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I. INTRODUCTION

A "critical stage" of criminal prosecution denotes any formal or informal step of the process, in or out of court, involving crucial confrontations between the accused and the prosecution, when the absence of the accused's counsel might affect their right to a fair trial.[1] These confrontations force the accused to make decisions that can ultimately dictate their fate, and thus presence of counsel is of paramount importance, even during the pretrial period.[2] Perhaps the most significant part of that period is the plea-bargaining stage, when a defendant decides to plead guilty or not guilty, shaping their fate before even stepping into the courtroom.[3]

The U.S. Supreme Court crafted the "critical stage" formulation in 1967, recognizing that—in our modern criminal justice system—the time most critical for a criminal defendant is the pretrial period, because it triggers the attachment of constitutional rights.[4] Even before that, in 1963, the Court's ruling in *Brady v. Maryland* established a defendant's due process right to exculpatory evidence.[5] Although the Court has not affirmatively extended that right to the pretrial stage, pursuant to the principles underlying *Brady* and in an era when criminal justice is equivalent to plea justice, a criminal defendant's constitutional right to receive exculpatory evidence must also extend to the pretrial period.

This Note addresses the circuit split on pretrial application of the *Brady* rule stemming from varying interpretations of the 2002 case of *United States v. Ruiz*, the Supreme Court's most recent decision on the issue.[6] First, this Note reviews the evolution of due process and the Court's *Brady* rule in Part II.A. Part II.B focuses on

1. *See* United States v. Wade, 388 U.S. 218, 224, 226 (1967) (noting that the Sixth Amendment right to counsel is construed to apply to "critical stages" of criminal proceedings and that "the accused . . . need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial").

2. *See* Bell v. Cone, 535 U.S. 685, 695–96 (2002) (citations omitted) ("A trial would be presumptively unfair . . . where the accused is denied the presence of counsel at 'a critical stage,' . . . that [holds] significant consequences for the accused."); *see also Wade*, 388 U.S. at 224–25 (stating that a criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings).

3. *See Wade*, 388 U.S. at 224 ("[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."); *see also* Missouri v. Frye, 566 U.S. 134, 141 (2012) (citations omitted) (acknowledging that the Supreme Court has "made clear that 'the negotiation of a plea bargain is a critical phase of litigation'").

4. *See* Lafler v. Cooper, 566 U.S. 156, 165 (2012) ("The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. . . . The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice."); *see also Wade*, 388 U.S. at 224–25.

5. *See* 373 U.S. 83, 87 (1963) (establishing a criminal defendant's due process right to obtain favorable, "material" evidence and thereby creating a prosecutorial obligation to disclose such evidence to a criminal defendant). Exculpatory evidence is "[e]vidence tending to establish a criminal defendant's innocence." *Evidence*, Black's Law Dictionary (11th ed. 2019).

6. 536 U.S. 622 (2002).

the current role and requirements of plea-bargaining in the United States. The Court's decision in *Ruiz* and the current circuit split regarding *Ruiz*'s application to exculpatory evidence are discussed in Part III. Part IV considers the impact of *Ruiz* on the modern criminal justice system and argues that due process requires disclosure of material exculpatory evidence before a defendant waives the right to trial and enters a plea. Part V proposes a solution in two parts, derived from a critical analysis of *Ruiz*, *Brady*, and Sixth Amendment jurisprudence. Part V.A suggests that *Ruiz* is limited to the pre-indictment disclosure of impeachment information. Next, Part V.B proposes an analytical framework, rooted in the Sixth Amendment right to counsel, that courts should adopt in extending the *Brady* rule to the "critical stage" of plea-bargaining. Part VI concludes this Note.

II. HISTORY AND BACKGROUND

A. The Brady Rule

1. Pre-Brady: Due Process & The Role of a Prosecutor

In the Declaration of Independence, the Founders enshrined their belief that life, liberty, and the pursuit of happiness were among the inalienable rights given to all men.[7] Life, liberty, and property are further protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.[8]

In the 1930s, the Supreme Court began to recognize the indispensable role of due process in the criminal justice system.[9] In *Berger v. United States*, the Court in 1935 established the fundamental principle that the role of a criminal prosecutor "is not that it shall win a case, but that justice shall be done."[10] As a servant of the law, a prosecutor must assure "that guilt shall not escape or innocence suffer."[11] Following *Berger*, the Court decided two cases protecting criminal defendants against unfair prosecutorial practices under the Due Process Clause of the Fourteenth Amendment.[12]

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7. *See* The Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

8. *See* U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

9. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932) ("[I]t is the duty of the court . . . to assign counsel for [a criminal defendant] as a necessary requisite of due process of law . . . ."). The Court's test for determining the existence of a criminal defendant's unenumerated due process right is whether the right is among the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 67. (citations omitted).

10. 295 U.S. 78, 88 (1935).

11. *Id.* The Court defined the purpose of criminal prosecution as a "legitimate means" to obtain a just and accurate outcome. *See id.* ("It is . . . [the prosecution's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

12. Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935).

The Court's primary concern in these cases was the wrongful deprivation of a person's liberty at the hands of the criminal justice system.[13]

The two pre-*Brady* cases demonstrate the Court's continuing effort to promote honesty and transparency by maintaining governmental accountability under due process. First, *Mooney v. Holohan* held in 1935 that a defendant is denied due process of law when the prosecution knowingly presents false evidence at trial.[14] Second, *Napue v. Illinois* held in 1959 that a prosecutor's deliberate failure to correct false testimony violates due process, even when the testimony only affects witness credibility and does not relate to substantive guilt or innocence.[15] The Court was, over time, expanding the duty of a prosecutor to encompass a truth-seeking function.[16]

2. *Brady v. Maryland*

In the landmark 1963 case *Brady v. Maryland*, the Supreme Court established a criminal defendant's constitutional right to obtain material exculpatory evidence upon the defendant's request.[17] There, the prosecutor withheld extrajudicial statements made by another individual confessing to the homicide.[18] Defendant John Brady learned of this favorable evidence after his own conviction was final.[19] The Court held that, regardless of whether the prosecution had acted in good faith, "the suppression . . . of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."[20] The *Brady* doctrine was derived from the Court's belief that the disclosure of exculpatory evidence was

13. *Mooney*, 294 U.S. at 112.

14. *See id.* (explaining that the due process of law "cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction [by] . . . means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."). In *Mooney*, the prosecution used perjured testimony to convict the defendant and suppressed evidence that would have impeached that false testimony. *Id.* at 110–11. According to the Court, this deliberate deception is "a means of depriving a defendant of liberty" and is further "inconsistent with the rudimentary demands of justice." *Id.* at 112.

15. *Napue*, 360 U.S. at 269. "The principle that a State may not knowingly use false evidence . . . [is] implicit in any concept of ordered liberty" because "a defendant's life or liberty may depend" on the jury's evaluation of a witness' truthfulness and reliability. *Id.*

16. *See id.* at 269–70 (quoting People v. Savvides, 136 N.E.2d 853, 854 (1956)) ("[T]he district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.").

17. 373 U.S. 83, 87 (1963).

18. *Id.* at 84.

19. *Id.*

20. *Id.* at 87. *See also* United States v. Bagley, 473 U.S. 667, 675 n.6 (1985) (noting that this constitutional obligation the Court created in *Brady* was a "limited departure" from the "adversary model."). However, the *Bagley* court explained that the *Brady* rule's "purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Bagley,* 473 U.S. at 675.

necessary to ensure that a criminal defendant was not deprived of life, liberty, or property, without due process of law.[21]

3. Post-Brady Developments

In later decisions, the Court expanded and defined the scope of the *Brady* doctrine. In the 1972 case *Giglio v. United States*, the Court extended *Brady* to include relevant impeachment information.[22] There, the Court stated that the prosecution must disclose all evidence that could be used to impeach a witness at trial when a defendant's guilt or innocence may rest on the reliability of that testimony.[23] Failure to disclose such evidence, said the Court, is a violation of due process.[24]

Next, in *United States v. Agurs,* the Court held in 1976 that prosecutors must disclose *Brady* evidence even in the absence of a specific request by the defendant.[25] The Court emphasized that its *Brady* decision was a product of the Court's "overriding concern with the justice of the finding of guilt."[26] *Brady* and *Agurs* thus marked a shift in the Court's concern from deterring prosecutorial misconduct to protecting the defendant from harm.[27] As a result, when the prosecution possesses evidence "clearly supportive of a claim of innocence," disclosure is necessary to prevent a miscarriage of justice and uphold fundamental notions of "elementary fairness."[28]

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21. *See Brady,* 373 U.S. at 87–88 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

22. 405 U.S. 150, 154 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general [*Brady*] rule."). Impeachment evidence is "[e]vidence used to undermine a witness's credibility." *Evidence*, Black's Law Dictionary (11th ed. 2019). Impeachment evidence often includes "impeachment information" which "has been generally defined as impeaching information which is material to the defense," and may include "specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness;" "evidence in the form of opinion or reputation as to a witness' character for truthfulness;" "prior inconsistent statements;" and "information that may be used to suggest that a witness is biased." *Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")*, Dep't of Just. Archives: Off. of the Att'y Gen. (Dec. 9, 1996), https://www.justice.gov/archives/ag/policy-regarding-disclosure-prosecutors-potential-impeachment-information-concerning-law#:~:text=Each%20investigative%20agency%20employee%20is,its%20employees%20fulfill%20this%20obligation (last updated Mar. 8, 2017).

