BRADY RIGHTS IN A SYSTEM OF PLEAS: ANALYZING THE NINTH CIRCUIT'S "APPARENT POSITION"

Laura Falk*

Brady v. Maryland *protects the due process rights of criminal defendants by requiring that prosecutors disclose material exculpatory evidence and impeachment evidence to the defense.* United States v. Ruiz *subsequently limited the scope of the* Brady *rule by holding that in the context of plea bargaining,* Brady *does not require prosecutors to disclose material impeachment evidence prior to entering a plea agreement. This led to a federal circuit split regarding whether* Brady *duties apply to material exculpatory evidence during plea bargaining or whether* Brady *is strictly a trial right. This Note first introduces* Brady *and its progeny and summarizes the current circuit split. Then, by analyzing case law, this Note argues that while the Ninth Circuit has never taken a direct stance in the circuit split, its position is that the government must disclose material exculpatory evidence prior to a defendant's entry of a guilty plea. Lastly, this Note examines ethical requirements and the Department of Justice's policy that already mandate prosecutors to do so in the Ninth Circuit. However, this Note argues that only a constitutional requirement to disclose exculpatory evidence will protect the rights of criminal defendants.*

TABLE OF CONTENTS

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* J.D. Candidate, 2025, University of Arizona James E. Rogers College of Law. I would like to thank Dean Jason Kreag, who provided advice and invaluable encouragement throughout the writing process. Thank you to Mom, Dad, Grandma, and Téva for always supporting me from near and far. Last, I want to express my appreciation to the editors on the *Arizona Law Review* who have dedicated significant time to editing and polishing my work.

INTRODUCTION

In *Brady v. Maryland*, the Supreme Court held that the suppression of material evidence by the prosecution violates a criminal defendant's due process rights.[1] However, *United States v. Ruiz* limited *Brady* by holding that prosecutors are not constitutionally required to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.[2] Impeachment evidence is any evidence that discredits or undermines the credibility of a witness.[3] On the other hand, exculpatory evidence is any statement that tends to excuse or justify the guilt of a defendant.[4] Some examples of exculpatory evidence include evidence that another person committed the crime (such as witness statements, confessions, and surveillance footage); physical evidence that casts doubt on the defendant's guilt; and evidence of police misconduct before, during, or after the defendant's arrest.[5] Whether *Ruiz*'s holding also applies to material exculpatory evidence is unresolved by the Supreme Court, and the Ninth Circuit does not have a clearly stated position.[6] This Note takes a deep dive into understanding what a Ninth Circuit criminal

1. Brady v. Maryland, 373 U.S. 83, 87 (1963).
2. United States v. Ruiz, 536 U.S. 622, 628 (2002).
3. *Impeachment of a Witness*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/impeachment_of_a_witness [https://perma.cc/U8UN-5H4C] (last visited Sept. 26, 2023).
4. *Exculpatory Evidence*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/exculpatory_evidence [https://perma.cc/37V5-LJ4Y] (last visited Sept. 26, 2023).
5. Brian Fishman, *What Are My Rights if Philadelphia Prosecutors Withhold Exculpatory Evidence?*, FISHMAN FIRM (July 1, 2022), https://www.thefishmanfirm.com/what-are-my-rights-if-philadelphia-prosecutors-withhold-exculpatory-evidence [https://perma.cc/88NP-QKTW].
6. *See infra* Part II.

defendant's rights are when the government fails to disclose material exculpatory evidence during plea negotiations.

In Part I of this Note, I introduce *Brady v. Maryland*, its development, and *Ruiz*'s limitation to when defendants can assert a *Brady* claim. In Part II, I provide an overview of the current federal circuit court split on whether *Ruiz*'s holding extends to material exculpatory evidence or only applies to material impeachment evidence. Next, in Part III, I analyze both pre- and post-*Ruiz* Ninth Circuit case law and ultimately conclude that if asked the question directly, the Ninth Circuit would apply *Brady* to prohibit the prosecution's withholding of material exculpatory evidence during plea bargaining. Then, I argue in Part IV that aside from case law supporting the pre-plea prosecutorial disclosure of material exculpatory evidence, existing ethics requirements and Department of Justice ("DOJ") policy make disclosure an expectation in the Ninth Circuit. Lastly, I explain how ethics requirements and DOJ policy alone do not go far enough in ensuring that defendants receive material exculpatory evidence prior to pleading guilty. For this to occur, the Ninth Circuit must view the pre-plea disclosure of exculpatory evidence as a constitutional right under *Brady*.

Focusing on *Brady* rights in the context of plea bargaining is highly relevant due to the prevalence of pleas in the federal criminal justice system. In 2009, 97% of federal convictions resulted from a guilty plea.[7] This percentage has risen sharply since November 1989, when the Supreme Court approved the U.S. Federal Sentencing Guidelines ("Guidelines").[8] One potential explanation for this increase is that the Guidelines constrain judges to mandatory minimum sentences, whereas before, judges had the ultimate discretion to determine a sentence.[9] Now, prosecutors have more influence to induce defendants to accept an offer to plead guilty to a crime that does not carry a mandatory minimum when alternative charges carry lengthy minimums.[10] The shift towards a "system of pleas, not a system of trials,"[11] represents a profound change in criminal justice because the disclosure of exculpatory evidence in the pre-plea phase can fundamentally alter the course of justice.

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7. Missouri v. Frye, 566 U.S. 134, 143 (2012). *See generally* RAM SUBRAMANIAN ET AL., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING (2020) (discussing various factors that influence plea bargaining, including the defendant's pretrial detention status; the possibility of the death penalty; the strength of evidence; the severity of charges; and the systemic inequities across race, ethnicity, gender, and age).

8. In 1989, 83.7% of federal cases ended in guilty or no-contest pleas. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html [https://perma.cc/4UJY-84XP].

9. Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3611 (2013).

10. *Id.*

11. Lafler v. Cooper, 566 U.S. 156, 170 (2012).

I. *BRADY* AND ITS DEVELOPMENT

A. The Brady *Rule*

In the landmark case *Brady v. Maryland*, the Supreme Court held that the prosecution's suppression of evidence favorable to a criminal defendant upon the defendant's request violates that individual's due process rights under the Fourteenth Amendment.[12] *Brady* applies to evidence that is material to the defendant's guilt or punishment, irrespective of the prosecution's good or bad faith failure to disclose it.[13] The ruling extended *Mooney v. Holohan*, decided nearly 30 years prior, which established that a prosecutor violates a criminal defendant's due process rights when presenting known perjured testimony to the court.[14] In *Brady*, the Court reasoned that the principle underlying *Mooney* was to avoid an unfair trial; thus, when the prosecution withholds evidence that would tend to exculpate the defendant or reduce his punishment, there is a similar risk of producing a trial that weighs heavily against the defendant.[15] Generally, the *Brady* decision focused heavily on the fairness of criminal trials, noting that "our system of the administration of justice suffers when any accused is treated unfairly."[16] In the following years, the Court clarified: (1) the type of information that prosecutors have the constitutional obligation to disclose,[17] (2) the instances in which prosecutors must disclose,[18] and (3) the meaning of "material."[19]

First, in *Giglio v. United States*, the Supreme Court held that the prosecution violates due process when it fails to disclose information about a witness's credibility that has a reasonable likelihood of affecting the jury's judgment.[20] While this case concerned an alleged promise of leniency to a witness in exchange for his testimony,[21] later cases have held that prosecutors must disclose any material evidence that may be used to impeach a key government witness.[22] This places both types of evidence—exculpatory and impeachment—under the scope of the *Brady* rule.

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12. 373 U.S. 83, 87 (1963); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").
13. 373 U.S. at 87.
14. *Id.* at 86; Mooney v. Holohan, 294 U.S. 103, 112 (1935).
15. *Brady*, 373 U.S. at 87–88.
16. *Id.* at 87.
17. Giglio v. United States, 405 U.S. 150, 154–55 (1972).
18. United States v. Agurs, 427 U.S. 97, 110 (1976).
19. United States v. Bagley, 473 U.S. 667, 682 (1985).
20. 405 U.S. at 154–55.
21. *Id.* at 151.
22. R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1434 (2011); Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (explaining one component of a *Brady* violation is failure to disclose evidence "favorable to the accused, either because it is exculpatory, or because it is impeaching").

