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Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining

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PLEA BARGAINING IN THE DARK: THE DUTY TO DISCLOSE EXCULPATORY *BRADY* EVIDENCE DURING PLEA BARGAINING

*Michael Nasser Petegorsky**

Ninety-seven percent of federal convictions are the result of guilty pleas. Despite the criminal justice system's reliance on plea bargaining, the law regarding the prosecution's duty to disclose certain evidence during this stage of the judicial process is unsettled. The Supreme Court's decision in Brady v. Maryland *requires the prosecution to disclose evidence that establishes the defendant's factual innocence during a trial. Some courts apply this rule during plea bargaining and require the disclosure of material exculpatory evidence before the entry of a guilty plea. Other courts have held or suggested that the prosecution may suppress exculpatory evidence during plea bargaining, forcing the defendant to negotiate and determine whether to accept a plea offer or proceed to trial without it. Substantial disparities therefore exist in the bargaining power and decision-making ability of criminal defendants, depending on where they are charged.*

This Note addresses the divide in how courts approach Brady *challenges to guilty pleas. After analyzing the development of plea bargaining and the* Brady *rule, this Note concludes that a guilty plea is not valid if made without awareness of material exculpatory evidence possessed by the prosecution. To provide additional support for the recognition of pre–guilty plea exculpatory* Brady *rights, this Note presents a case study of two 2012 Supreme Court decisions establishing the right to effective assistance of counsel during plea bargaining, and argues that the same justifications for recognizing that right during plea bargaining apply to* Brady *as well.*

TABLE OF CONTENTS

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> "And it would be foolish to think that 'constitutional' rules governing *counsel*'s behavior will not be followed by rules governing the *prosecution*'s behavior in the plea-bargaining process that the Court today announces '*is* the criminal justice system.'"[1]

INTRODUCTION

A grocery store clerk is robbed at gunpoint on a Friday night, and two hours later police arrest twenty-four year old Chris, who lives nearby.[2] Chris is charged in the robbery, and two weeks before his trial is set to start, Chris and the prosecutor meet to discuss a guilty plea. Chris maintains his innocence, but the prosecutor tells Chris that she has video surveillance footage of the robbery showing a masked robber matching his medium build, and a search of his apartment revealed a drawer full of cash and a gun. The prosecutor says that if he agrees to plead guilty, she will reduce the charges and recommend only a one-year prison sentence. However, if Chris refuses to plead guilty, the prosecutor threatens to charge him with the highest degree of armed robbery, in addition to a slew of other charges. Furthermore, she says she will recommend the maximum sentence for every charge, totaling over twenty years in prison. Wishing to avoid the possibility of such a harsh sentence, Chris pleads guilty.

While in prison, Chris discovers that the police arrested another man five miles away from the grocery store on the night of the robbery for driving while intoxicated. In his car, this man had a mask matching the one in the surveillance video and a large amount of cash, with no explanation of where he got the money. Chris believes that this evidence casts doubt on his guilt, and would not have pled guilty had he known about it, so he files a petition for a writ of habeas corpus to have his guilty plea vacated. Whether or not Chris has the ability to challenge his plea, however, depends entirely on where his trial took place. In some jurisdictions, Chris could have his guilty plea vacated if the court found that the prosecution failed to disclose

1. Lafler v. Cooper, 132 S. Ct. 1376, 1392 (2012) (Scalia, J., dissenting).
2. The facts described in this Introduction are hypothetical.

evidence establishing his factual innocence. In others, the prosecution has no such duty of disclosure, and Chris would be forced to serve his sentence, unable to challenge his plea. The evidence of the other man's arrest would have been disclosed at trial in any jurisdiction, but Chris waived his right to trial when he was confronted with the evidence against him and the threat of a severe prison sentence.

While a full criminal trial has long been considered the "gold standard of American justice,"[3] the criminal justice system is now primarily a system of pleas.[4] In 2009, 97 percent of federal convictions and 94 percent of state convictions were obtained through guilty pleas.[5] Despite that shift, some constitutional protections afforded to defendants at trial have not been applied during plea bargaining. One traditionally trial-based right that has not been extended to plea bargaining is *Brady* disclosure.[6] Under the *Brady* rule, the prosecution's failure to disclose at trial any exculpatory or impeachment evidence that is material to punishment or guilt constitutes a violation of the defendant's due process rights under the Fifth and Fourteenth Amendments.[7] The Supreme Court has yet to recognize a similar disclosure duty during plea negotiations.[8]

There is a circuit split on whether a defendant may raise a *Brady* violation to challenge a guilty plea for the failure to divulge material exculpatory evidence.[9] In 2002, the Supreme Court held in *United States v. Ruiz*[10] that a guilty plea could not be vacated due to the prosecution's failure to disclose *impeachment* evidence.[11] However, a dispute remains regarding whether a defendant may challenge a guilty plea for the prosecution's suppression of material *exculpatory* evidence.[12] Every subsequent circuit court decision regarding the duty to divulge exculpatory evidence during plea bargaining has been guided by each court's own interpretation of *Ruiz*.[13] These interpretations have led to opposing conclusions on whether the *Brady* rule applies to the disclosure of exculpatory evidence during plea bargaining.[14]

This Note seeks to resolve the circuit split as to whether a defendant may raise a post–guilty plea exculpatory *Brady* challenge. Part I introduces the *Brady* rule and outlines the current role of plea bargaining in the U.S.

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3. Lafler, at 1398.

4. Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 151 (2012).

5. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

6. *See* Samuel R. Wiseman, Brady, *Trust, and Error*, 13 LOY. J. PUB. INT. L. 447, 459 (2012).

7. *See* Brady v. Maryland, 373 U.S. 83, 86 (1963).

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

9. Wiseman, *supra* note 6, at 458. This Note will refer to such a challenge as an "exculpatory *Brady* challenge."

10. 536 U.S. 622, 632 (2002).

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

12. *See* Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 992 (2012).

13. *See infra* Part II.C.

14. *See* Wiseman, *supra* note 6, at 458.

federal court system. Part II details the circuit split regarding a defendant's ability to challenge a guilty plea for failure to disclose exculpatory evidence, and discusses the Supreme Court's decision in *Ruiz* regarding the prosecutor's pre-plea duty to divulge impeachment evidence. Part III presents an analogous case study of the Supreme Court's recent extension of constitutional protections to plea bargaining in the context of the right to effective assistance of counsel. In Part IV, this Note argues that the nondisclosure of exculpatory *Brady* evidence should automatically preclude a valid guilty plea. Additionally, Part IV illustrates why the same principles that motivated the Supreme Court to extend effective assistance of counsel rights to guilty plea defendants support the pre-plea recognition of *Brady*.

I. DEVELOPMENT OF THE *BRADY* RULE AND PLEA BARGAINING

The key to resolving the circuit split on the availability of a *Brady* challenge to contest a guilty plea is not a myopic focus on the evolution of *Brady* and its progeny. Rather, this question is best addressed by also examining the current role of plea bargaining in the U.S. legal system and the ramifications of allowing or barring post-plea *Brady* challenges. This part first introduces *Brady v. Maryland*[15] and the evolution of the *Brady* rule. It then discusses the process of plea bargaining and the function that process currently plays in the U.S. criminal justice system. This part concludes by presenting policy reasons for and against allowing post–guilty plea exculpatory *Brady* challenges.

A. The Brady *Rule*

In *Brady*, the Supreme Court held that the prosecution in a criminal trial has a duty to disclose evidence that is favorable to the defense and material to guilt or sentencing.[16] This rule was not a stark departure from earlier jurisprudence; rather, it was a natural step in defining the rights afforded to a criminal defendant.[17] *Brady* reflected an understanding that the role of the prosecutor is not purely adversarial, because the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[18] In the eyes of the Supreme Court, the *Brady* rule helped perform the crucial function of ensuring that a criminal defendant was not deprived of life, liberty, or property, without due process of law.[19] The Supreme Court went on to define the contours of the *Brady* rule in a number of subsequent cases. These cases defined what kinds of

15. 373 U.S. 83 (1963).
16. *Id.* at 87.
17. *See* Adam M. Harris, Note, *Two Constitutional Wrongs Do Not Make a Right: Double Jeopardy and Prosecutorial Misconduct Under the* Brady *Doctrine*, 28 CARDOZO L. REV. 931, 934–35 (2006).
18. Berger v. United States, 295 U.S. 78, 88 (1935).
19. *See Brady*, 373 U.S. at 87; *see also* U.S. CONST. amends. V, XIV.

evidence had to be disclosed, the standard of materiality, and when *Brady* claims may be raised.[20]

1. The Duty To Disclose: *Brady v. Maryland*

The *Brady* rule defines one aspect of the prosecution's evidentiary disclosure requirements during a criminal trial. The Supreme Court first established a prosecutor's constitutional obligations during discovery in *Mooney v. Holohan*, where the Court held that due process is violated if the government knowingly uses perjured testimony to obtain a conviction.[21] The duty pronounced in *Mooney* was further developed in *Napue v. Illinois*, where the Court overturned a conviction because the knowing use of perjured testimony may have affected the outcome of the trial.[22]

The government's discovery obligations coalesced into a distinct defendant's right in *Brady*,[23] where defendant John Brady and his companion Charles Boblit separately stood trial for the killing of a man during a robbery.[24] Before trial, Brady's attorney asked the prosecution to divulge Boblit's extrajudicial statements.[25] The prosecution provided Brady with some of the statements but withheld one in which Boblit admitted committing the actual homicide.[26] At trial, Brady's attorney conceded murder in the first degree and asked only that the jury return a verdict without a death sentence.[27] Both Brady and Boblit, however, were sentenced to death.[28]

The Supreme Court held that the government's failure to divulge Boblit's statement upon request violated Brady's right to due process under the Fourteenth Amendment.[29] The Court set out what became known as the *Brady* rule, which requires that the government provide the defendant any evidence at trial that is material to either guilt or punishment.[30] The holding was not intended to punish to society or the prosecutor for any misdeeds, even if the suppression of evidence was willful.[31] Rather, the holding in *Brady* came from the Court's belief that a defendant could not be justly deprived of his life, liberty, or property, without being presented with all material, exculpatory evidence held by the prosecution.[32] The Court further noted that society is served not only by the conviction of criminals

20. *See, e.g.*, United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972).
21. Mooney v. Holohan, 294 U.S. 103, 112 (1935).
22. Napue v. Illinois, 360 U.S. 264, 272 (1959).
23. 373 U.S. 83 (1963).
24. *Id.* at 84.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 86–87.
30. *Id.* at 87; *see also* Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 417 (2011).
31. *See Brady*, 373 U.S. at 87.
32. *See id.* at 87–88.

but also when trials are fair, and that "our system of the administration of justice suffers when any accused is treated unfairly."[33]

2. Development of the Rule

After *Brady*, the Supreme Court went on to define the contours of the prosecution's disclosure obligations in a number of decisions. While *Brady* was concerned with exculpatory evidence—information that the defense could use to prove the defendant's innocence—in *Giglio v. United States*,[34] the Court considered the suppression of evidence that went to the impeachment of witnesses against the defendant.[35]

The Court held in *Giglio* that where guilt or innocence may rest on the reliability of a witness, the suppression of evidence impugning that witness's credibility violates due process.[36] *Giglio* thus defined two types of material that must be disclosed under *Brady*: impeachment evidence and exculpatory evidence.[37] Impeachment evidence goes to the credibility of witnesses and may include evidence revealing that a witness has a bias or was offered leniency in exchange for testimony and cooperation.[38] Exculpatory evidence, on the other hand, establishes the factual innocence of the defendant, such as video footage of the crime or DNA left at the scene.[39] Some evidence may be both exculpatory and impeaching, such as inconsistent statements from a witness regarding the perpetrator of a crime.[40] Additionally, after *Giglio* the Supreme Court has traditionally treated exculpatory and impeachment evidence identically: the analysis of a *Brady* violation has been the same whether the undisclosed evidence was impeachment or exculpatory.[41] However, the equal treatment of impeachment and exculpatory evidence arguably changed after the Supreme Court's decision in *Ruiz*, which some courts have viewed as creating a distinction between the two in the plea bargaining context.[42]

The scope of the evidence required to be disclosed under *Brady*, and the situations in which it must be disclosed, has continued to expand after

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33. *Id.* at 87.

34. 405 U.S. 150 (1972).

35. *See id.* at 154; *see also* Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423, 1462 (2001).

36. *Giglio*, 405 U.S. at 154; *see also* Peter A. Joy & Kevin C. McMunigal, *Implicit Plea Agreements and Brady Disclosure*, 22 CRIM. JUST. 50 (2007) (discussing the scope of the Court's holding in *Giglio*).

37. *See* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 496 (2001).

38. R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1437–38 (2011).

39. Douglass, *supra* note 37, at 480.

40. Cassidy, *supra* note 38, at 1438.

41. *See* United States v. Bagley, 473 U.S. 667, 676 (1985) ("This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.").

42. *See infra* Part II.B.

Giglio. In *United States v. Agurs*,[43] the Supreme Court held that *Brady* material must be disclosed even in the absence of a specific request by the defendant.[44] *Agurs* noted a subtle shift in the concerns of the Court: while the Supreme Court in *Brady*'s predecessors was mainly concerned with misconduct or misrepresentation by prosecutors, the Court's concern in *Brady* was the injury to the defendant resulting from the nondisclosure of material exculpatory evidence.[45] With this focus, the question became how to determine materiality or when that injury violated due process. The Court in *Agurs* found that, under *Brady*, "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."[46] The Supreme Court held that the standard of materiality must reflect the Court's "overriding concern with the justice of the finding of guilt."[47] As guilt must be established beyond a reasonable doubt, the Court found that due process is violated if the undisclosed evidence creates a reasonable doubt that did not previously exist.[48]

The Supreme Court further developed this standard of materiality in *United States v. Bagley*,[49] where the Court held that evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[50] *Bagley*'s standard of materiality—which continues to be applied in the *Brady* analysis today—was not derived solely from the *Brady* line of cases.[51] Rather, the Court noted that this standard was used to determine whether due process was violated by the ineffective assistance of counsel in *Strickland v. Washington*.[52] The *Strickland* line of cases concerns the actions of defense counsel rather than those of the prosecutor, but continues to share this materiality standard with *Brady* and its progeny.[53]

B. The Practice of Plea Bargaining

Defendants at the plea bargaining stage of the judicial process have not traditionally been afforded the same constitutional protections as they receive at trial. This discrepancy has become progressively more

43. 427 U.S. 97 (1976).
44. *See id.* at 110.
45. *Id.* at 104 n.10; *see also* Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty To Search the Intelligence Community for* Brady *Material*, 88 CORNELL L. REV. 1471, 1484 (2003).
46. *Agurs*, 427 U.S. at 104.
47. *Id.* at 112. The Court rejected the assertion that the standard of materiality should focus on the defendant's ability to prepare for trial, instead of on the importance of the evidence to the determination of guilt or punishment. *Id.* at 112 n.20.
48. *Id.* at 112–13.
49. 473 U.S. 667 (1985).
50. *Id.* at 682.
51. *See id.* at 681–82.
52. *See id.* at 682; *see also* Strickland v. Washington, 466 U.S. 668 (1984).
53. *See infra* notes 386–89, 419–21 and accompanying text.

problematic, as plea bargains have accounted for an ever-increasing percentage of the resolutions of criminal cases. This section describes the development of plea bargaining and outlines the current role that plea bargaining plays in the federal court system.[54]

1. The Plea Bargaining Process

While plea bargaining has long been a part of the criminal justice system, the Supreme Court only recognized it as a constitutional method of adjudicating criminal cases in the latter half of the twentieth century.[55] Despite the prior lack of constitutional grounding, plea bargaining has come to play a major role in the American judicial process.[56] Plea bargaining occurs before the start of the trial and usually takes the form of a series of offers and counteroffers between a prosecuting attorney and the defendant and his attorney.[57] There are two broad categories of plea negotiations, each of which generally entails concessions on the part of both the prosecution and the defendant: charge bargaining and sentence bargaining.[58] In charge bargaining, the defendant agrees to plead guilty in exchange for the dropping of some charges or the decrease in their severity.[59] In sentence bargaining, the prosecution agrees to recommend a lesser sentence in return for the guilty plea.[60] These categories are not mutually exclusive, and many plea agreements will contain elements of both.[61] In both types of negotiation, the exchange is essentially one in which the defendant waives his customary trial rights,[62] and the prosecution makes a recommendation to the judge.[63] However, the judge is not required to follow the recommendation of the prosecution and may decide not to accept a guilty plea.[64]

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54. The question whether plea bargaining is beneficial or detrimental to the U.S. judicial system is beyond the scope of this Note. For an argument that plea bargaining should be eliminated, see Stephen J. Schulhofer, *Plea Bargaining As Disaster*, 101 YALE L.J. 1979 (1992). For a defense of plea bargaining, see Frank Easterbrook, *Plea Bargaining As Compromise*, 101 YALE L.J. 1969 (1992).

55. CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 180 (4th ed. 2008).

56. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

57. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 1036 (7th ed. 2004).

58. *Id.*

59. *Id.*; *see also* FED. R. CRIM. P. 11(c)(1)(A).

60. *See Frye*, 132 S. Ct. at 1407; *see also* FED. R. CRIM. P. 11(c)(1)(B)–(C).

61. *See* Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 702–03 (2001).

62. These waived trial rights include the privilege against self-incrimination and the right to confront his accusers, present witnesses, and testify on his own behalf. *See* FED. R. CRIM. P. 11(b)(1).

63. *See* Colquitt, *supra* note 61, at 701–03; *see also* Lynch v. Overholser, 369 U.S. 705, 719 (1962).

64. *See* Colquitt, *supra* note 61, at 697.

Rule 11 of the Federal Rules of Criminal Procedure provides guidelines for the entry of a guilty plea.[65] Before a guilty plea is accepted, the defendant must appear in court, and the court must be sure that the defendant understands his rights and the consequences of entering a guilty plea.[66] Courts interpreting this section of Rule 11 have referred to this as the requirement that a guilty plea be entered "knowingly."[67] The court must also determine that a guilty plea was given voluntarily[68] and that there was a "factual basis" for the plea.[69] These determinations are made during a plea colloquy, where the court informs the defendant of his rights and the consequences of his plea and attempts to determine whether the defendant is acting knowingly and voluntarily.[70] If the requirements of Rule 11 are met, the court may accept a guilty plea.[71]

While Rule 11 provides the basic framework for guilty plea consideration in the courts, the Supreme Court has discussed and elaborated upon Rule 11's requirements in a number of cases reviewing the validity of guilty pleas. Rather than treating "knowing" and "voluntary" as two separate criteria, the Court generally treats them as one requirement, asking whether a guilty plea meets the "knowing and voluntary" standard.[72]

In addition to expanding on the knowing and voluntary requirement, the Supreme Court has also defined the context in which this requirement applies and other characteristics of the plea bargaining process. In *McCarthy v. United States*,[73] the Court held that if a court does not expressly confirm that a defendant's guilty plea is both knowing and voluntary, the plea is void.[74] For a guilty plea to be knowing and voluntary, the court must determine that the conduct admitted actually constitutes the offense charged.[75] A defendant must understand the nature of the crime of which he is accused and how that law relates to the factual occurrences to which he admits.[76] The Court also noted that, although plea bargaining itself is not constitutionally mandated, a finding that the guilty plea was

65. FED. R. CRIM. P. 11.

66. *See* FED. R. CRIM. P. 11(b)(1).

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

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

69. FED. R. CRIM. P. 11(b)(3).

70. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 727 (2002).

71. FED. R. CRIM. P. 11(c)(3).

72. *See, e.g.*, Puckett v. United States, 556 U.S. 129, 136 (2009). The term "intelligent" is also sometimes part of the standard for validity of a guilty plea, either in place of "knowing" or as a third requirement. *See, e.g.*, Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005).

73. 394 U.S. 459 (1969).

74. *See id.* at 466–67.

75. *See id.* at 467.

76. *See id.* at 466–67. This rule was later expanded to require that a defendant understand the rights he waives by pleading guilty and be fully aware of the nature of the charges against him. Henderson v. Morgan, 426 U.S. 637, 644–45 (1976). In *Henderson*, the plea was found to be involuntary because the defendant was never informed that intent to cause death was an element of second-degree murder. *Id.* at 645–46.

"truly voluntary" *is* constitutionally required.[77] By pleading guilty, a defendant waives numerous constitutional rights;[78] for that waiver to be valid under the Due Process Clause, the guilty plea must be knowing and voluntary.[79]

In addition to establishing the constitutional requirement that a guilty plea be knowing and voluntary, the Court in *McCarthy* also held that an improperly entered guilty plea must be vacated, and the case remanded for new pleadings.[80] The Court reasoned that vacating and remanding was the only way to guarantee that a defendant is afforded due process and the procedural safeguards it entails.[81] Moreover, this rule prevents the waste of judicial resources on frivolous attacks of guilty plea convictions where the original record is inadequate.[82]

A few months after *McCarthy*, the Court took the knowing and voluntary requirement a step further in *Boykin v. Alabama*.[83] The Court held that because a guilty plea is effectively a waiver of multiple constitutional rights, such a waiver cannot be presumed from a silent record.[84] Rather, a defendant must make an affirmative showing that he understands the nature of the charges against him and the waiver that the guilty plea entails, and wishes to waive those constitutional rights.[85] If a guilty plea is not "equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."[86]

While the system of plea bargaining in the United States has been met with criticism,[87] the Supreme Court affirmed the constitutionality of the practice in a later and unrelated *Brady* case, *Brady v. United States*.[88] The Court noted that plea bargaining has substantial benefits for both the defendant and the prosecution.[89] For the defendant, a guilty plea is an opportunity to receive a lesser punishment than he might receive after a full

77. *McCarthy*, 394 U.S. at 466.

78. These rights include the privilege against self-incrimination, the right to a jury trial, and the right to confront his accusers. *Id.*

79. *See id.* ("For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.'" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))).

80. *See id.* at 469.

81. *Id.* at 472. The Court noted that a postconviction voluntariness hearing would be especially problematic in cases like the one at bar. *Id.* at 470–71. Here, the crime required a "knowing and willful" attempt to commit tax fraud. *Id.* at 470. At his sentencing hearing, the defendant stated that his acts were "neglectful" and "inadvertent," but also stated that he was pleading guilty with full understanding of the charges and of his own volition. *Id.* Thus, the record would have been insufficient to determine whether the plea was actually knowing and voluntary; pleading anew would be a more just and efficient remedy. *See id.* at 471.

82. *See id.* at 472.

83. 395 U.S. 238 (1969).

84. *Id.* at 243.

85. *See id.* at 242.

86. *Id.* at 243 n.5.

87. *See* SALTZBURG, *supra* note 57, at 1041.

88. 397 U.S. 742 (1970).

89. *See id.* at 752–53.

trial, and the costs and burdens of trial are eliminated.[90] The government benefits by achieving its goals of punishment and deterrence and from saving the judicial resources normally expended at trial.[91] In light of these benefits, the Court reaffirmed the holdings of *Boykin* and *McCarthy*, holding that a guilty plea is constitutionally valid only if it is knowing and voluntary.[92] However, the Court also held that a defendant does not need to have an accurate assessment of the prosecution's case in order for a plea to be knowing and voluntary.[93]

Rule 11 also sets the basic parameters for withdrawal of, or challenges to, a guilty plea.[94] A defendant may withdraw a guilty plea without justification before the court has accepted the plea.[95] Once the court has accepted the plea, however, withdrawal becomes more difficult. After the court has accepted the plea but before sentencing, a defendant may withdraw his plea if the court rejects the plea agreement or the defendant "can show a fair and just reason for requesting the withdrawal."[96] A guilty plea cannot be withdrawn after sentencing and may be set aside only by direct appeal or collateral attack, such as a petition for a writ of habeas corpus under 28 U.S.C. § 2255.[97] However, most guilty plea agreements include an express waiver of the right to appeal.[98]

Additionally, the Supreme Court has limited the challenges available under habeas review.[99] In *Tollett v. Henderson*,[100] the Court held that a guilty plea precludes habeas review of nonjurisdictional "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."[101] However, in addition to jurisdictional challenges, a defendant who pleads guilty does not waive the right to attack the validity of the guilty plea itself, including challenges to the knowing and voluntary nature of the plea and claims of ineffective assistance of counsel.[102]

90. *See id.*
91. *See id.*
92. *See id.* at 748.
93. *See id.* at 756–57.
94. FED. R. CRIM. P. 11(d)–(e).
95. FED. R. CRIM. P. 11(d)(1).
96. FED. R. CRIM. P. 11(d)(2)(B).
97. FED. R. CRIM. P. 11(e); *see also* 28 U.S.C. § 2255 (2006).
98. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From* Caveat Emptor *to Consumer Protection*, 99 CALIF. L. REV. 1117, 1119 (2011).
99. *See* Douglass, *supra* note 37, at 465.
100. 411 U.S. 258 (1973).
101. *Id.* at 267.
102. *See* Douglass, *supra* note 37, at 516–17; *see also* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2025–26 (2000).

2. The Current Role of Plea Bargaining

In 1990, 84 percent of all federal criminal cases prosecuted to conclusion were resolved by guilty plea.[103] By 2011, that number had risen to 97 percent.[104] One reason for this increase may be the specter of mandatory minimum sentences.[105] In the past, judges in federal court had the power to determine criminal sentences.[106] This meant that a prosecutor knew that she could not hold an excessive sentence over a defendant's head at the plea bargaining stage as motivation to avoid trial, because the ultimate power to sentence rested with the judge.[107] The discretion afforded to judges has dwindled, however, with the advent of the U.S. Sentencing Guidelines.[108] Now, judges are constrained by mandatory minimum sentences, and prosecutors have more power at the plea bargaining stage.[109] A prosecutor often has the ability to charge a defendant with a variety of crimes carrying longer or shorter sentences; a defendant may therefore be heavily motivated to accept a prosecutor's offer to plead guilty to a crime that does not carry a mandatory minimum, especially if the alternative charge carries a lengthy sentence.[110] In the era of mandatory minimum sentencing, the prosecutor's control over the charge amounts to control over a defendant's sentence.[111]

A second cause for the increase in guilty pleas may be the practice of overcharging.[112] To convince a defendant to plead guilty, a prosecutor might threaten to charge him with an offense carrying a harsher sentence should he decide to go to trial.[113] For example, in *Bordenkircher v. Hayes*,[114] the prosecutor told the defendant that if he did not plead guilty to the offense charged, which was punishable by two to ten years in prison, she would seek a new indictment under a state law that carried a mandatory life sentence.[115] Hayes pled not guilty and subsequently received a life sentence.[116] The Supreme Court held that the decision of what crime to charge was within the discretion of the prosecutor and that charging the defendant with a more severe crime did not constitute a violation of due process.[117] By sanctioning the practice of overcharging, the Court allowed

103. Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar As Bargains Trump Trials*, WALL ST. J. (Sept. 23, 2012, 10:30 PM), http://online.wsj.com/article/SB10000872396390443589304577637610097206808.html.
104. *Id.*
105. *See* SALTZBURG, *supra* note 57, at 1049.
106. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1475 (1993).
107. *See id.*
108. *Id.*
109. *See id.*
110. *See id.*
111. *Id.*
112. *See* SALTZBURG, *supra* note 57, at 1051.
113. *See id.*
114. 434 U.S. 357 (1978).
115. *Id.* at 358.
116. *Id.* at 359.
117. *Id.* at 364–65.

prosecutors to use harsher sentences as leverage to obtain guilty pleas.[118] This technique has now become a common practice,[119] leading defendants to increasingly plead guilty, perhaps to avoid the risk of an extremely harsh sentence.[120] As the percentage of criminal cases being resolved by guilty plea continues to increase,[121] it becomes all the more necessary to establish proper procedures and safeguards to ensure that pleas are entered fairly and in a way that does not violate defendants' constitutional rights.[122]

C. Why Require Pre-plea Disclosure of Exculpatory Brady Evidence?

As discussed in Part II of this Note, the circuits are split as to whether the *Brady* rule applies to exculpatory evidence during plea bargaining.[123] This section first discusses various policy arguments put forth by criminal defense attorneys and legal commentators in favor of pre-plea *Brady* disclosure, and then presents some arguments against expanding *Brady*.

1. Policy Justifications for Allowing Exculpatory *Brady* Challenges to Guilty Pleas

Commentators have put forth a number of different justifications in pushing for the recognition of exculpatory *Brady* rights during plea bargaining.[124] First, some argue from a constitutional standpoint that guilty pleas are not truly knowing and voluntary without the knowledge of material exculpatory evidence.[125] These commentators argue that the decision to plead guilty rests substantially on the defendant's assessment of the strength of the prosecution's case, not on whether he actually committed the crime.[126] A plea therefore cannot be knowing and voluntary if it is made without knowledge of material exculpatory evidence.[127]

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118. Stephanos Bibas, *Pleas' Progress*, 102 MICH. L. REV. 1024, 1039 (2004).

119. *See* Jeremy Root, *Cruel and Unusual Punishment: A Reconsideration of the* Lackey *Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 293 (2002).

120. *See* Ana Maria Gutiérrez, *The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure*, 87 DENV. U. L. REV. 695, 717 (2010).

121. *See* DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.5.22.2010, http://www.albany.edu/sourcebook/pdf/t5222010.pdf (last visited Apr. 19, 2013).

122. *See* Gutiérrez, *supra* note 120, at 717–18; Nancy J. King, *Regulating Settlement: What Is Left of the Rule of Law in the Criminal Process?*, 56 DEPAUL L. REV. 389, 395–96 (2007).

123. *See infra* Part II.

124. *See* Blank, *supra* note 102, at 2040. While the complete breadth of justifications for pre-plea *Brady* challenges is too vast to be addressed here, some key arguments are presented.

125. *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 964 (1989); *see also* Blank, *supra* note 102, at 2040.

126. Douglass, *supra* note 37, at 466.

127. *See id.* at 466–68. The idea that *Brady* violations preclude knowing and voluntary pleas was highly influential in the Ninth Circuit's decision to allow pre-plea *Brady* challenges. *See infra* Part II.A.5.