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

24. *Id.* at 154–55.

25. *See* 427 U.S. 97, 107–13 (1976). Recognizing that the prosecution does not have a constitutional duty "to deliver [their] entire file to defense counsel," the Court explained that prosecutors must disclose evidence that is "of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request," to ensure that "justice shall be done." *Id.* at 110–11.

26. *Id.* at 112.

27. *See id.* at 104 n.10 ("Although in Mooney the Court had been primarily concerned with the willful misbehavior of the prosecutor, in Brady the Court focused on the harm to the defendant resulting from nondisclosure.").

28. *Id.* at 107, 110.

And in 1985 in *United States v. Bagley*, the Court established the Brady materiality standard.[29] According to the Court, Brady 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."[30]

Further, in 2004, the Court determined in *Banks v. Dretke* that a witness' status as a government informant is "material" for *Brady* purposes, and the prosecution's failure to disclose such information to a defendant violates due process.[31] The *Banks* Court emphasized that operating under a "'prosecutor may hide, defendant must seek'" rule "is not tenable in a system constitutionally bound to accord defendants due process."[32]

B. Plea-Bargaining

Beginning in the 1970s with *Santobello v. New York*, the Supreme Court encouraged the proper management of plea-bargaining, which had become "an essential component of the administration of justice."[33]

The plea-bargaining process is often a series of negotiations in which the prosecutor offers the defendant a lesser charge or penalty in exchange for an admission of guilt.[34] A guilty plea becomes the pretrial "disposition of criminal

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29. 473 U.S. 667, 682 (1985).

30. *Id.* The *Bagley* Court explained that "reasonable probability" in this context is defined "as 'a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). The *Bagley* Court derived the *Brady* materiality standard from *Strickland v. Washington,* which created a two-prong test to establish an ineffective assistance of counsel claim. *Id.* at 682. The two-prong standard is laid out in *Strickland* as follows: "First, [a] defendant must show that counsel's performance was deficient" (known as the "reasonableness" prong); "Second, [a] defendant must show that the deficient performance prejudiced the defen[dant]" (known as the "prejudice" prong). *See Strickland*, 466 U.S. at 687–88, 691–96. The Court later explained that, in *Strickland*, "it had 'relied on and reformulated' the test for materiality from *Brady* cases." Alvarez v. City of Brownsville, 904 F.3d 382, 409 (5th Cir. 2018) (Costa, J., dissenting) (quoting *Bagley*, 473 U.S. at 681). Ultimately, the *Bagley* Court adopted the second prong of the reformulated *Strickland* test as the standard to determine the materiality of *Brady* evidence. *Alvarez*, 904 F.3d at *409*; *see also Bagley*, 473 U.S. at 682 ("We find the *Strickland* formulation . . . for materiality sufficient[] . . . .").

31. Banks v. Dretke, 540 U.S. 668, 675–76 (2004).

32. *Id.* at 696.

33. 404 U.S. 257, 260 (1971); *see* Brady v. United States, 397 U.S. 742, 751 (1970) (holding that a guilty plea is constitutional under the Fifth Amendment despite a defendant's subjective motivation for entering the plea); *see also* Missouri v. Frye, 566 U.S. 134, 143 (2012) (recognizing that "plea bargains have become . . . central to the administration of the criminal justice system.").

34. Frank v. Blackburn, 646 F.2d 873, 875–76 (5th Cir. 1980). There are three main types of plea-bargaining: charge bargaining, sentence bargaining, and count bargaining. *Plea bargaining*, Britannica, https://www.britannica.com/topic/plea-bargaining (last visited Jan. 29, 2021). In charge bargaining, the prosecution agrees to dismiss or reduce charges in exchange for a guilty plea. Fed. R. Crim. P. 11(c)(1)(A). In sentence bargaining, the prosecution agrees to recommend a lesser sentence to the court in exchange for a guilty plea. Fed. R. Crim. P. 11(c)(1)(B)–(C). In count bargaining, the prosecutor agrees to "drop any charge or charges in exchange for a guilty plea on the remaining charges." *Plea bargaining*, *supra*.

charges by agreement between the prosecutor and the accused,"[35] and its purpose is to conserve government resources that would otherwise be spent on trial.[36] A guilty plea is thus more than just the admission of criminal culpability; "it is itself a conviction" that supplies "both evidence and verdict, ending controversy."[37]

1. Procedural Process

Absent certain procedural requirements, a court is not obligated to accept a guilty plea.[38] The procedural guidelines governing plea agreements in federal courts are established in Rule 11 of the Federal Rules of Criminal Procedure.[39] Under subsection (b)(1), before a guilty plea is accepted, a court must be sure that a defendant understands that they are waiving the following constitutional rights by pleading guilty: "the right to a jury trial;" "the right to be represented by counsel . . . at trial and at every other stage of the proceeding;" "the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses."[40] Additionally, "the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than those in the plea agreement)."[41] There must be a "factual basis for the plea," which the defendant must verbally convey to the judge.[42] The court cannot simply presume a valid waiver from a defendant's silence.[43] When all of these

35. *Santobello*, 404 U.S. at 260.

36. *See Frye*, 566 U.S. at 144 (noting that plea agreements "benefit both parties" by "conserv[ing] valuable prosecutorial resources" and providing defendants "more favorable terms at sentencing"); *see also Frank*, 646 F.2d at 876 (quoting *Santobello*, 404 U.S. at 260) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

37. Boykin v. Alabama, 395 U.S. 238, 242, 242 n.4 (1969) (quoting Woodward v. State, 171 So. 2d 462, 469 (Ala. Ct. App. 1965)).

38. *See* Lynch v. Overholser, 369 U.S. 705, 719 (1962) ("This does not mean . . . that a criminal defendant has an absolute right to have his guilty plea accepted by the court.").

39. Fed. R. Crim. P. 11. State courts are not bound by the federal plea-taking procedures established in Rule 11 because the federal rules of procedure do not govern state court proceedings. Miles v. Dorsey, 61 F.3d 1459, 1466–67 (10th Cir. 1995); *Frank*, 646 F.2d at 882; Wade v. Coiner, 468 F.2d 1059, 1060 (4th Cir. 1972). State courts must only ensure that guilty-plea proceedings satisfy due process requirements. *Miles*, 61 F.3d at 1466–67; *Frank*, 646 F.2d at 882; *Wade*, 468 F.2d at 1060.

40. Fed. R. Crim. P. 11(b)(1)(C)–(E).

41. Fed. R. Crim. P. 11(b)(2).

42. Fed. R. Crim. P. 11(b)(3).

43. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (quoting Carnley v. Cochran, 369 U.S. 506, 516 (1962)) (explaining that the standard for determining whether a defendant waived their right to counsel when remaining silent is "the same standard [that] must be applied [for] determining whether a guilty plea was voluntarily made"—"[p]resuming waiver from a silent record is impermissible").

requirements are met, the court may accept a guilty plea and effectuate a valid waiver of the defendant's constitutional rights.[44]

2. The Knowing and Voluntary Requirement

Rule 11 codifies the requirements of understanding set forth in 1969 in *Boykin v. Alabama*, which must be satisfied in order for a guilty plea to be constitutionally valid.[45] Under *Boykin*, courts determine the validity of a guilty plea by assessing whether a defendant knowingly and voluntarily waived their constitutional rights.[46] If a guilty plea is not "equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."[47] If both the knowing and voluntary requirements are satisfied, a defendant has waived the right to collaterally challenge a guilty plea.[48]

III. THE PROBLEM: UNITED STATES V. RUIZ

In 2002, the Supreme Court held in *United States v. Ruiz* that the Constitution does not require the government to disclose impeachment information prior to entering a plea agreement with a criminal defendant; the Court's holding was limited

44. Fed. R. Crim. P. 11(b)(1)–(3) (listing the requirements that must be met before accepting and entering judgment on a guilty plea). "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized." Brady v. United States, 397 U.S. 742, 748 (1970).

