable doubt. *Id.* at 599; *see also* Blank, *supra* note 57, at 2038 (analyzing *Fambo* decision).

[63] *See* Zacharias, *supra* note 48, at 1125 n.10 (discussing circuit split that existed in 1980s and 1990s); Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 573 n.43 (1999) (laying out circuit decisions that evidence split); *see also* Matthew v. Johnson, 201 F.3d 353, 358 (5th Cir. 2000) (detailing circuit split regarding *Brady* disclosure prior to a plea entry).

[64] *See* Smith v. United States, 876 F.2d 655, 657 (8th Cir. 1989) (holding guilty plea waives all non-jurisdictional challenges, including non-disclosure of favorable evidence); United States

state that the purpose of *Brady* is to protect the integrity of trials, and when a defendant waives his trial right, he also waives his *Brady* right, therefore requiring no prosecutorial disclosure duty.[65]

The majority of courts refused to hold that a prosecutor owes no duty to disclose pre-plea.[66] The United States Courts of Appeals for the Sixth and Eighth Circuits were reluctant to invalidate guilty pleas because of nondisclosure alone, holding that a case-by-case factual analysis is required in determining the defendant's voluntariness and intelligence in the plea entry.[67] The United States Court of Appeals for the Second Circuit found that a defendant has a right to challenge a voluntary and intelligent guilty plea when the suppressed evidence was material and would have influenced the defendant's assessment of his case and possibly prevented the guilty plea.[68] In *Sanchez v. United States*,[69] the United States Court of Appeals for the Ninth Circuit created a more radical per se approach: the nondisclosure of material evidence alone automatically classifies the guilty plea entered as involuntary and unintelligent, and thus void.[70]

As shown, even jurisdictions that consistently found *Brady*

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v. Autullo, Nos. 88 CR 91-4, 93 C 4415, 1993 WL 453446, at *2 (N.D. Ill. Nov. 4, 1993) (holding defendant's guilty plea waives *Brady* obligation); United States v. Ayala, 690 F. Supp. 1014, 1017 (S.D. Fla. 1988) (holding guilty pleas waive *Brady* challenges).

[65] *See* Orman v. Cain, 228 F.3d 616, 620 (5th Cir. 2000) ("The duty articulated in *Brady* . . . was expressly premised on a defendant's right to a fair trial, a concern that does not animate [a guilty plea]."); *Matthew*, 201 F.3d at 361-62 (analyzing fair trial right of *Brady* and its inapplicability pretrial); United States v. Wolczik, 480 F. Supp. 1205, 1210 (W.D. Pa. 1979) (holding no prosecutorial disclosure owed pre-plea because it is a trial right).

[66] *See* Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U. L. Q. 1, 6-7 (2002) (detailing that most courts recognized *Brady* in plea bargaining context); Franklin, *supra* note 63, at 573-74 (stating majority of courts imposed *Brady* obligations pre-plea).

[67] *See* White v. United States, 858 F.2d 416, 423-24 (8th Cir. 1988) (adopting Sixth Circuit interpretation); Campbell v. Marshall, 769 F.2d 314, 324 (6th Cir. 1985) (finding analysis of surrounding facts shows whether defendant was prejudiced by prosecutorial misconduct). In *White*, the Eighth Circuit found that even if the suppressed evidence had been disclosed, it would have had no effect on the defendant pleading guilty and, therefore, the court refused to set aside the defendant's plea. *See White*, 858 F.2d at 424; *see also* Lain, *supra* note 66, at 10-11 (detailing Sixth and Eighth Circuits' "totality of the circumstance" approach).

[68] *See* Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988) ("[W]e conclude that even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution.").

[69] 50 F.3d 1448 (9th Cir. 1995).

[70] *See id.* at 1453 ("[A plea] cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.'" (quoting Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988))); *see also* Franklin, *supra* note 63, at 573-74 (discussing *Sanchez* decision); Blank, *supra* note 57, at 2039-40 (detailing *Sanchez* decision and Ninth Circuit's "per se" approach).

applicable pre-plea had contrasting rationale in their analyses.[71] Noting these ambiguities and inconsistencies among the courts, commentators requested clarification, and called for the creation of a concrete rule to promote fairness and predictability.[72] For a period, resolution looked bleak as the Supreme Court continually rejected certiorari for a number of these cases[73] until 2002, when it granted certiorari in *United States v. Ruiz*.[74]

B. United States v. Ruiz

In *United States v. Ruiz*, the prosecution offered the defendant a "fast track" plea agreement, requiring the defendant to explicitly waive the right to an appeal and her right to receive impeachment evidence, and in return, the prosecution would recommend a two-level downward departure at sentencing.[75] The defendant refused to accept the "fast track" agreement because she believed that the provision waiving impeachment evidence was unconstitutional.[76] Nonetheless, the defendant later pleaded guilty absent any agreement and sought the same two-level downward departure, which the district court denied, and instead sentenced her according to the federal guidelines.[77] The district court held that the defendant's denial to enter into the agreement barred her from obtaining the recommended sentencing that

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[71] *See* Lain, *supra* note 66, at 4 (noting several courts use inconsistent justifications in reaching same holdings).

[72] *See* Douglass, *supra* note 6, at 446 (noting accuracy and fairness can only be achieved through issue resolution); Peter A. Joy & Kevin C. McMunigal, *Disclosing Exculpatory Material in Plea Negotiations*, CRIM. JUST., Fall 2001, at 41, 43 (finding circuit split to be "serious potential legal and ethical pitfall[]"); Lain, *supra* note 66, at 49 (noting high frequency of pleas and importance of accurate rules).