Other commentators have advocated for a plea bargaining disclosure requirement based on a contract analysis. They argue that because a guilty plea agreement is essentially a contract, the doctrines of duress and mistake weigh in favor of pre-plea disclosure of exculpatory evidence.[128] General appeals to fairness motivate the desire for *Brady* disclosure during plea bargaining as well: if the true goal of the criminal process is justice, then a prosecutor's suppression of exculpatory evidence to coerce a defendant to plead guilty directly contravenes that goal.[129] Moreover, as *Brady* disclosures are required at trial, fairness dictates that the same requirements apply during plea bargaining.[130]

Perhaps the most salient argument that commentators have raised in favor of requiring the pre-plea disclosure of material exculpatory evidence is the fear that, without such a requirement, innocent defendants are compelled to plead guilty.[131] While some argue that innocent defendants will not plead guilty, the reality is that when faced with the alternative possibilities of a life sentence or a few years in prison, an innocent defendant might plead guilty to minimize that risk if he is unaware that the prosecution possesses exculpatory evidence.[132] Moreover, prosecutors are more likely to suppress exculpatory evidence when they have a weak case—when the defendant is most likely to be innocent—because they would rather secure even a minimal conviction than lose the case altogether.[133] Thus, the coercive effect of withholding exculpatory evidence is at its apex when the defendant is innocent.[134]

Brady disclosure levels the playing field between the prosecutor and the defendant: by forcing disclosure of exculpatory evidence, a prosecutor cannot bluff her way to a conviction by misrepresenting the strength of the government's case.[135] Bluffing, mandatory minimum sentencing, and the practice of overcharging all act to compel innocent defendants to plead guilty, as defendants seek to minimize the risk of a lengthy sentence.[136] Prosecutors, on the other hand, seek to maximize the number of convictions but are less concerned with the length of the sentence imposed.[137] When disclosure is required, defendants are less susceptible to coercion, as they have accurate information about the strength of the prosecution's case and

128. Blank, *supra* note 102, at 2041; *see* Eleanor J. Ostrow, Comment, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581, 1609 (1981). *See generally* Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1926 (1992).

129. *See* Douglass, *supra* note 37, at 441–42.

130. *See* McMunigal, *supra* note 125, at 1010.

131. *See id.* at 963–64 (referring to the problem of innocent defendants pleading guilty as "accuracy" in pleading); *see also* Douglass, *supra* note 37, at 441.

132. *See* Douglass, *supra* note 37, at 448.

133. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1152 (2008).

134. *See* Douglass, *supra* note 37, at 449.

135. *See* Blank, *supra* note 102, at 2072.

136. *See* Douglass, *supra* note 37, at 448–49; *see also* McMunigal, *supra* note 125, at 989.

137. Bowers, *supra* note 133, at 1128.

the relative risk of going to trial.[138] One goal of the criminal justice system is to protect innocent people from being punished; by requiring pre-plea *Brady* disclosure, the risk of innocent defendants pleading guilty is substantially abated.[139]

2. Arguments Against Applying *Brady* During Plea Bargaining

Scholarly argument against requiring disclosure of material exculpatory evidence prior to a guilty plea has been minimal.[140] Some have argued that few innocent people are actually accused of crimes and that those who are will never actually plead guilty.[141] Moreover, for guilty defendants, the disclosure of exculpatory evidence allows them to bargain for a lesser sentence than they actually deserve under the law.[142] Others argue that while substantial information should be disclosed prior to a guilty plea, *Brady*'s narrow materiality standard provides too minimal a protection.[143] Additionally, there is a fear that if exculpatory evidence is required to be disclosed prosecutors will soon have to turn over their entire case to the defendant, thus negating the efficiency and expediency provided by plea bargaining.[144] As is evident from the circuit court decisions holding that pre-plea *Brady* disclosure is not required, however, these policy arguments against disclosure give way to more substantial constitutional and precedential obstacles.[145]

II. *BRADY* CHALLENGES TO GUILTY PLEAS: THE CIRCUIT SPLIT

Part II of this Note discusses the circuit split regarding the use of the *Brady* rule to challenge a guilty plea for the failure to divulge exculpatory evidence. The Supreme Court resolved one aspect of this split in *Ruiz*, where the Court held that a defendant could not raise a *Brady* violation where the prosecution failed to disclose *impeachment* evidence prior to the entry of a guilty plea.[146] The Court did not, however, speak directly on the failure to divulge *exculpatory* evidence prior to a guilty plea.[147] Every subsequent circuit court decision on the issue of exculpatory *Brady* challenges to guilty pleas has been substantially based on the court's

138. McMunigal, *supra* note 125, at 968–73.
139. *See id.* at 965–67.
140. *See* Douglass, *supra* note 37, at 442.
141. *See* McMunigal, *supra* note 125, at 964.
142. *See* Douglass, *supra* note 37, at 489.
143. *See id.* at 442. However, Douglass notes that "even a limited rule of disclosure may be better than none." *Id.* at 443.
144. *See* Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1394 (1991); *see also* United States v. Ruiz, 536 U.S. 622, 632 (2002).
145. *See infra* Part II.
146. *See id.* at 625.
147. *See id.*

interpretation of *Ruiz*'s holding.[148] However, these interpretations have differed greatly, creating a new circuit split. To resolve this split, the meaning of *Ruiz* must be understood not only in the context of the *Brady* rule, but in the larger picture of what rights are afforded to a criminal defendant at different stages of the judicial process.

*A. The Pre-*Ruiz *Split*

Before *Ruiz*, the Second, Sixth, Eighth, Ninth, and Tenth Circuits held that a defendant may raise a *Brady* challenge to a guilty plea. However, the reasoning supporting these decisions varied: some courts have found that *Brady* violations render guilty pleas unknowing and involuntary,[149] while others found that suppression of *Brady* material constitutes an exception to the "knowing and voluntary" rule for the validity of a guilty plea.[150] Conversely, the Fifth Circuit held that a guilty plea precludes a *Brady* challenge, and the Eighth Circuit later went against its earlier decision and held the same.[151] While the Supreme Court answered some questions raised by this split in *Ruiz*, others remain unanswered: *Ruiz* addressed only the question of impeachment *Brady* material, which until then had been viewed as equivalent to exculpatory material for purposes of *Brady* challenges.[152] This section chronologically details the circuit split before *Ruiz*, and the principles underlying the different circuit's positions on *Brady* challenges to guilty pleas.

1. The Sixth Circuit Allows a Post-plea *Brady* Challenge

In *Campbell v. Marshall*, the Sixth Circuit became the first court to decide whether a defendant may raise a *Brady* challenge to a guilty plea.[153] The Sixth Circuit held that a *Brady* violation could potentially negate the voluntary and knowing character of a guilty plea.[154] However, the court found that a *Brady* violation was just one part of the analysis of a guilty plea's validity and was not always sufficient on its own to preclude a plea's knowing and voluntary nature.[155] In addition to suppression of *Brady* material, the court also looked at the factual basis for the plea, the

148. *See, e.g.*, United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009); McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003).

149. *See, e.g.*, United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994).

150. *See, e.g.*, Miller v. Angliker, 848 F.2d 1312, 1320–21 (2d Cir. 1988).

151. *See infra* Part II.A.2, A.5. The Eighth Circuit contradicted itself, first allowing post-plea *Brady* challenges and then holding the opposite shortly after.

152. *See* Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 981 (2008). Before *Ruiz*, the circuit courts' disposition of *Brady* questions during plea bargaining did not depend on whether the evidence in question went to impeachment of witnesses or the defendant's factual innocence. *See id.*

153. 769 F.2d 314 (6th Cir. 1985).

154. *See id.* at 318–24; *see also* Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 10 (2002).

155. *Campbell*, 769 F.2d at 321–24. The court ruled that the pre-plea suppression of *Brady* material was not a per se constitutional violation. *See id.* at 322.

procedures used by the court in accepting the plea, and the effectiveness of Campbell's attorney.[156]

Under this totality-of-the-circumstances approach, the Sixth Circuit ultimately held that the prosecutor's improprieties did not invalidate the defendant's guilty plea.[157] Still, the Sixth Circuit reached the merits of the post-plea *Brady* claim, and suggested that under other circumstances, the failure to divulge material exculpatory evidence could render a guilty plea invalid.[158] Under this approach, even if the court were to find that the Supreme Court's guilty plea jurisprudence precluded post-plea *Brady* claims by name, the suppression of material exculpatory evidence could still be a factor that renders a plea unknowing and involuntary.

2. Contradiction in the Eighth Circuit

In two opinions separated by only one year, the Eighth Circuit first decided a defendant's *Brady* challenge to his guilty plea on the merits, then later held that a guilty plea waived the defendant's right to assert a *Brady* claim.[159]

a. White v. United States

In the first Eighth Circuit case to address this issue, *White v. United States*,[160] the court expressly adopted the Sixth Circuit's framework from *Campbell*, holding that a defendant in a federal habeas corpus proceeding could attack the knowing and voluntary nature of his guilty plea based on the suppression of material evidence.[161] The court quoted *Campbell* for the proposition that "the Supreme Court did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent."[162] The court therefore permitted collateral attacks on guilty pleas based on the failure to disclose exculpatory *Brady* evidence.[163]

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156. *See id.* at 321–22.

157. *See id.* at 324; *see also* Lain, *supra* note 154, at 10.

158. *See Campbell*, 769 F.2d at 324; *see also* Douglass, *supra* note 37, at 517.

159. *See id.* at 6.

160. 858 F.2d 416 (8th Cir. 1988). The *Brady* material in this case was *impeachment* evidence, rather than *exculpatory*, as it went to the credibility of the key witness against the defendant. *See id.* at 423. Though White's claim could not have been heard after *Ruiz*, *see infra* note 241 and accompanying text, the Eighth Circuit's reasoning was nearly identical to the Sixth Circuit's reasoning in *Campbell*, which concerned *exculpatory Brady* material. *See infra* Part II.A.1.

161. *See White*, 858 F.2d at 421–22.

162. *Id.* at 422.

163. *See id.*; *see also* 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).

Following the Sixth Circuit's lead, the Eighth Circuit analyzed the validity of White's plea under a totality-of-the-circumstances approach.[164] Like the Sixth Circuit in *Campbell*, the court sought to determine whether White's knowledge of the withheld information would have "affected his decision to forego trial."[165] The Eighth Circuit found that the undisclosed *Brady* material would not have been controlling in White's decision whether to plead guilty or proceed to trial.[166] Additionally, the court held that the benefit conferred to White by pleading guilty weighed in favor of the finding that he would have pled guilty even with the suppressed evidence.[167] As White had previously stated at his plea hearing that it was in his "best interest to terminate all of the litigation as quickly as possible," the court found it unlikely that knowledge of the suppressed material would have changed his decision.[168] Despite the ruling against White, this case appeared to establish in the Eighth Circuit a defendant's ability to raise a *Brady* claim to challenge a guilty plea for nondisclosure of exculpatory evidence.[169]

b. Smith v. United States

The Eighth Circuit quickly changed course in *Smith v. United States*, decided less than one year after *White*.[170] In a very brief opinion, the court declined to reach the merits of Smith's claim, holding that by pleading guilty Smith had waived all challenges "except those related to jurisdiction."[171] The court made no mention of its previous precedent in *White* or of the *Brady* rule.[172] By declining to reach the merits of Smith's *Brady* challenge to his guilty plea, the Eighth Circuit split from the Sixth (and from its previous holding in *White*).

3. The Second Circuit's Approach: Suppression of Material Evidence As Official Misconduct

In *Miller v. Angliker*, the Second Circuit joined the Sixth in allowing a defendant to challenge the validity of a guilty plea for the failure of the prosecution to disclose material exculpatory evidence, but on a different legal theory.[173] The court found that a guilty plea is valid if it is both

164. *White*, 858 F.2d at 422.
165. *Id.* at 424.
166. *Id.*
167. *See id.*
168. *Id.*
169. *See* Lain, *supra* note 154, at 6 n.23.
170. 876 F.2d 655 (8th Cir. 1989).
171. *Id.* at 657.
172. *See id.*
173. 848 F.2d 1312 (2d Cir. 1988). This case actually involved a plea of not guilty by reason of insanity. *Id.* at 1319. However, the Second Circuit decided that in determining whether Miller could raise a Brady challenge, it would treat his plea of not guilty by reason of insanity like a guilty plea. *Id.* The court reasoned that both pleas waived certain rights normally held by the defendant at trial, including the right to argue that he did not commit

intelligent and voluntary.[174] However, the court found that this test only applies so long as there is no "misrepresentation or other impermissible conduct by state agents."[175] The court proceeded to note that a defendant's decision whether or not to plead guilty rested heavily on a determination of the strength of the prosecution's case against him, and the availability of exculpatory evidence.[176] The Second Circuit concluded 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."[177] Applying the materiality standard from *Bagley* and *Strickland*, the court found that there was a reasonable probability that, but for the suppression of the file, Miller would not have taken the plea agreement, and would instead have gone to trial.[178] Based on that probability, the suppression of the file violated Miller's due process rights under *Brady*.[179]

Under the Second Circuit's analysis, the prosecution's suppression of material *Brady* evidence, while not causing the plea to be unintelligent or involuntary, nevertheless renders it constitutionally invalid due to "misrepresentation or other impermissible conduct by state agents."[180] This holding stands in contrast to the Sixth Circuit's approach in *Campbell*.[181] Both courts reached the merits of the defendants' *Brady* claims, but the Second Circuit viewed *Brady* violations as an exception to the rule that a guilty plea must be knowing and voluntary, whereas the Sixth Circuit viewed *Brady* violations as having the potential to preclude a knowing and voluntary plea.[182] While this rule has been consistently applied in the Second Circuit,[183] other circuits have identified a different basis for permitting *Brady* challenges to guilty pleas in similar situations.

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the alleged acts, the right to challenge the validity of his confession, and the right to introduce any other evidence to cast doubt on his commission of the alleged acts. *Id.*

174. *See id.* at 1320 (citing Brady v. United States, 397 U.S. 742 (1970); Boykin v. Alabama, 395 U.S. 238 (1969)).

175. *Id.* (quoting Brady v. United States, 397 U.S. 742 (1970)).

176. *See id.*

177. *Id.*

178. *See id.* at 1322–24. The Second Circuit noted that the standard for materiality applied to *Brady* claims was the same as for claims of ineffective assistance of counsel. *See id.* at 1322. The court held that, in order to show prejudice and invalidate his guilty plea, Miller had to show that there was a "reasonable probability that but for the withholding of the information [he] would not have entered the recommended plea but would have insisted on going to a full trial . . . ." *Id.*

179. *Id.*

180. *Id.* at 1320 (quoting Brady v. United States, 397 U.S. 742, 757 (1970)).

181. *See supra* Part II.A.1.

182. *See* Douglass, *supra* note 37, at 467 n.125. *Compare Miller*, 848 F.2d at 1320, *with* Campbell v. Marshall, 769 F.2d 314, 318–22 (6th Cir. 1985).

183. *See, e.g.*, United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998); Tate v. Wood, 963 F.2d 20, 25 (2d Cir. 1992).