45. *See* 395 U.S. at 244 (quoting Boykin v. State, 207 So. 2d 412, 415 (Ala. 1968) (Goodwyn, J., dissenting)) (determining that the record must show "that [a] defendant voluntarily and understandingly entered" a guilty plea); *see also* Fed. R. Crim. P. 11(b)(1)–(2) (requiring that before accepting a guilty plea, a court must find "that the defendant underst[ood the consequences of pleading guilty]" and "that the plea [was] voluntary"). The knowing and voluntary standard for a valid plea "is rooted in the due process clauses of the Constitution and is therefore applicable in both state and federal courts." Frank v. Blackburn, 646 F.2d 873, 882 (5th Cir. 1980).

46. *Boykin*, 395 U.S. at 242. Supreme Court jurisprudence has defined the terms "knowing" and "voluntary." *Brady*, 397 U.S. at 748; McCarthy v. United States, 394 U.S. 459, 466 (1969). "Knowing" means an "intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748 (footnote omitted). Specifically, a defendant pleading guilty must fully understand the charges and the potential consequences of the plea. *Id.* at 748 n.6. Full awareness of direct consequences "includ[es] the actual value of any commitments made to [a defendant] by the court, prosecutor, or his own counsel." *Id.* at 755 (citations omitted). "Voluntary" means "an intentional relinquishment or abandonment of a known right or privilege" and, therefore, implies that "the defendant possesses an understanding of the law in relation to the facts." *McCarthy*, 394 U.S. at 466 (footnote omitted) (citations omitted) (internal quotations omitted). Notably, the term "intelligent" is sometimes applied as part of the standard for validity of a guilty plea, either in place of "knowing" or as a third requirement. *See Boykin*, 395 U.S. at 242, 244 (discussing whether the guilty plea was entered "voluntarily," "knowingly," and "intelligently").

47. *Boykin*, 395 U.S. at 243 n.5.

48. White v. United States, 858 F.2d 416, 421 (8th Cir. 1988) (citation omitted) ("'It is well settled that a *voluntary* and *intelligent* plea of guilty made by an accused person . . . may not be collaterally attacked.'") (emphasis in original).

to impeachment information and did not encompass exculpatory evidence.[49] Angela Ruiz was charged with unlawful drug possession in the Southern District of California after immigration agents found drugs in her luggage.[50] Federal prosecutors offered her a "fast track" plea bargain,[51] which required the defendant to waive her right to receive "impeachment information relating to any informants or other witnesses."[52] The defendant refused the waiver, was indicted, and ultimately pleaded guilty even though the plea agreement was no longer available.[53] The district court sentenced her in accordance with standard sentencing guidelines.[54]

The defendant appealed her sentence to the U.S. Court of Appeals for the Ninth Circuit, which held that the prosecution's "fast track" plea agreement violated the defendant's constitutional rights by requiring a waiver of the defendant's right to impeachment information.[55] According to the Ninth Circuit, because a defendant is constitutionally entitled to impeachment information before trial, it follows that they are entitled to that same information before they enter into a plea agreement.[56]

The Supreme Court granted certiorari on the issue of "whether the Constitution requires [the] preguilty plea disclosure of impeachment information"[57] and held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."[58]

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49. *See* 536 U.S. 622, 628–33 (2002) (recognizing that defendants may have a right to disclosure of impeachment information in other stages of criminal proceedings but stating that "due process considerations . . . argue against the existence of the [right to exculpatory and impeachment information]" at the plea-bargaining stage).

50. *Id.* at 625.

51. *Id.* The *Ruiz* Court explained that the "fast track" plea bargain is "standard in [the Southern District of California]" and "asks a defendant to waive indictment, trial, and an appeal" in exchange for a lenient sentence recommendation. *Id.* Conversely, a standard plea bargain is usually offered after a defendant is indicted. *See* United States v. Ohiri, 133 F. App'x 555, 561–62 (10th Cir. 2005) (distinguishing *Ruiz* on the basis, inter alia, that the "fast track" plea bargain occurred pre-indictment rather than post-indictment).

52. *Ruiz*, 536 U.S. at 625 (internal quotations omitted).

53. *Id.* at 625–26. "[T]he prosecutors withdrew their bargaining offer" because Ruiz refused to waive her "right to receive information supporting any affirmative defense [she would] raise[] if the case [went] to trial," resulting in Ruiz's indictment for unlawful drug possession. *Id.* at 625.

54. *Id.* at 626. The United States Sentencing Guidelines provide the standard sentencing range for criminal defendants convicted in U.S. federal courts. U.S. Sent'g Guidelines Manual § 1A1.1 (U.S. Sent'g Comm'n 2018). If Ruiz had accepted the government's plea bargain, her sentence range could have been six months shorter than the sentence under the Guidelines, which specified eighteen to twenty-four months for unlawful drug possession. *Ruiz*, 536 U.S. at 625.

55. *Ruiz*, 536 U.S. at 626. Ruiz argued that her "right to receive undisclosed *Brady* evidence [could not] be waived through [a] plea agreement[]," and that the government's proposed plea agreement was unconstitutional. United States v. Ruiz, 241 F.3d 1157, 1161 (9th Cir. 2001).

56. *See Ruiz*, 241 F.3d at 1166–67 ("When there is *not* going to be a trial . . . as in the context of plea bargaining, *Brady* evidence is only valuable to the accused if it is disclosed before acceptance of the plea agreement.") (emphasis in original).

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

58. *Id.* at 633.

The Court's reasoning was threefold. First, the Court stated that impeachment information bears a "special . . . relation" to the "*fairness of a trial*" and not to the voluntariness of a defendant's plea.[59] The Court determined that impeachment information is not "critical" at the plea stage because "[t]he degree of help that impeachment information can provide will depend upon the defendant's own independent knowledge of the prosecution's potential case—a matter that the Constitution does not require prosecutors to disclose."[60]

Second, relying on precedent, the Court reasoned that a guilty plea may be constitutionally valid despite a defendant's misapprehension of certain relevant circumstances.[61] The Court classified impeachment information as one such circumstance, after concluding that a defendant's ignorance of such information during the plea-bargaining phase is minimal in terms of importance.[62]

Finally, the Court reasoned that due process considerations weigh against disclosure of impeachment information.[63] The Court noted that a constitutional obligation to provide impeachment information during plea-bargaining could impede the government's interest in "the efficient administration of justice."[64] Specifically, requiring the government to disclose witness information prematurely has the potential to increase the resources the government must utilize in pretrial preparation, thereby negating the "main resource-saving advantages" of plea-bargaining.[65] Additionally, "premature disclosure of Government witness information . . . could 'disrupt ongoing investigations' and expose prospective witnesses to serious harm."[66] Thus, the Court concluded that the minimal benefits of pre-plea disclosure of impeachment information are substantially outweighed by the potential risks.[67]

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59. *Id.* at 629 (emphasis in original).

60. *Id*. at 630.

61. *Id.* The *Ruiz* Court cited four cases in which the Court upheld a guilty plea despite the defendant's ignorance of certain circumstances: *United States v. Broce*, 488 U.S. 563, 573 (1989) (counsel "failed to point out a potential defense"); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (counsel "failed to find a potential constitutional infirmity in grand jury proceedings"); *Brady v. United States*, 397 U.S. 742, 757 (1970) (the defendant "misapprehended the quality of the State's case" and "the likely penalties," and "failed to anticipate a change in the law regarding relevant punishments"); *McMann v. Richardson*, 397 U.S. 759, 770 (1970) (counsel "misjudged the admissibility of a confession"). *Ruiz*, 536 U.S. at 630–31 (internal quotations omitted).