Second, *United States v. Agurs*[23] extended the language in *Brady* that the prosecution must disclose evidence "upon request."[24] The Supreme Court held that if evidence so clearly supports a claim of innocence that it gives the prosecution "notice of a duty to produce,"[25] as a matter of fairness, the duty arises even if the defense has not made a request.[26]

Third, the Supreme Court has grappled with defining what evidence is "material" to guilt or punishment—a definition not provided in *Brady*.[27] Noting that the standard of materiality reflects the "overriding concern with the justice of the finding of guilt," the *Agurs* Court held that constitutional error occurs when the omitted evidence creates a reasonable doubt that would otherwise not exist.[28] In *United States v. Bagley*, the Court borrowed the language of *Strickland v. Washington*[29] to further refine the definition of material evidence: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[30] The *Bagley* standard is still applied in *Brady* analyses today.[31]

B. United States v. Ruiz*: Limitation to* Brady *in Plea Bargaining*

In *United States v. Ruiz*, defendant Ruiz refused the prosecutor's proposed plea agreement, which included a provision waiving her right to receive impeachment information relating to any informants or other witnesses.[32] Ruiz ultimately pleaded guilty without any plea agreement and appealed her sentence to the Ninth Circuit.[33] The Ninth Circuit vacated the district court's sentence, reasoning that the Constitution requires prosecutors to make certain impeachment information available to defendants before trial.[34]

On appeal, the Supreme Court reversed the Ninth Circuit's decision, holding that the Constitution does not require the government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.[35] The Court reasoned that while more information gives the defendant better awareness of the likely consequences of a plea, the Constitution does not require the prosecutor to share all useful information with the defendant.[36] At its

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23. 427 U.S. 97 (1976).
24. Brady v. Maryland, 373 U.S. 83, 87 (1963).
25. *Agurs*, 427 U.S. at 107.
26. *Id.* at 110.
27. LAURA L. HOOPER ET AL., FED. JUD. CTR., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES 2 (Oct. 2004).
28. 427 U.S. at 112.
29. 466 U.S. 668, 694 (1984) (holding there is ineffective assistance of counsel when there is a reasonable probability that but for the counsel's errors, the result of the proceeding would have been different).
30. United States v. Bagley, 473 U.S. 667, 682 (1985).
31. Petegorsky, *supra* note 9, at 3606.
32. 536 U.S. 622, 625 (2002).
33. *Id.* at 625–26.
34. *Id.* at 626.
35. *Id.* at 629.
36. *Id.*

core, impeachment information relates to the fairness of a trial, not whether a plea is voluntary.[37] The Court also noted that a constitutional obligation to provide impeachment information during plea bargaining could interfere with the government's interest in using guilty pleas to promote judicial efficiency.[38] In sum, the Court "definitively ruled out" the ability of defendants to assert *Brady* claims for the prosecution's failure to disclose impeachment information during plea bargaining.[39]

II. CURRENT CIRCUIT SPLIT

In *Ruiz*, the Supreme Court did not specify whether the *Brady* rule would still apply to disclosing material exculpatory evidence during plea bargaining. As such, a circuit split among the federal courts of appeals has burgeoned. Some circuits have held that *Ruiz* implies a broader rule that the government has no duty to disclose any *Brady* evidence during plea negotiations, while other circuits have limited *Ruiz* to impeachment evidence.[40]

The Supreme Court has not resolved the circuit split.[41] As the split has deepened and created geographical and jurisdictional disparities, the incidence of cases ending by plea has increased to even higher levels.[42] The Seventh and Tenth Circuits have suggested that the prosecution has the duty to disclose material exculpatory evidence pre-plea, while the First, Fourth, and Fifth Circuits have held that it does not.[43] This Part will further delve into the circuit split by giving an overview of key cases on each side.

A. Brady *Applies to Exculpatory Evidence in Plea Bargaining*

1. The Seventh Circuit

In dicta, the Seventh Circuit has suggested that a prosecutor's failure to disclose exculpatory evidence to a defendant before he enters a guilty plea violates

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37. *Id.*

38. *Id.* at 631–32 ("[The Ninth Circuit's requirement] could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages.").

39. Kyle Greene, *Circuit Split: Are Brady Claims Available for Defendants Who Plead Guilty When the Prosecution Withholds Materially Exculpatory Evidence?*, U. CIN. L. REV. BLOG (Oct. 31, 2018), https://uclawreview.org/2018/10/31/circuit-split-are-brady-claims-available-for-defendants-who-plead-guilty-when-the-prosecution-withholds-materially-exculpatory-evidence/ [perma.cc/ZU8H-5LUR].

40. Petegorsky, *supra* note 9, at 3625.

41. *See generally* Alvarez v. City of Brownsville, 904 F.3d 382 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2690 (2019); Mansfield v. Williamson Cnty., 30 F.4th 276 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 486 (2022).

42. Petition for Writ of Certiorari at 11–13, 28, Mansfield v. Williamson Cnty., 143 S. Ct. 486 (2022) (No. 22-186) ("If the split on the right to pre-plea *Brady* material persists, similarly situated defendants will continue to have different due-process rights depending on which jurisdiction they happen to be prosecuted in.").

43. Cameron Casey, *Lost Opportunity: Supreme Court Declines to Resolve Circuit Split on* Brady *Obligations During Plea-Bargaining*, 61 B.C. L. REV. E. SUPP. II. 73, 82–83 (2020).

due process.[44] In *McCann v. Mangialardi*, defendant McCann argued that a police officer violated his due process rights by failing to disclose before his guilty plea that the drugs the police found in his car on the day of his arrest were planted there without his knowledge.[45] As an indication that there is a significant distinction between impeachment information and exculpatory evidence of actual innocence,[46] the court pointed to *Ruiz*'s language that it is "particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty . . . ."[47]

However, the Seventh Circuit's commentary was not necessary to resolve the case because McCann did not present evidence that the officer knew about the drugs being planted in McCann's car prior to the entry of his guilty plea.[48] The Seventh Circuit has yet to take a definitive stance, noting just two years ago that it has "suggested, but not held, that a plea agreement might not be voluntary if the defendant waived the right . . . to receive 'exculpatory evidence' of actual guilt before pleading guilty."[49]

2. The Tenth Circuit

The Tenth Circuit has taken the stance that even after *Ruiz*, *Brady* includes the right to pre-plea exculpatory evidence. In *United States v. Ohiri*, defendant Ohiri pleaded guilty to knowingly "causing the storage" of hazardous waste in violation of the Resources and Conservation Recovery Act without knowledge of his co-defendant's Acceptance of Responsibility.[50] In his habeas petition,[51] Ohiri alleged a *Brady* violation, arguing that had he known of his co-defendant's statements, he would not have entered a guilty plea.[52]

The Tenth Circuit reversed the district court's conclusion that *Ruiz* foreclosed Ohiri's ability to establish a *Brady* violation.[53] The court reasoned that Ohiri's case differed from *Ruiz* in that the evidence the prosecution withheld was exculpatory—not just for impeachment.[54] Further, since Ohiri's plea agreement was

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44. McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003).
45. *Id.* at 787.
46. *Id.* at 788.
47. United States v. Ruiz, 536 U.S. 622, 630 (2002).
48. *Mangialardi*, 337 F.3d at 788.
49. United States v. Bridgewater, 995 F.3d 591, 598 (7th Cir. 2021).
50. 133 Fed. App'x 555, 561 (10th Cir. 2005). Acceptance of Responsibility statements come from a provision in the Guidelines that allows for a reduction in the offender's sentence if he takes responsibility for his actions. This can be done by admitting to the conduct, withdrawing from criminal associations, assisting the authorities, and undertaking "other conduct that shows an intention to change . . . in a timely manner." Stechschulte Nell, *Acceptance of Responsibility*, STECHSCHULTE NELL ATT'YS AT L. (Apr. 20, 2021), https://www.tpatrialattorneys.com/acceptance-of-responsibility-2/ [https://perma.cc/5P86-3L9S].
51. A habeas corpus petition is a civil action filed by a prisoner that alleges his imprisonment is illegal because the arrest, trial, or sentence violated the Constitution. COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER'S MANUAL 262 (12th ed. 2020).
52. *Ohiri*, 133 Fed. App'x at 561.
53. *Id.* at 562.
54. *Id.*

executed on the day that jury selection was set to begin, rather than before indictment, as was the case in *Ruiz*, the government should have disclosed any exculpatory information it was aware of by that time.[55] However, *Ohiri* is unpublished, so it has no precedential value.[56] As a result, district courts within the Tenth Circuit are even further divided.[57]