4. The Tenth Circuit's Approach: Suppression of *Brady* Material May Preclude a Knowing and Voluntary Guilty Plea

While the Tenth Circuit joined the Second and Sixth Circuits in allowing a defendant to raise a *Brady* challenge to a guilty plea, it supported its holding with different reasoning. The court first addressed the question in *United States v. Wright*,[184] where the Tenth Circuit stated that a defendant who enters a knowing and voluntary guilty plea "waives all non-jurisdictional challenges to his conviction."[185] This language closely mirrors the Eighth Circuit's language in *Smith*, which held that a guilty plea precluded *Brady* challenges.[186] However, rather than foreclosing upon Wright's ability to raise a *Brady* challenge, the Tenth Circuit held that Wright *could* challenge his conviction by asserting that he did not enter his plea intelligently or voluntarily due to the claimed *Brady* violation.[187] The court noted that a defendant who pleads guilty may still challenge that plea as being the "product of prosecutorial threats, misrepresentations, or improper promises," which go directly to the knowing and voluntary nature of the plea.[188] According to the Tenth Circuit, failure to divulge *Brady* material is a form of "misrepresentation" with the potential to render a "guilty plea a constitutionally inadequate basis for imprisonment."[189]

Whereas the Second Circuit in *Miller* found that official misconduct—the government's failure to turn over *Brady* evidence—was an exception to the "voluntary and intelligent" test for the validity of a guilty plea, the Tenth Circuit reasoned that such misconduct can undercut the intelligent or voluntary nature of the plea.[190] In essence, the court found that a defendant may be incapable of entering a truly voluntary guilty plea if he is unaware of material evidence in his favor that weakens the prosecution's case against him.[191] The court also reasoned that allowing *Brady* challenges to guilty pleas was justified by "the importance to the integrity of our criminal justice system that guilty pleas be knowing and intelligent."[192]

In discussing materiality, the Tenth Circuit held that *Brady* evidence was material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[193] A "reasonable probability" was a probability "sufficient to undermine confidence in the outcome."[194] The court ultimately held that

184. 43 F.3d 491 (10th Cir. 1994).
185. *Id.* at 494.
186. *See supra* note 171 and accompanying text.
187. *See Wright*, 43 F.3d at 494.
188. *Id.* at 495 (internal quotation marks omitted).
189. *Id.* at 497 (quoting Blackledge v. Allison, 431 U.S. 63, 75 (1977)). Notably, the Tenth Circuit found that a *Brady* violation can render a guilty plea unknowing and involuntary only "under certain limited circumstances." *Id.* at 496.
190. *See id.* at 495; *see also* Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988).
191. *See Wright*, 43 F.3d at 496; *see also* Lain, *supra* note 154, at 12.
192. *Wright*, 43 F.3d at 496.
193. *Id.* (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).
194. *Id.* (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

Wright's plea was valid, finding that the prosecution's failure to disclose immunity agreements offered to witnesses was not material to guilt or punishment.[195] While the court did not find in Wright's favor, the decision solidified the Tenth Circuit's rule allowing a defendant to challenge a guilty plea based on a *Brady* violation.[196]

5. The Ninth Circuit's Per Se Rule

In *Sanchez v. United States*, the Ninth Circuit adopted an even more expansive view of a defendant's *Brady* rights during plea bargaining.[197] The Ninth Circuit began by discussing whether a defendant may raise a *Brady* claim to vacate a guilty plea, noting that the Second, Sixth, and Eighth Circuits had already answered in the affirmative.[198] The Ninth Circuit likewise allowed post-plea *Brady* challenges, finding that a guilty plea cannot be knowing and voluntary if made without knowledge of material evidence suppressed by the prosecution.[199] However, rather than following the Sixth Circuit's method of considering the totality of the circumstances in determining whether a guilty plea was valid, the Ninth Circuit held that a *Brady* violation automatically renders a plea unknowing and involuntary.[200] The court found that such a rule makes sense because "'a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case.'"[201]

The court also noted that prohibiting defendants from asserting *Brady* claims to challenge guilty pleas would tempt prosecutors to "deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas."[202] While the court appeared to believe it was following the other circuits, it failed to note that the Second Circuit had not found that a *Brady* violation prevented a plea from being knowing and voluntary, but had instead found that a *Brady* violation constitutes official misconduct that negates an otherwise knowing and voluntary plea.[203]

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195. *See id.* at 497.

196. *See id.*

197. 50 F.3d 1448 (9th Cir. 1995).

198. *See id.* at 1453.

199. *See id.*

200. *See id.* ("A waiver cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution." (internal quotation marks omitted)); *see also* Lain, *supra* note 154, at 8.

201. *Sanchez*, 50 F.3d at 1453 (quoting Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988)).

202. *Id.*

203. *Compare id.* ("Three circuits have held that a defendant can argue that his guilty plea was not voluntary and intelligent because it was made in the absence of withheld *Brady* material."), *with* 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."). The court also adopted the same standard of materiality as the Second Circuit in *Miller*, finding that *Brady* evidence is material only when there is a reasonable probability that the defendant would not have pleaded guilty had he received the undisclosed information. *See Sanchez*, 50 F.3d at 1453.

While the Ninth Circuit did not ultimately find that the government's nondisclosure of evidence violated *Brady*, the test established by this court was the most defendant-friendly to date.[204] Whereas the Sixth Circuit viewed *Brady* violations as having the *potential* to invalidate a guilty plea under a totality-of-the-circumstances approach,[205] the Ninth Circuit effectively adopted a "per se" rule whereby a *Brady* violation *automatically* precludes a knowing and voluntary plea.[206]

6. The Fifth Circuit Dissents

In *Matthew v. Johnson*,[207] the Fifth Circuit was the first circuit court to lay down a full, detailed opinion holding that a defendant could *not* challenge the validity of a guilty plea due to a *Brady* violation. In considering whether or not to proceed to the merits of Matthew's *Brady* claim, the Fifth Circuit first noted that the Second, Sixth, Eighth, Ninth, and Tenth Circuits had generally held that a defendant could assert a *Brady* violation to challenge his guilty plea.[208] The court, however, also cited *Smith* and two district court cases holding that *Brady* violations may not be asserted after a guilty plea.[209]

The court proceeded to find that the government's duty under *Brady* to disclose material exculpatory evidence is based on the Due Process Clause and "exists to ensure that the accused receives a fair *trial*."[210] The court continued to emphasize the language in *Brady* that discussed the impact of withholding evidence on the trial itself, and found that the inclusion of impeachment evidence in the *Brady* rule by *Giglio* was also justified by the potential detriment to the jury's determination of guilt.[211] Thus the court framed the *Brady* rule not as one that promoted fairness and protected defendants through the criminal justice process,[212] but rather as a rule to ensure proper determinations of guilt at trial.[213]

The Fifth Circuit also found that the Supreme Court's materiality standard in *Brady* cases demonstrated that the rule was properly confined to the trial setting.[214] The court found, citing *Bagley*, that a prosecutor was only required to disclose evidence that was favorable to the defense and, if suppressed, would deprive the defendant of a fair *trial*.[215] This is a different reading of *Bagley's* materiality standard than that of the Tenth

204. *See* John G. Douglass, *Can Prosecutors Bluff?* Brady v. Maryland *and Plea Bargaining*, 57 CASE W. RES. L. REV. 581, 585 (2007).
205. Campbell v. Marshall, 769 F.2d 314, 324 (6th Cir. 1985).
206. *See Sanchez*, 50 F.3d at 1453; *see also* Blank, *supra* note 102, at 2039.
207. 201 F.3d 353 (5th Cir. 2000).
208. *Id.* at 358.
209. *Id.*
210. *Id.* at 360 (emphasis added).
211. *See id.*
212. *See supra* notes 129–30 and accompanying text.
213. *See Matthew*, 201 F.3d at 360–61.
214. *See id.* at 361.
215. *Id.*

Circuit and other courts that cite *Bagley* as holding that evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the *proceeding* would have been different."[216] Nonetheless, the Fifth Circuit found *Brady* to be purely a trial right, and "where no trial is to occur, there may be no constitutional violation."[217] By pleading guilty or nolo contendere, the defendant waived not only his right to trial but also the right to assert constitutional violations of trial rights.[218]

In prohibiting Matthew from raising a *Brady* challenge to invalidate his plea, the Fifth Circuit also distinguished the cases allowing such challenges in other circuits.[219] Notably, the court found the Second Circuit's holding—that a violation occurs if a defendant would have pled differently had he received the undisclosed information—to be unsupported by Supreme Court jurisprudence.[220] The court found that such an argument was foreclosed by the Supreme Court's decision in *Brady v. United States*, where the Court rejected the argument that because the defendant would not have pled guilty but for the possibility of receiving the death penalty at trial, his plea was invalid as an involuntary act.[221] The Fifth Circuit found that while some circuits had held that a guilty plea was not knowing or voluntary if the defendant was not provided with material exculpatory evidence, the Supreme Court said otherwise.[222] In *McMann v. Richardson*[223] the Court recognized that the decision to plead guilty is inherently made without complete or accurate information, and in *Brady v. United States*[224] the Court held that incorrect assessments of the strength of the government's case did not preclude a knowing and voluntary plea.[225] Thus, the Fifth Circuit held that *Brady* was purely a trial right, and to extend it to plea bargaining would go against the Supreme Court's established precedents.[226]

B. United States v. Ruiz

Two years after *Matthew*, in *United States v. Ruiz*, the Supreme Court decided its first case directly on the question whether a *Brady* violation invalidates a guilty plea.[227] Defendant Angela Ruiz was arrested in California for importing marijuana from Mexico into the United States.[228] Ruiz was offered a "fast track" plea deal, whereby she would waive

216. *See* United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994); *see also* Douglass, *supra* note 37, at 470–71.
217. *Matthew*, 201 F.3d at 361.
218. *Id.* at 362.
219. *Id.* at 362–63.
220. *See id.* at 363.
221. *Id.* at 366 (citing Brady v. United States, 397 U.S. 742, 750 (1970)).
222. *Id.* at 368.
223. 397 U.S. 759, 769 (1970).
224. 397 U.S. 742, 757 (1970).
225. *See Matthew*, 201 F.3d at 368.
226. *See id.*
227. United States v. Ruiz, 536 U.S. 622 (2002).
228. *Id.* at 625; *see also* United States v. Ruiz, 241 F.3d 1157, 1160 (9th Cir. 2001).

indictment, trial, and appeal in exchange for the government's recommendation to the sentencing judge of a two-level reduction from the otherwise applicable U.S. Sentencing Guidelines sentence.[229] The "fast track" deal specified that "any [known] information establishing the factual innocence of the defendant"[230] has been disclosed to the defendant and required the defendant to "waiv[e] the right to receive impeachment information relating to any informants or other witnesses."[231] Ruiz declined the offer and was indicted for unlawful drug possession.[232]

After the indictment, and in the absence of any subsequent plea agreement, Ruiz pled guilty.[233] Ruiz asked the sentencing judge to grant her the same two-level reduction she would have received under the plea deal, but the government opposed the request and the district court imposed the standard Guideline sentence.[234] Ruiz appealed her sentence to the Ninth Circuit, which vacated the district court's sentence.[235] The government sought certiorari, and the Supreme Court granted the petition.[236]

Writing for the majority, Justice Breyer framed the question as whether federal prosecutors must disclose material *impeachment* evidence before entering into a plea agreement with a criminal defendant.[237] Citing *Brady*, the Court located this right both in the Fifth Amendment's Due Process Clause and the Sixth Amendment's "fair trial" guarantee.[238] The Court found that due to the gravity of waiving one's constitutional trial rights by pleading guilty, the Constitution required that a guilty plea be entered knowingly and voluntarily, and with "sufficient awareness of the relevant circumstances and likely consequences."[239] The Court noted that the Ninth Circuit had essentially held that a guilty plea is not voluntary unless it is made with full knowledge of the material impeachment evidence possessed by the prosecution.[240] The Supreme Court disagreed, holding that the Constitution does not require the disclosure of impeachment information before the entry of a guilty plea.[241]

In support of this holding, the Court first found that impeachment information, while special in relation to the fairness of the trial, was not

229. *Ruiz*, 536 U.S. at 625. In this case, that meant a reduction from an eighteen-to-twenty-four month range to a twelve-to-eighteen month range. *Id.*

230. In other words, exculpatory *Brady* material.

231. *Id.* (alterations in original) (internal quotation marks omitted). This clause refers to impeachment *Brady* material, included in the *Brady* rule by *Giglio*. *See supra* notes 36–40 and accompanying text.

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

233. *Id.* at 625–26.

234. *Id.* at 626.

235. *Id.*

236. *Id.*

237. *See id.* at 625.

238. *Id.* at 628 (citing Brady v. United States, 397 U.S. 742, 748 (1970)).

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

240. *Id.*

241. *See id.*

significant to whether a guilty plea was knowing and voluntary.[242] Noting that the Constitution does not confer a general right to criminal discovery, the Court found that a plea is ordinarily considered valid if the defendant "fully understands the nature of the right [he waives] and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it."[243] The Constitution does not require that the government disclose all useful information to the defendant.[244] The Court found that impeachment evidence was not "critical information of which the defendant must always be aware prior to pleading guilty," due to the inconsistent way in which it tends to help a defendant.[245]

Affirming the Fifth Circuit's holding in *Matthew*,[246] the Supreme Court held that the Constitution does not require that a defendant have complete knowledge of all relevant circumstances before entering a guilty plea.[247] The Court also found that the due process considerations underlying the *Brady* rule did not support a rule requiring the disclosure of impeachment material before pleading guilty.[248] The added value of such a rule to the defendant would be limited, as impeachment information is rarely crucial.[249] Moreover, the Court found little reason to believe that innocent individuals would plead guilty in the absence of impeachment evidence because the government was required to disclose "any information establishing the factual innocence of the defendant" under the "fast track" plea bargain, and the defendant was still protected by Rule 11.[250] The Court appeared to assume that innocent defendants were very unlikely to plead guilty.[251]

The Supreme Court also found that a constitutional rule requiring disclosure of impeachment information prior to a guilty plea could interfere with the "[g]overnment's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice."[252] The Court agreed with the government's warning that such a rule would disrupt investigations and potentially expose witnesses to harm.[253] Such a requirement would also force the government

242. *Id.*

243. *Id.* (emphasis in original); *see also* Bibas, *supra* note 98, at 1133–34 (discussing the Supreme Court's understanding of the voluntariness requirement in *Ruiz*).

244. *Ruiz*, 536 U.S. at 629.

245. *Id.* at 630.

246. *See* Matthew v. Johnson, 201 F.3d 353, 368 (5th Cir. 2000) ("The Court has explicitly recognized that the decision whether to plead guilty or go to trial is one made under circumstances of incomplete, and often inaccurate, information.").

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

248. *See id.* at 631.

249. *See id.* at 630–32.

250. *Id*. at 631; *see also* FED. R. CRIM. P. 11.

251. Bibas, *supra* note 98, at 1133. At oral argument, Justice Scalia went so far as to suggest that "our system never permits or encourages innocent defendants to plead guilty." *Id.* at 1134 (quoting Transcript of Oral Argument at 12, *Ruiz*, 536 U.S. 622 (No. 01-595)).

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

253. *Id.* at 631–32.

to expend more time, energy, and manpower on preparation before plea bargaining, thereby erasing the benefits to judicial expediency which plea bargaining normally offers.[254] In the alternative, the Court feared that the Ninth Circuit's rule would result in more cases being sent to trial.[255] In addition to not being in the best interests of the justice system, the Court held that such a change was not justified by the minimal benefit bestowed by requiring disclosure of impeachment evidence.[256] The Court therefore held that the Constitution did not require the government to disclose impeachment evidence before the entry of a guilty plea.[257]

C. Judicial Interpretation of Ruiz*: The New Circuit Split*

While the Supreme Court was quite clear in striking down a rule requiring the pre-plea disclosure of *impeachment* evidence, it was not clear from the holding what *Ruiz* meant for *exculpatory* evidence.[258] Prior to *Ruiz*, courts treated exculpatory and impeachment evidence as "constitutionally indistinguishable."[259] While some—including the Seventh and Tenth Circuits—have viewed *Ruiz* as suggesting that the *Brady* rule *would* apply to exculpatory evidence prior to the entry of a plea,[260] others—including the Second, Fourth, and Fifth Circuits—have understood *Ruiz* to imply a broader rule that the government has no duty to disclose any *Brady* material during plea negotiations.[261] This section outlines the cases following *Ruiz* that address whether the prosecution must disclose material exculpatory evidence prior to the entry of a guilty plea.

1. Circuits That Find *Ruiz* Suggests That Failure To Disclose Material Exculpatory Evidence Violates Due Process

The first two circuit courts to address this question after *Ruiz* both held that exculpatory evidence, unlike impeachment evidence, had to be disclosed prior to the entry of a guilty plea. This section discusses these cases and their interpretation of *Ruiz*.