62. *See Ruiz*, 536 U.S. at 630–31 ("[I]n any case, as the proposed plea agreement at issue here specifies, the Government will provide 'any information establishing the factual innocence of the defendant' regardless. That fact, along with other guilty-plea safeguards . . . diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals . . . will plead guilty.").

63. *Id.* at 631.

64. *Id.*

65. *Id*. at 631–32.

66. *Id.* (quoting Brief for the United States at 25, *Ruiz*, 536 U.S. 622 (No. 01-595), 2002 WL 316340).

67. *See id.* at 632 ("We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit.").

The *Ruiz* Court focused on impeachment information but left open the question of whether exculpatory evidence must be disclosed to a criminal defendant prior to the entry of a guilty plea. The Court has yet to clarify whether its holding in *Ruiz* extends to exculpatory evidence.[68] With circuit courts split on this question, a criminal defendant's constitutional right to exculpatory evidence is contingent on the jurisdiction in which a prosecution takes place.[69]

IV. THE CONSEQUENCES OF ALLOWING PROSECUTORS TO SUPPRESS EXCULPATORY EVIDENCE DURING PLEA-BARGAINING

Given the lack of guidance from the Supreme Court, jurisdictions vary as to whether prosecutors provide the defense with exculpatory evidence.[70] In practice, federal prosecutors have vast discretion in determining whether to disclose pre-plea exculpatory evidence under *Brady*.[71] Some circuit courts have incorrectly interpreted *Ruiz* as a blanket denial of *Brady* rights during the plea-bargaining process.[72] By

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

69. *Compare* Friedman v. Rehal, 618 F.3d 142, 154 (2d Cir. 2010) (holding that there is no constitutional right to *Brady* material prior to the entry of a guilty plea), *and* United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (holding that the government is not obligated to hand over exculpatory information before the defendant pleads guilty), *with* McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003) (holding that the government is required to disclose material exculpatory information prior to a guilty plea if the information is proof "of a criminal defendant's factual innocence"), *and* Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) (finding that withholding exculpatory evidence automatically renders a guilty plea unknowing and involuntary).

70. *See supra* note 69 and accompanying text; *see also* Editorial, *Beyond the Brady Rule*, N.Y. Times (May 18, 2013), https://www.nytimes.com/2013/05/19/opinion/sunday/beyond-the-brady-rule.html ("It might seem obvious that prosecutors . . . would inform a defendant's lawyer of evidence that could be favorable to the defendant's case. But . . . this principle, known as the Brady rule, has been restricted by subsequent rulings of the court and have been severely weakened . . . .").

71. *See generally* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 141–42 (2012) (exploring "the disjuncture between" *Brady* jurisprudence, the "defendant due diligence rule," and the "reality of criminal practice"). The term "defendant due diligence rule" reflects "the common modern tendency of [federal] courts to excuse" a prosecutor's "failure to disclose exculpatory evidence [which is otherwise "subject to disclosure under *Brady*"] on the theory that the defendant either knew or could have known of that evidence through due diligence." *Id.* at 141–42 ("Every federal court of appeals, except for the Tenth and D.C. Circuits, applies some form of [the defendant due diligence rule]."). This rule "shift[s] the burden of discovery to the defendant and suggest[s] that the government's disclosure duty is not absolute," therefore undermining the *Brady* rule requirement "that prosecutors provide broad, timely, and absolute disclosure of all material exculpatory evidence." *Id.* at 158. The tension between the *Brady* rule and the due diligence rule thus leaves prosecutors with "even more discretion" and "additional justifications . . . to withhold exculpatory evidence" because they get to decide which "evidence is material [and] whether [that] evidence is sufficiently available to a diligent defendant." *Id.* at 159. *See* Brady v. Maryland, 373 U.S. 83, 88 (1963) (defining a prosecutor as the "architect of a proceeding"); *see also* Lafler v. Cooper, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (noting that plea-bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser defense").

72. *See Conroy*, 567 F.3d at 179 (holding that "*Ruiz* never makes . . . a distinction [between impeachment evidence and exculpatory evidence] nor can this proposition be implied from its discussion"); *see also*

extending *Ruiz* to exculpatory evidence, these circuit courts have ignored the modern realities of the American criminal justice system, which "is for the most part a system of pleas, not a system of trials."[73] Although historically, a trial was the forum to determine a defendant's guilt or innocence,[74] the current criminal justice system increasingly utilizes plea-bargaining, potentially determining a defendant's fate well ahead of the trial.[75] Notably, between July, 2019 and June, 2020, more than 98 percent of federal convictions resulted from guilty pleas, meaning that a mere 2 percent of federal criminal proceedings went to trial.[76] To confine *Brady*'s application to only 2 percent of criminal defendants would needlessly limit its principles of fairness and transparency. Given the prevalence of plea-bargaining and its effect on the outcome in the vast majority of cases, *Brady* must extend beyond the confines of a criminal trial.[77]

Moreover, by allowing the government to withhold exculpatory evidence from a criminal defendant during plea-bargaining, circuit courts deprive defendants of the ability to make a knowing and voluntary decision to forgo trial.[78] The Supreme Court noted that the "negotiation of a plea . . . is almost always the critical point for

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United States v. Mathur, 624 F.3d 498, 507 (1st Cir. 2010) (finding that "[t]he *Ruiz* Court evinced a reluctance to extend a *Brady*-like right to the realm of pretrial negotiations[.]"); *see also Friedman*, 618 F.3d at 154 (citations omitted) ("[T]he Supreme Court has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligations of a prosecutor to provide *Brady* materials prior to trial . . . ."); *see also Moussaoui*, 591 F.3d at 285–86 (describing the *Brady* right to material exculpatory evidence as a trial right and reasoning that *Ruiz* and other Supreme Court cases indicate that due process does not require that a defendant receive all useful information prior to a guilty plea) (emphasis omitted).

73. *Lafler*, 566 U.S. at 170.

74. *See id*. at 186 (defining the "gold standard of American justice" as "a full-dress criminal trial"); *see also Brady*, 373 U.S. at 87.

75. *See* Missouri v. Frye, 566 U.S. 134, 144 (2012).

76. *See U.S. District Courts—Criminal Defendants Terminated, by Type of Disposition and Offense—During the 12-Month Period Ending June 30, 2020*, U.S. Cts.: Stat. Tables for the Fed. Judiciary (June 30, 2020), https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2020/06/30 (reporting that for the period between June 30, 2019 and June 20, 2020 there were 74,056 total convictions and of those, 72,683 were from guilty pleas); *see also* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, Pew Rsch. Ctr. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ (providing statistics from state and federal courts to explain the rarity of acquittals in each).

77. *See* McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) ("[I]t is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.").

78. At least two circuits have held that a defendant's guilty plea is neither knowing nor voluntary if it was made in the absence of withheld *Brady* material. *See* Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) (holding that withholding exculpatory evidence automatically renders a guilty plea unknowing and involuntary); *see also* 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.").

a defendant" because it is the defendant's only opportunity to decide whether to waive fundamental constitutional rights otherwise inherent in a criminal trial.[79] This decision is primarily based on the perceived strength of the government's case and the defendant's awareness of favorable evidence that tends to prove their innocence.[80] Thus, the early disclosure of exculpatory evidence helps a defendant to make an informed decision regarding their plea.[81] A holding to the contrary curtails the defendant's ability to do so.[82]

Finally, by extending *Ruiz* to exculpatory evidence, circuit courts have prioritized the government's administrative efficiency over its profound obligation to seek justice and truth. While it is modern practice for the federal government to offer criminal defendants lenient plea bargains to avoid spending time, money, and resources on a trial,[83] the courts have long recognized that plea offers may induce innocent people to plead guilty to avoid the risk of receiving a harsher penalty at trial.[84] With no clear rule requiring the pre-plea disclosure of exculpatory evidence, prosecutors are incentivized to withhold material exculpatory evidence in an effort to secure a guilty plea. It is implausible to suggest that this was the Court's intended result in *Ruiz*.[85] Further, the concealment of such evidence undermines the transparency of our

79. *Frye*, 566 U.S. at 144.

80. *See Sanchez*, 50 F.3d at 1453 (quoting *Miller*, 848 F.2d at 1320) ("[A] defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case").