[73] *See, e.g.*, Matthew v. Johnson, 201 F.3d 353, 360 (5th Cir.), *cert. denied*, 531 U.S. 830 (2000); Smith v. United States, 876 F.2d 655, 657 (8th Cir.), *cert. denied*, 493 U.S. 869 (1989); Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir.), *cert. denied sub nom.* Anglicker v. Miller, 488 U.S. 890 (1988); Campbell v. Marshall, 769 F.2d 314, 318 (6th Cir. 1985), *cert. denied sub nom.* Campbell v. Morris, 475 U.S. 1048 (1986).

[74] 534 U.S. 1074 (2002) (granting petition for writ of certiorari); *see also* Cahill, *supra* note 55, at 42 (speculating whether *Ruiz* Court noticed inconsistent court rulings and need for clarification).

[75] *See* United States v. Ruiz, 536 U.S. 622, 625 (2002) (establishing facts of case). The defendant, Angela Ruiz, was arrested and charged with importing marijuana from Mexico into the United States. United States v. Ruiz, 241 F.3d 1157, 1160 (9th Cir. 2001), *rev'd*, 536 U.S. 622 (2002). The plea agreement contained a provision declaring that all "[known] information establishing the factual innocence of the defendant has been turned over to the defendant," and it also informed the defendant of the government's "continuing duty to provide such information." *Ruiz*, 536 U.S. at 625 (internal quotation marks omitted).

[76] *See Ruiz*, 536 U.S. at 625 (detailing defendant's refusal to accept "fast track" agreement).

[77] *See Ruiz*, 241 F.3d at 1161 (detailing defendant's stated reason for denying agreement).

she would have received.[78] Accordingly, the defendant appealed to the Ninth Circuit, claiming that the *Brady*-waiver to impeachment evidence in a plea agreement is unconstitutional, and that requiring acceptance of this provision as the only way for her to obtain a downward departure is improper.[79] The Ninth Circuit reversed the district court, finding that due process requires the disclosure of impeachment evidence pre-plea, and that a waiver to this right is unconstitutional.[80]

The Supreme Court unanimously reversed the Ninth Circuit and held that disclosure of impeachment information before a guilty plea is not constitutionally required.[81] First, the Court found that the nondisclosure of impeachment evidence prior to a plea will not render the plea involuntary or unintelligent because impeachment evidence is not "critical information" for the defendant to have prior to entering the guilty plea.[82] Second, the Court noted that no legal authority exists supporting the Ninth Circuit's decision and that the Constitution does not require that the defendant have total awareness of the circumstances surrounding his charge.[83] Third, the Court analyzed the procedural due process considerations of these waivers and balanced the likelihood of innocent defendants pleading guilty[84] with

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[78] *See Ruiz*, 536 U.S. at 625-26 (detailing defendant's guilty plea without any agreement); *Ruiz*, 241 F.3d at 1161 (detailing district court's reasoning for rejecting defendant's request).

[79] *See Ruiz*, 241 F.3d at 1163 (stating two constitutional allegations raised by defendant).

[80] *See Ruiz*, 536 U.S. at 626 (laying out Ninth Circuit's holding); *see also* Tarun, *supra* note 18, at 108-09 (discussing Ninth Circuit's holding).

[81] *See Ruiz*, 536 U.S. at 629-33 (analyzing constitutional scope of impeachment evidence disclosure pre-plea); *see also* Tarun, *supra* note 18, at 109 (acknowledging *Ruiz* holding and distinction made concerning impeachment information).

[82] *Ruiz*, 536 U.S. at 629-30 (discussing impeachment evidence's inability to render plea involuntary and unintelligent). The Court used a "degree of help" standard and found that impeachment evidence provided insignificant help to a defendant because such information is random and contingent on too many circumstances. *Id.* at 630. Therefore, since the Court held impeachment evidence will only provide arbitrary help to defendants, suppression of such information cannot invalidate a guilty plea. *Id.* Justice Thomas, in concurrence, disagreed with the use of this "degree of help" standard, claiming it is "neither necessary nor accurate." *Id.* at 633-34 (Thomas, J., concurring).

[83] *See id.* at 630-31 (majority opinion) (holding Constitution does not require defendant to have complete knowledge pre-plea). The Court specifically noted that the Constitution "permits a court to accept a guilty plea . . . despite various forms of misapprehension under which a defendant might labor." *Id.* at 630. The Court then found it difficult to distinguish these "various forms of misapprehension" from a defendant's ignorance of possible impeachment material at the plea bargaining stage. *Id.* at 630-31.

[84] *See id.* at 631 (laying out factors used to determine due process violations). The Court identified the following three factors: "(1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests." *Id.* In *Giglio v. United States*, the Court notes that this due process analysis is used to determine that the *Brady* duty is owed with respect to impeachment evidence during a trial. *Id.*; *see also* Michael Avery, *Paying for Silence: The Liability of Police Officers*

the detrimental impact on the government's interests in requiring disclosure of all impeachment materials.[85] The Court noted that extra information pre-plea is valuable to a defendant, but that there is no requirement when such disclosure creates a heightened burden on the government that "significantly interfer[es] with the administration of the plea-bargaining process."[86]

*C. Post-*Ruiz *Prosecutorial Disclosure in Guilty Plea Context*

Soon after *Ruiz*, legal commentators voiced their disappointment with the Court's failure to recognize and acknowledge several areas of uncertainty involving the application of *Brady* in the pre-plea context.[87] State and federal courts have varied in their interpretation of *Ruiz* when analyzing a lack of disclosure pre-plea.[88] The main issue courts and commentators have with *Ruiz* is its limited nature, because it only specifically addresses impeachment evidence, but not exculpatory

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Under Section 1983 for Suppressing Exculpatory Evidence, 13 TEMP. POL. & CIV. RTS. L. REV. 1, 27 (2003) (analyzing *Ruiz* Court's use of due process procedural factors). The Court found that both Rule 11 and the "fast track" agreement's explicit promise that the government will disclose any information showing the innocence of the defendant are sufficient safeguards to protect an innocent defendant in this scenario. *See Ruiz*, 536 U.S. at 631 (finding that requiring disclosure of impeachment evidence will not deter innocent defendants from pleading guilty); *see also* Avery, *supra* (noting safeguards identified by *Ruiz* Court).