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254. *See id.* at 632.
255. *See id.*
256. *See id.*
257. *Id.* at 633.
258. *See* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 273 (2006).
259. Natapoff, *supra* note 152, at 981.
260. *See, e.g.*, Langer, *supra* note 258, at 273 n.200 (collecting cases); Kevin C. McMunigal, *Guilty Pleas*, Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 654 (2007) ("In response to the Supreme Court's decision in *Ruiz*, the American College of Trial Lawyers proposed modifying Federal Rule of Criminal Procedure 11 to impose a duty to disclose exculpatory information in the guilty plea context.").
261. *See infra* Part II.C.2.

a. The Seventh Circuit

The Seventh Circuit was the first to address the application of *Brady* to plea bargaining after *Ruiz* in *McCann v. Mangialardi*.[262] In discussing McCann's *Brady* claim, the court noted that the Supreme Court had not yet addressed whether disclosure of material exculpatory evidence was required outside the trial context.[263] The court viewed *Ruiz* as drawing a major distinction between impeachment information—which was "special in relation to the *fairness of the trial*, not in respect to whether a plea is *voluntary*"[264]—and exculpatory evidence, which was at issue in *McCann*.[265] Because of this distinction, the Seventh Circuit found that the question whether a guilty plea can be voluntary[266] when it is made without knowledge of material exculpatory evidence was not directly answered by *Ruiz*.[267]

The Seventh Circuit held that *Ruiz* "strongly suggests" that the government is required to disclose material exculpatory information prior to a guilty plea.[268] The court found that the Supreme Court's reasoning for *not* requiring disclosure of impeachment information was that such impeachment information was unlikely to be "critical information of which the defendant must always be aware prior to pleading guilty."[269] Additionally, the disclosure of impeachment information was not required in *Ruiz* because the plea agreement already specified that the government would provide material exculpatory evidence.[270] The Seventh Circuit held that this language created a distinction between impeachment and exculpatory evidence, and therefore indicated that the Supreme Court *would* find a due process violation if the government withheld material exculpatory evidence prior to the entry of a guilty plea.[271]

Ultimately, however, the Seventh Circuit found that it did not have to actually resolve the issue, because McCann had not presented evidence to show that Mangialardi actually new about the cocaine being planted in his car.[272] Still, the Seventh Circuit set the foundation for interpretation of *Ruiz* and pre-plea *Brady* requirements.

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262. 337 F.3d 782 (7th Cir. 2003).
263. *See id.* at 787.
264. *Id.* (quoting United States v. Ruiz, 536 U.S. 622, 629 (2002)).
265. *See id.* In *McCann*, the exculpatory evidence consisted of the defendant's alleged knowledge that the cocaine found in the plaintiff's car was planted there. *Id.* at 784.
266. Voluntary was defined by the Supreme Court in *Ruiz* and by the Seventh Circuit here as "knowing, intelligent, and sufficiently aware." *Ruiz*, 536 U.S. at 629; *McCann*, 337 F.3d at 787 (internal quotation marks omitted).
267. *McCann*, 337 F.3d at 787.
268. *Id.*
269. *Id.* (quoting *Ruiz*, 536 U.S. at 630) (emphasis omitted).
270. *Id.*
271. *Id.* at 788.
272. *Id.*

b. The Tenth Circuit

Ten years after its decision in *United States v. Wright*,[273] the Tenth Circuit once again addressed the viability of post–guilty plea *Brady* challenges in *United States v. Ohiri*.[274] While the district court had held that Ohiri could not establish a *Brady* violation prior to the entry of his guilty plea, the Tenth Circuit disagreed.[275] The district court relied on *Ruiz*, which it viewed as holding that "the government is not required to produce all *Brady* material when a defendant pleads guilty."[276] The Tenth Circuit, however, found that *Ruiz* did not absolve the government of its disclosure responsibilities in this case.[277]

The court first highlighted the Supreme Court's statement that "'impeachment evidence is special in relation to the *fairness of a trial*,' not in respect to whether a *plea is voluntary*."[278] Like the Seventh Circuit in *McCann*,[279] the Tenth Circuit used this passage to draw a distinction between impeachment and exculpatory evidence: exculpatory evidence is "'critical information of which the defendant must always be aware prior to pleading guilty,'"[280] while impeachment evidence is not.[281] Moreover, the Tenth Circuit found that the duty to disclose exculpatory evidence prior to a guilty plea was supported by the Supreme Court's statement that Ruiz's constitutional *Brady* rights were protected by the plea agreement's stipulation that she would receive all material exculpatory evidence.[282]

The Tenth Circuit also found that *Ruiz* was distinguishable from the case at bar in two ways.[283] First, the withheld evidence in this case was exculpatory, whereas the evidence in *Ruiz* was impeachment evidence.[284] Second, the court found a significant difference between the "fast track" plea in *Ruiz*, which was offered before an indictment, and the plea agreement offered to Ohiri on the same day as jury selection.[285] The Tenth Circuit understood the Supreme Court's holding in *Ruiz* as being relatively narrow: that there was no due process violation in requiring a defendant to waive the disclosure of impeachment evidence *before* indictment.[286] This did not, however, imply that the government could withhold material exculpatory evidence if the defendant accepts a last-minute plea deal.[287]

273. 43 F.3d 491 (10th Cir. 1994).
274. 133 F. App'x 555 (10th Cir. 2005).
275. *See id.* at 562.
276. *Id.* at 561.
277. *Id.* at 562.
278. *Id.* (quoting United States v. Ruiz, 536 U.S. 622, 629 (2002)).
279. *See supra* notes 264–65 and accompanying text.
280. *Ohiri*, 133 F. App'x at 562 (quoting United States v. Ruiz, 536 U.S. 622, 630 (2002)).
281. *See id.*
282. *Id.* (citing United States v. Ruiz, 536 U.S. 622, 631 (2002)).
283. *See id.*
284. *Id.*
285. *Id.*
286. *See id.*
287. *See id.*

The Tenth Circuit cited *McCann* as holding the same, and also as understanding *Ruiz* to suggest that exculpatory evidence must be disclosed prior to a guilty plea.[288] The court therefore held that post–guilty plea *Brady* challenges for suppression of exculpatory evidence were permitted after *Ruiz*.[289]

2. Circuits That Find *Ruiz* Precludes All *Brady* Challenges to Guilty Pleas

In *United States v. Conroy*, the Fifth Circuit once again disagreed with the other circuits, mirroring the split that existed before *Ruiz*.[290] One year later in *United States v. Moussaoui*,[291] the Fourth Circuit indicated that it might follow suit, but its holding was not an outright endorsement of *Conroy*. The Second Circuit also suggested in dictum, in *Friedman v. Rehal*,[292] that it might reverse course from *Miller* and its progeny. This section discusses these three cases and the circuit split as it currently exists.

a. The Fifth Circuit

Nine years after its decision in *Matthew v. Johnson*,[293] the Fifth Circuit once again held that a guilty plea precludes a *Brady* challenge in *Conroy*.[294] The court declined to reach the merits of Conroy's *Brady* claim, finding that it was precluded by *Ruiz* and *Matthew*.[295] First, the court reviewed its holding in *Matthew*, where it found that the *Brady* rule was only intended to ensure that the defendant received a fair *trial*, and that it did not apply when an individual waived his trial rights.[296] In addition, the court cited a number of Fifth Circuit decisions following *Matthew* that also found that a guilty plea waives the right to claim a *Brady* violation.[297]

In further support of its holding, the Fifth Circuit found that the Supreme Court in *Ruiz* had declined to extend *Brady* rights to guilty pleas.[298] The Fifth Circuit did not see *Ruiz* as creating (or even implying) a distinction between impeachment and exculpatory evidence, but rather as precluding all post–guilty plea *Brady* claims.[299] Accordingly, the Fifth Circuit held that Conroy's *Brady* claim was precluded under *Ruiz* and *Matthew*, and that

288. *See id.*; *see also* McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003).
289. *See Ohiri*, 133 F. App'x at 561–62.
290. 567 F.3d 174 (5th Cir. 2009).
291. 591 F.3d 263 (4th Cir. 2010).
292. 618 F.3d 142 (2d Cir. 2010).
293. *See supra* Part II.A.6.
294. 567 F.3d 174 (5th Cir. 2009).
295. *Id.* at 178–79; *see also supra* Part II.A.6.
296. *See Conroy*, 567 F.3d at 178; *see also* Part II.A.6.
297. *See Conroy*, 567 F.3d at 178 (citing United States v. Santa Cruz, 297 F. App'x 300 (5th Cir. 2008); United States v. Alvarez-Ocanegra, 180 F. App'x 535 (5th Cir. 2006); Orman v. Cain, 228 F.3d 616 (5th Cir. 2000)).
298. *Conroy*, 567 F.3d at 179.
299. *See id.*

a defendant may not challenge a guilty plea for the suppression of impeachment *or* exculpatory evidence.[300]

b. The Fourth Circuit

The Fourth Circuit's first substantial discussion of post-plea *Brady* challenges after *Ruiz* occurred in *Moussaoui*.[301] While the court ultimately found that it did not have to decide the *Brady* issue, a few points in dictum suggest that the Fourth Circuit would side with the Fifth in finding that *Ruiz* precluded all *Brady* challenges to guilty pleas.[302] First, the court held that *Brady* was purely a trial right, existing to "preserve the fairness of a trial verdict."[303] The court found that when a defendant pleads guilty, the concerns of maintaining a fair trial and not convicting an innocent defendant are "almost completely eliminated because his guilt is admitted."[304]

The Fourth Circuit also acknowledged that *Ruiz* did not directly address the question of whether a defendant may challenge his guilty plea for suppression of *exculpatory* evidence.[305] However, the court noted that the Supreme Court had recognized in *Ruiz* and previous cases that due process did not require the disclosure of all useful information prior to a guilty plea and that pleas may be valid despite inaccurate knowledge of the strength of the government's case.[306] Furthermore, the court cited with approval a previous Fourth Circuit case decided shortly after *Ruiz*, holding that "the prosecutor's failure to disclose information potentially relevant as mitigation evidence" prior to the entry of a guilty plea, did not invalidate the plea.[307] Thus, the Fourth Circuit's decision appears to be in line with the Fifth Circuit's holding in *Conroy*, finding that *Ruiz* confined *Brady* to the trial setting.[308]

c. The Second Circuit

The Second Circuit's decision in *Miller*,[309] allowing a post-plea *Brady* challenge for the suppression of exculpatory evidence, was followed by a number of Second Circuit cases allowing both impeachment and

300. *See id.*
301. 591 F.3d 263 (4th Cir. 2010).
302. *See* Wiseman, *supra* note 12, at 994.
303. *Moussaoui*, 591 F.3d at 285 (citing United States v. Ruiz, 536 U.S. 622, 628 (2002); Brady v. Maryland, 373 U.S. 83, 87 (1963)).
304. *Id.* at 285.
305. *Id.* at 286.
306. *Id.*
307. *Id.* (citing Jones v. Cooper, 311 F.3d 306, 315 n.5 (4th Cir. 2002)); *see also* Wiseman, *supra* note 12, at 994.
308. *See* Cassidy, *supra* note 38, at 1444 n.67.
309. 848 F.2d 1312 (2d Cir. 1988).

exculpatory *Brady* challenges to guilty pleas.[310] The Second Circuit had a chance to revisit this issue after *Ruiz* in *Friedman*, and although the court did not fully reverse its course,[311] it suggested that it interpreted *Ruiz* as precluding all post-plea *Brady* challenges.[312]

In *Friedman*, the Second Circuit viewed *Ruiz* as reaffirming the precedent from *Brady* that a defendant is entitled to information that is necessary to ensure a knowing and voluntary guilty plea.[313] The court understood *Ruiz* to hold that because impeachment information is relevant only to the fairness of the trial, and not to the voluntariness of the plea, the failure to disclose such information prior to a guilty plea does not violate due process.[314]

The Second Circuit found that the undisclosed evidence in this case was impeachment evidence and therefore not subject to disclosure requirements after *Ruiz*.[315] However, the court noted that even if the suppressed evidence had been exculpatory, Friedman's challenge would still be precluded by *Ruiz*.[316] While the court found that *Ruiz* did not expressly overrule *Miller*,[317] the Second Circuit held that, because the Supreme Court "has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial," the holding in *Ruiz* likely applied to both impeachment and exculpatory evidence.[318] Furthermore, the court found that the reasoning underlying *Ruiz* supported such a ruling.[319]

The circuit courts are thus split as to whether *Ruiz* permits post–guilty plea exculpatory *Brady* challenges.[320] On one side, the Seventh and Tenth Circuits view *Ruiz* as creating a distinction between impeachment and exculpatory evidence, requiring the disclosure of the latter, but not the former, before a defendant enters a guilty plea.[321] On the other side, the Fifth Circuit is cautiously joined by the Second and Fourth Circuits in understanding *Ruiz* to preclude all pre–guilty plea *Brady* claims.[322] To resolve this split and fully define the disclosure rights of defendants during plea bargaining, the Supreme Court will have to address the specific

310. *See, e.g.*, United States v. Avellino, 136 F.3d 249 (2d Cir. 1998); Tate v. Wood, 963 F.2d 20, 25 (2d Cir. 1992).

311. The court did not actually decide the issue, as the defendant's challenge was untimely. Friedman v. Rehal 618 F.3d 142, 152 (2d Cir. 2010).

312. *See id.* at 154; *see also* Jane Campbell Moriarty & Marisa Main, *"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1039 (2011).

313. *Friedman*, 618 F.3d at 153; *see also supra* notes 87–93 and accompanying text.

314. *See id.* (citing United States v. Ruiz, 563 U.S. 622, 629 (2002)).

315. *Id.* at 153–54.

316. *Id.*

317. *See id.*

318. *Id.* at 154 (citing United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 153–54 (1972)).

319. *Id.*; *see also* Wiseman, *supra* note 12, at 993–94.

320. *See* Wiseman, *supra* note 6, at 458.

321. *See supra* Part II.C.1.

322. *See supra* Part II.C.2.

question whether the failure to disclose material exculpatory evidence prior to a guilty plea violates *Brady*.

III. AN ANALOGOUS CASE STUDY: EXTENSION OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL TO PLEA BARGAINING

In addressing the question of whether *Brady* applies to the disclosure of exculpatory evidence during plea bargaining, a useful comparison may be drawn to the right to effective assistance of counsel. The two rights are doctrinally linked.[323] While *Brady* concerns whether the prosecutor's actions violate a defendant's due process rights,[324] the right to effective assistance of counsel provides a minimum standard of representation for the defendant's attorney.[325] The Supreme Court has frequently noted that the same standard of materiality applies to reviews of both claims.[326] Additionally, like *Brady*, the right to effective assistance was traditionally considered purely a trial right, as it was rooted in the Sixth Amendment right to a fair trial.[327] While numerous courts have held that *Brady* should not be extended to plea bargaining *because* it is a trial right,[328] the Supreme Court recently recognized the right to effective assistance of counsel as applying during plea bargaining as well as trial. In two companion cases decided in 2012, the Court held that a defendant may challenge a conviction where his attorney's deficient assistance caused him to reject a plea agreement and receive a harsher sentence at trial.[329] This part presents a case study of how and why the constitutional right to effective assistance of counsel—a right whose history and application share many similarities with *Brady* rights—was expanded into the plea bargaining arena.

A. The Right to Effective Assistance of Counsel

The right to effective assistance of counsel is based in the Sixth Amendment, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his

323. *See* Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1183 n.109 (2012).

324. *See supra* note 32 and accompanying text.

325. *See* Bibas, *supra* note 98, at 1143–44.

326. *See supra* notes 51–53 and accompanying text.

327. *See* United States v. Ash, 413 U.S. 300, 309–10 (1973) ("This historical background suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial . . . . Later developments have led this Court to recognize that 'Assistance' would be less than meaningful if it were limited to the formal trial itself."); *see also* Michael A. Millemann, *Collateral Remedies in Criminal Cases in Maryland: An Assessment*, 64 MD. L. REV. 968, 968–69 (2005) ("[T]he collateral process is usually the sole means by which a convicted person can enforce fundamental fair-trial rights, for example, to the effective assistance of counsel . . . ."); David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1238 (2002).