B. Brady *Is Never Applicable During Plea Bargaining*

1. The First Circuit

The First Circuit has categorized *Brady* as a trial right that does not extend to any evidence, whether exculpatory or impeachment, to the plea-bargaining process. In *United States v. Mathur*, the court categorized the animating principle of *Brady* as the avoidance of an unfair trial, and it reasoned that when a defendant chooses to admit his guilt, there are no longer *Brady* concerns.[58] The court went as far as calling the application of *Brady* during plea bargaining an "unprecedented expansion."[59]

2. The Fourth Circuit

Like the First Circuit, the Fourth Circuit has suggested that there is no basis for a defendant to assert a *Brady* claim after a guilty plea. In *Jones v. Cooper*, defendant Jones argued that the government violated *Brady* by failing to turn over material exculpatory information of a jail log and a jailor's identity.[60] The court rejected this argument, reasoning that the jail log and the jailor's identity were not material.[61] However, in a footnote, the court added that even if Jones had argued that he would not have pleaded guilty if the prosecution had provided the jail log, the claim would have been foreclosed by *Ruiz*.[62]

Next, in *United States v. Moussaoui*, the court did not resolve whether *Jones* definitively ruled out *Brady* claims for exculpatory evidence in the plea context.[63] Nonetheless, the court suggested opposition to any *Brady* claims arising out of the plea-bargaining process by emphasizing that a key *Brady* concern of an innocent person being found guilty is almost eliminated when that person chooses to plead guilty.[64]

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55. *Id.* ("[T]he 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.").

56. 10th Cir. R. 32.1(A).

57. *See, e.g.*, Ankeney v. Jones, No. 12-cv-00808-LTB, 2012 U.S. Dist. LEXIS 137545, at *17–18 (D. Colo. Sept. 25, 2012) ("Mr. Ankeney's reliance on the Tenth Circuit's decision in *Ohiri* is misplaced because the Tenth Circuit's decision in *Ohiri* . . . does not constitute clearly established federal law.").

58. 624 F.3d 498, 507 (1st Cir. 2010).

59. *Id.*

60. Jones v. Cooper, 311 F.3d 306, 314 (4th Cir. 2002).

61. *Id.* at 315.

62. *Id.* at 315 n.5.

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

64. *Id.* at 285.

3. The Fifth Circuit

Perhaps the Fifth Circuit has been the firmest in holding that *Brady* never applies during plea bargaining. Even before *Ruiz*, the court held that because *Brady* is concerned with how undisclosed information impacted the jury's assessment of the defendant's guilt, the prosecution's failure to disclose exculpatory information to a defendant pleading guilty is not a constitutional violation.[65] After *Ruiz*, the court revisited the issue and came to the same conclusion.[66] Criminal defendants have tried, to no avail, to persuade the Fifth Circuit to overrule this precedent. Twice within the last five years, the Supreme Court has denied certiorari to appeals from Fifth Circuit cases where the court held that there is no constitutional right to *Brady* material prior to a guilty plea.[67] Both of these cases invited interesting opinions from Judge Gregg Costa, who argued that due process rights are not usually limited to trials and should not be in the *Brady* context, either.[68]

The first of these two cases, *Alvarez v. City of Brownsville*,[69] came after the Texas Court of Criminal Appeals concluded that defendant Alvarez was "actually innocent" of committing an assault against a police officer after videos of the altercation surfaced during discovery for an unrelated case.[70] Alvarez then filed a Section 1983 claim[71] against the City of Brownsville, asserting, among other things, that the Brownsville Police Department's nondisclosure of the videos constituted a *Brady* violation.[72] The Fifth Circuit dismissed Alvarez's action, reasoning that prior case law does not establish that defendants have a constitutional right to *Brady* material during the plea bargaining process, and the court was unwilling to "disturb this circuit's settled precedent."[73]

In his dissent, Judge Costa articulated many reasons for disagreeing with the majority. Among his points was the argument that while *Brady* is often characterized as a "trial right," due process rights are usually not limited to trials, and other due process rights—such as the requirement that a plea be knowing and voluntary—apply at plea hearings.[74] Generally, no other Fifth Amendment rights—including protections against self-incrimination, takings, double jeopardy, and being charged without a grand jury indictment—are limited to the trial context, which

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

66. United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009).

67. Alvarez v. City of Brownsville, 904 F.3d 382, 392 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2690 (2019); Mansfield v. Williamson Cnty., 30 F.4th 276, 280–81 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 486 (2022).

68. One of these is a dissent, and the other is a special concurrence. *See Alvarez*, 904 F.3d at 406 (Costa, J., dissenting); *Mansfield*, 30 F.4th at 282 (5th Cir. 2022) (Costa, J., specially concurring).

69. 904 F.3d 382 (5th Cir. 2018).

70. *Id.* at 388.

71. Under 42 U.S.C. § 1983, people can sue certain government entities and their employees for violation of a federally protected civil right. *What Are the Elements of a Section 1983 Claim?*, THOMSON REUTERS (June 13, 2022), https://legal.thomsonreuters.com/blog/what-are-the-elements-of-a-section-1983-claim/ [https://perma.cc/H37H-HV9Z].

72. *Alvarez*, 904 F.3d at 388.

73. *Id.* at 394.

74. *Id.* at 407–08 (Costa, J., dissenting).

further supports requiring prosecutors to disclose exculpatory evidence during plea bargaining.[75]

Next, Judge Costa analogized *Brady* claims to ineffective assistance of counsel claims. When a defendant pleads guilty, he can later undo that plea if he can show that ineffective counsel caused him to plea instead of proceeding to trial.[76] However, the Fifth Circuit's majority view is that by pleading guilty, the defendant implicitly waives a right to obtain evidence that would undermine his guilt.[77] Because the Supreme Court has rejected the idea that a plea is equivalent to a waiver in the context of ineffective assistance claims, there is no reason why the same cannot be said in the *Brady* context.[78] Despite many jurisdictions' unclear disclosure obligations, which leave defendants with "ambiguous rights,"[79] the Supreme Court denied Alvarez's writ of certiorari.[80]

Just four years later, the Fifth Circuit yet again addressed the issue in *Mansfield v. Williamson County*, a Section 1983 claim stemming from prosecutors' failure to tell defendant Mansfield about the victim's contradictory statements during plea bargaining.[81] The court held, consistent with *Alvarez*, that *Brady* focuses on the integrity of trial and does not reach guilty pleas.[82]

Judge Costa disagreed with the case's outcome, calling it "yet another injustice" resulting from the circuit's "mistaken view" of *Brady*.[83] He cited his dissent in *Alvarez* to explain why the majority was incorrect, and he added the point that one of the cases *Brady* relied on was, in fact, a case involving the suppression of exculpatory evidence before the defendant pleaded guilty to murder.[84] In his writ for certiorari, Mansfield raised the importance of resolving the circuit split once and for all, noting that depending on the jurisdiction they are prosecuted in, defendants have different due process rights.[85] The Supreme Court denied his petition.[86]

III. NINTH CIRCUIT CASE LAW ANALYSIS

This Part starts with a case illustration of *Poulos v. City of Los Angeles*,[87] a case where the District Court for the Central District of California concluded that the Ninth Circuit's "apparent position" is that the Constitution requires the

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75. *Id.* at 408.
76. *Id.*; Hill v. Lockhart, 474 U.S. 52, 56–57 (1985).
77. *Alvarez*, 904 F.3d at 408 (Costa, J., dissenting).
78. *Id.* at 409.
79. Petition for Writ of Certiorari at 18, Alvarez v. City of Brownsville, 139 S. Ct. 2690 (2019) (No. 16-40772).
80. Alvarez v. City of Brownsville, 139 S. Ct. 2690 (2019).
81. 30 F.4th 276, 277 (5th Cir. 2022).
82. *Id.* at 280–81.
83. *Id.* at 282–83 (Costa, J., specially concurring).
84. *Id.* at 283. *See generally* Wilde v. Wyoming, 362 U.S. 607 (1960).
85. Petition for Writ of Certiorari at 28, Mansfield v. Williamson Cnty., 143 S. Ct. 486 (2022) (No. 22-186).
86. Mansfield v. Williamson Cnty., 143 S. Ct. 486 (2022).
87. No. CV 19-496-MWF, 2022 U.S. Dist. LEXIS 212706, at *21 (C.D. Cal. Sept. 30, 2022).

government to disclose exculpatory evidence during plea bargaining.[88] The rest of this Part analyzes the accuracy of that claim by looking at a chronology of Ninth Circuit case law from both before and after *Ruiz*. Ultimately, I conclude that *Poulos* is correct: the Ninth Circuit would likely hold that *Ruiz* does not preclude a defendant from raising a *Brady* claim post-plea for the government's failure to disclose exculpatory evidence.

