Brady in the Plea Era: How *U.S. v. Ruiz* Should Be Reconstrued in Light of *Missouri v. Frye* and *Lafler v. Cooper*

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INTRODUCTION

In 1974, Joseph Green Brown was charged with robbery, rape, and murder, based on the testimony of one eyewitness, Ronald Floyd, who provided the only evidence linking Brown to the crime.[1] Despite repeated questioning at trial, Floyd adamantly denied receiving any promises in exchange for his testimony.[2] The prosecutor supported Floyd's denials in his closing, reinforcing Floyd's credibility.[3]

After trial, the defense learned that the prosecutor had offered Floyd a deal.[4] In exchange for Floyd's testimony, the government had offered him "favorable consideration" in charges related to both Brown's case and an earlier case.[5] Although the prosecution's deal with Floyd was not directly "exculpatory," meaning that it did not in itself prove Brown's innocence, the evidence cast significant doubt on the state's case for guilt: it bore directly on Floyd's credibility, a critical component of the conviction, since only he tied Brown to the alleged crime.[6] The Eleventh

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1 Brown v. Wainwright, 785 F.2d 1457, 1458–59 (11th Cir. 1986).
2 *Id.*
3 *Id.*
4 *Id.* at 1461.
5 *Id.*
6 The court reasoned that "[t]here is a reasonable likelihood that disclosure to the jury that Floyd was testifying under an agreement that might save his skin could have affected the jury's verdict and sentence." *Id.* at 1466.

Circuit ultimately granted habeas relief because the government's suppression of the deal with Floyd was critical "impeachment evidence,"[7] that is, evidence relating to the reliability of a witness that may be used to discredit that witness, often through cross-examination. Indeed, the court went so far as to state that "[a]bsent [Floyd's] testimony the state was left with . . . *possibly not even sufficient evidence* to submit the case to the jury."[8]

Yet, under current Supreme Court doctrine, if Brown had pleaded guilty (as is the case for 97% of federal criminal defendants),[9] he likely never would have learned about the prosecution's promises of leniency to Floyd, and never would have been able to challenge his conviction.[10] To be sure, the Supreme Court has repeatedly affirmed that under *Brady v. Maryland*, the government has an affirmative duty to share both "impeachment" and "exculpatory" evidence with defendants.[11]

But in *United States v. Ruiz*, the Supreme Court ruled that the Constitution does not require the government to disclose material impeachment information before a defendant enters a plea agreement.[12] As part of the plea bargain, Angela Ruiz was required to give up her right to receive "impeachment information relating to any informants or other witnesses."[13] The Court permitted this waiver, holding that impeachment evidence "is [only] special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*."[14] Interestingly, the Court did not explicitly rule whether affirmative exculpatory evidence must be disclosed before a plea, but it did emphasize that the agreement in the case required disclosure of evidence of "factual innocence," thus ensuring accuracy in the guilty plea.[15] Some circuit courts have interpreted dicta in *Ruiz* to suggest that such evidence must be disclosed before a plea.[16]

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[7] *Id.* at 1466–67. Impeachment evidence is evidence affecting a witness's credibility and falls within the *Brady* rule, necessitating disclosure in time for trial. Giglio v. United States, 405 U.S. 150, 153–54 (1972).

[8] *Id.* at 1466 (emphasis added).

[9] U.S. SENT'G COMM'N, 2012 ANNUAL REPORT 42 (2012).

[10] *See* United States v. Ruiz, 536 U.S. 622, 625 (2002).

[11] *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 433 (1995) (noting that the *Bagley* Court "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes"); United States v. Bagley, 473 U.S. 667, 676 (1985) ("This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.").

[12] *Ruiz*, 536 U.S. at 632.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 631.