328. *See, e.g.*, United States v. Moussaoui, 591 F.3d 263, 285 (4th Cir. 2010); Matthew v. Johnson, 201 F.3d 353, 361 (5th Cir. 2000).

329. *See generally* Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

defence."[330] While the Sixth Amendment provides only for the basic right to counsel, the idea that representation has to be more than nominal did not appear until 1932 in *Powell v. Alabama*.[331] In *Powell*, the Supreme Court held that even though the trial court had attempted to designate counsel to the defendants, that attempt was either so half-hearted or so close to the start of the trial that it "amount[ed] to a denial of effective and substantial aid in that regard."[332] *Powell* thus set forth the idea that the right to counsel requires some threshold level of effectiveness.[333] However, the Court did not define exactly what such representation actually entails.[334]

The Supreme Court set the standard for overturning a conviction based on ineffective assistance of counsel over fifty years later in *Strickland v. Washington*.[335] The Court held that the right to counsel is the right to *effective* assistance of counsel, and established a two-part test for determining when that right is violated.[336] First, the defendant must show that his attorney's performance fell below an objective standard of reasonableness.[337] Second, the defendant must show that his attorney's substandard assistance caused him prejudice.[338] To demonstrate prejudice, the defendant must show that there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors.[339] As noted in *Bagley*, this test for prejudice was based on the "test for materiality of exculpatory information not disclosed to the defense by the prosecution" in adjudicating *Brady* claims.[340] Where representation is deficient and prejudice is shown, the Court held that a conviction must be overturned, as the attorney's ineffective assistance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[341]

Although the holding was based primarily on the Sixth Amendment, the language used by the Court was not limited to the trial context. Washington's challenge was not to his attorney's actions at trial, but rather at the sentencing proceeding.[342] The Court stated that the role of counsel was not only to promote a just *trial*, but to ensure the "ability of the *adversarial system* to produce just results."[343] Ultimately, the question that

330. U.S. CONST. amend. VI.
331. 287 U.S. 45 (1932); *see also* SALTZBURG, *supra* note 57, at 1301.
332. *Powell*, 287 U.S. at 53.
333. *See id.*
334. *See id.*
335. 466 U.S. 668 (1984).
336. *See id.* at 686–87.
337. *See id.* at 687.
338. *See id.*
339. *See id.* at 694. Note that the Court did not confine the test to whether the outcome of the *trial* would have been different, but rather whether the outcome of the *proceeding* would change.
340. *Id.*
341. *Id.* at 686.
342. *See id.* at 686–87.
343. *Id.* at 685 (emphasis added).

the *Strickland* test sought to answer was whether "the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable."[344] This question left open the possibility that the right to effective assistance of counsel could be expanded to other stages of the judicial process.

The Supreme Court first considered the use of the two-part *Strickland* test in the context of a guilty plea in *Hill v. Lockhart*, where defendant William Hill argued that his attorney's incorrect legal advice rendered his guilty plea involuntary.[345] The Supreme Court held that the *Strickland* test applies to ineffective assistance of counsel challenges to guilty pleas.[346] The Court's holding was essentially a mixture of the tests set forth in *Boykin* and *Strickland*.[347] First, the Court cited *Boykin* for the proposition that a guilty plea is only valid when it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."[348] Where a defendant pleads guilty on the advice of counsel, he must to show that the advice of his attorney was not "within the range of competence demanded of attorneys in criminal cases" in order to render his plea involuntary.[349]

The Court held that this test for determining whether a plea was truly voluntary was not only compatible with the two-part test set forth in *Strickland*, but was supported by the same justifications.[350] To ensure the proper administration of justice and prevent innocent defendants from being convicted, errors that affect the outcome of a judicial proceeding must have a remedy.[351] To invalidate a guilty plea on the basis of ineffective assistance of counsel, a defendant must therefore show first that his attorney's advice fell below an objectively reasonable standard, and second, that there is a reasonable probability that he would not have pled guilty absent the errors of his attorney.[352] As Hill did not allege that he would have pled not guilty having received different advice, the Court found that he was not prejudiced by his attorney's error.[353]

B. The Conflict: Whether or Not To Fully Extend the Right to Effective Assistance of Counsel to Plea Bargaining

Hill allowed a defendant to vacate a guilty plea where the ineffective assistance of counsel led him to accept a plea bargain and forgo trial, but it

344. *Id.* at 687.
345. 474 U.S. 52, 53–56 (1985). Hill's attorney told him that he would be eligible for parole under the guilty plea agreement much earlier than was actually the case. *Id.* at 55.
346. *Id.* at 58.
347. *See id*. at 56–60.
348. *Id.* at 56 (internal quotation marks omitted).
349. *Id.* (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).
350. *See id.* at 57.
351. *See id.* at 57–58; *see also* Strickland v. Washington, 466 U.S. 668, 693–96 (1984); Boykin v. Alabama, 395 U.S. 238, 242 (1969) .
352. *See Hill*, 474 U.S. at 57–60.
353. *Id.* at 60.

did not address what recourse, if any, was available to a defendant whose attorney's deficient performance caused him to *reject* a plea bargain and proceed to trial.[354] Courts generally took one of three different approaches to this problem: no remedy, specific performance of the plea bargain, or retrial.[355]

The courts that provided no remedy for a defendant whose attorney's deficient performance caused him to reject a plea agreement generally found that such a defendant suffered no prejudice.[356] These courts held that prejudice occurs where some error deprives a defendant of some substantive or procedural right, but as there is no constitutional right to plea bargain,[357] there was no prejudice in rejecting a plea and standing trial.[358] Courts found that this holding was further supported by the fact that the right to effective assistance of counsel was "grounded in the constitutional right to receive a fair trial."[359] This reason for denying post-plea ineffective assistance challenges to rejected guilty pleas mirrors the reason often put forth for denying post-plea *Brady* challenges: both were considered by some courts to be purely trial rights.[360] Finally, courts declining to allow ineffective assistance challenges where the defendant rejected a plea agreement found that it would be extremely difficult to determine the soundness of the attorney's representation, whether the defendant actually would have pled differently, and whether the court would have accepted the plea.[361]

Where courts found that the decision to reject a plea agreement *did* cause prejudice, that prejudice consisted of receiving a higher sentence at trial than he would have received under the guilty plea agreement.[362] One remedy used by courts to cure this prejudice was the reinstatement of the original plea offer.[363] For example, in *United States v. Blaylock*, the Ninth Circuit found prejudice where the defendant would have received a less severe sentence had he gone to trial.[364] The court held that in determining the proper remedy, a court should "put the defendant back in the position he

354. *See* Bibas, *supra* note 98, at 1140.

355. David A. Perez, Note, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1535–36 (2011).

356. *See, e.g.*, State v. Monroe, 757 So. 2d 895, 898 (La. Ct. App. 2000); State v. Taccetta, 975 A.2d 928, 935–37 (N.J. 2009).

357. *See, e.g.*, Weatherford v. Bursey, 429 U.S. 545, 561 (1977).

358. Perez, *supra* note 355, at 1540–41.

359. *See, e.g.*, State v. Greuber, 165 P.3d 1185, 1188 (Utah 2007).

360. *See supra* note 217 and accompanying text.

361. Perez, *supra* note 355, at 1542–43; *see also, e.g.*, Rasmussen v. State, 658 S.W.2d 867, 868 (Ark. 1983) (finding no remedy because the defendant did not allege that she would have accepted the plea but for her attorney's ineffective assistance or that she would now accept the plea agreement); *In re* Alvernaz, 830 P.2d 747, 756–57 (Cal. 1992) (discussing the difficulty in determining whether a defendant would have accepted the plea bargain offer had she received effective assistance of counsel).

362. *See* Perez, *supra* note 355, at 1553.

363. *See* United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994).

364. *See id.*

would have been in if the Sixth Amendment violation had not occurred."[365] The court found that in many cases a new trial would not cure the harm, and held that in such cases the original plea must be reoffered.[366] However, not all courts proceeded identically in reinstating the original plea. While some directed the government to reoffer the plea agreement and allow the defendant to decide whether or not to accept, others mandated that the defendant accept the original plea agreement and directed the trial court to sentence the defendant accordingly.[367]

The second remedy offered by courts finding prejudice is the granting of a new trial.[368] These courts also found prejudice where a defendant received a harsher sentence at trial than he would have if he had accepted the plea offer, and the decision to reject the offer was the result of deficient assistance of counsel.[369] However, these courts held that reoffering the original plea agreement was not a proper remedy. In *Julian v. Bartley*, the Seventh Circuit found that specific performance was inappropriate because the state was not responsible for the Sixth Amendment violation, and the defendant had never accepted the terms of the original offer.[370] Instead, the judge ordered a new trial, and the court acknowledged that the state could choose to propose a plea agreement if it wished.[371]

From these three approaches to cases where the ineffective assistance of counsel leads to the rejection of a plea agreement, two crucial questions remained: First, does receiving a harsher sentence after a fair trial constitute prejudice to the defendant? Second, if so, what is the proper remedy? The Supreme Court answered these questions in *Lafler v. Cooper*[372] and *Missouri v. Frye*.[373]

C. Resolution: Lafler v. Cooper *and* Missouri v. Frye

This section outlines and discusses two companion Supreme Court cases decided in 2012 that fully extended the right to effective assistance of counsel to defendants during plea bargaining.

1. *Lafler v. Cooper*

The Supreme Court's recent decisions in *Lafler* and *Fry* address the other side of the *Hill* coin: situations where defense counsel's errors caused a

365. *Id.*

366. *Id.* (finding such a remedy permissible under *Mabry v. Johnson*, 467 U.S. 504, 510 n.11 (1984), and *Santobello v. New York*, 404 U.S. 257, 263 (1971)).

367. Perez, *supra* note 355, at 1548.

368. Tara Harrison, Note, *The Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel When Pleading Not Guilty at the Plea Bargaining Stage*, 2006 UTAH L. REV. 1185, 1202.

369. *See, e.g.*, Julian v. Bartley, 495 F.3d 487, 500 (7th Cir. 2007); Turner v. Tennessee, 858 F.2d 1201, 1207 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989).

370. *See Julian*, 495 F.3d at 500.

371. *Id.*

372. 132 S. Ct. 1376 (2012).

373. 132 S. Ct. 1399 (2012).

defendant *not* to enter a guilty plea.[374] In these two 5–4 decisions decided on the same day, the Court solidified the right to effective assistance of counsel during plea bargaining.[375]

In *Lafler*, the question taken up by the Supreme Court was whether Cooper's attorney's incorrect legal statements regarding the prosecution's ability to prove its case during plea bargaining, which led him to reject a favorable plea agreement and proceed to trial, deprived him of effective assistance of counsel.[376] Although the petitioner and the Solicitor General argued that the Sixth Amendment protects only the defendant's right to a fair *trial*, the Court disagreed.[377] Rather, the defendant was entitled to the effective assistance of counsel at all "critical stages of a criminal proceeding."[378] The Court had already held in previous cases that plea negotiation was a critical stage.[379] The guarantee of this constitutional right at all critical stages of a criminal proceeding is necessary to ensure the fair administration of the judicial process because defendants "cannot be presumed to make critical decisions without counsel's advice."[380]

The Court, citing *Hill*, applied the *Strickland* test to Cooper's claim.[381] This test is properly applied to plea bargaining because the question at the heart of the *Strickland* inquiry is whether the attorney's errors "so undermined the proper functioning of the adversarial process that it failed to produce a reliably just result."[382] Thus the concern was with justice and fairness not solely at trial, but throughout the entire judicial process, including the plea bargaining stage that preceded it.[383] The Court found that an otherwise fair trial does not remedy errors that occur during plea bargaining.[384] Both sides agreed that the advice of Cooper's counsel was deficient under the first *Strickland* prong; the problem was how to determine prejudice under the second prong.[385]

The Court held that to show prejudice, Cooper had to show that the outcome of the plea process would have been different had he received sound legal advice.[386] In *Hill*, that meant only that the defendant had to

374. *See Lafler*, 132 S. Ct. at 1383–84; *Frye*, 123 S. Ct. at 1408.
375. *See Lafler*, 132 S. Ct. at 1383–84; *Frye*, 132 S. Ct. at 1408.
376. *See Lafler*, 132 S. Ct. at 1383–84. Cooper was charged with numerous felonies and misdemeanors after repeatedly shooting a woman. *Id*. at 1383. The prosecution made two offers to dismiss some of the charges and to recommend a lower sentence if he pleaded guilty. *Id.* Cooper refused both offers and was subsequently convicted on all counts and sentenced to a mandatory minimum of 185 to 360 months imprisonment. *Id.*
377. *See id.* at 1385.
378. *Id.*
379. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (citing Hill v. Lockhart, 474 U.S. 52, 57 (1985)).
380. *Lafler*, 132 S. Ct. at 1385.
381. *Id.* at 1384–85; *see also* Hill v. Lockhart, 474 U.S. 52, 59 (1985).
382. *Lafler*, 132 S. Ct. at 1393 (citations omitted).
383. *Id.* at 1388.
384. *Id.* at 1386.
385. *See id.* at 1385.
386. *Id.*

show that he would not have pled guilty without the error of his attorney.[387] In this case, however, the Court held that Cooper must show three things: first, a reasonable probability that, but for the advice of his counsel, he would have entered a guilty plea; second, that the court would have accepted his terms; and third, that the conviction or sentence imposed would have been more favorable than what was actually decided.[388] The Court held that Cooper was prejudiced by his attorney's advice not to accept the plea offer, as he received a sentence more than three times as harsh as he would have had he pled guilty, and the case was remanded with an order that the state reoffer the plea agreement.[389]

In further support of its holding that the *Strickland* test applied to the rejection of a guilty plea agreement, the Court noted that even though a defendant has no constitutional right to plea bargain, a defendant still retains his constitutional rights when the prosecution decides to engage in such negotiations: "When [the government] opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution."[390] The effective assistance of counsel is a constitutional right afforded to criminal defendants, and when a prosecutor decides to bring a defendant to the plea bargaining table—a critical stage of the judicial process—the defendant's constitutional rights come with him.[391]

Justice Scalia wrote the dissent, joined by Justice Thomas, and Chief Justice Roberts in all but part IV.[392] Justice Scalia lamented what he viewed as the newly "constitutionalized" plea bargaining process, fearing that the Court would soon attempt to govern not only the behavior of defense attorneys but also the prosecution during plea bargaining.[393] He found it problematic that Cooper's alleged injury was having to stand trial.[394]

Justice Scalia took no issue with the characterization of the entry of a guilty plea as a "critical stage" of the judicial process during which a defendant must be afforded the right to effective assistance of counsel.[395] However, he limited that characterization to the *acceptance* of a guilty plea; he would not require the effective assistance of counsel before a defendant rejects a plea bargain and proceeds to trial.[396] Perhaps more importantly, Justice Scalia viewed the right to effective assistance of counsel as existing only to ensure a fair trial.[397] Thus, there can be no Sixth Amendment

387. *See* Hill v. Lockhart, 474 U.S. 52, 59 (1985).
388. *Lafler*, 132 S. Ct. at 1385.
389. *Id.* at 1391.
390. *Id.* at 1387 (internal quotation marks omitted).
391. *See id.*
392. *Id.* at 1391 (Scalia, J., dissenting).
393. *See id.* at 1391–92.
394. *See id.*
395. *See id.*
396. *See id.* at 1393.
397. *See id.*

violation where the prejudice complained of is having to stand trial, even where the sentence is higher than would have been imposed under the plea agreement.[398] According to Justice Scalia, Cooper was not deprived of a fair process by being forced to stand trial.[399]