[85] *See Ruiz*, 536 U.S. at 631-32 (describing how requiring disclosure of impeachment evidence pre-plea will seriously interfere with governmental interests). The Court found the government's interests are "securing . . . guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." *Id.* at 631. The Court stated that requiring prosecutors to disclose impeachment evidence will take significant resources pre-plea, which would defeat the government's "main resource-saving advantages" of plea bargaining. *Id.* at 632. Additionally, the Court agreed with the government's claim that the disclosure of informants or witnesses before a plea would "disrupt ongoing investigations" and may create a dangerous situation for such prospective witnesses. *Id.* at 631-32.

[86] *Id.* at 633 (balancing defendant's limited value from disclosure against particular effects on government's plea agreement procedure). *See generally* State v. Harris, 667 N.W.2d 813, 821 (Wis. Ct. App. 2003) (discussing *Ruiz* Court's respect and recognition of importance to plea agreements by federal government).

[87] *See* PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 153-54 (American Bar Association 2009) (criticizing *Ruiz* Court for its limited holding). Professors Joy and McMunigal argue that the *Ruiz* Court had the potential to clarify this ambiguity among the courts, but that the Court instead came down with a narrow and ambiguous ruling that fails to resolve the issue. *See id.*; *see also* McMunigal, *supra* note 40, at 853 (criticizing Court's failure to properly interpret broad ethical disclosure rule); Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 1017 (2008) (criticizing Court's limited holding in *Ruiz* and its failure to resolve issue).

[88] *See* Marc Sackin, Note, *Applying* United States v. Stein *to New York's Indigent Defense Crisis*, 73 BROOK. L. REV. 299, 317 (2007) (noting various interpretations of *Ruiz* used by courts).

evidence.[89]

Some courts take the Fifth Circuit's approach and interpret *Ruiz* broadly, holding that the Court's lack of distinction regarding the category of evidence indicates that the *Ruiz* ruling applies to both impeachment and exculpatory evidence.[90] In contrast, the Seventh and Tenth Circuits have held that the *Ruiz* Court's refusal to specifically discuss exculpatory evidence created an implicit distinction between these two categories of evidence, and that prosecutors are constitutionally required to disclose exculpatory evidence pre-plea.[91] Other courts, notably the First, Fourth, and Ninth Circuits established a more moderate, totality of the circumstances analysis when interpreting *Ruiz* and *Brady* disclosures pre-plea.[92] These latter courts refuse to answer the dilemma left by *Ruiz*, and instead, examine the facts to determine on a case-by-case basis whether the plea entered was voluntary and intelligent,[93] or whether the suppressed

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[89] *See* Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 954 (2008) (stating *Ruiz* decision is limited to impeachment evidence); Kate Stith, *Introduction: Wherefor the Privilege?*, 30 CARDOZO L. REV. 717, 719-20 (2008) (noting impeachment and exculpatory distinction in *Ruiz*); Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiations: "Voluntary" Waivers of Constitutional Rights*, 23 CRIM. JUST. 14, 19 (2008) (stating *Ruiz* does not directly address exculpatory evidence).

[90] *See* United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) ("*Ruiz* never makes [an impeachment/exculpatory] distinction nor can this proposition be implied from its discussion. Accordingly, we conclude that [a defendant's] guilty plea precludes [the defendant] from claiming that the government's failure to disclose [exculpatory evidence] was a *Brady* violation."); Torres v. Prosper, No. Civ S-07-1689 LKK CHS, 2008 WL 6665286, at *8 (E.D. Cal. Dec. 12, 2008) (holding *Ruiz* never distinguished exculpatory and impeachment and therefore suppression is not unconstitutional); *see also* United States v. Ireland, No. 1:07-CR-249-BLW, 2010 WL 4342324, at *3 (D. Idaho Nov. 1, 2010) (holding suppressed evidence pre-plea, whether exculpatory or impeaching, is constitutional); Comer v. United States, Nos. 3:09-CV-1261-N-BH, 3:08-CR-0085-N (01), 2009 WL 5033924, at *8 (N.D. Tex. Dec. 18, 2009) (ruling suppressed exculpatory evidence pre-plea is constitutional and consistent with *Ruiz*).

[91] *See* United States v. Ohiri, 133 F. App'x 555, 562 (10th Cir. 2005) (holding *Ruiz* did not imply that government may withhold exculpatory evidence); McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) ("Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors 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."); *see also* United States v. Danzi, 726 F. Supp. 2d 120, 128 (D. Conn. 2010) (holding suppression of exculpatory evidence pre-plea is unconstitutional); Garrett v. United States, No. 2:05cv323, No. 2:03cr59, 2006 WL 1647314, at *4 (E.D. Va. June 13, 2006) (stating *Ruiz* does not apply to exculpatory evidence).

[92] *See* Hashimoto, *supra* note 89, at 955 (discussing courts' allowances of defendants to raise *Brady* challenges pre-plea in limited circumstances).