[16] *See, e.g.*, United States v. Ohiri, 133 F. App'x 555, 561–62 (10th Cir. 2005) (finding that *Ruiz* does not release the government from all disclosure responsibilities when a

This Article argues that *Ruiz* stemmed from a fundamental misunderstanding—or misremembering—of *Brady* and its principles. At its core, *Brady* protects those accused of crimes from being "treated unfairly" through the government's withholding of evidence.[17] It suggests that the government's suppression of favorable evidence is so significant—that is, such a failure to "comport with standards of justice"—as to violate due process.[18] Thus, *Brady* reflects a broad concern not only with avoiding convicting factually innocent defendants, but with fairness and legitimacy throughout the adjudicatory process. And yet, *Ruiz* failed to reflect what the Court later recognized in *Missouri v. Frye* and *Lafler v. Cooper*—that the criminal legal system today relies almost entirely on pleas and that even innocent people plead guilty.

Since *Ruiz*, the Supreme Court has come to more fully and correctly recognize the centrality of plea bargaining in our system of criminal adjudication. In 2012, the Supreme Court in *Missouri v. Frye* and *Lafler v. Cooper* interpreted the Sixth Amendment right to counsel to reflect the changing reality of how criminal cases are adjudicated—as of that year, 97% of federal criminal cases were resolved through pleas, not trials.[19] In these two cases, the Court reasoned that since the primary means of criminal adjudication occurs through pleas, the right to counsel must not be denied at the stage where it has the greatest impact for criminal defendants. That interpretation should apply with equal force to *Brady* evidence, whether exculpatory or impeachment.

While other commentators have lamented the holding of *Ruiz*, this Article is the first to address the untenability of *Ruiz*'s holding and *Brady*'s materiality standard in a post-*Frye* and *Lafler* understanding of the criminal legal system. While tying *Brady* rights to trial may have made sense in 1963, the primary means of criminal adjudication is now through pleas, not trials. Restricting *Brady*'s critical due process right to trial problematically excludes the vast majority of criminal defendants from accessing information necessary to fairness and accuracy in the adjudication of their case.

As this Article will illustrate, impeachment evidence is essential for criminal defendants, regardless of whether a case proceeds to trial. But providing such evidence under the confines of *Brady*'s materiality

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defendant pleads guilty); McCann v. Mangiarlardi, 337 F.3d 782, 787 (7th Cir. 2003) (finding that *Ruiz* "strongly suggests" that the government must disclose material exculpatory evidence prior to entry of a guilty plea).

[17] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[18] *Id.* at 87–88.

[19] *See* Missouri v. Frye, 566 U.S. 134 (2012); Lafler v. Cooper, 566 U.S. 156 (2012).

standard will continue to prevent substantial disclosure. While impeachment evidence may not be categorically more important than exculpatory evidence under *Brady*, in practice it may be more important in some cases, for instance where the government's case rests solely or primarily on eyewitness testimony. Courts have recognized the risks inherent in eyewitness testimony for decades,[20] and recent social science advances have revealed such testimony is dangerously unreliable.[21] Nevertheless, juries still tend to regard eyewitness testimony as particularly convincing.[22] Access to impeachment evidence, including the prior inconsistent statements of an eyewitness, is thus critical. A prior inconsistent statement can cast doubt on an eyewitness's testimony—and could potentially be the difference between conviction and acquittal. Criminal defendants must not be denied this key information at what has become the main avenue through which their cases are adjudicated.

This Article proceeds in three parts. Part I explains how *Frye* and *Lafler* created an appropriate framework for applying critical rights to plea negotiations. Part II analyzes how the *Brady* doctrine interacts with the reality of plea negotiations, detailing the importance of early disclosure of impeachment evidence and how *Brady*'s materiality test is especially ill-suited at this early stage. Part III describes potential solutions—including abandoning the materiality standard, at least in pleas, and ensuring that all favorable, relevant evidence is disclosed to individuals at the plea stage—and addresses various counterarguments.