2. *Missouri v. Frye*

The Court addressed a similar, but not identical, question in *Frye*.[400] Whereas *Lafler* involved a defendant's rejection of a favorable plea offer on the advice of counsel, *Frye* involved the defendant's attorney's failure to inform him of a plea offer, and the defendant's acceptance of a subsequent offer on less favorable terms.[401] The Supreme Court held that defense counsel has a duty to inform the defendant of potentially favorable plea offers made by the prosecution.[402] By failing to do so in this case, Frye's attorney deprived him of his constitutional right to effective assistance of counsel.[403] The Court began its decision with a discussion of *Hill* and *Padilla v. Kentucky*.[404] First, the Court reiterated the proposition from *Hill* that ineffective assistance of counsel claims for errors during plea bargaining are governed by the *Strickland* test.[405] Second, the Court noted that plea bargaining is a "critical phase" of the judicial process, and that the constitutional protections of the Sixth Amendment apply even in that pretrial context.[406] Moreover, the Court stated that a "knowing and voluntary" guilty plea does not supersede mistakes by a defendant's attorney.[407]

While the Court acknowledged the state's argument that this presented a different situation from *Hill* and *Padilla* because those cases concerned a defendant who had *accepted* a guilty plea agreement, the Court did not find that difference sufficient to overcome the need for constitutional protection during plea bargaining.[408] As in *Lafler*, the Court found that a defendant is entitled to effective assistance of counsel at all "critical stages" of a criminal proceeding.[409] The Court understood "critical stages" to include the entry of a guilty plea.[410]

The State urged that a defendant should not be allowed to vacate a guilty plea due to ineffective assistance of counsel for a number of reasons.[411]

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398. *See id.* at 1393–94.
399. *Id.* at 1395.
400. 132 S. Ct. 1399 (2012).
401. *Id.* at 1404.
402. *Id.* at 1408.
403. *See id.*
404. *See id.* at 1405; *see also* Padilla v. Kentucky, 130 S. Ct. 1473 (2010); Hill v. Lockhart, 474 U.S. 52, 57 (1985).
405. *Frye*, 132 S. Ct. at 1405–06.
406. *Id.* at 1406 (quoting *Padilla*, 130 S. Ct. at 1486).
407. *Id.*
408. *See id.* at 1406–08.
409. *See id.* at 1405 (internal quotation marks omitted).
410. *Id.*
411. *Id.* at 1407.

Most importantly, the State argued that there is no constitutionally guaranteed right to accept a guilty plea offer, and that the plea bargaining process is so amorphous and lacking in clear standards or timelines that the prosecution would have little notice of problems or capacity to intervene.[412] While the Court found that these were tenable arguments, they were outweighed by the "simple reality" that 97 percent of federal convictions were obtained through guilty pleas.[413] Due to the importance of plea bargaining to the judicial process, the Court reasoned that defense counsel had responsibilities that must be met in order to ensure the fair administration of justice.[414] Moreover, the Court found that because the criminal justice system is now "for the most part a system of pleas, not a system of trials," the guarantee of a fair trial was insufficient to cure pretrial errors.[415] To deny defendants the effective assistance of counsel at plea bargaining would be to deny them effective representation "at the only stage when legal aid and advice would help him."[416] To provide the effective assistance guaranteed by the Sixth Amendment, the Court held that defense counsel had a duty to communicate formal guilty plea offers to the defendant.[417] Frye's attorney's failure to do so therefore rendered his performance deficient.[418]

As in *Lafler*, the Supreme Court applied the same standard of materiality for ineffective assistance of counsel claims as is used to review *Brady* claims: the defendant must show a "reasonable probability [that he] would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel."[419] In this case, Frye had to prove a reasonable probability that the end result of his criminal proceedings would have been more favorable, whether by a plea to a lesser charge against him or a less harsh sentence.[420] As Frye's attorney failed to communicate the plea offer, the Supreme Court remanded the case to apply the appropriate *Strickland* test and to determine if Frye was prejudiced by that failure.[421]

Justice Scalia once again dissented, joined by Chief Justice Roberts and Justices Thomas and Alito.[422] Although Justice Scalia found the cases to be substantially similar, he found that the justifications for his dissent in *Lafler* were even more present in *Frye*, where the fairness of the process and the conviction were established by the defendant's admission of guilt.[423]

412. *Id.*
413. *See id.*; *see also* Bibas, *supra* note 4, at 154.
414. *Frye*, 132 S. Ct. at 1407.
415. *Id.*
416. *Id.* at 1408 (citation omitted).
417. *Id.*
418. *Id.*
419. *Id.* at 1409.
420. *See id.*
421. *Id.* at 1410–11.
422. *Id.* at 1412.
423. *See id.* (Scalia, J., dissenting).

Justice Scalia found that, as there is no constitutional right to plea bargain, Frye was not deprived of any substantive or procedural right by his attorney's failure to inform him of the plea offer.[424] There was no question that this failure rendered the attorney's performance deficient; however, as the deficiency did not deprive Frye of his "constitutional right to a fair trial," there was no prejudice and no need for remedy.[425] The dissent also took issue with the difficulty of defining what constitutes adequate representation during plea bargaining, finding it disconcerting that an attorney's "personal style" might violate the Sixth Amendment.[426]

Finally, the dissent disagreed with the Court's analysis of potential prejudice to the defendant.[427] Justice Scalia found it absurd to engage in "retrospective crystal-ball gazing" to determine whether the defendant would have accepted the earlier plea bargain, whether the prosecution would have withdrawn it, and whether the court would have accepted it.[428] He admitted that plea bargaining should be regulated, but found that the Sixth Amendment was not the proper means to do so.[429]

3. The Response to *Lafler* and *Frye*

The Supreme Court's decisions in *Lafler* and *Frye* were viewed by commentators as both logical and inevitable, the objections of Justice Scalia and the other dissenters notwithstanding.[430] While the dissent took a formalist, historical approach to the question, the majority's approach was more functional and contemporary, focusing on the fact that plea bargaining now dominates the criminal justice system.[431] Having acknowledged the importance of plea bargaining as a critical stage in the judicial process, the Court would have been hard-pressed to deny constitutional protections to defendants at that stage. The right to effective assistance of counsel could not be confined to the trial context; to hold otherwise would be to grant that right to only the 3 percent of federal defendants that actually go to trial.[432] Another important ruling from *Lafler* and *Frye* is that an otherwise fair trial does not cure the constitutional errors that came before.[433] Indeed,

424. *See id.*
425. *See id.*; *see also* Bibas, *supra* note 4, at 157–58.
426. *See Frye*, 132 S. Ct. at 1412–13 (internal quotation mark omitted).
427. *Id.* at 1413.
428. *Id.*
429. *See id.* at 1413–14.
430. *See generally* Gerard E. Lynch, Frye *and* Lafler*: No Big Deal*, 122 YALE L.J. ONLINE 39 (2012), *available at* http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/frye-and-lafler:-no-big-deal/; *see also* Darryl K. Brown, Lafler, Frye *and Our Still-Unregulated Plea Bargaining System*, 25 FED. SENT'G REP. 131 (2012).
431. Bibas, *supra* note 4, at 151.
432. Lynch, *supra* note 430, at 40.
433. *See* James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 204 (2012).

prejudice may be found where a heavier sentence is imposed than would have occurred had the defendant accepted the earlier plea.[434]

Finally, while Justice Scalia found that the Court's decisions constituted a radical departure from established jurisprudence,[435] others viewed the decisions as simply applying the standards already established in *Strickland*.[436] *Strickland* had a goal of promoting a just *result*, and this goal applies equally to convictions and sentences, even for guilty defendants.[437] In this sense, *Lafler* and *Frye* were relatively straightforward cases: both defendants were prejudiced by receiving longer sentences due to unquestionably deficient assistance of counsel during plea bargaining, which is a critical stage of the judicial process.[438] Under the *Strickland* standard, the Sixth Amendment required that their sentences be vacated and remanded.[439]

IV. RECOGNIZING THE RIGHT: THE SUPREME COURT SHOULD PERMIT EXCULPATORY *BRADY* CHALLENGES TO GUILTY PLEAS

The Supreme Court should resolve the circuit split that currently exists by allowing a criminal defendant to challenge a guilty plea for the failure to disclose exculpatory *Brady* material. To settle this conflict, the Court should look not only to the prevailing logic among the circuit courts and its previous holding in *Ruiz* but also to its own recent decisions in *Lafler* and *Frye* that considered a question with very similar constitutional underpinnings in the context of plea bargaining. Part IV.A of this Note shows that *Ruiz* allows exculpatory *Brady* challenges to guilty pleas. Part IV.B argues that courts considering these challenges should follow the Ninth Circuit's holding that a pre-plea *Brady* violation automatically precludes a knowing and voluntary guilty plea. Part IV.C concludes by asserting that the same practical and jurisprudential reasoning that justified recognizing the pre-plea right to effective assistance of counsel also applies to *Brady* violations.

A. Ruiz *Suggests That Material Exculpatory Evidence Must Be Disclosed Prior to a Guilty Plea*

Despite the Supreme Court's focus on impeachment evidence in *Ruiz*, the holding suggests that a defendant may raise a post-plea *Brady* challenge for the failure to disclose material *exculpatory* evidence.[440] First, contrary to the Second Circuit's understanding in *Friedman*, the holding in *Ruiz* did not

434. Bibas, *supra* note 4, at 155. This was the case in *Lafler*, where his sentence after trial was over three times longer than what was offered during plea bargaining. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1386 (2012).

435. *Lafler*, 132 S. Ct. at 1398.

436. *See* Bibas, *supra* note 4, at 160.

437. *See id.*

438. *See* Lynch, *supra* note 430, at 39–40.

439. Bibas, *supra* note 4, at 151.

440. *See supra* Part II.B.

apply equally to impeachment and exculpatory evidence.[441] The Second Circuit properly found that, prior to *Ruiz*, the Supreme Court treated exculpatory and impeachment identically for purposes of *Brady* disclosure.[442] However, the conclusion it drew from that fact was erroneous: if the Court had wished to proscribe all post-plea *Brady* challenges, it could have easily done so by issuing its holding in general *Brady* terms. Instead, the language used throughout the opinion, and specifically in the holding, was explicitly in terms of impeachment evidence: "These considerations, taken together, lead us to conclude that the Constitution does not require the Government to disclose material *impeachment* evidence prior to entering a plea agreement with a criminal defendant."[443] Thus, at the very least it can be said that *Ruiz* declined to address post–guilty plea exculpatory *Brady* challenges; but it does not follow from the language of the opinion that *Ruiz* precludes all post-plea *Brady* claims.

Rather than being neutral, the Supreme Court's holding in *Ruiz* actually suggests that exculpatory *Brady* challenges are permitted for the very reasons that *impeachment* challenges are not.[444] First, while courts proscribing *Brady* challenges to guilty pleas typically repeated the refrain that *Brady* was purely a "trial right,"[445] the Supreme Court declined to do so. Furthermore, the Seventh and Tenth Circuits were correct in understanding the Supreme Court in *Ruiz* to draw a significant distinction between impeachment and exculpatory evidence: whereas impeachment evidence is only important in relation to the fairness of the trial, and therefore does not have to be disclosed before a guilty plea, exculpatory evidence may be determinative of the constitutional validity of a guilty plea.[446] The Supreme Court found that impeachment evidence is unlikely to be "critical information of which the defendant must always be aware prior to pleading guilty."[447] What, then, would constitute such "critical information"? As noted by the Seventh and Tenth Circuits, the answer implied by the Supreme Court is exculpatory evidence: a defendant's waiver of his constitutional rights through a guilty plea cannot be truly knowing and voluntary if he is unaware of evidence possessed by the prosecution that establishes his factual innocence.[448]

Additional justification for understanding *Ruiz* as allowing exculpatory *Brady* challenges to guilty pleas is found in the Supreme Court's discussion of the "fast track" plea agreement's stipulations. One of the key reasons behind the Court's holding that the "fast track" agreement did not violate due process was the fact that the agreement explicitly required the

441. *See supra* notes 317–19 and accompanying text.
442. *See supra* note 318 and accompanying text.
443. United States v. Ruiz, 536 U.S. 622, 633 (2002) (emphasis added).
444. *See supra* Part II.C.1.
445. *See supra* notes 217–18, 226 and accompanying text.
446. *See supra* notes 269–71, 278–82 and accompanying text.
447. *Ruiz*, 536 U.S. at 630.
448. *See supra* notes 271, 279–81 and accompanying text.

government to disclose material exculpatory evidence.[449] The Court found that this disclosure of exculpatory evidence ensured that innocent defendants would not plead guilty, and held that the suppression of impeachment evidence does not violate due process so long as exculpatory evidence is divulged.[450] By emphasizing the value of the exculpatory evidence disclosure requirement, the Supreme Court further underscored the distinction between impeachment and exculpatory evidence and indicated that the failure to disclose material exculpatory evidence violates a defendant's due process rights.[451]

B. The Failure To Disclose Material Exculpatory Evidence Precludes a Knowing and Voluntary Guilty Plea

Accepting that *Ruiz* allows *Brady* challenges for the failure to disclose material exculpatory evidence prior to a guilty plea, the question then becomes how to determine whether that failure renders a plea invalid. From the circuits that have allowed post–guilty plea *Brady* challenges, four methods of inquiry have emerged: (1) the Second Circuit's official misconduct approach, in which a *Brady* violation may invalidate an otherwise knowing and voluntary plea;[452] (2) the Tenth Circuit's misrepresentation approach, under which a *Brady* violation constitutes government misconduct that may preclude a knowing and voluntary guilty plea;[453] (3) the Sixth and Eighth Circuits' totality-of-the-circumstances approach, whereby a *Brady* violation is one of many factors that may negate the knowing and voluntary nature of a guilty plea;[454] and (4) the Ninth Circuit's per se approach, finding that a *Brady* violation automatically renders a guilty plea unknowing and involuntary.[455] Of these four, the Ninth Circuit's approach provides the most workable standard, and is the most closely aligned with the Supreme Court's guilty plea jurisprudence.