[93] *See* United States v. Moussaoui, 591 F.3d 263, 286-88 (4th Cir. 2010) (finding no *Brady* violation in suppression of favorable, material evidence because plea was entered knowingly); Ferrara v. United States, 456 F.3d 278, 297 (1st Cir. 2006) (finding deliberate prosecutorial suppression to be deceptive, which rendered defendant's plea involuntary).

evidence was "material" under *Brady* and its progeny.[94] Some legal commentators argue that a totality of circumstances test is too all-encompassing and its unpredictability makes it virtually impossible to guide an uncertain prosecutor on which evidence is required to be disclosed pre-plea.[95]

In response to *Ruiz*, the American College of Trial Lawyers made a proposal in 2004 to modify Rule 11 to include exculpatory evidence in a pre-plea context.[96] The Department of Justice vehemently opposed the proposal and claimed that the current *Brady* obligations are "clearly defined by existing law that is the product of more than four decades of experience with the *Brady* rule."[97] The Federal Rules Advisory Committee rejected the proposal, and no further attempt has been made to resolve this contentious constitutional issue that remains in our courts today.[98]

IV. ANALYSIS

A. No Trial Requirement

Criminal defendants are uniquely exposed and vulnerable in the plea bargain context.[99] In contrast, prosecutors have unsupervised and

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[94] *See* Smith v. Baldwin, 510 F.3d 1127, 1148 (9th Cir. 2007) (finding suppressed exculpatory evidence not material and therefore nondisclosure does not void plea).

[95] *See* Burke, *supra* note 4, at 508-09 (detailing issues with case-by-case adjudications of voluntariness). "[T]he 'totality of circumstances' test prove[s] too fact-specific to provide a coherent body of case law to regulate confessions, case-by-case determinations of the materiality of undisclosed evidence have failed to produce clear guidelines for prosecutorial disclosure of exculpatory evidence." *Id.* at 509.

[96] *See* Tarun, *supra* note 18, at 120-22 (setting out proposed amendment to Rule 11(e)). The following is the language proposed: "The attorney for the government shall disclose in writing to the defendant all exculpatory and mitigating information as provided in Rule 16(f) fourteen days before the defendant enters a plea of guilty or *nolo contendere* to a charged offense." *Id.* at 120. The American College of Trial Lawyers conclude that their proposed amendments will "ensure the timely, fair and consistent application of *Brady v. Maryland* and will aid federal courts in the sound administration of justice." *Id.* at 122; *see also* Yaroshefsky, *supra* note 8, at 32 (detailing proposal made by American College of Trial Lawyers to Judicial Committee).

[97] LAURAL L. HOOPER ET AL., FED. JUDICIAL CTR., TREATMENT OF BRADY V. MARYLAND MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES 4 (2004) (quoting Memorandum from U.S. Dep't of Justice (Criminal Division), to Hon. Susan C. Buckley, Chair, Judicial Conference Subcomm. on Rules 11 and 16 (Apr. 26, 2004)) (internal quotation marks omitted) (declaring Department of Justice's response to proposed Rule 11 modification).

[98] *See* JOY & MCMUNIGAL, *supra* note 87, at 156 (noting denial of modified rule adoption and its unlikely resolution).

[99] *See supra* note 14 and accompanying text (discussing Court's recognition of defendant's vulnerability during plea bargaining).

unfettered discretion on the timing of disclosure and on the type of evidence they may choose to disclose.[100] A prosecutor, like any attorney, strives for career successes, which may be built from high conviction rates of defendants.[101] However, a prosecutor's focus should be on the obligations of ensuring justice is served, adhering to constitutional and ethical duties, and, most importantly, protecting the innocent.[102] When deciding whether to enter a guilty plea, a criminal defendant's only option is to examine all of the evidence presented and to determine the strength of the case.[103] An innocent defendant may be compelled to enter into plea negotiations if presented with insurmountable evidence against him, and, therefore, be forced to enter a guilty plea to a lower charge to avoid the risk of a more severe charge resulting from a trial verdict.[104] This type of scenario illustrates the harm a prosecutor invokes if he or she withholds material evidence favorable to the defendant, even absent a trial.[105]

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[100] *See* Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2123-24 (2010) (discussing broad discretion of prosecutors and courts refusal to monitor); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 435-36 (1992) (analyzing judiciary's lack of guidance for prosecutors, which provides "virtually unlimited prosecutorial discretion").

[101] *See* Burke, *supra* note 4, at 488-89 (noting prosecutors may be "overzealous" and motivated by convictions); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 843 (1997) (discussing special prosecutorial role as something more than "a zealous advocate"); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2472 (2004) (discussing social reputations and public images prosecutors strive to maintain through convictions); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN ST. L. REV. 1133, 1140 (2005) ("[A prosecutor] will only be noticed, climb the career ladder, or become a member of elected office himself if he racks up the convictions."); Eric Rasmusen et al., *Convictions Versus Conviction Rates: The Prosecutor's Choice*, 11 AM. L. & ECON. REV. 47, 75-76 (2009) (applying statistical evidence to demonstrate prosecutors are motivated and pressured to obtain convictions).

[102] *See supra* note 36 (discussing how ABA views prosecutor as "minister of justice"); *see also* United States v. Wade, 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part) ("[The government has] the obligation to convict the guilty and to make sure they do not convict the innocent."); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314 (2001) (laying out prosecutorial duties in criminal justice system).

[103] *See* Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 78 (2009) (detailing criminal defendant's options in face of different plea bargaining models).