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[20] *See* United States v. Wade, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

[21] *See* Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCH. PUB. POL. & L. 765 (1995) (finding that mistaken eyewitness identification is "the single largest source of wrongful convictions"); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48 (2011) (explaining that in a study of 250 cases of wrongful convictions, eyewitnesses misidentified 76% of the exonerees).

[22] *See, e.g.*, Cindy Laub & Brian H. Bornstein, *Juries and Eyewitnesses*, ENCYCLOPEDIA PSYCH. & L. (Brian L. Cutler ed., 2008) (finding that jurors consider eyewitness testimony to be highly credible and are more likely to believe confident witnesses); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, L. & HUM. BEHAV. 7, 20 (1983) ("[L]aypersons place considerable faith in eyewitness identification evidence.").

I. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS NOT EXCLUSIVELY TIED TO TRIALS.

The Supreme Court has long recognized that plea bargaining is a "critical stage," at least with respect to right to counsel.[23] And the Sixth Amendment right to effective assistance of counsel is no longer tied exclusively to trials because such a limitation would render the right functionally meaningless for most criminal defendants. The Supreme Court in *Missouri v. Frye* held that the Sixth Amendment right to counsel requires defense attorneys to communicate plea offers to defendants.[24] The Court explained that "plea bargains have become so central to the administration of the criminal legal system that defense counsel have responsibilities in the plea bargain process [and] it is insufficient to simply point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process."[25] *Frye* further reasoned that "[i]n today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[26]

Lafler v. Cooper, decided on the same day as *Frye*, also reasoned that the Sixth Amendment applies more broadly than just protecting trial rights.[27] The Court emphasized that the right to effective assistance of counsel "cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions."[28] *Lafler* explicitly held that the constitutional guarantee of the Sixth Amendment applies to "pretrial critical stages that are part of the whole course of a criminal proceeding," and that defendants cannot make "critical decisions" such as plea bargaining without the advice of counsel.[29] Indeed, the reality of the current system and the extraordinary pressure on defendants to plead guilty has led even innocent people, not infrequently, to admit to crimes they did not commit.[30]

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[23] *See* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (The Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation" for the Sixth Amendment right to effective assistance of counsel.); Hill v. Lockhart, 474 U.S. 52, 57–58 (1985) (finding that ineffectiveness of counsel claims apply to guilty pleas).

[24] 566 U.S. at 140, 143–44.

[25] *Id.*

[26] *Id.* at 144.

[27] 566 U.S. 156, 165, 170 (2012).

[28] *Id.*

[29] *Id.* at 165.

[30] Empirical research of 354 individuals exonerated by DNA analysis showed that 11% pleaded guilty to crimes they did not commit. *The Trial Penalty: The Six Amendment Right to Trial on the Verge of Extinction and How to Save It*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS 10 (July 2018) [hereinafter *The Trial Penalty*],

In deciding *Lafler* and *Frye*, the Supreme Court recognized that in a criminal legal system overwhelmingly dominated by pleas, the Sixth Amendment right to effective assistance of counsel would be rendered virtually meaningless if defendants were denied counsel "at the only stage when legal aid and advice would help them," i.e., during plea negotiations.[31] Those very reasons apply with equal force to *Brady*'s due process rights. While *Brady* is a due process right, distinct from the Sixth Amendment, both are constitutional rights that go to fairness in the criminal adjudicatory process. If the rights established by *Brady* and its progeny only apply to the small minority of defendants who go to trial, those rights will be effectively rendered moot.[32]

https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf. *See The National Registry of Exonerations*, UNIV. OF MICH. L. SCH., http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7bFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7d&FilterField1=Group&FilterValue1=P; Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 95 (2012) ("At some point, the sentencing differential becomes so large that it destroys the defendant's ability to act freely and decide in a rational manner whether to accept or reject the government's offer."); *see also Lafler*, 566 U.S. at 185 (Scalia, J., dissenting) ("[P]lea bargaining . . . presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense . . . .").