A. The June Patti Story

June Patti had a history of making false statements that prosecutors relied on to wrongfully convict innocent defendants.[89] First, in 1998, Susan Mellen was wrongfully convicted for the first-degree murder of Richard Daly and sentenced to life without parole.[90] While the State of California offered ten witnesses against Mellen,[91] her conviction was primarily grounded in the false testimony of June Patti, who claimed that Mellen had confessed to her participation in the murder.[92] During the investigation, Detective Marcella Winn called June Patti's sister Laura Patti, a police officer for the City of Torrance, California, to ask about June.[93] Despite Laura Patti stating that her sister was a "habitual liar" who was "known to make false accusations," Winn pursued the prosecution of Mellen based on June's testimony.[94] Mellen secured habeas relief and was exonerated in October 2014 after being wrongfully imprisoned for 17 years.[95]

In an unrelated matter in March 2001, June Patti called Los Angeles Deputy District Attorney Valerie Cole and alleged that Michelle Poulos, a woman whose former boyfriend was living with June Patti,[96] had called her and made the threat, "I am going to slit your throat and kill your father and sister."[97] Cole turned the crime report over to Winn, who, after conducting a more thorough investigation, discovered June Patti's story had changed in multiple ways, including the

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88. *Id.* at *19; *see infra* Section III.A.

89. While June Patti was living in northwest Washington State in the 1990s, she was involved in more than 2,000 police calls in Skagit County. Corina Knoll, *Great Read: Witness' Dubious History Puts a 16-year-old Murder Conviction in Doubt*, L.A. TIMES (Sept. 30, 2014, 3:00 AM), https://www.latimes.com/local/great-reads/la-me-c1-murder-conviction-doubts-20140930-story.html [https://perma.cc/P55F-SF5V]. The Skagit County Public Defender's Office even kept a document called "the June Patti brief" that cast doubt on the credibility of her observations. The office referred to it whenever her name was mentioned in a case. *Id.*

90. Maurice Possley, *Susan Mellen: Other California Cases with Female Exonerees*, NAT'L REGISTRY OF EXONERATIONS (Oct. 10, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4507 [https://perma.cc/C7JQ-FTW2].

91. *Poulos*, 2022 U.S. Dist. LEXIS 212706, at *21.

92. Mellen v. Winn, 900 F.3d 1085, 1088–89 (9th Cir. 2018).

93. *Poulos*, 2022 U.S. Dist. LEXIS 212706, at *4–5.

94. *Id.*

95. Possley, *supra* note 90.

96. Maurice Possley, *Michelle Poulos: Other California Exonerations Where No Crime Actually Occurred*, NAT'L REGISTRY OF EXONERATIONS (Feb. 28, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5105 [https://perma.cc/U6BX-R4WE].

97. *Poulos*, 2022 U.S. Dist. LEXIS 212706, at *6.

originating telephone number and location of the call.[98] Nonetheless, the Los Angeles County District Attorney's Office filed criminal charges against Poulos for willfully and unlawfully threatening to commit a crime that would result in death and great bodily injury to June Patti.[99] In June 2001, Michelle Poulos pleaded guilty and was sentenced to two years of probation.[100] In September 2002, after being arrested on a drug possession charge, Poulos's probation was revoked, and she was sentenced to two years in prison.[101] However, but for the first conviction, California law would have mandated that she be sentenced to probation with a drug treatment program, rather than to incarceration.[102]

In 2013, Innocence Matters, a Los Angeles-based nonprofit organization that investigates wrongful convictions, began reviewing the Mellen case.[103] When Poulos learned of Mellen's exoneration, she contacted the organization for help, informing them that she had never threatened June Patti.[104] Dierdre O'Connor, Executive Director of Innocence Matters, filed a motion to vacate Poulos's conviction, citing June Patti's history of false testimony.[105] By October 2017, the Superior Court of Los Angeles County granted Poulos a certificate of innocence.[106] She then brought a civil action against Winn, claiming, among other things, that Winn deliberately suppressed evidence relating to Laura Patti's 1997 warning regarding her sister's credibility ("Laura Claim").[107] Winn argued that *Ruiz* barred Poulos's claim.[108]

The District Court for the Central District of California concluded that *Ruiz* did not bar the Laura Claim because it was not just impeachment evidence but critical exculpatory evidence.[109] In its analysis, the court discussed the split among the federal circuits on whether a criminal defendant may assert a *Brady* claim based on the government's failure to disclose material exculpatory evidence prior to the defendant entering a guilty plea.[110] While acknowledging that "the Ninth Circuit has not directly addressed the issue," in one brief paragraph, the court concluded that

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98. *Id.* at *6–8.
99. *Id.* at *9–10.
100. Possley, *supra* note 96.
101. *Id.*
102. *Poulos*, 2022 U.S. Dist. LEXIS 212706, at *10.
103. Possley, *supra* note 96.
104. *Id.*
105. Larry Altman, *False Convictions Unite South Bay Women in Torrance Court*, DAILY BREEZE (Oct. 11, 2017, 8:20 PM), https://www.dailybreeze.com/2017/10/11/false-convictions-unite-south-bay-women-in-torrance-court/ [https://perma.cc/QCM8-KXJX]. O'Connor's motion summarized 28 fabricated allegations June Patti made to the police between 1990 and 2000, including accusing people of drug possession, child molestation, money laundering, threatening her with a gun, theft, and claiming children were left home without adult supervision.
106. Possley, *supra* note 96.
107. *Poulos*, 2022 U.S. Dist. LEXIS 212706, at *11.
108. *Id.* at *2.
109. *Id.* at *17.
110. *Id.* at *18; *see supra* Part II.

the Ninth Circuit's "apparent position" is that the Constitution requires the government to disclose exculpatory *Brady* evidence during plea bargaining.[111]

The rest of this Part analyzes both pre- and post-*Ruiz* Ninth Circuit case law. Using a voluntariness analysis, the Ninth Circuit has consistently held that criminal defendants have broad rights prior to entering a guilty plea.[112] But, as *Poulos* noted,[113] the court has never directly stated that *Brady* extends to the disclosure of pre-plea material exculpatory evidence. However, precedent supports *Poulos*'s conclusion: the Ninth Circuit would likely follow the Seventh and Tenth Circuits[114] and hold that *Ruiz* does not bar defendants from raising a *Brady* claim for the government's failure to disclose exculpatory evidence prior to entering a guilty plea.