[104] *See* Covey, *supra* note 103, at 85-86 (analyzing incentives for innocent defendant to enter into plea agreement); *supra* note 48 (detailing view that plea agreements may be coercive and place innocent defendant in dilemma).

[105] *See* sources cited *supra* note 1 and accompanying text (illustrating clear prosecutorial *Brady* violation where possible innocent defendants are coerced into pleading guilty). Professor McMunigal noted the "psychological phenomenon" upon defendants when incriminating evidence is presented to them by the prosecution, which could invoke a false confession. McMunigal, *supra* note 1, at 655-56. Professor McMunigal concludes that requiring *Brady* disclosure pre-plea will reduce the risks of injustice to a helpless defendant. *Id.* at 656-57.

When creating the disclosure due process right in *Brady*, the Supreme Court analyzed the unfairness to criminal defendants by detailing the effect of a nondisclosure on their trial.[106] Additionally, Rule 16 of the Federal Rules of Criminal Procedure, which legislatively codifies the *Brady* obligation, provides no timing requirement, but does require that the prosecution disclose any testimony, document, and/or test that it plans to use "at trial."[107] Some courts, including the Fifth Circuit, misinterpret the *Brady* requirement and hold that the suppression of material evidence only violates a defendant's due process right when the nondisclosure affects a fact finder's ability to determine the defendant's guilt at trial (i.e., a *Brady* violation may only occur when a defendant has a trial right).[108] Yet, the Supreme Court has never stated that a trial is a condition precedent to trigger a defendant's *Brady* right.[109] Rather, the Court focused on the injustice a criminal defendant suffers when material evidence is withheld, and results in an unfair trial.[110] Therefore, courts that allow pre-plea *Brady* violation claims properly recognize that a potentially manipulative prosecutor may have used tactics that violated a criminal defendant's constitutional rights.[111]

B. Proposed Pre-Plea Procedural Rules and Modifications

Due process requires that criminal defendants enter a guilty plea "intelligently" and "voluntarily."[112] In determining whether to enter a plea,

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[106] *See supra* note 15 and accompanying text (discussing *Brady* and its creation of due process rights). In *Brady v. Maryland*, Justice Douglas stated, "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. 83, 87 (1963).

[107] *See supra* note 18 and accompanying text (laying out Rule 16 of Federal Rules of Criminal Procedure); *see also* Douglass, *supra* note 6, at 452-53 (discussing insufficiencies within criminal procedure rules involving prosecutorial disclosure).

[108] *See* cases cited *supra* note 65 and accompanying text (detailing courts' interpretations of *Brady* and trial requirement); *see also* United States v. Conroy, 567 F.3d 174, 178 (5th Cir. 2009) (citing precedent that *Brady* violations occur only when suppression affects fact-finders at trial).

[109] *See* Lain, *supra* note 66, at 3-4 (maintaining Supreme Court has never required trial right for *Brady* to apply). The *Ruiz* Court had the opportunity to explicitly rule whether *Brady* applies pre-trial, but instead the Court applied procedural due process analysis to determine whether prosecutors may suppress impeachment evidence pre-plea. *See* Avery, *supra* note 84, at 26-27 (detailing *Ruiz* Court analysis and its reluctance to identify circuit split).

[110] *See Brady*, 373 U.S. at 87-88 (finding that prosecutors "do[] not comport with standards of justice" when suppressing material evidence). Justice Douglas notes the inscription found on the wall within the Department of Justice: "The United States wins its point whenever justice is done its citizens in the courts." *Id.* at 87.

[111] *See supra* notes 68-70 and accompanying text (describing Second and Ninth Circuits' decisions requiring prosecutorial disclosure pre-plea).

[112] *See supra* notes 59-61 and accompanying text (detailing and defining requirements for

a defendant puts significant weight on an analysis of the prosecutor's case.[113] Courts have found that guilty pleas could be entered unintelligently in situations where prosecutors withheld material evidence because the suppression prevents defendants from properly appraising their case.[114] The suppression of material evidence affects a defendant's knowledge and intelligence of his or her case because the revelation of such evidence to the defendant would have produced a different result at a criminal proceeding.[115] Exculpatory evidence is defined as evidence that "tend[s] to establish a criminal defendant's innocence."[116] Therefore, material exculpatory evidence is vital in preventing convictions of innocent defendants, and suppression of such evidence pre-plea will render a defendant unintelligent, voiding the entered plea.[117] Furthermore, as the *Ruiz* Court correctly points out, impeachment evidence pre-plea is not critical enough to render a plea unintelligent because the materiality of such evidence at this point in the litigation is undeterminable.[118]

Along with revealing innocence, broad prosecutorial disclosure pre-plea allows criminal defendants to better predict the trial outcome and, thus, ensure fair plea negotiations or a more knowledgeable plea entry.[119] *Brady* and its progeny require disclosure of "material" evidence, and the standard in determining this materiality requires a post-hoc review.[120] Establishing an open-file discovery procedure would provide a defendant

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valid plea).

[113] *See supra* note 103 and accompanying text (describing defendant's lack of options in deciding whether to enter guilty plea).

[114] *See supra* notes 68-70 (discussing circuit opinions that hold pleas may be unknowing if material evidence is withheld).

[115] *See supra* notes 25-26 and accompanying text (detailing materiality requirement created by Supreme Court).

[116] BLACK'S LAW DICTIONARY 637 (9th ed. 2009).