[31] *Frye*, 566 U.S. at 144 (citing Massiah v. United States, 377 U.S. 201, 204 (1964)).

[32] Other scholars have reasoned that *Frye* and *Lafler* demonstrate that it is possible to modernize other Sixth Amendment rights. For example, William Ortman argues that the Confrontation Clause should not be understood as "at odds with the reality of the American criminal justice system." William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 454–55 (2021). Ortman posits that the Court in *Lafler* rejected a "trial-centric" view of the Sixth Amendment, suggesting that constitutional rights should be interpreted for the criminal legal system "as it exists," rather than a normative view of how the system should work. *Id.* at 467–68.

II. ACCESS TO IMPEACHMENT MATERIAL AT THE PLEA NEGOTIATION STAGE IS CRITICAL

A. The Supreme Court Recognizes Impeachment and Affirmative Exculpatory Evidence As Equally Important *Brady* Evidence

Interestingly, the right to impeachment evidence has a longer and more impressive pedigree than the right to affirmative exculpatory evidence. Long before *Brady v. Maryland*, the Supreme Court prohibited the government's use of perjured or false testimony at trial.[33]

Building on these foundations, the Warren Court established a due process right to the disclosure of favorable evidence material to guilt or punishment.[34] In the seminal case of *Brady v. Maryland*, the government suppressed the confession of a man named Boblit who had admitted to the actual killing whereas Brady himself had admitted only to participating in the crime.[35] While Brady could not claim that the undisclosed evidence was factually exculpatory, the Court reasoned that Boblit's confession would have been useful to Brady *at sentencing* to mitigate against capital murder.[36] Even though the evidence was not about guilt or innocence, it was nevertheless favorable because it was relevant to Brady's punishment, and thus its suppression violated the due process clause.[37] Ultimately, the Court declared that *Brady*'s underlying ethos was "the avoidance of an unfair trial to the accused," rather than punishing prosecutors for misconduct.[38] For that reason, a *Brady* analysis does not consider whether the prosecutor acted in good faith or not.[39] Instead, regardless of how or why suppression occurs, disclosure of material exculpatory evidence—and, as established later, impeachment evidence—ensures that those accused of crimes are not "treated unfairly."[40]

Brady did not define what it meant by "material" evidence,

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[33] *See, e.g.*, Mooney v. Holohan, 294 U.S. 103, 112 (1935) (finding a due process violation to use the "pretense of a trial" to present testimony known to be perjured); Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding that the state violated due process when the prosecutor did not correct a witness's false testimony that he received no promise of consideration in exchange for his testimony).

[34] Brady v. Maryland, 373 U.S. 83, 84–86 (1963).

[35] *Id.* at 87–89.

[36] *Id.* at 84–89.

[37] *Id.* at 87–89.

[38] *Id.* at 87.

[39] *Id.*

[40] *Id.*

suggesting that "material" meant "important" or "relevant" to guilt or punishment, as in the subpoena context.[41] It was not until later that the Court defined "material" evidence much more narrowly, as facts or information which, had it been disclosed, would have had a reasonable probability of affecting the outcome of the proceeding.[42]

Given that the Court had required disclosure of evidence relating to a witness's truthfulness and reliability even before *Brady*,[43] it should not be surprising that the *Brady* rule covers not only affirmative exculpatory but also "impeachment" evidence.[44] Relying on the due process requirements established in *Napue*, the Supreme Court in *Giglio v. United States* officially established that *Brady* covers impeachment evidence.[45] *Giglio* held that the government's failure to disclose a promise of leniency it had made to a key witness violated the defendant's due process rights under *Brady*.[46]