81. *See* United States v. Persico, 164 F.3d 796, 804–05 (2d Cir. 1999) ("The Government's obligation to disclose *Brady* material is pertinent to the accused's decision to plead guilty; the defendant is entitled to make that decision with full awareness of favorable (exculpatory and impeachment) evidence known to the Government."); *see also Miller*, 848 F.2d at 1320, 1322 ("[E]ven where counsel would likely adhere to his recommendation of a plea of guilty or not guilty by reason of insanity, if there is a reasonable probability that but for the withholding of the information the accused would not have entered the recommended plea but would have insisted on going to a full trial, the withheld information is material within the meaning of the *Brady v. Maryland* line of cases.").

82. *See* Patton v. United States, 281 U.S. 276, 307–08 (1930) (noting that defendants have the ability to waive their constitutional rights, but that doing so should be based upon sound knowledge and advice).

83. *See* Off. of U.S. Att'ys, *Justice 101: Plea Bargaining*, U.S. Dep't. of Just., https://www.justice.gov/usao/justice-101/pleabargaining (last visited Jan. 29, 2021) ("When the Government has a strong case, the Government may offer the defendant a plea deal to avoid trial and perhaps reduce his exposure to a more lengthy sentence."); *see also* Lafler v. Cooper, 566 U.S. 156, 169 (2012).

84. *See* Von Moltke v. Gillies, 332 U.S. 708, 719 n.5 (1948) (plurality opinion) (citation omitted) ("'[T]here may be circumstances which may induce an innocent man to accuse himself.'"); *see also* United States v. Fine, 975 F.2d 596, 604 (9th Cir. 1992) (en banc) ("A plea to some charges in exchange for dismissal of others may sometimes produce little benefit, but . . . [o]verly lenient plea bargains may induce innocent defendants to plead guilty[.]"); *see also* United States v. Int'l Paper Co., 457 F. Supp. 571, 576 (S.D. Tex. 1978) ("[P]lea bargaining . . . creates the possibility that an innocent person may plead guilty out of fear of conviction and a harsher sentence.").

85. *See* United States v. Ruiz, 536 U.S. 622, 628–29 (2002) (recognizing that because pleading guilty waives several constitutional rights, the defendant must only enter a guilty plea voluntarily and must waive such constitutional rights "knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences"); *see also* McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003).

criminal justice system and obstructs governmental accountability.[86] The disclosure of exculpatory evidence generally depends on the good faith and integrity of the prosecutor.[87] Therefore, it is imperative for the Court to incentivize proper prosecutorial behavior by requiring all prosecutors to comply with early disclosure obligations.[88]

V. THE SOLUTION: MANDATING THE DISCLOSURE OF EXCULPATORY EVIDENCE AT PLEA-BARGAINING

The absence of a holding directly addressing a prosecutor's obligation to disclose exculpatory evidence during plea-bargaining deprives some defendants of crucial constitutional protections. The solution to this problem should be consistent with fairness principles underlying *Brady* and should acknowledge the modern realities of the American criminal justice system. This Note proposes a two-part solution. First, Part V.A suggests that the holding in *Ruiz* is limited to the pre-indictment disclosure of only impeachment information. Second, Part V.B proposes an analytical framework, rooted in the Sixth Amendment right to counsel, that courts should adopt in extending *Brady* rights and obligations to the pretrial process.

A. The Proposed Ruiz Rule

Circuit courts are split on whether *Ruiz* applies to only impeachment information, only exculpatory evidence, or both.[89] A critical reading of the Court's opinion resolves this ambiguity—*Ruiz* was clearly intended to be limited to impeachment information in the context of pre-indictment pleas.

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86. Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. Penn. L. Rev. 277, 314 (2020); *see also* Massiah v. United States, 377 U.S. 201, 207 (1964) (White, J., dissenting) ("In my view, a civilized society must maintain its capacity to discover transgressions of the law and to identify those who flout it.").

87. *See* Editorial, *Beyond the Brady Rule*, *supra* note 70 ("It is impossible to know how often prosecutors violate Brady since this type of misconduct, by definition, involves concealment.").

88. The American Bar Association (ABA) has promulgated professional rules of conduct and ethics for attorneys, which evidence a clear trend towards transparent discovery, even at the plea-bargaining stage. *See* Model Rules of Pro. Conduct r. 3.8 (Am. Bar Ass'n 1983). The ABA Standards for Criminal Justice also provide that requiring early disclosure obligations from prosecutors would "promote a fair and expeditious disposition of charges . . . [and] provide . . . defendants with sufficient information to make . . . informed plea[s]." Standards for Criminal Justice Discovery and Trial by Jury, Standard 11-1.1 (Am. Bar Ass'n 1996).

89. *Compare* Friedman v. Rehal, 618 F.3d 142, 154 (2d Cir. 2010) (holding that there is no constitutional right to *Brady* material prior to the entry of a guilty plea), *and* United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (holding that the government is not obligated to hand over exculpatory information before the defendant pleads guilty), *with McCann*, 337 F.3d at 787 (holding that the government is required to disclose material exculpatory information prior to a guilty plea if the information is proof "of a criminal defendant's factual innocence"), *and* Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) (holding that withholding exculpatory evidence automatically renders a guilty plea unknowing and involuntary).

First, the main issue in *Ruiz* was "whether the Constitution requires [the] preguilty plea disclosure of impeachment information."[90] Exculpatory evidence was neither at issue nor discoverable because the defendant's guilt was undisputed.[91] The only contested issue was the disclosure of impeachment information that could be used in a potential future trial.[92] Consistent with this premise, the *Ruiz* Court explicitly distinguished impeachment information from exculpatory evidence[93] in two ways: first, the Court said that "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*;" and, second, that a defendant's awareness of impeachment information is not critical prior to a guilty plea.[94]

The Court formulated these distinctions by analyzing the "degree of help" that impeachment information would provide to a defendant at the plea stage.[95] Under the "degree of help" analysis, the prosecution's duty to disclose evidence turns on how helpful that evidence is to the defendant during the particular stage of the proceedings.[96] Here, the Court concluded that impeachment information constitutes trial-related evidence that provides minimal, if any, "degree of help" to the defendant during the plea-bargaining stage.[97] The Court explained that because impeachment information can only be used against a prosecution's witness at trial, the usefulness of impeachment information depends on the prosecution's trial strategy,[98] and is relevant only if the prosecution decides to call a particular witness.[99] The prosecution,

90. *Ruiz*, 536 U.S. at 629. The Court concluded that the Constitution did not require the pre-guilty plea disclosure of impeachment information. *Id.* In reaching that conclusion, the Court "primarily consider[ed] whether the Fifth and Sixth Amendments require[d] federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose 'impeachment information relating to any informants or other witnesses.'" *Id.* at 625 (citation omitted).

91. *Id.* at 634 (Thomas, J., concurring) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)) ("The principle supporting *Brady* was 'avoidance of an unfair trial of the accused.' That concern is not implicated at the plea stage regardless.").

92. *Id.* at 629.

93. The Court defined exculpatory evidence as "evidence the suppression of which would 'undermine confidence in the verdict,'" and which "includes 'evidence affecting' witness 'credibility,' where the witness' 'reliability' is likely 'determinative of guilt or innocence.'" *Id.* at 628 (citations omitted). The Court defined impeachment information as evidence that provides a defendant with "grounds for impeachment of potential witnesses at a possible future trial." *Id.* at 631.

94. *Id.* at 629–30 (emphasis in original).

95. *Id.*

96. *See id.* at 633 (Thomas, J., concurring) ("The Court . . . suggests that the constitutional analysis turns in some part on the 'degree of help' . . . [impeachment] information would provide to the defendant at the plea stage . . . .").

97. *See id.* at 631 (recognizing that "the added value of the Ninth Circuit's 'right' to [receive impeachment information from the prosecution during the plea-bargaining stage] is often limited" and other "guilty-plea safeguards" already exist to prevent innocent defendants from pleading guilty).