*B. Pre-*Ruiz*: Broader Pre-Plea Disclosure Requirements*

In *Sanchez v. United States*, the Ninth Circuit held that a defendant may assert a *Brady* claim to challenge the voluntariness of his guilty plea on the basis that without the knowledge of material information withheld by the prosecutor, his waiver was not intelligent and voluntary.[115] The court elaborated that while the usual standard of materiality comes from *Bagley*,[116] in instances where there is a guilty plea, the standard is whether, but for the failure to disclose the evidence, there is a "reasonable probability . . . the defendant would have refused to plead and would have gone to trial."[117] This test borrows its language from cases dealing with ineffective assistance of counsel,[118] and is an objective test that emphasizes how persuasive the withheld information would have been in the defendant's decision-making.[119] The court also reasoned that without the defendant's ability to raise a *Brady* claim after pleading guilty, prosecutors may be induced to purposely withhold exculpatory information to elicit guilty pleas.[120]

Additionally, in its later-overruled *Ruiz* decision, the Ninth Circuit held that a defendant cannot intelligently and voluntarily enter into a plea agreement that waives the right to receive *Brady* information if the defendant entered it without knowledge of withheld material information.[121] The court clarified that *Sanchez* applies both to material exculpatory and impeachment evidence, reasoning that there is no reason to allow prosecutors to withhold impeachment evidence that could

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111. *Poulos*, 2022 U.S. Dist. LEXIS 212706, at *19.
112. *See infra* Section III.B.
113. *Poulos*, 2022 U.S. Dist. LEXIS 212706, at *19.
114. *See supra* Section II.A.
115. 50 F.3d 1448, 1453 (9th Cir. 1995).
116. *See supra* Section I.A.
117. *Sanchez*, 50 F.3d at 1454 (citing Miller v. Angliker, 848 F.2d 1312, 1322 (2d Cir. 1988)).
118. John G. Douglass, *Can Prosecutors Bluff?* Brady v. Maryland *and Plea Bargaining*, 57 CASE W. RSVR. L. REV. 581, 585 (2007); *see also* Hill v. Lockhart, 474 U.S. 52, 59 (1985) ("[T]he defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").
119. *Sanchez*, 50 F.3d at 1454.
120. *Id.* at 1453.
121. United States v. Ruiz, 241 F.3d 1157, 1164 (9th Cir. 2001).

create a reasonable probability of the defendant rejecting the plea agreement.[122] The Supreme Court rejected the notion that the Constitution requires the government to disclose impeachment evidence prior to entering a plea agreement,[123] thereby limiting the Ninth Circuit's "defendant-friendly"[124] interpretation of *Brady*.

*C. Post-*Ruiz*: Where Did the Ninth Circuit Go?*

In the *Ruiz* oral arguments before the Supreme Court, Justice Ginsburg asked the U.S. Solicitor General why he was addressing "any information establishing the factual innocence of the defendant" (exculpatory evidence) and not just impeaching material.[125] Since the government had already purported to have turned over the exculpatory evidence to defendant Ruiz, she questioned why this was not a moot issue.[126] The Solicitor General responded that the Ninth Circuit made it clear that its disclosure rule in *Sanchez* and *Ruiz* applied to all exculpatory material; therefore, if the Supreme Court limited its decision to impeaching material, the government would have to return to the Court the next year to argue the exculpatory evidence issue anyways.[127]

The Supreme Court did not revisit the issue in the next year, or even the next 20 years, but the question remains: does the Ninth Circuit allow *Brady* claims post-guilty plea for the prosecutor's failure to disclose material exculpatory evidence? District courts within the Ninth Circuit are divided on whether the *Sanchez* voluntariness analysis is still applicable, or if *Ruiz* put an end to all *Brady* claims in the plea-bargaining context.[128] However, the Ninth Circuit has implicitly held that *Ruiz* does not limit all post-plea *Brady* claims.

1. Minore *and* Villalobos*: A Narrow Reading of* Ruiz

Just eight days before the Supreme Court issued *Ruiz*, the Ninth Circuit decided *United States v. Minore*.[129] In *Minore*, defendant Minore challenged the validity of his conviction after the district court did not advise him that had he gone to trial, the government would be required to prove to the jury the amount of

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122. *Id.* at 1166 ("[N]othing in *Sanchez* suggests that only exculpatory evidence must be disclosed before the entry of a guilty plea. . . . Nor would such a distinction make much sense.").

123. United States v. Ruiz, 536 U.S. 622, 633 (2002).

124. Petegorsky, *supra* note 9, at 3621.

125. Transcript of Oral Argument at 5, United States v. Ruiz, 536 U.S. 622 (2002) (No. 01-595).

126. *Id.*

127. *Id.* at 5–6.

128. *Compare* Clark v. Lewis, No. 2:12-cv-2687 TLN GGH, 2014 U.S. Dist. LEXIS 58246, at *23 (E.D. Cal. Apr. 23, 2014) ("Although the Ninth Circuit previously held that a *Brady* claim could be asserted to attack the voluntariness of the plea, the Supreme Court has since held otherwise."), *and* United States v. Wilson, No. 2:08-cr-00114 TLN DB, 2017 U.S. Dist. LEXIS 212182, at *13–14 (E.D. Cal. Dec. 26, 2017) (holding that *Ruiz* applies equally to exculpatory evidence), *with* Moore v. Adduci, No. CV 11-9135-GW, 2012 U.S. Dist. LEXIS 188273, at *38–40 (C.D. Cal. Nov. 13, 2012) (still using *Sanchez* in its analysis), *and* Wright v. Dir. of Corr., No. CV 12-1728-JEM, 2013 U.S. Dist. LEXIS 172345, at *24 (C.D. Cal. Dec. 6, 2013) (same).

129. 292 F.3d 1109 (9th Cir. 2002).

marijuana involved in his offense beyond a reasonable doubt.[130] The Ninth Circuit held that due process requires that the defendant is informed of the critical elements of his offense, which does not necessarily include a description of every element.[131] An element is critical, however, when its existence exposes the defendant to a higher statutory maximum sentence.[132]

Next, in *United States v. Villalobos*, defendant Villalobos moved to withdraw his guilty plea in a drug offense, arguing that his plea was not knowing, intelligent, and voluntary because, between his plea and sentencing, a Supreme Court case[133] had changed the government's burden of proof as to drug quantity.[134] The court followed *Minore* and reasoned that because the drug quantity exposed him to a higher maximum sentence than he would otherwise face, it was a critical element of which he must be adequately informed before a judge could accept a guilty plea.[135]

In his dissent, Judge Gould argued that *Ruiz* undermines *Minore*.[136] He reasoned that being unable to properly evaluate the risks of entering the plea agreement—the "form of ignorance" alleged by Villalobos—is indistinguishable from Ruiz's ignorance about the information the prosecutors had, which could have been used to impeach a witness at trial.[137] Judge Gould emphasized *Ruiz*'s point that a waiver can be voluntary—knowing, intelligent, and sufficiently aware—even if the defendant does not understand all the consequences of invoking it.[138] Thus, he concluded that Villalobos's general knowledge about how the waiver of proof of drug quantity applied was sufficient to demonstrate that his plea was voluntary.[139]

In a footnote, the majority opinion addresses Judge Gould's dissent, distinguishing the case's facts from those in *Ruiz*.[140] *Ruiz* concerned evidence that could have been adduced at trial to satisfy the government's burden of proof—not evidence related to the voluntariness of the defendant's plea.[141] On the other hand, *Villalobos* concerned evidence that went directly to the nature of the charge against the defendant and the plea's voluntariness, and thus can be characterized as "critical information" as defined in *Minore*.[142] Further, the Ninth Circuit implicitly recognized that *Ruiz* did not undermine *Minore* by denying to rehear *Minore* after *Ruiz* was issued.[143]

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130. *Id.* at 1114–15.
131. *Id.* at 1115.
132. *Id.* at 1117.
133. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).
134. United States v. Villalobos, 333 F.3d 1070, 1072 (9th Cir. 2003).
135. *Id.* at 1074.
136. *Id.* at 1076 (Gould, J., dissenting).
137. *Id.* at 1077.
138. *Id.*
139. *Id.* at 1077–78.
140. *Id.* at 1075 n.6.
141. *Id.*
142. *Id.*
143. *Id.*

While *Villalobos* does not specifically address exculpatory evidence, the court's refusal to extend *Ruiz* to the defendant's lack of information about a critical element of the charged offense suggests that the Ninth Circuit reads *Ruiz* narrowly.