It should also not be surprising, then, that the Court has recognized impeachment evidence as having equal weight and importance to affirmative exculpatory evidence in the *Brady* context.[47] In *Bagley*, the government suppressed information about the existence of a monetary reward for information provided by the two key witnesses.[48] The Supreme Court reasoned that a reward gives witnesses an "incentive to testify falsely in order to secure a conviction," especially when the payment hinges on the case's outcome.[49] Indeed, the Ninth Circuit had held that the failure to disclose impeachment evidence is "even more egregious [than the failure to disclose exculpatory evidence] because it threatens the defendant's right to confront adverse witnesses."[50] To be sure, the Supreme Court "rejected any such distinction" that would elevate impeachment evidence above exculpatory evidence.[51] But in rejecting the Ninth Circuit's reasoning, the Court acknowledged that proper disclosure and use of impeachment evidence at trial "may make

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[41] *See, e.g.*, Fed. R. Crim. P. 16.
[42] *See* United States v. Bagley, 473 U.S. 667, 682 (1985).
[43] *See, e.g.*, Mooney v. Holohan, 294 U.S. 103, 112 (1935).
[44] Giglio v. United States, 405 U.S. 150, 154 (1972).
[45] *Id.*
[46] *Id.* at 150–51, 155.
[47] *See* Kyles v. Whitley, 514 U.S. 419, 433 (1995) (explaining that the *Bagley* Court "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes").
[48] United States v. Bagley, 473 U.S. 667, 683 (1985).
[49] *Id.*
[50] Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983).
[51] *Bagley*, 473 U.S. at 676.

the difference between conviction and acquittal."[52] Even "subtle factors" that may incentivize a witness to testify falsely impact "[t]he jury's estimate of the truthfulness and reliability of a given witness [which] may well be determinative of guilt or innocence."[53] And as the Court continued, *Brady*'s purpose is "ensur[ing] that a miscarriage of justice does not occur."[54]

B. Doctrinal Limitations on Disclosure of Impeachment Evidence at the Plea Stage Do Not Comport with the Reality of the Criminal Legal System

Despite the recognized importance of impeachment evidence, the *Ruiz* Court declined to require the government to disclose impeachment evidence prior to entering a plea.[55] The Court's relegation of impeachment evidence to a lesser status than exculpatory evidence at the plea stage, and its strong focus on efficiency rather than the accuracy or fairness of guilty pleas, does not comport with precedent and misunderstands both the value of impeachment evidence and the nature of plea negotiations in the modern era, as recognized in *Frye* and *Lafler*.

While admitting that more information will make the defendant's plea more intelligent, the *Ruiz* Court dismissed impeachment evidence as "random" at the plea stage: "[it] is particularly difficult to characterize impeachment evidence as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant."[56] According to the Court, impeachment evidence "is special in relation to the *fairness of a trial*."[57] Since "[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," the Court held that disclosing impeachment evidence before a plea is not constitutionally required.[58]

However, disclosure of impeachment evidence at the plea stage would help ensure reliability of pleas and preserve the integrity of the judicial process. As explained below, pre-plea impeachment evidence is critical to a defendant's decision to plead guilty. If *Brady*'s "overriding

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[52] *Id.*
[53] *Id.* (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)).
[54] *Id.* at 675.
[55] United States v. Ruiz, 536 U.S. 622, 629 (2002).
[56] *Id.* at 630.
[57] *Id.* at 629 (emphasis added).
[58] *Id.* at 630, 633.

concern [is] with the justice of the finding of guilt,"[59] then defendants must have access to impeachment evidence at the plea stage as it affects the reliability of a judgment of guilt. But the *Brady* line of cases do not simply talk about the importance of guilt-finding; the cases also emphasize that disclosure is required to achieve fairness in punishment[60] and avoid a "miscarriage of justice."[61] Disclosure of impeachment evidence before a plea contributes to those goals by ensuring that criminal defendants are privy to the relevant information that they would be entitled to if they went to trial.

Below, I first detail why the Court's focus on efficiency is misplaced. Next, I argue that the Court incorrectly held that impeachment evidence is less important (and requires more work to disclose) than exculpatory evidence at the plea stage. Then I explain how the *Ruiz* Court's concern about the government being unable to administer pleas has not come to fruition in the districts that mandate early disclosure.