[117] *See* Jones, *supra* note 16, at 424 (discussing exculpatory evidence's importance to criminal defendants). Jones points out that along with diminishing culpability, the revelation of exculpatory evidence may reduce the applicable charge and resulting sentence against criminal defendants. *Id.* at 424. Additionally, even the Fifth Circuit, which is the same court that refuses to apply *Brady* pre-plea, recognized the importance of exculpatory evidence by overturning a murder conviction after discovering the prosecution's failure to disclose "partially exculpatory" evidence. Sellers v. Estelle, 651 F.2d 1074, 1077-78 (5th Cir. 1981).

[118] *See supra* note 82 and accompanying text (discussing *Ruiz* holding that impeachment evidence's value pre-plea is speculative). The *Ruiz* Court noted that defendants are uncertain how the prosecution will present their case and that they have no right to know such information. *See* United States v. Ruiz, 536 U.S. 622, 630 (2002). The Court explicitly held that suppression of impeachment evidence cannot render a plea involuntary and unintelligent. *See id.* at 629.

[119] *See* Hashimoto, *supra* note 89, at 951-52 (discussing how broad disclosure pre-plea will promote fairness and help eradicate the inequality during negotiations).

[120] *See supra* note 27 and accompanying text (detailing problem with having prosecutors examine future importance of evidence).

with a broad examination of the prosecutor's case and would ensure intelligent and knowing guilty pleas.[121] However, the Supreme Court has held that there is no constitutional requirement for the prosecution to disclose its complete file.[122] Imposing the open-file discovery method goes beyond the constitutional obligation.[123] Similarly, the ABA recommends state ethics organizations adopt rules beyond due process, allowing defendants to examine the evidence and determine the practical value themselves.[124] Creating a partial open-file discovery procedure that allows a defendant to view all of the prosecutor's non-impeachment evidence (including all exculpatory evidence) pre-plea is consistent with the constitutional obligation created by *Brady*,[125] and it expands the disclosure requirement sought by the ABA.[126] The Advisory Committee will more likely accept a uniform procedural rule that explicitly expands the disclosure requirement to all material exculpatory evidence, but still allows the suppression of impeachment evidence prior to a guilty plea because it is not overly broad and unlikely to impact plea negotiations.[127]

To avoid disclosure issues, prosecutors began implementing *Brady* waivers in plea agreements.[128] Courts have allowed prosecutors to impose express waivers of certain evidentiary rights through plea agreements.[129]

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[121] *See supra* note 44 and accompanying text (describing open-file discovery procedure).

[122] *See* United States v. Agurs, 427 U.S. 97, 109 (1976) (stating complete disclosure is "surely" not required by prosecutors).

[123] *See* Burke, *supra* note 4, at 515-16 (pointing out advantages of going beyond constitutional obligation imposed by the Court).

[124] *See supra* notes 34-43 and accompanying text (discussing ABA Formal Opinion 09-454 and its plea for broadening *Brady* disclosure); *see also* Formal Opinion 09-454, *supra* note 17, at 2 ("[Model Rule 3.8] requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.").

[125] *See supra* notes 81-86 and accompanying text (arguing suppression of impeachment evidence pre-plea is consistent with due process and *Brady*).

[126] *See* Covey, *supra* note 103, at 89-90 (arguing broadened pre-plea discovery would benefit innocent defendants and keep guilty defendants informed); Douglass, *supra* note 6, at 517 (advocating revised pre-plea procedures which will promote prosecutorial disclosure).

[127] *See supra* note 118 and accompanying text (arguing *Ruiz* correctly prohibited requirement of impeachment evidence disclosure pre-plea); *see also* Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1559 (2010) (discussing problems complete open-file discovery rule creates). Professor Medwed points out that opponents argue that complete access may not be granted, as it transfers too much power to a defendant and might lead to witness intimidation. *See* Medwed, *supra*.

[128] *See supra* note 55 and accompanying text (detailing prosecutorial usage of *Brady* waivers in plea agreements).

[129] *See supra* notes 54-55 and accompanying text (detailing waivers prosecutors have implemented into plea agreements); *see also* United States v. Mezzanatto, 513 U.S. 196, 210 (1995) (holding prosecutors may require defendants to waive admissibility of plea negotiation statements). In *Mezzanatto*, at the onset of a plea negotiation meeting, the prosecutor required the defendant to agree that any of his statements made during the meeting could be admissible to

However, the implementation of waivers that prohibit something that is "so fundamental to the reliability of the factfinding process" is prohibited.[130] This limitation must be applied to exculpatory evidence and to any plea agreement waiver that prohibits an appeal of the nondisclosure of such evidence.[131]

A prosecutor violates a defendant's constitutional right of due process by requiring the defendant to waive a *Brady* claim for exculpatory evidence found after a guilty plea entry.[132] The discovery of exculpatory evidence is crucial for a criminal defendant because such information could expose innocence, and the prohibition of admitting such evidence due to the timing of the discovery violates the principles of fairness, implicit in *Brady*.[133] Additionally, the prosecutorial value of these waivers is significantly less than the harm they may bring to potentially innocent defendants.[134] The possibility of prosecutors persuading vulnerable innocent defendants to enter into plea agreements with these waivers clearly demonstrates that the relinquishment of such due process rights is improper, as it violates the rationale behind *Brady* and renders the plea involuntary.[135]

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impeach him if the case were to go to trial. *See id.* at 198. Rule 410 of the Federal Rules of Evidence expressly excludes statements made during plea negotiations from the record. *See* FED. R. EVID. 410. The defendant agreed to waive this protection if he made any contradictory statements at trial. *See Mezzanatto*, 513 U.S. at 198. Indeed, at the defendant's trial, he made statements that contradicted prior statements made during his plea negotiations, and over the defendant's objection, the prosecutor admitted the inconsistent statements and the statements of witnesses who were present during the plea negotiations. *See id.* at 199. Seven members of the Supreme Court found the Rule 410 waiver to be proper, and the majority ruled that these statements would "enhance[] the truth-seeking function of trials." *Id.* at 204 (emphasis omitted).