98. *See id.*

99. The federal *Justice Manual*, formerly known as the United States Attorneys' Manual (USAM) and revised and renamed in 2018, explicitly recognizes that impeachment information "depends on the

however, is not required to disclose its witness list to a defendant until immediately before trial.[100] As such, the value of impeachment information at plea-bargaining is speculative and uncertain; it merely provides the defendant with information about "potential witnesses at a possible future trial."[101] Therefore, the Court concluded that a defendant is not entitled to impeachment information during plea-bargaining because of the "random way in which such information may, or may not, help a particular defendant" at any stage of prosecution.[102]

The Court's "degree of help" analysis changes greatly in the context of substantive exculpatory evidence.[103] Exculpatory evidence is substantive in nature because it independently proves or tends to prove a defendant's innocence.[104] Conversely, impeachment information is collateral in nature because it is merely responsive to the government's case[105] and becomes relevant only to discredit the government's

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prosecutor's decision on who is or may be called as a government witness," thus, the purpose of disclosure is "to allow the trial to proceed efficiently." U.S. Dep't of Just., Just. Manual § 9-5.001(D)(2) (2018). The manual current at the time of *Ruiz*—the USAM—provided the same substantive information. *See* U.S Dep't of Just., U.S. Att'ys' Manual § 9-5.001(D)(2) (1997).

100. *See Ruiz*, 536 U.S. at 631–32 (citations omitted) (acknowledging that based on the codified "legal Government witness disclosure requirements," Congress and the Federal Rules Committees have already recognized that requiring the government to disclose its witness list too early would "expose prospective witnesses to serious harm"); *see, e.g.*, 18 U.S.C. § 3432 (2020) (allowing the government to disclose its witness list in capital cases as little as three days before trial). According to the federal *Justice Manual,* the government is required to disclose impeachment information "at a reasonable time before trial." U.S Dep't of Just., Just. Manual § 9-5.001(D)(2) (2018) (reflecting the same substantive information as the USAM).

101. *Ruiz,* 536 U.S. at 631. Because impeachment information relates to the credibility of government witnesses, such evidence is only helpful if the government decides to call that particular witness at trial. *Id.* Therefore, courts have found that the government need only disclose impeachment information "the day the witness testifies, because disclosure at that time will fully allow the defendant to effectively use the information to challenge the veracity of the government's witnesses." United States v. Lujan, 530 F. Supp. 2d 1224, 1255–56 (D.N.M. 2008) (citation omitted); *see also* United States v. Gonzalez-Montoya, 161 F. 3d 643, 649–50 (10th Cir. 1998) (explaining that delayed disclosure of impeachment information did not violate the *Brady* rule as the "untimely disclosure did not affect the results of the proceeding because defense counsel had an opportunity to review the new evidence and question [the witness] about it").

102. *Ruiz*, 536 U.S. at 629–30.

103. Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

104. *See* Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.") (emphasis omitted).

105. *See Lujan*, 530 F. Supp. 2d at 1255–56 (finding that impeachment information is only used "to challenge the veracity of the government's witnesses" at trial; therefore, disclosure of such information on the day the witness testifies is sufficient for *Brady* purposes); *see also Collateral*, Black's Law Dictionary (11th ed. 2019) (defining collateral as "[s]upplementary; accompanying, but secondary and subordinate").

witnesses at trial.[106] Exculpatory evidence, however, is always relevant regardless of the government's trial strategy.[107]

This important distinction between exculpatory evidence and impeachment information is implicitly recognized in the *Ruiz* dicta.[108] The Court explained that the mandatory disclosure of exculpatory evidence helps mitigate the risk that "innocent individuals . . . will plead guilty."[109] This reinforces the idea that, unlike impeachment information, exculpatory evidence constitutes "critical information" that a defendant must be aware of, so that the possibility of a wrongful conviction is diminished.[110]

Further, exculpatory evidence is especially important because of the voluntary nature of a guilty plea.[111] The *Ruiz* Court determined that a defendant's pretrial

106. *See Ruiz*, 536 U.S. at 623 (emphasis in original).

107. *See Lujan*, 530 F. Supp. 2d at 1255 ("Exculpatory evidence will usually require significant pretrial investigation to be useful to a defendant at trial, and thus, disclosure should generally be required well before pure *Giglio* impeachment evidence, which usually does not require substantial time to prepare for its effective use at trial."); *see also* United States v. Beckford, 962 F. Supp. 780, 788–89 (E.D. Va. 1997) (requiring production of impeachment material at least three days in advance of jury selection); *see also* United States v. Aiken, 76 F. Supp. 2d 1339, 1344–45 (S.D. Fla. 1999) (ordering the government to produce impeachment material ten days before trial). Whereas impeachment information could undermine a witness's credibility, exculpatory evidence could undermine the accuracy and reliability of the entire criminal proceeding itself. *See* United States v. Agurs, 427 U.S. 97, 113 (recognizing that exculpatory evidence of even "minor importance" may be "sufficient to create a reasonable doubt" about the defendant's guilt "if the verdict is already of questionable validity").

108. *Ruiz*, 536 U.S. at 631. The *Ruiz* Court found that due process considerations were satisfied because the plea agreement required the government to disclose all exculpatory evidence prior to defendant's plea. *Id.* Specifically, "the proposed plea agreement at issue here specifies [that] the Government will provide 'any [known] information establishing the factual innocence of the defendant'" and "it acknowledges the Government's 'continuing duty to provide such information.'" *Id.* at 625 (internal quotations omitted) (alteration in original).

109. *See id.* at 631 (explaining that the concern that "innocent individuals . . . will plead guilty" is diminished due to the requirement that "the Government provide 'any information establishing the factual innocence of the defendant,'" in addition to the "other guilty plea safeguards" required under Rule 11 of the Federal Rules of Criminal Procedure).

110. *See id.* at 630–31. The *Ruiz* Court's concern that innocent people are wrongfully pleading guilty is a legitimate one that too often is a reality in the modern criminal justice system. *See* Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 Harv. L. Rev. 293, 293 (1975) (noting that the Court approves "the practice of plea bargaining" because of "the assumption that defendants who were convicted on the basis of negotiated pleas of guilt would have been convicted had they elected to stand trial" and "conclud[ing] that the fundamental assumption underlying the Court's approval of plea bargaining is incorrect."). As of December 2020, forty-four of 375 DNA exonerations in the United States involved defendants who had pled guilty without the benefit of that evidence, to crimes they did not commit. *DNA Exonerations in the United States*, Innocence Project, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Jan. 29, 2021). *See also* Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651, 656–62 (2007) (explaining how the pre-plea disclosure of exculpatory evidence can reduce the risk of innocent people pleading guilty).

111. *See* State v. Huebler, 275 P.3d 91, 97–98 (Nev. 2012) ("While the value of impeachment information may depend on innumerable variables that primarily come into play at trial and therefore arguably make it less than critical information in entering a guilty plea, the same cannot be said of exculpatory

ignorance of impeachment information is minimal "in terms of importance."[112] Meanwhile, exculpatory evidence is the most important evidence because it speaks directly to a defendant's innocence;[113] a defendant's knowledge or ignorance of exculpatory evidence significantly impacts their decision to plead guilty.[114] Notably, the *Ruiz* Court also conceded that "the more information the defendant has" before making a decision to plea or waive rights, "the wiser that decision will likely be."[115] It is logical to conclude that the "more information" denotes exculpatory evidence, as opposed to the less important impeachment information.

Additionally, the *Ruiz* Court also engaged in a balancing test and concluded that the minimal benefits of disclosing impeachment information before trial were substantially outweighed by government interests.[116] The Court emphasized that premature disclosure of impeachment information could "disrupt ongoing investigations," "expose prospective witnesses to serious harm," and waste substantial government resources on pre-plea trial preparation.[117] In contrast, the value of exculpatory evidence far outweighs governmental interests because exculpatory evidence can potentially salvage an innocent man's liberty. This interpretation is supported by federal policy.[118] Therefore, the balancing test in *Ruiz* is inapplicable to exculpatory evidence, which should almost always be disclosed without judicial balancing of various interests and factors.[119]

Finally, the *Ruiz* Court's primary concern in rejecting the idea of mandatory disclosure of impeachment information at plea-bargaining was the possibility that

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information, which is special not just in relation to the fairness of a trial but also in relation to whether a guilty plea is valid and accurate.").

112. *Ruiz*, 536 U.S. at 630–32.

113. *See* United States v. Nelson, 979 F. Supp. 2d 123, 130 (D.D.C. 2013) (noting that any "defendant who is forced to make a choice about going to trial or pleading guilty unaware that the government has not disclosed" evidence speaking directly to the defendant's innocence "suffers unfair treatment unworthy of the bedrock ideal inscribed on the Justice Department walls.").

114. *See* United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (holding that the prosecutorial obligation to disclose *Brady* material "is pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty," and that defendants are "entitled to make that decision with full awareness of favorable material evidence known to the government").

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

116. *Id.* at 632–33.

117. *Id.* at 632.