1. Ruiz*'s Emphasis on Efficiency Ignores the Purpose Behind* Brady *and the Reality of the Criminal Legal System*

The *Ruiz* Court's focus on efficiency misunderstands that the existence of a fundamental or constitutional right does not rest on the government's desire to quickly adjudicate a criminal case.[62] Beyond merely dismissing the utility of impeachment evidence at the plea stage, the *Ruiz* Court was concerned that requiring such disclosure could hinder "the efficient administration of justice" by making it more difficult to secure guilty pleas.[63] Because it might require the government to spend more resources preparing for plea bargaining, disclosure could "depriv[e] the plea-bargaining process of its main resource-saving advantages," or even lead the government to "abandon its heavy reliance on plea bargaining in a vast number."[64]

Crucially, this reasoning misunderstands the critical premise of *Brady*, and should be reexamined in light of *Frye* and *Lafler*. First, a guilty plea does not necessarily confirm that an individual is guilty. Indeed, the Supreme Court has recognized that guilty pleas are "no more foolproof than full trials," and as such, courts must take "great precautions

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[59] United States v. Agurs, 427 U.S. 97, 112 (1976).
[60] *E.g.*, Brady v. Maryland, 373 U.S. 83, 84–87 (1963).
[61] *E.g.*, United States v. Bagley, 473 U.S. 667, 675 (1985).
[62] *See* Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963).
[63] *Ruiz*, 536 U.S. at 631.
[64] *Id.* at 632.

against unsound results . . . whether [the] conviction is by plea or by trial."[65] Second, and perhaps more importantly, *Brady* is about fairness in the adjudication of both guilt *and* sentencing.[66] Even assuming that a person who pleads guilty is factually guilty, impeachment evidence may still impact the individual's decision to go to trial. As illustrated in *Brown v. Wainwright* discussed in the introduction, evidence challenging the credibility of a principal witness may be the difference between conviction and acquittal,[67] and must not be withheld even if it were to slow down the plea process. This type of evidence may also impact the individual's sentence. For example, the prosecutor may offer a lesser sentence at the plea stage due to a weakened bargaining position.

Notably, racial justice concerns are intertwined with pre-plea disclosure of information. Black and Latino individuals face lengthier prison sentences than white individuals (indeed, Black boys and men specifically are more policed, arrested at a higher rate, and are more likely to be convicted).[68] This inequality is even further exacerbated at the plea stage. Black defendants are more likely to receive plea offers with longer sentences and higher charges than white defendants.[69] A recent study of one state's misdemeanor cases shows that white individuals were 25% more likely than Black individuals to have their principal initial charge dropped or reduced to a lesser crime, and 75% more likely to be convicted of crimes not resulting in incarceration or not being convicted at all.[70] When combined with the lack of information to individuals at the plea stage, Black criminal defendants are at a particular disadvantage.

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[65] Brady v. United States, 397 U.S. 742, 757–58 (1970).

[66] *See* Brady v. Maryland, 373 U.S. 83, 84–86 (1963).

[67] 785 F.2d 1457, 1458–59, 1461 (11th Cir. 1986).

[68] THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities.

[69] *Research Finds Evidence of Racial Bias is Plea Deals*, EQUAL JUST. INITIATIVE (Oct. 26, 2017), https://eji.org/news/research-finds-racial-disparities-in-plea-deals.

[70] Jenn Rolnick Borchetta & Alice Fontier, *When Race Tips the Scales in Plea Bargaining*, MARSHALL PROJECT (Oct. 23, 2017), https://www.themarshallproject.org/2017/10/23/when-race-tips-the-scales-in-plea-bargaining; *see generally* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187, 1189–91 (2018).