[130] *Mezzanatto*, 513 U.S. at 803 (stating limitation on plea agreement waivers); *see* Cahill, *supra* note 55, at 24 (describing *Mezzanatto* decision and how "sacrosanct" rights cannot be waived).

[131] *See* Franklin, *supra* note 63, at 580 (describing *Brady* waivers as unfair and restricting discovery of facts). Franklin compares *Brady* waivers to the right to conflict-free counsel waivers, which the Supreme Court has prohibited. *Id.* Franklin notes that *Brady* waivers impact the fairness of the process as a whole, before a defendant's guilt is even at issue. *Id.*

[132] *See id.* (finding prosecutorial exclusion of exculpatory evidence is error that requires appellate review).

[133] *See supra* note 117 and accompanying text (discussing importance of exculpatory evidence for criminal defendants); *see also* Blank, *supra* note 57, at 2083-85 (describing fundamental fairness established by *Brady* and its inapplicability with waivers); *supra* note 106 and accompanying text (discussing fairness rationale behind *Brady*).

[134] *See* Blank, *supra* note 57, at 2030 (referencing lack of policy rationale behind plea waivers); Franklin, *supra* note 63, at 585-87 (describing defendants' vulnerability and possibility of innocent defendants agreeing to *Brady* waivers).

[135] *See* cases cited *supra* note 14 (discussing Supreme Court's recognition of prosecutorial superiority); *supra* notes 68-70 and accompanying text (discussing circuit opinions that held pleas may be unknowing if material evidence is withheld).

C. Imposing Prosecutorial Sanctions for Pre-Plea Nondisclosure

Prosecutors rarely, if ever, suffer any type of disciplinary action as a result of failing to comply with their *Brady* disclosure obligation.[136] The lack of accountability for prosecutorial misconduct involving *Brady* violations is inexcusable.[137] The prosecution analyzes evidence and makes decisions regarding such evidence in isolation, with no outside supervision.[138] A "zealous advocate" type of prosecutor will believe the defendant is guilty and may easily find exculpatory evidence to be immaterial, or even overlook it entirely.[139] However, whether the nondisclosure of material exculpatory evidence pre-plea is done intentionally or negligently, severe sanctions should be imposed to provide incentives for prosecutors to follow *Brady*.[140]

After a *Brady* violation is exposed, criminal defendants are generally prevented from bringing a civil lawsuit against the prosecutor,[141] and the state will likely be unable to bring a criminal proceeding against the prosecutor.[142] In order to dissipate *Brady* violations, an external oversight

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[136] *See supra* note 31 and accompanying text (describing studies performed that show lack of punishment taken against prosecutors).

[137] *See* Davis, *supra* note 31, at 32-33 (detailing that by not holding prosecutors accountable, government is essentially fostering misconduct); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 427 (2006) (arguing lack of prosecutorial accountability is factor contributing to wrongful convictions).

[138] *See* Davis, *supra* note 31, at 33 (discussing how prosecutorial decisions and possible misconduct are occurring "behind closed doors.").

[139] *See supra* note 101 and accompanying text (describing prosecutors whose main objection is obtaining convictions); *see also* Gershman, *supra* note 102, at 353 (stating pressures may encourage prosecutors to overlook or ignore exculpatory evidence to obtain conviction); Rosen, *supra* note 31, at 732 (explaining prosecutors' belief that evidence disclosure would release guilty defendants); Weeks, *supra* note 101, at 843 (describing how prosecutors get caught up in advocacy and may overlook evidence, in good faith).

[140] *See* Barkow, *supra* note 4, at 2093 (arguing sanctions can deter prosecutorial misconduct); Rosen, *supra* note 31, at 731 (noting system of justice presumes sanctions deter misconduct).

[141] *See* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2219-22 (2010) (discussing civil liability of prosecutor and how suit is unlikely to be successful). The Supreme Court held that absolute prosecutorial immunity leaves a "wronged defendant without civil redress against a prosecutor." Imbler v. Pachtman, 424 U.S. 409, 427 (1976). Recently, the Court extended this prosecutorial immunity to prosecutors who train and supervise lower-level prosecutors on fulfilling their *Brady* obligation. *See* Van de Kamp v. Goldstein, 555 U.S. 335, 345 (2009).

[142] *See* Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 27 (2009) (detailing rarity and impracticality of prosecutors bringing criminal charges against fellow prosecutors); Scheck, *supra* note 141, at 2225 (describing difficulty in establishing criminal intent against prosecutors

body is needed to supervise prosecutors and confirm that prosecutors disclose appropriate and material evidence to criminal defendants.[143] Professor Davis suggests the creation of a review commission that responds to prosecutorial complaints and conducts random examinations of prosecutorial files to determine whether prosecutors follow the established obligations.[144] These prosecutorial review boards will be implemented into state bar ethic committees and made up of independent and significantly experienced attorneys who understand the intricacies behind prosecutorial decisions, and when and how exculpatory evidence was obtained.[145]

Model Rule 3.8(d) fails to recommend any action that could be taken against a prosecutor for violating their disclosure obligation.[146] State bar ethics rules should be revised and amended to limit *Brady* violations, including increased sanctions against prosecutors who have failed their disclosure duty.[147] The failure to disclose material evidence deprives a defendant of certain constitutional protections, which may lead to a conviction and long-term imprisonment, and some state bars merely impose reprimands to deter such misconduct.[148] As justice requires, the ABA seemingly supports state bar ethics commissions' adoption of

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who violated *Brady*).