118. Federal policy allows the pretrial disclosure of impeachment information only after the prosecutor "balance[s] the goals of early disclosure against other significant interests—such as witness security and national security." U.S. Dep't of Just., Just. Manual § 9-5.001(D)(2) (2018). This policy imposes no balancing test restriction on the pretrial disclosure of exculpatory evidence, which "must be disclosed reasonably promptly after it is discovered." U.S. Dep't of Just., Just. Manual § 9-5.001(D)(1) (2018).

119. Pursuant to federal policy, there is only one exception that allows the application of a balancing test to exculpatory information. That exception pertains to "classified or otherwise sensitive national security material," which may "require certain protective measures that may cause disclosure to be delayed or restricted (e.g. pursuant to the Classified Information Procedures Act.)" U.S. Dep't of Just., Just. Manual § 9-5.001(D)(1) (2018).

mandating such disclosure "could require the Government to devote substantially more resources to trial preparation prior to plea bargaining."[120] But this concern is limited to the type of plea agreement used in *Ruiz*, which was a pre-indictment "fast-track" plea.[121] In the post-indictment context, the Court's concern with burdening the prosecutor unnecessarily early in trial preparation would not exist because post-indictment pleas occur after the prosecution has already collected the evidence necessary to indict the defendant;[122] it would be fair to expect that a prosecutor has already gathered the evidence necessary to bring the defendant to trial.[123]

Even if a court were to consider the burden on the government and the potential waste of resources posed by the pre-plea disclosure of exculpatory evidence in the post-indictment context, these burdens are substantially outweighed by the potential of the defendant's wrongful loss of liberty that may result from non-disclosure. Accordingly, *Ruiz* must be limited to the pre-indictment disclosure of impeachment information only.

B. The Sixth Amendment Right to Effective Assistance of Counsel

In addition to limiting the application of *Ruiz*, the courts should extend *Brady* to pretrial proceedings. A criminal defendant's due process right to receive *Brady* evidence and the Sixth Amendment right to effective assistance of counsel have been inextricably linked throughout Supreme Court jurisprudence and are considered trial

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

121. *Id.* at 629.

122. *See* 2 David S. Rudstein et al., Criminal Constitutional Law § 9.05 (LexisNexis 2020) ("An indictment is a written accusation of a crime found by a grand jury and presented by it to a court. The underlying charge is proffered to the grand jury by the prosecutor."); *see also* Off. of the U.S. Att'ys, *Justice 101: Charging*, U.S. Dep't of Just., https://www.justice.gov/usao/justice-101/charging (last visited Jan. 29, 2021) (explaining that to obtain an indictment, the prosecutor must "present the evidence" and "outline . . . the case" to an impartial grand jury and the grand jury "then votes . . . on whether they believe that enough evidence exists to charge the person with a crime").

123. *See* Kirby v. Illinois, 406 U.S. 682, 689–90 (1972) (holding that an indictment "marks the commencement of the 'criminal prosecution[]'" because "the government has committed itself to prosecute" and "the adverse positions of [the] government and defendant have solidified"); *see also* Dickey v. Florida, 398 U.S. 30, 38 (1970) ("[T]he right to a prompt inquiry into criminal charges is fundamental . . . ."). The Tenth Circuit has recognized that the *Ruiz* rationale is limited to pre-indictment pleas. *See* United States v. Ohiri, 133 F. App'x 555, 561–62 (10th Cir. 2005) (distinguishing the defendant's plea agreement from the defendant's plea agreement in *Ruiz*). In *Ohiri*, the Tenth Circuit held that the government should have disclosed all known exculpatory evidence before the defendant pled guilty because, unlike in *Ruiz*, the plea agreement occurred post-indictment, "not before indictment in conjunction with a 'fast-track' plea." *Id.* at 562. The Tenth Circuit noted that, in *Ruiz*, "the Supreme Court did not imply that the government may avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government's possession." *Id.* This interpretation is further supported by federal policy, which requires a prosecutor to disclose "substantial evidence that directly negates the guilt" of a defendant to the grand jury at the point of indictment. U.S. Dep't of Just., Just. Manual § 9-11.233 (2018).

rights.[124] Further, the Sixth Amendment, like the Due Process Clause, serves to ensure the accuracy and reliability of criminal convictions.[125] Finally, courts apply the same *Strickland* materiality standard to assess whether a defendant's Sixth Amendment and due process rights were violated.[126] Based on these similarities, it is logical to conclude that the Court's Sixth Amendment jurisprudence is equally applicable to pre-plea *Brady* disclosures.[127]

Although the Court has not yet extended *Brady* rights to pretrial proceedings, it has extended the right to effective assistance of counsel to "various pretrial 'critical' interactions between the defendant and the State."[128] In 1964, in *Massiah v. United States*, the Court established a defendant's right to be protected by counsel even during pretrial interrogation.[129] The Court reasoned that the interrogation of an already indicted defendant without the presence of counsel "contravenes the basic dictates of fairness . . . and the fundamental rights of persons charged with crime."[130] Although the Constitution guarantees the aid of counsel at trial, the *Massiah* Court determined that the "most critical period of the proceedings" is "from the time of . . . arraignment until the beginning of . . . trial."[131] Thus, it was necessary for the Court to extend constitutional rights to the pretrial period.[132] The Court concluded that a defendant's

124. *See* Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 Fordham L. Rev. 3599, 3631 (2013) (noting that the right "to the disclosure of exculpatory evidence" and "the right to effective assistance of counsel" are "doctrinally linked" and comparable considering that "the same standard of materiality applies to reviews of both claims" and, "like *Brady*, the right to effective assistance was traditionally considered purely a trial right").

125. *See id.* at 3631–33 (discussing the impact of ineffective counsel and how it leads to inaccurate and unreliable convictions for criminal defendants).

126. *See supra* note 30 and accompanying text.

127. *See* Alvarez v. City of Brownsville, 904 F.3d 382, 410 (5th Cir. 2018) (Costa, J., dissenting) ("It would be anomalous if the *Strickland* right that is found in the trial-focused Sixth Amendment applied to pleas but the due process *Brady* right did not.").

128. Kansas v. Ventris, 556 U.S. 586, 590 (2009) (citing United States v. Wade, 388 U.S. 218, 224 (1967)). These critical stages or interactions include arraignments, *e.g.*, *Powell v. Alabama*, 287 U.S. 45, 57 (1932); post-indictment lineups, *e.g.*, *Wade*, 388 U.S. at 218; and post-indictment interrogations, *e.g.*, *Massiah v. United States*, 377 U.S. 201 (1964).

129. 377 U.S. at 201, 206.

130. *Id.* at 205 (internal quotations omitted) (quoting People v. Waterman, 175 N.E.2d 445, 448 (N.Y. 1961)).

131. *Id.* (internal quotations omitted) (quoting *Powell*, 287 U.S. at 57). According to the *Massiah* Court, this pretrial period is "when consultation, thorough-going investigation and preparation (are) vitally important." *Id.* (parenthesis in original) (internal quotations omitted) (quoting *Powell*, 287 U.S. at 57).

132. *See id.* at 204 (quoting Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)) ("[A] Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'").

inculpatory statements made during uncounseled interrogation are automatically deemed involuntary and must be excluded from trial.[133]

However, the *Massiah* Court left open when precisely the constitutional violation occurs—at the uncounseled interrogation or when the improperly obtained evidence is used against the defendant at trial.[134] In 2009, the Court confronted this question in *Kansas v. Ventris*, which concluded that the constitutional violation occurs at the time of the uncounseled interrogation.[135] The Court noted that the right to counsel is determined by "the usefulness of counsel to the accused at the particular [pretrial] proceeding."[136] Thus, the Court deemed it "illogical" to suggest that the constitutional right to counsel is not violated until evidence is introduced at trial because that is not when the deprivation of counsel assistance occurs.[137]

In conjunction, *Ventris* and *Massiah* hold that an indicted defendant's Sixth Amendment right to counsel is triggered by the pretrial "critical stage" in which counsel's advice would be most "helpful" or "useful" to the defendant.[138] This rule is equally applicable to the *Brady* context and aligns closely with Part V.A of this Note.[139] First, as proposed in Part V.A, the *Massiah* Court suggests that a criminal defendant's constitutional rights attach at the point of indictment, rather than the

133. *See id.* at 206–07 (stating that a "defendant's own incriminating statements, obtained by federal agents" who "deliberately elicited" the "incriminating words" during an interrogation—formal or informal—without the defendant's counsel present, "could not constitutionally be used by the prosecution as evidence against [the defendant] at [their] trial").