2. Baldwin *and Beyond*

In *Smith v. Baldwin*, the Ninth Circuit applied a voluntariness analysis, without mention of *Ruiz*, to a *Brady* claim after defendant Smith pleaded no contest to felony murder and first-degree robbery.[144] In this case, Smith's co-defendant, Edmonds, told the police that Smith had killed the victim.[145] The prosecution offered Edmonds a plea deal contingent on him passing a polygraph examination.[146] Although the exam results were inconclusive, he entered the plea deal in exchange for testimony against Smith.[147] After Smith entered a no-contest plea, Edmonds changed his story to say that Smith did not kill the victim.[148] In a federal habeas petition, Smith raised a *Brady* claim based on the prosecution's failure to disclose Edmond's exam results upon his request.[149]

The court borrowed *Sanchez*'s language and analyzed the probability that but for the government's failure to disclose the information, Smith would have refused to plead no contest and gone to trial.[150] Smith's claim failed because the polygraph results did not qualify as material evidence, so he could not show prejudice based on the prosecution's delay in revealing them.[151] Important to note is that the court did not outright bar Smith's claim on the basis that *Brady* does not apply to a no-contest plea. The court's analysis implies that even after *Ruiz*, the government has a duty to disclose material exculpatory evidence pre-plea. The Supreme Court denied hearing *Smith* on appeal.[152] While this does not mean the Supreme Court approves of the holding, it does indicate that at least some of the justices "did not disapprove, or did not doubt, the correctness of the ruling."[153]

Subsequent unpublished Ninth Circuit decisions continue to analyze post-plea *Brady* claims without mention of *Ruiz*.[154] One decision goes as far as to do a

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144. Smith v. Baldwin, 510 F.3d 1127, 1148 (9th Cir. 2007).

145. *Id.* at 1130.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1136.

150. *Id.* at 1148.

151. The results of Edmond's polygraph examination did not qualify as "evidence" for *Brady* purposes because, in the Linn County Circuit Court, where the case was first tried, the results of polygraph examinations are inadmissible. Therefore, even if the polygraph results had been immediately disclosed to Smith, it is not reasonably likely that they would have influenced his decision to plead no contest rather than proceed to trial because at trial, he would not have been able to mention them. *Id.*

152. Smith v. Mills, 555 U.S. 830 (2008).

153. Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1283 (1979) (quoting Kraft Foods Cos. v. Commodity Credit Corp., 266 F.2d 254, 263 (7th Cir. 1959)).

154. *See, e.g.*, United States v. Delemus, 828 F. App'x 380, 381–82 (9th Cir. 2020) (applying a *Sanchez* voluntariness analysis on the defendant's post-plea *Brady* claim for the government's failure to disclose exculpatory evidence).

Brady analysis on a defendant's motion to vacate his guilty plea due to withheld impeachment evidence.[155] But perhaps the strongest evidence that the Ninth Circuit does not read *Ruiz* to limit all *Brady* claims in the plea-bargaining context is the language in *United States v. Lucas*, which is binding precedent.[156] Here, when laying out the *Brady* rule, the court wrote that a reasonable probability of materiality for *Brady* purposes is sufficient to undermine confidence in the outcome of "either the defendant's guilty plea *or* trial."[157] The addition of the words "guilty plea" to the direct quote from *Bagley*[158] would be unnecessary if the Ninth Circuit took the stance that *Brady* claims are limited to the trial context.

In conclusion, it is true that the court has not directly addressed what side of the *Ruiz* split it falls on,[159] but its stance can be inferred from the following two decades of case law. First, in *Minore* and *Villalobos*, the court read *Ruiz* narrowly by refusing to extend its holding to the defendants' lack of information about critical elements of the charges to which they had pleaded guilty. Second, in *Baldwin* and its progeny, the court has applied a voluntariness analysis, without mention of *Ruiz*, to the defendants' post-guilty plea *Brady* claims. Therefore, *Poulos*'s conclusion that the Ninth Circuit requires the government to disclose *Brady* evidence prior to a defendant's entry of a guilty plea is correct.[160]

IV. NINTH CIRCUIT EXPECTATIONS: ETHICS AND DOJ POLICY

Due to ethical standards and DOJ policy, pre-plea disclosure of exculpatory evidence is already an expectation across the Ninth Circuit. Accordingly, this Part explores non-constitutional sources that oblige prosecutors to disclose exculpatory evidence to defendants during plea deal negotiations. However, these sources do not provide defendants with sufficient recourse for situations where this does not occur: first, DOJ policies do not create legally enforceable rights; and second, if a prosecutor violates ethical guidelines, disciplinary action is rarely taken. The only way for the Ninth Circuit to adequately protect defendants is to recognize a constitutional right under *Brady* to receive material exculpatory evidence prior to pleading guilty.

A. DOJ Policy

The DOJ Manual ("Manual"), prepared under the supervision of the Attorney General and revised by the Executive Office for United States Attorneys, provides internal DOJ guidance.[161] Its policy regarding disclosure of exculpatory

155. Marr v. United States, 585 F. App'x 438, 438 (9th Cir. 2014). *But see* United States v. Harshman, No. 19-35131 2021, U.S. App. LEXIS 26496, at *7 (9th Cir. Sept. 2, 2021) (Nelson, J., concurring) (noting that the court's post-*Ruiz* precedent that holds that the government must disclose material evidence, whether impeachment or exculpatory, prior to a defendant's entry of a guilty plea "seem[s] inconsistent" with *Ruiz*).

156. *See* 841 F.3d 796 (9th Cir. 2016).

157. *Id.* at 807 (emphasis added).

158. 473 U.S. 667, 682 (1985) ("A 'reasonable probability' is a probability sufficient to undermine the confidence in the outcome [of the proceeding].").

159. *See supra* Part II.

160. Poulos v. City of L.A., No. CV 19-496-MWF, 2022 U.S. Dist. LEXIS 212706, at *19 (C.D. Cal. Sept. 30, 2022).

161. U.S. Dep't of Just., Just. Manual § 1-1.200 (2024).

and impeachment information, which is intended to "ensure timely disclosure of an appropriate scope,"[162] demonstrates a preference for early disclosure. This policy kicks in at the very beginning of a criminal prosecution, as the Manual requires that when a prosecutor conducting a grand jury inquiry is aware of "substantial" exculpatory evidence, he must disclose it before seeking an indictment.[163]

Next, the Manual advises that exculpatory information must be disclosed "reasonably promptly after it is discovered"[164] to give the defendant sufficient time to use it effectively at trial.[165] While the Manual explicitly states that its policy does not create a general discovery right for plea negotiations,[166] its preference for early disclosure would presumably enable a defendant to make a more informed choice of whether to plead guilty or proceed to trial in the first place.

Additionally, the Manual instructs prosecutors to become familiar with controlling case law governing disclosure obligations at various stages of litigation.[167] While jurisdictions vary, of the 37 districts that address the *Brady* decision in disclosure rules, orders, and procedures,[168] at least 19 require the disclosure of *Brady* material within 14 days of arraignment or less. This is almost always before a defendant enters a guilty plea.[169]

Last, the Manual sets its disclosure obligations as a floor, rather than a ceiling. It encourages prosecutors to provide broader and more comprehensive discovery than required to promote the DOJ's "truth-seeking mission" and the speedy resolution of cases.[170]

B. Ethical Requirements

1. ABA Model Rule 3.8(d)

Some prosecutorial obligations are guided by ethical rules. The American Bar Association ("ABA") has imposed duties on prosecutors to disclose exculpatory evidence as far back as its 1908 Canons of Professional Ethics, which stated that the suppression of facts "capable of establishing the innocence of the accused" is "highly reprehensible."[171] Since the ABA adopted the Model Rules of Professional

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162. U.S. Dep't of Just., Just. Manual § 9-5.001(A) (2020).

163. *Id.* § 9-11.233.

164. *Id.* § 9-5.001(D)(1); Brief of Former Federal and State Judges as Amici Curiae in Support of Petitioner at 16, Mansfield v. Williamson Cnty., 142 S. Ct. 486 (2022) (No. 22-186).

165. U.S. Dep't of Just., Just. Manual § 9-5.001(D) (2020).

166. *Id.* § 9-5.001(B).

167. U.S. Dep't of Just., Just. Manual § 9-5.002, Step 3: Making the Disclosures (2017).

168. LAURA L. HOOPER & SHELIA THORPE, FED. JUD. CTR., *BRADY V. MARYLAND* MATERIAL IN THE UNITED STATES DISTRICT COURTS: RULES, ORDERS, AND POLICIES 10 (May 2007).

169. *Id.* at 16. The 2 districts within the Ninth Circuit that are a part of this 37—the District of Idaho and the District of Hawaii—require disclosure within just seven days of arraignment. *Id.*; *see also* Alvarez v. City of Brownsville, 904 F.3d 382, 410 (5th Cir. 2018) (Costa, J., dissenting).