The Second Circuit's misconduct approach misses the mark by choosing not to consider a *Brady* violation in relation to the knowing and voluntary nature of the plea.[456] The court laudably noted that a defendant's decision to plead guilty is highly dependent on his determination of the strength of the prosecution's case and the existence of exculpatory information.[457] However, by phrasing its test in terms of government misconduct, the Second Circuit leaves open the question of what exactly constitutes official misconduct. It is unclear whether misconduct occurs only when a prosecutor suppresses information specifically requested, or also where a

449. *See supra* notes 250, 270, 282 and accompanying text.
450. *See supra* note 250 and accompanying text.
451. *See supra* notes 250, 271, 284 and accompanying text.
452. *See supra* Part II.A.3.
453. *See supra* Part II.A.4.
454. *See supra* Part II.A.1–2.
455. *See supra* Part II.A.5.
456. *See supra* notes 173–79 and accompanying text.
457. *See supra* note 176 and accompanying text.

prosecutor fails to divulge evidence in the absence of a specific request.[458] Disclosure is required in both situations under *Agurs*.[459] Additionally, this test fails to address the central question of a guilty plea's validity—its knowing and voluntary nature.[460] While the later *Brady—Brady v. United States*—did mention misconduct as a concern for the validity of guilty pleas,[461] subsequent Supreme Court jurisprudence has been almost exclusively concerned with the knowing and voluntary standard.[462]

The Tenth Circuit's approach is similar to the Second Circuit's in that it views *Brady* violations as official misconduct or misrepresentation.[463] However, this standard fits better with established guilty plea jurisprudence because it asks whether that official misconduct precludes a knowing and voluntary plea.[464] Still, this approach falls short of a proper standard because it finds that a *Brady* violation renders a guilty plea unknowing and involuntary only under certain circumstances.[465] A *Brady* violation is a violation of due process, and the Tenth Circuit recognized that *Brady* violations may occur during plea bargaining; it stands to reason that no plea which was entered through a violation of the defendant's due process rights should retain its validity.[466]

The totality-of-the-circumstances approach adopted by the Sixth and Eighth Circuits is attractive because it engenders careful consideration of whether a guilty plea was truly knowing and voluntary.[467] Additionally, this approach would survive an interpretation of *Ruiz* that precludes all post-plea *Brady* challenges, because even if the suppression of material exculpatory evidence is not couched in terms of *Brady*, it is still one of the circumstances taken into account in determining the validity of the plea.[468] However, the totality-of-the-circumstances approach affords too little protection to defendants, as a *Brady* violation may still be insufficient to render a plea unknowing and involuntary.[469] Like the Tenth Circuit's approach, this approach does not comport with the *Brady* materiality standard. Due process is violated where there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed;[470] under the totality-of-the-circumstances test, a court could find that a *Brady* violation occurred but still find that the guilty plea was knowing and voluntary because of additional factors surrounding the entry

458. Lain, *supra* note 154, at 13–14.
459. *See supra* note 44 and accompanying text.
460. *See supra* notes 73–79 and accompanying text.
461. *See* Brady v. United States, 397 U.S. 742, 755 (1970).
462. *See supra* notes 239–45 and accompanying text.
463. *See supra* notes 188–89 and accompanying text.
464. *See supra* notes 190–91 and accompanying text.
465. *See supra* note 189 and accompanying text.
466. *See supra* notes 7, 187–89 and accompanying text.
467. *See supra* Part II.A.1–2.
468. *See supra* notes 157–59 and accompanying text.
469. *See supra* note 155 and accompanying text.
470. *See supra* note 50 and accompanying text.

of the plea.[471] This gray area makes the totality-of-the-circumstances approach somewhat unworkable, and gives courts insufficient guidance on how to determine whether a plea was actually valid.

The Ninth Circuit's per se approach is the best application of the *Brady* rule to plea bargaining.[472] Under this structure, if the court finds that the prosecution fails to disclose material exculpatory evidence prior to the entry of a guilty plea, the plea is automatically rendered unknowing and involuntary.[473] The standard of materiality is imported from *Bagley*: a *Brady* violation renders a plea invalid if there is a reasonable probability that the result of the plea negotiations would have been more favorable had the defendant received the undisclosed evidence.[474] Unlike the Second Circuit's approach, this standard addresses the central question of constitutionality for a guilty plea: whether it was truly knowing and voluntary.[475] Moreover, there is no gray area where *Brady* is violated but the plea is still considered knowing and voluntary. Due process is violated where material exculpatory evidence is withheld, and any plea entered without knowledge of that evidence is not truly knowing and voluntary.[476]

The Ninth Circuit's approach is not without its problems. The Supreme Court has held that a valid guilty plea does not require that a defendant have a perfect assessment of the strength of the prosecution's case.[477] However, the per se approach does not seek to provide a defendant with a complete understanding of the case against him. Rather, it requires only that the prosecution turn over any exculpatory evidence that is material to the decision to plead guilty.[478] The government therefore does not have to disclose immaterial evidence or impeachment evidence, so there is no fear that the prosecution will have to turn over its "entire file" to the defendant.[479]

Moreover, while some additional judicial resources may be expended by defendants choosing to go to trial after learning of exculpatory evidence rather than pleading guilty,[480] this expenditure is justified by both the criminal justice system's interest in providing a fair and nonduplicitous plea bargaining system and the benefits this rule would confer upon defendants.[481] Moreover, it would not require the government to expend resources digging for exculpatory evidence; it would only require the disclosure of evidence it already possessed. Given the extremely high

471. *See supra* notes 153–56 and accompanying text.
472. *See supra* Part II.A.5.
473. *See supra* notes 200–01 and accompanying text.
474. *See supra* note 50 and accompanying text.
475. *See supra* notes 199–200 and accompanying text.
476. *See supra* notes 200–01, 206 and accompanying text.
477. *See supra* note 93 and accompanying text.
478. *See supra* note 203 and accompanying text.
479. *See supra* note 144 and accompanying text.
480. This was one of the Court's fears in *Ruiz*. *See supra* notes 254–56 and accompanying text.
481. *See supra* notes 128–39 and accompanying text.

percentage of cases ending in guilty pleas[482] and the importance of exculpatory evidence in the decision to plead guilty,[483] disclosure of material exculpatory evidence is necessary to ensure fair and just plea bargaining.

As recognized by the Ninth Circuit, the per se approach is justified by substantial policy considerations.[484] First, the defendant's appraisal of the prosecution's case is crucial to an informed decision on how to plead.[485] When discussing the knowing and voluntary requirement for a valid guilty plea, the Supreme Court has repeatedly emphasized that the defendant must have "sufficient awareness of the relevant circumstances and likely consequences" of his guilty plea.[486] This does not mean that the defendant must be aware of every piece of evidence, or every argument the prosecution intends to make; but it cannot be said that a defendant has sufficient awareness of the relevant circumstances if he pleads guilty to a crime without knowing that the prosecution possesses evidence establishing his factual innocence.

Second, a rule to the contrary would incentivize prosecutors to withhold material exculpatory evidence in order to compel a defendant to plead guilty.[487] Prosecutors are incentivized to obtain convictions,[488] and as a prosecutor knows that her chances of securing a conviction will decrease at trial because she will have to disclose exculpatory evidence, she will be motivated to conceal that evidence in order to obtain a conviction through plea bargaining.[489]

Third, it is naïve for courts and commentators to assume that innocent defendants will not plead guilty.[490] Overcharging and mandatory minimum sentencing create an overwhelming pressure on defendants to plead guilty.[491] In addition to the risk of harsher punishment, there are other costs incurred by a defendant who goes to trial, including attorney's fees, time, stress and emotional harm, and the ignominy of having to publicly stand trial.[492] The pressure to plead guilty is strong for both minor and major offenses. For a minor offense, pleading guilty may be a way to avoid jail time; for a major crime, it might allow a defendant to avoid the death penalty. While Rule 11 and jurisprudential safeguards theoretically prevent innocent defendants from pleading guilty,[493] the reality is that a guilty plea is a rational choice for many innocent defendants.

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482. *See supra* note 5 and accompanying text.
483. *See supra* notes 126–27, 176 and accompanying text.
484. *See supra* notes 201–02 and accompanying text.
485. *See supra* notes 126–27, 176 and accompanying text.
486. *See supra* note 239 and accompanying text.
487. *See supra* note 202 and accompanying text.
488. *See supra* note 137 and accompanying text.
489. *See supra* notes 133–34 and accompanying text.
490. *See supra* note 251 and accompanying text.
491. *See supra* notes 105–22 and accompanying text.
492. *See* Bowers, *supra* note 133, at 1132–34.
493. *See supra* Part I.B.1.

When considering *Brady* challenges to guilty pleas, a court should therefore proceed as follows. First, the court must determine whether the undisclosed evidence can be considered exculpatory.[494] Second, the court must determine if the evidence is material by asking if there is a reasonable probability that the result of plea bargaining would have been different had the evidence been disclosed.[495] If such a probability exists, the guilty plea is not knowing and voluntary, and is therefore invalid.

C. The Logic of Lafler *and* Frye *Supports the Recognition of Exculpatory* Brady *Rights During Plea Bargaining*

Courts and commentators have frequently noted the link between the right to effective assistance of counsel and *Brady* rights.[496] They are two sides of the same coin—concerning whether the actions of defense counsel or the prosecution during the judicial process violate the defendant's constitutional rights.[497] In addition, violations of both rights are asserted by defendants to challenge their convictions;[498] they share the same standard of materiality, asking whether there is a reasonable probability that the result of the proceeding would have been different absent the deficient representation or suppression of evidence;[499] and both were traditionally considered to be purely trial rights.[500] Given the link between these two rights, it is unsurprising that much of the logic that supported the extension of the right to ineffective assistance of counsel to plea bargaining also applies to the question of pre-plea *Brady* disclosure.

First, *Lafler* and *Frye* suggest that the assertion that *Brady* is a "trial right" will not preclude it from being applied during plea bargaining. Effective assistance of counsel was traditionally considered a right that ensured only a fair *trial*,[501] but in *Lafler* and *Frye* the Supreme Court expressly rejected that argument.[502] Instead, the Court found that guaranteeing the right to effective assistance of counsel at all "critical stages of the criminal proceeding" was necessary for the fair administration of justice.[503] The chief concern of the Supreme Court in both *Lafler* and *Bagley* was ensuring a fair judicial process that results in just outcomes, not solely ensuring fair trials.[504] This concern necessitates pre-plea disclosure of exculpatory *Brady* evidence, because just as a defendant "cannot be presumed to make critical decisions without counsel's advice,"[505] neither

494. *See supra* notes 444–51 and accompanying text.
495. *See supra* notes 50, 178, 193–94 and accompanying text.
496. *See supra* notes 323–29 and accompanying text.
497. *See supra* notes 30–32, 416 and accompanying text.
498. *See supra* notes 30–33, 411–18 and accompanying text.
499. *See supra* notes 50–53 and accompanying text.
500. *See supra* notes 217, 303–04, 327 and accompanying text.
501. *See supra* notes 327, 397 and accompanying text.
502. *See supra* note 377 and accompanying text.
503. *See supra* notes 378–80 and accompanying text.
504. *See supra* notes 50, 380 and accompanying text.
505. *See supra* note 380 and accompanying text.

can he be presumed to make an informed decision to plead guilty without material exculpatory evidence.[506] As the Court has recognized that plea bargaining is a critical stage of the judicial process,[507] and as it has suggested that exculpatory evidence is crucial to decision making at that stage,[508] it is evident after *Lafler* and *Frye* that *Brady*'s traditional existence as a trial right will not preclude the recognition of exculpatory *Brady* rights during plea bargaining.

Second, the Court's recognition of the prevalence of plea bargaining—roughly 97 percent of federal criminal convictions—supports the establishment of pre-plea exculpatory *Brady* rights.[509] The Court in *Frye* acknowledged the State's arguments that there is no constitutional right to plea bargaining, and that the right to effective assistance of counsel would be difficult to apply during plea bargaining.[510] However, the Court found that these arguments were outweighed by the importance of plea bargaining to the criminal process: the right to effective assistance of counsel is guaranteed by the Constitution, and it cannot be ignored during plea bargaining, which now represents virtually the entire criminal justice system.[511] So too with *Brady*: as the vast majority of criminal proceedings are resolved by guilty pleas, denying defendants' *Brady* rights during plea bargaining would be to deny those rights at the only stage when they could actually be of use.[512] The importance of plea bargaining therefore outweighs concerns of judicial efficiency and resource expenditure that accompany a pre-plea exculpatory disclosure requirement.[513] Like the right to effective assistance of counsel, exculpatory *Brady* rights are guaranteed by the Constitution, and should not be afforded only to the tiny fraction of defendants who proceed to trial.

Third, *Lafler* and *Frye* shoot down the argument that exculpatory *Brady* rights should not be afforded during plea bargaining because there is no constitutional right to plea bargain.[514] The Supreme Court held in no uncertain terms that, while the prosecution is not constitutionally required to engage in plea bargaining, it is required to abide by the Constitution's protections for defendants if it chooses to do so.[515] If prosecutors do not wish to turn over exculpatory evidence, expend resources on pre-plea discovery, or risk giving away too much of their case, then they can abstain from plea bargaining. But as the Court found in *Lafler*, once the government begins to enter into highly discretionary negotiations that will ultimately affect the defendant's freedom, it is bound to respect the

506. *See supra* notes 126–27, 176, 201 and accompanying text.
507. *See supra* notes 378–80 and accompanying text.
508. *See supra* notes 446–51 and accompanying text.
509. *See supra* note 413 and accompanying text.
510. *See supra* notes 412–13 and accompanying text.
511. *See supra* notes 413–18 and accompanying text.
512. *See supra* notes 415–16 and accompanying text.
513. *See supra* note 144 and accompanying text.
514. *See supra* notes 390–91 and accompanying text.
515. *See supra* notes 390–91 and accompanying text.

defendant's constitutional right to the disclosure of material exculpatory evidence.[516]

Fourth, the standard of materiality that is used to review both *Brady* and ineffective assistance of counsel claims suggests that defendants should be able to assert post-plea exculpatory *Brady* claims. In *Lafler* and *Frye*, the Supreme Court continued to apply the standard from *Bagley*, holding that a conviction must be vacated if there is a reasonable probability that, but for his attorney's errors, the result of the proceeding—in this case, plea bargaining—would have been more favorable to the defendant.[517] From this standard, it is evident that a guilty plea does not waive claims of constitutional deficiencies that materially affect a defendant's decision whether to plead guilty. Like deficient advice from an attorney, the suppression of material exculpatory evidence during plea bargaining impedes a defendant's rational decision making and precludes a knowing and voluntary plea.[518] Therefore, just as a guilty plea or a conviction must be vacated where the ineffective assistance of counsel materially affects the defendant's decision to plead guilty, the same should be true where the prosecution's suppression of exculpatory evidence materially affects that decision.

Finally, Justice Scalia's criticism that having to stand trial cannot constitute prejudice will not apply to post-plea *Brady* claims, because the suppression of material exculpatory evidence will rarely, if ever, lead to the *rejection* of a plea offer.[519] When a defendant is deprived of exculpatory evidence, he views the government's case as being stronger than it actually is, and is therefore compelled to accept a seemingly favorable plea offer to avoid trial.[520] It is difficult to envision a situation in which the suppression of evidence establishing a defendant's factual innocence would lead him to prefer trial over a plea to a lesser charge or sentence. Pre-plea exculpatory *Brady* violations impel defendants to plead guilty, thereby depriving them of the "gold standard of American justice": a full criminal trial.[521] Such violations cause substantial prejudice, especially when they lead innocent defendants to plead guilty; but this prejudice can be avoided by requiring the pre-plea disclosure of material exculpatory evidence. Thus, while Justice Scalia bemoaned the "constitutionalization" of plea bargaining,[522] allowing exculpatory *Brady* challenges to guilty pleas is necessary to protect the constitutional rights of defendants and preserve the legitimacy of today's plea-based criminal justice system.

516. *See supra* notes 390–91 and accompanying text.
517. *See supra* notes 50–53, 386–91, 419–21 and accompanying text.
518. *See supra* notes 125–27, 131–34, 199–201 and accompanying text.
519. *See supra* notes 384–99 and accompanying text.
520. *See supra* notes 135–39 and accompanying text.
521. Lafler v. Cooper, 132 S. Ct. 1376, 1398 (2012) (Scalia, J., dissenting).
522. Missouri v. Frye, 132 S. Ct. 1399, 1413 (2012) (Scalia, J., dissenting).

CONCLUSION

Given the importance of the rights at stake, the Supreme Court should address the viability of post-guilty plea exculpatory *Brady* claims. Almost all criminal convictions are the result of guilty pleas, and yet while some defendants are provided with evidence establishing their factual innocence before they enter a plea, others must plea bargain without the benefit of that evidence. The Supreme Court recently made substantial progress in protecting defendants' constitutional rights by recognizing the right to effective assistance of counsel during plea bargaining. In the interests of fairness, accurate convictions, and a just criminal process, the Supreme Court should continue that trend by requiring the disclosure of exculpatory *Brady* evidence during plea bargaining and holding that the failure to do so renders a guilty plea invalid.