[143] *See* Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512, 527-28 (2007) (suggesting external transparency as a method to eradicate prosecutorial misconduct); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 25-26 (2009) (stating external regulation is likely to eradicate prosecutorial misconduct).

[144] *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463-64 (2001) (proposing "Prosecution Review Boards" to oversee routine prosecution practices). Professor Davis recommends that such a commission examine plea bargaining decisions and whether the prosecution complied with their obligations. *See id.* at 463; *see also* Medwed, *supra* note 127, at 1547-48 (asserting bar complaints brought against prosecutors are significantly different than complaints against private attorneys).

[145] *See* Joy, *supra* note 137, at 427 (stating bar disciplinary authorities are best fit to implement a system to investigate prosecutorial misconduct); Medwed, *supra* note 127, at 1547 (stating disciplinary authorities' experience put them in best position to sanction prosecutors); *see also* Medwed, *supra* note 127, at 1550 (suggesting retired judges and prosecutors are strongest candidates to serve on prosecutorial review boards). Professor Medwed notes that a retired judge or prosecutor would be independent, as they have "little to lose by alienating the law enforcement establishment." Medwed, *supra* note 127, at 1550.

[146] *See supra* note 33 and accompanying text (discussing ABA Model Rule 3.8); *see also* Formal Opinion 09-454, *supra* note 17, at 1-2 (conceding that disciplinary action is rarely taken against prosecutors violating Rule 3.8(d)).

[147] *See* Joy, *supra* note 137, at 411-16 (claiming vague and ambiguous ethical rules may be why prosecutors are rarely reprimanded).

[148] *See* Rosen, *supra* note 31, at 722 (demonstrating imposition of public reprimand against prosecutor violating *Brady*); *see also In re* Grant, 541 S.E.2d 540, 540 (S.C. 2001) (affirming reprimand against prosecutor who failed to disclose material exculpatory evidence).

suspension as the lowest form of sanction against *Brady* violators.[149]

State bar boards generally impose stricter sanctions based on prosecutorial intent.[150] Similarly, prosecutorial sanctions should vary depending on when prosecutors have knowledge of the material evidence, and when they fail to disclose.[151] Due to the vulnerability and susceptibility of defendants at the onset of a criminal charge, and the likelihood of the conviction of an innocent defendant, public policy should impose a severe sanction on prosecutors who fail to disclose known material exculpatory evidence pre-plea.[152] Imposing strict penalties for pre-plea nondisclosures will deter powerful prosecutors from taking advantage of powerless defendants, which will result in equalized bargaining power and a surety that the defendant who enters a plea agreement is knowledgeable and intelligent.[153]

V. CONCLUSION

The *Brady* disclosure rule was created by the due process clause's basic requirement of fundamental fairness. As recognized by several courts and the ABA, the superiority that prosecutors possess over susceptible defendants, and the frequent use of plea agreements by defendants,

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[149] *See* AM. BAR ASS'N, STANDARDS FOR IMPOSING LAWYER SANCTIONS § 5.22 (1992) [hereinafter ABA STANDARDS], *available at* http://www.abanet.org/cpr/regulation/standards_sanctions.pdf (defining when suspension is appropriate). The ABA states that "[s]uspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process." *Id.*; *see also* Gurwitch, *supra* note 32, at 318 (finding that reprimands and current discipline are too mild to have a deterrent effect); Weeks, *supra* note 101, at 892 (stating *Brady* violations merit more than reprimand to deter such misconduct).

[150] *See* Jeremy L. Carlson, Student Commentary, *The Professional Duty of Prosecutors to Disclose Exculpatory Evidence to the Defense: Implications of Rule 3.8(D) of the Model Rules of Professional Conduct*, 28 J. LEGAL PROF. 125, 129 (2003-2004) (explaining prosecutorial sanctions are less severe if based on negligence); ABA STANDARDS, *supra* note 149, at §§ 5.22-5.23 (holding suspension appropriate for knowing failure and reprimand appropriate for negligent failure).

[151] *See* Gershman, *supra* note 100, at 436 (stating prosecutors acting in bad faith may withhold material evidence until certain periods of litigation); Jones, *supra* note 16, at 432 (describing that prosecutors may intentionally suppress evidence "until the last possible minute").

[152] *See supra* note 14 and accompanying text (discussing Court's recognition of a defendant's vulnerability during plea bargaining); *supra* note 100 and accompanying text (describing significant prosecutorial power over a criminal defendant before and during plea bargaining); *supra* notes 104-05 and accompanying text (analyzing how innocent defendants may be coerced into entering a guilty plea).

[153] *See* Blank, *supra* note 57, at 2040-42 (arguing pre-plea *Brady* disclosure will benefit the voluntariness of pleas); Covey, *supra* note 103, at 88-91 (discussing importance of improved pre-plea discovery and transparency).

demonstrate the need for this fairness principle pre-plea. Prosecutors who fail to disclose exculpatory evidence, whether intentionally or negligently, and allow a then-presumptively innocent defendant to plead guilty without knowledge of such information, manifestly violate the important constitutional rights and principles in *Brady*. The suppression of exculpatory evidence pre-plea inhibits defendants from examining their case and their innocence and, thus, prevents a knowing and intelligent guilty plea entry. Additionally, without strict disciplinary guidelines, prosecutors have the incentive to misrepresent and manipulate defendants to enter guilty pleas to meet their conviction quota. Clear and unambiguous legislation is required to rectify this massive injustice because it not only violates criminal defendants' constitutional rights, but it also increases the possibility of convictions of innocent defendants.

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