170. U.S. Dep't of Just., Just. Manual § 9-5.002 (2017).

171. ABA CANONS OF PROF'L ETHICS, Canon 5 (AM. BAR ASS'N 1908).

Conduct ("MRPC")[172] in 1983, Rule 3.8 has concerned the special responsibilities of prosecutors. Rule 3.8(d) instructs prosecutors to:

> Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[173]

The language "capable of establishing the innocence of the accused" from the 1908 Canons of Professional Ethics certainly indicates that some amount of materiality is required to trigger a disclosure obligation. However, it is less clear whether there is a materiality standard for the modern Rule 3.8(d) "tends to negate the guilt of the accused" language.[174] In 2009, the ABA clarified in Formal Opinion 09-454 ("Formal Opinion") that Rule 3.8(d) is more demanding than constitutional case law because it requires the disclosure of evidence favorable to the defense regardless of whether it is material to the outcome of the case.[175]

Further, the Formal Opinion instructs that Rule 3.8(d) does not merely codify *Brady*.[176] Instead, it is a distinct disclosure obligation that *may* overlap with other federal constitutional provisions and discovery obligations established by statutes, procedural rules, court rules, or court orders.[177] Since the ethical obligations imposed by Rule 3.8(d) are not "coextensive with the prosecutor's constitutional duties," they remain even if courts hold that a defendant can constitutionally waive the right to all favorable evidence during the course of plea bargaining.[178] This has wide implications because it imposes an ethical obligation on prosecutors to disclose material exculpatory evidence, even in courts such as the Fifth Circuit, which have held that defendants do not have *Brady* rights during plea bargaining.[179]

All 50 states have adopted Rule 3.8(d) or a similar standard.[180] At least 31 states have adopted the rule verbatim, while others have made modifications, such

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172. The MRPC are a set of legal ethics rules that provide guidance for attorneys on ethics topics such as conflicts of interest, duties of competence, and confidentiality. They are not inherently binding, but states have chosen to adopt certain rules. *Model Rules of Professional Conduct*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/model_rules_of_professional_conduct [https://perma.cc/Q2Q9-HBPA**]** (last visited Dec. 19, 2023). At the ABA's "Ethics 2000" review, where it reviewed its entire MRPC to encourage uniformity among state ethics rules and address new questions, it did not make changes to any of Rule 3.8. *See* Nicki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 429–30 (2009).

173. MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 1983).

174. Cassidy, *supra* note 22, at 1443.

175. ABA Comm. on Pro. Ethics & Grievances, Formal Op. 09-454 (2009), at 3–4.

176. *Id.* at 1, 3.

177. *Id.* at 1.

178. *Id.* at 7 n.33 (addressing the *Ruiz* split).

179. *See supra* Subsection II.B.3.

180. MARC ALLEN, NON-*BRADY* LEGAL AND ETHICAL OBLIGATIONS ON PROSECUTORS TO DISCLOSE EXCULPATORY EVIDENCE 5 (2018).

as adding that failure to disclose must be willful or intentional for a violation to occur.[181] However, there is less of a consensus on the Formal Opinion. Some states agree with the ABA, while others insist that the ethical and constitutional obligations of a prosecutor are the same.[182] Generally, however, the ABA's ethics opinions are heavily criticized in scholarly literature.[183]

2. Application in Federal Courts

Subsection IV.B.1's discussion on the adoption of Rule 3.8(d) was focused on state courts. Understanding what ethical rules are applicable in federal court is more complex. Traditionally, some federal judges used their state's code of professional conduct in federal lawyer-discipline cases, while others referred to, but did not bind themselves to, various state and bar codes.[184] The Supreme Court has not given a clear answer as to where to find a lawyer's professional duties in federal court, noting that specific guidance is provided by case law, applicable court rules, and the indeterminate "lore of the profession."[185] Still, given that the first step to being admitted to any federal bar is to be admitted to a state bar, the Court has noted that a federal court can rely on the lawyer's knowledge of the code of professional conduct applicable in their state court.[186]

Much of the debate regarding whether federal lawyers are subject to state ethics rules ended after the passage of the 1998 Citizens Protection Act, also known as the McDade–Murtha Amendment, which reads: "An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."[187] The Amendment, passed in response to controversies over the ethical behavior of

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181. Kirsten M. Schimpff, *Rule 3.8, the Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729, 1743 n.80 (2012).

182. Justin Murray & John Greabe, *Disentangling the Ethical and Constitutional Regulation of Criminal Discovery*, HARV. L. REV. BLOG (June 15, 2018), https://harvardlawreview.org/blog/2018/06/disentangling-the-ethical-and-constitutional-regulation-of-criminal-discovery/ [https://perma.cc/WWF4-6HMD]. *Compare In re* Disciplinary Action Against Feland, 820 N.W.2d 672, 678 (N.D. 2012) (concluding that a prosecutor's ethical obligation to disclose evidence under Rule 3.8(d) is broader than the duty under *Brady*), *and In re* Kline, 113 A.3d 202, 216 (D.C. 2015) (same), *with In re* Seastrunk, 236 So. 3d 509, 518 (La. 2017) (holding that the duties outlined in Rule 3.8(d) and *Brady* are coextensive), *and* Disciplinary Couns. v Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010) (holding there is no greater scope of disclosure required beyond applicable laws, such as *Brady*).

183. *See, e.g.*, Schimpff, *supra* note 181, at 1762–74 (summarizing criticism that ethics opinions are tainted by the members of an association's self-interest, are poorly reasoned, create confusion and inconsistency, and are used as tactical weapons in litigation).

184. Linda S. Mullenix, *Multiforum Federal Practice: Ethics and Erie*, 9 GEO. J. LEGAL ETHICS 89, 101 (1995).

185. *In re* Snyder, 472 U.S. 634, 645 (1985).

186. *Id.* at 645 n.6.

187. 28 U.S.C. § 530B(a).

federal prosecutors,[188] attempts to prevent prosecutorial abuse.[189] Now the answer is clearer: federal prosecutors must abide by the version of Rule 3.8(d) that has been adopted in the state where they practice, or they may be subject to sanctions.[190]

3. ABA Criminal Justice Standards for the Prosecution Function

Another source of ethical guidelines that can shape a prosecutor's behavior is the ABA Criminal Justice Standards for the Prosecution Function ("Standards"). The Standards describe the "best practices" for prosecutors and are intended to supplement the MRPC.[191] They do not modify a prosecutor's obligations under applicable statutes or the Constitution.[192] If there is any inconsistency, lawyers should comply with the binding rules of professional conduct within their jurisdictions.[193] Few states have incorporated the Standards into their local rules,[194] but it is still useful to understand them as background context when reading the MRPC.

First, Standard 3-5.4(a) to (c) encourages prosecutors to make timely disclosure to the defense of information that tends to negate the guilt of the accused, mitigates the offense charged, impeaches the government's witnesses or evidence, or reduces the likely punishment of the accused if convicted, regardless of whether the prosecutor believes it is likely to change the result of a proceeding.[195] Because this eliminates any materiality requirements, it goes much further than *Brady*.

Second, Standard 3-5.6(f) refers specifically to prosecutorial disclosure obligations during plea deal negotiations. It states: "Before entering into a disposition agreement, the prosecutor should disclose to the defense . . . information currently known to the prosecutor that tends to negate guilt, mitigates the offense or is likely to reduce punishment."[196] This Standard does not include the language

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188. In the late 1980s and early 1990s, two major controversies related to the ethical regulation of prosecutors emerged and motivated the Amendment's passage. First, the DOJ exempted itself from the "no-contact rule," an ethical regulation that prohibits attorneys from contacting represented parties without the consent of their lawyers, which led to attention from media and scholars and prompted lawsuits. Second, Congressman Joseph McDade publicly criticized the ethical conduct of the federal prosecutors when he was criminally prosecuted for bribery-related conduct. Hopi Costello, *Judicial Interpretation of State Ethics Rules Under the McDade Amendment: Do Federal or State Courts Get the Last Word?*, 84 FORDHAM L. REV. 201, 208–10 (2015).