134. *See, e.g.*, Kansas v. Ventris, 556 U.S. 586, 591–92 (2009) (explaining that the *Massiah* opinion "indicat[ed] that the [constitutional] violation occurred at the moment of the postindictment interrogation . . . [b]ut the opinion later suggested that the violation occurred only when the improperly optioned evidence was 'used against [the defendant] at his trial.'")

135. *Id.* at 592.

136. *Id.* (alteration in original) (internal quotations omitted) (quoting Patterson v. Illinois, 487 U.S. 285, 298 (1988)).

137. *Id.* The *Ventris* Court emphasized that the defendant was deprived of the assistance of counsel "at the prior critical stage which produced the inculpatory evidence." *Id.* The Sixth Amendment right to counsel, governed by *Massiah*'s deliberate elicitation standard, differs from the Fifth Amendment right to counsel, governed by *Miranda*'s custodial-interrogation standard. Fellers v. United States, 540 U.S. 519, 524 (2004). The Sixth Amendment right to counsel attaches at the initiation of adversary judicial proceedings, with or without a specific request by defendant, and a violation occurs at the pre-trial moment when information is deliberately elicited from a defendant without counsel present. *Id.* at 523; *see also* Brewer v. Williams, 430 U.S. 387, 398 (1977) (citations omitted) (noting that the Sixth Amendment right to counsel is triggered "at or after the time that judicial proceedings have been initiated . . . '[including] by way of . . . indictment'").

138. *See Massiah*, 377 U.S. at 204–05 (citations omitted) (acknowledging that constitutional rights are at play from the time of arraignment up to trial because that pretrial period is "'the most critical stage of the proceedings'"); *see also Ventris*, 556 U.S. at 592 (citation omitted) (noting that the "'usefulness of counsel to the accused at the particular [pretrial] proceeding'" will determine whether the right to counsel exists) (alteration in original).

139. *See infra* Part V.A. The proposed *Ruiz* rule in Part V.A of this Note suggests that the *Ruiz* decision should be limited to impeachment information in the context of pre-indictment pleas.

commencement of trial.[140] Second, consistent with the "degree of help" standard in *Ruiz*, both *Ventris* and *Massiah* look to the degree of "usefulness" and "help" that a constitutional right can provide to a defendant to determine the existence of the "critical stage" that triggers constitutional protection.[141] The interrogation in *Massiah* was a "critical stage" because it subjected the defendant to potential incrimination through the use of his own statements.[142] Arguably, the plea stage is even more "critical" than an interrogation because a guilty plea results in an automatic guilty conviction and might lead to a permanent deprivation of liberty. Therefore, the Court should follow its holding in *Ventris* and find that a defendant's constitutional right to receive *Brady* evidence is violated at the pretrial moment of suppression, not simply when the government fails to disclose such evidence at trial.[143] Accordingly, just as a defendant's confession is automatically involuntary without the presence of counsel, a defendant's guilty plea should be equally involuntary without the disclosure of exculpatory evidence, and any subsequent plea should be constitutionally void.[144]

Consistent with this conclusion, in 2012, the Court extended the right to effective assistance of counsel to plea-bargaining.[145] In *Lafler* and *Frye*, the Court held that a defendant can challenge a guilty plea when counsel's ineffective assistance caused the defendant to reject a plea deal—or to let it expire—and inevitably receive a harsher penalty.[146] The Court concluded that the right to effective assistance of counsel applies to all "critical stages of the criminal proceeding" in which "defendants cannot be presumed to make critical decisions without counsel's advice."[147] A defendant's pretrial

140. *See Massiah*, 377 U.S. at 205 (quoting People v. Waterman, 175 N.E.2d 445, 448 (N.Y. 1961)) ("Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.").

141. *See id.* at 204 (quoting Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)) (stating that it is necessary to afford defendants their Sixth Amendment right to counsel at "the only stage when legal aid and advice would help [the defendant]"); *see also Ventris*, 556 U.S. at 592 (quoting Patterson v. Illinois, 487 U.S. 285, 298 (1988)) (noting that "'the usefulness of counsel to the accused at the particular [pretrial] proceeding" needs to be determined when analyzing "the stringency of the warnings necessary for a waiver of the assistance of counsel") (alteration in original).

142. *Id.* at 204–05.

143. *See supra* notes 136–39.

144. *See Massiah*, 377 U.S. at 206–07.

145. Lafler v. Cooper, 566 U.S. 156, 162 (2012); Missouri v. Frye, 566 U.S. 134, 144 (2012).

146. *Lafler,* 566 U.S. at 161; *Frye*, 566 U.S. at 139. In *Lafler*, defense counsel informed the defendant of the prosecutor's plea offer, which carried a four-to-seven-year sentence, but advised him to reject it. *Lafler,* 566 U.S. at 161. The defendant took his attorney's advice, went to trial, and was "convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment." *Id.* In *Frye*, the defense counsel did not inform the defendant about the prosecutor's two plea offers, including reducing the felony charge to a misdemeanor charge. *Frye*, 566 U.S. at 139. The offers expired, remaining unknown to the defendant, and resulted in the defendant later pleading guilty to a felony charge. *Id.*

147. *Lafler*, 566 U.S. at 165; *see also Frye*, 566 U.S. at 144 (quoting *Massiah*, 377 U.S. at 204) (explaining that "criminal defendants require effective counsel during plea negotiations;" otherwise, there is a risk of denying the defendant legal advice during the "only stage [the advice] would help").

decision of whether or not to plead guilty, according to the Court, constitutes one of these "critical decisions."[148] In recognizing that pleas account for nearly 97 percent of federal criminal convictions, the Court determined that "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[149] Finally, the Court noted that the benchmark for determining ineffective assistance is whether "counsel's conduct so undermined the proper functioning of the adversarial process" as to produce an unjust result.[150]

The Court's logic in *Lafler* and *Frye* is equally applicable to *Brady*'s exculpatory evidence. Just as a defendant cannot make the critical decision of whether to plead guilty without the competent advice of counsel, a defendant is equally deprived of this ability in the absence of exculpatory evidence.[151] Therefore, a prosecutor's *Brady* obligations should be held to the same standard, which is to ensure a proper functioning of the adversarial process and produce a just outcome. Neither of these goals can be accomplished without the disclosure of exculpatory evidence before a defendant makes the critical decision of whether to plead guilty. In accordance with its Sixth Amendment jurisprudence, the Court must extend the right to receive exculpatory evidence to the "critical point" of plea-bargaining.

VI. CONCLUSION

In a plea-dominated criminal justice system characterized by unequal bargaining power and vast prosecutorial discretion, justice cannot be measured by mere access to the courthouse doors.[152] In a country where 97 percent of criminal convictions result in a plea, the preceding plea-bargaining is the critical stage in which a defendant's liberty depends on the ability to prove his or her innocence. If *Brady* means anything, it means that there is no justification for withholding evidence before the door to the presumption of innocence is permanently closed. Modern jurisprudence compels the conclusion that the government must disclose exculpatory evidence at the plea-bargaining stage. Any rule to the contrary would be a blatant disregard of legal precedent, constitutional rights, and the values of the modern criminal justice system.

148. *See Lafler*, 566 U.S. at 165 ("The [Sixth Amendment] constitutional guarantee [to effective assistance of counsel] applies to pretrial critical stages that are part of the whole course of a criminal proceeding . . . ."); *see also Frye*, 566 U.S. at 140 ("Critical stages [of criminal proceedings] include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.") (internal citations omitted).

149. *Frye*, 566 U.S. at 143–44.

150. *Lafler*, 566 U.S. at 169 (internal quotations omitted) (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)).

151. *See* Petegorsky, *supra* note 124; *see also* Alvarez v. City of Brownsville, 904 F.3d 382, 410 (5th Cir. 2018) (Costa, J., dissenting).

152. The due process right to *Brady* disclosure is a product of the Court's "overriding concern with the justice of the finding of guilt." United States v. Agurs, 427 U.S. 97, 112 (1976) (footnote omitted). This concern is equally apparent in the pretrial context, since the negotiation of plea agreements is "no more foolproof than full trials to the court or to the jury." Brady v. United States, 373 U.S. 742, 757–58 (1970).