2. Impeachment Evidence Is As Important As Exculpatory Evidence at the Plea Stage and Its Disclosure Does Not Require Additional Investigatory Work

The *Ruiz* Court did not explain why disclosing impeachment evidence would be more onerous than disclosing exculpatory evidence at the plea stage, but nevertheless demoted impeachment evidence to a lesser status.[71] The Court found that disclosing impeachment evidence before pleas would provide a "comparatively small" benefit and make it harder for the government to secure "factually justified pleas."[72] But the Court's analysis misses the entire point. Impeachment evidence may be the deciding factor between conviction and acquittal, and between an individual's decision to plead guilty or proceed to trial. Although the *Ruiz* Court explained that the disclosure of exculpatory evidence in the case ensures accuracy in the guilty plea,[73] disclosure of impeachment evidence showing that a key government witness is inconsistent, unreliable, or biased is essential in ensuring that a conviction is accurate.

Ruiz's holding that impeachment evidence only helps defendants in "random" ways is simply incorrect. First, the utility of all evidence, not merely impeachment evidence, hinges on the specific facts of the case. For example, impeachment evidence such as inducements or rewards for providing information or testifying may be particularly relevant when they involve a key witness.[74] This evidence is no less random than affirmative exculpatory evidence, the relevance of which "must [also] be evaluated in the context of the entire record."[75] The *Agurs* Court presented a hypothetical to explain this concept: if an eyewitness were to state that the defendant is not the perpetrator, at first glance, that seems like pretty straightforward exculpatory evidence that must be disclosed. But there would be a significant difference in the importance of such a statement when the eyewitness is one of two eyewitnesses to the crime as opposed to when he is one of fifty eyewitnesses.[76] In the latter scenario,

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[71] United States v. Ruiz, 536 U.S. 622, 631 (2002).

[72] *Id.* at 631–32.

[73] *Id.* at 631.

[74] *See* United States v. Bagley, 473 U.S. 667, 683 (1985); Giglio v. United States, 405 U.S. 150, 150–51 (1972); *see also* Brown v. Wainwright, 785 F.2d 1457, 1461, 1466 (11th Cir. 1986) (finding that the promise of a reward led to false testimony that was key in securing Brown's conviction).

[75] United States v. Agurs, 427 U.S. 97, 112 (1976).

[76] *Id.* at 112 n.21.

the existence of the eyewitness's statement might not be as relevant.

Second, since juries find eyewitness testimony particularly convincing,[77] evidence of leniency or a monetary reward in exchange for testimony, or of the witness's previous inconsistent statements, may well be determinative of guilt. The Supreme Court has unequivocally held that material evidence affecting a witness's credibility must be disclosed when that witness's reliability is critical.[78] And the Court in *Ruiz* even admitted that "the more information the defendant has . . . the wiser that decision [to plead] will likely be."[79] Disclosing this crucial evidence before a plea may change the defendant's calculus of whether to plead guilty and determine whether the defendant is ultimately convicted.

The holding in *Ruiz* not only contradicts Supreme Court precedent establishing that evidence affecting a witness's credibility is key in determining whether a conviction or sentence is factually justified.[80] It also does not reflect the reality that the Court recognized in *Frye* and *Lafler*: that most individuals never go to trial, so the pre-trial stage is the *only* time an individual has access to critical impeachment information. Without this critical information, defendants may face more severe sentences, having to contend with disproportionate prosecutorial bargaining power.

3. Despite the Efficiency Concern in Ruiz*, Early Disclosure Has Not Hindered the Administration of Guilty Pleas*

Further, the *Ruiz* Court's concern about the government being unable to administer pleas has not come to fruition in the districts that mandate early disclosure of *Brady* and *Giglio* information.[81] As of 2004, twenty-five federal districts mandated specific events where the government must disclose *Brady* material. Some districts mandate *Brady*

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[77] *See* Laub & Bornstein, *supra* note 22, at 486; Brigham & Bothwell, *supra* note 22, at 20.