189. CHARLES DOYLE, CONG. RSCH. SERV., RL31221, MCDADE-MURTHA AMENDMENT: LEGISLATION IN THE 107TH CONGRESS CONCERNING ETHICAL STANDARDS FOR JUSTICE DEPARTMENT LITIGATORS 1 (2001).

190. Schimpff, *supra* note 181, at 1743– 44.

191. CRIM. JUST. STANDARDS: PROSECUTION FUNCTION § 3-1.1(b) (AM. BAR ASS'N 2017).

192. *Id.*

193. *Id.*

194. ALLEN, *supra* note 180, at 4.

195. CRIM. JUST. STANDARDS: PROSECUTION FUNCTION § 3-5.4(a)–(c) (AM. BAR ASS'N 2017).

196. *Id.* § 3-5.6(f).

"impeach the government's witnesses or evidence" as does Standard 3-5.4(a), so it does not differ from the holding in *Ruiz*.[197]

C. Putting It All Together: Why Case Law Still Matters

If DOJ policy and ethical obligations compel prosecutors to disclose exculpatory evidence to defendants during plea bargaining, why does it matter what side of the *Ruiz* split the Ninth Circuit falls on? It matters because DOJ policy and ethics standards regarding prosecutorial obligations are insufficient to protect federal criminal defendants. To open pathways to meaningful remedies for defendants who discover *Brady* violations[198] after pleading guilty, there must be a constitutional right for defendants to receive material exculpatory evidence prior to pleading guilty. The reality is that if prosecutors commit misconduct by withholding material exculpatory evidence pre-plea, DOJ policy and ABA ethical requirements will not aid defendants.

First, the Manual does not give defendants an avenue for recourse if, after pleading guilty, they discover a prosecutor has withheld material exculpatory evidence, for the Manual is intended solely for internal guidance. In its introduction, it makes clear that it does not create any rights enforceable at law by any party in a civil or criminal action.[199]

Second, the enforcement of ethical requirements against prosecutors will do little to help defendants because disciplinary charges are infrequently brought against prosecutors. For example, between 1999 and 2007, California courts found that state prosecutors committed misconduct in trials that led to convictions in 707 cases, yet the California State Bar disciplined only six of these prosecutors.[200] In one study, Professor Fred Zacharias collected the reported cases where states had disciplined lawyers for violations of various ethical obligations.[201] He found that overall, prosecutors are disciplined rarely, and the discrepancy between the discipline of prosecutors and private attorneys is "enormous."[202] Of the 18 total cases in the category he titled "knowingly disobeying a legal obligation—e.g., disclosure—and failing to comply with discovery," which involved ethical

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197. *Compare id.* § 3-5.6(f), *with id.* § 3-5.4(a).

198. Unfortunately, most *Brady* violations remain undiscovered, and defendants do not know that their rights were violated. Prosecutorial misconduct is particularly difficult to study because most convictions based on guilty pleas leave almost no substantive records. Even if there is a court opinion, neither the defense lawyer nor judge knew about the misconduct at the time, so it is overlooked. *See* Elizabeth Napier Dewar, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1452 (2006); SAMUEL R. GROSS ET AL., GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 6 (2020).

199. U.S. Dep't of Just., Just. Manual § 1-1.000 (2024); *see also* Alvarez v. City of Brownsville, 904 F.3d 382, 410 (5th Cir. 2018) (Costa, J., dissenting) ("A violation of DOJ, court, or ethical rules would not have helped Alvarez when he learned about the undisclosed video.").

200. KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 2–3 (2010).

201. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 751–52 (2001).

202. *Id.* at 755.

provisions that he called "uniquely or specially" applicable to prosecutors, only 2 cases were against prosecutors, with the remaining against civil lawyers.[203]

Professor Zacharias argues that one possible explanation for this result is that disciplinary authorities are hesitant to control misconduct in criminal cases, concerned that it will interfere with the province of the judiciary.[204] Regardless, with such infrequent disciplinary sanctions brought against prosecutors for Rule 3.8(d) violations, ethical discipline has little, if any, deterrent value.[205] Further, in the rare instances when a disciplinary authority does find a violation of Rule 3.8(d), courts are not always willing to censure the prosecutor or analyze the issue distinctly from a *Brady*-type analysis.[206]

Additionally, even if a prosecutor is sanctioned for violating Rule 3.8(d), this will do the defendant little good. The most common penalties for violating ethics rules include disbarment, suspension, and censure.[207] While this could prevent the particularly egregious prosecutor[208] from committing future wrongdoings, it of course does nothing to change that the defendant has already pleaded guilty and faces whatever consequences that may bring.

On the other hand, if the Ninth Circuit views the right to material exculpatory evidence prior to pleading guilty as a defendant's constitutional right, there is a chance of changing the outcome for the defendant. Indeed, the most common outcome for a *Brady* violation is overturning the defendant's conviction.[209]

CONCLUSION

To demonstrate the grave implications of a circuit court not viewing *Brady* rights as applicable to defendants in the plea-bargaining context, consider defendant George Alvarez.[210] He pleaded guilty to assault of a public servant based on a police report that stated he had grabbed a jail officer's throat, reached down towards his groin area, and grabbed the inner part of his leg.[211] Alvarez knew that he did not assault the jailer, but believed he had no way to win the case because "it's my word

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203. *Id.* at 753.

204. *Id.* at 754.

205. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 703 (1987).

206. Christina Parajon, Comment, *Discovery Audits: Model Rule 3.8(d) and the Prosecutor's Duty to Disclose*, 119 YALE L.J. 1339, 1343–44 (2010).

207. *Discipline, Sanction, Disqualification*, LAWSHELF EDUC. MEDIA, https://www.lawshelf.com/coursewarecontentview/discipline-sanction-disqualification [https://perma.cc/4ZLX-N6C3] (last visited Jan. 10, 2024).

208. This is not to imply that a prosecutor necessarily acts maliciously by withholding exculpatory evidence; withholding is often unintentional. Jon B. Gould et al., *Mapping the Path of* Brady *Violations: Typologies, Causes & Consequences in Erroneous Conviction Cases*, 71 SYRACUSE L. REV. 1061, 1068–69 (2021) (noting that cognitive biases such as tunnel vision and a workplace environment with large caseloads and a lack of resources contribute to prosecutors inadvertently overlooking exculpatory evidence).

209. Brady *Rule*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/brady_rule [https://perma.cc/JA9T-UZ9T**]** (last visited Jan. 10, 2024).

210. *See supra* Subsection II.B.3.

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

against their word, and they're always going to believe them because they're like the law."[212] In an internal investigation, the Brownsville Police Department reviewed a videotape recording of the incident, which did not clearly show Alvarez grabbing the jailer's throat or groin.[213] However, the video was never shared with the district attorney's office, and it also did not arrive to Alvarez before he pleaded guilty.[214] After the video was discovered, Alvarez filed a motion for a writ of habeas corpus, and ultimately, the Texas Court of Criminal Appeals determined that he was actually innocent.[215] In 2010, the state dismissed all charges against him.[216]

However, because of the Fifth Circuit's rule that *Brady* never applies during plea bargaining,[217] the City of Brownsville was not subject to liability.[218] Had the Fifth Circuit taken the opposite side of the split, perhaps Alvarez would have been afforded some relief after 13 years of litigation, which started when he was just 17 years old.[219]

Since there is no date in sight for when the Supreme Court will resolve the *Ruiz* split, all we have is the Ninth Circuit's "apparent position" of *Ruiz* as limited to impeachment evidence. An analysis of Ninth Circuit case law makes evident that the court views the prosecutorial disclosure of material exculpatory evidence prior to a defendant's entry of a guilty plea as a constitutional right afforded under *Brady*. And for the vast majority of federal criminal defendants who plead guilty, this has significant and important implications. Failing to view the pre-plea disclosure of exculpatory evidence as a constitutional *Brady* right has led to the wrongful convictions of Michelle Poulos, George Alvarez, and surely numerous other defendants.

212. *Id.* at *4.
213. *Id.* at *5.
214. *Id.* at *6.
215. *Id.* at *8–9.
216. *Id.* at *9.
217. *See supra* Subsection II.B.3.
218. Alvarez v. City of Brownsville, 904 F.3d 382, 385 (5th Cir. 2018).
219. *Alvarez*, 2013 U.S. Dist. LEXIS 194540, at *2.