[78] *Giglio*, 405 U.S. at 154 (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)).

[79] United States v. Ruiz, 536 U.S. 622, 629 (2002).

[80] *See, e.g.*, United States v. Bagley, 473 U.S. 667, 676 (1985) (impeachment evidence "may well be determinative of guilt or innocence").

[81] *See* Brief for the Respondent at 41, United States v. Ruiz, 536 U.S. 622 (2002) (No. 01-595), 2002 WL 523026, at *25 ("[T]he Solicitor General will not dispute that the 'fast-track' plea bargain program in the Southern District of California has survived in the wake of *Ruiz*. That program has proceeded in the same fashion, simply without the inclusion of *Brady* waiver provisions in the plea agreement.").

disclosure at arraignment;[82] within five days of arraignment;[83] within ten days of the arraignment;[84] at the discovery conference;[85] and prior to the pretrial conference.[86] And many states and districts have vague disclosure requirements, including "as soon as practicable,"[87] "a reasonable time in advance of trial date,"[88] "as soon as possible,"[89] and "within a reasonable time before trial."[90] In such districts, there has been no evidence that the government is unable to secure guilty pleas.[91]

C. Early Disclosure Is Critical Because, As the Court Recognized in *Frye* and *Lafler*, the Criminal Legal System Is a System of Pleas

1. Criminal Cases Are Adjudicated Through Pleas, Necessitating Earlier Brady *Disclosure*

The criminal legal system is no longer a system of trials.[92] In

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[82] N.D. Ala., S.D. Ala. *See* LAURAL L. HOOPER ET AL., TREATMENT OF BRADY V. MARYLAND MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES: REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (2004), https://www.uscourts.gov/sites/default/files/bradymat_1.pdf; Stanley Z. Fisher, *Ethics in Criminal Advocacy, Symposium, The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1417 n.206 (2000) (cataloging forty-three states that require *Brady* disclosures at some point before trial).

[83] N.D. Fla., S.D. Ga., W.D. Pa., E.D. Wis. *See* HOOPER, *supra* note 82, at 12.

[84] D. Conn. D.R.I., S.D. W. Va. *See* HOOPER, *supra* note 82, at 12.

[85] W.D. Okla. *See* HOOPER, *supra* note 82, at 12.

[86] N.D. Ga. *See* HOOPER, *supra* note 82, at 12.

[87] *See, e.g.*, Ark. R. Crim. P. 17.2(a); Ill. Sup. Ct. R. 412(d).

[88] *See, e.g.*, Ky. R. Crim. P. 7.24(6).

[89] *See, e.g.*, Vt. R. Crim. P. 16(b).

[90] *See, e.g.*, Wis. Stat. § 971.23(1).

[91] While data pertaining to different states and federal districts has been scarce, overall, it shows an upward trend in the disposition of criminal cases through pleas. *See* 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/ (citing *U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2018*, https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf); *see also* Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html.

[92] This section focuses on federal laws because of the available data and the clear picture they provide of the current system.

1970, 15% of federal cases went to trial,[93] which dropped to only 2.9% in 2015,[94] and 2% in 2018.[95] As of 2012, 97% of federal convictions resulted from guilty pleas.[96] The Supreme Court acknowledged the impact of this shift from trials to pleas in 2012 when deciding *Lafler* and *Frye*.[97]

A myriad of factors caused this drastic shift from trials to pleas. For example, the Warren Court's expansion of rights for criminal defendants made cases longer and more expensive, incentivizing pleas over trials.[98] Punitive sentencing laws, overwhelming caseloads, mandatory minimums, and laws that empower prosecutors further incentivize prosecutors, defense attorneys, and defendants to resolve cases through pleas instead of trials.[99]

Prosecutors use harsh mandatory minimums and sentencing guidelines to pressure criminal defendants to plead guilty. Individuals convicted under laws with mandatory minimums face considerably longer prison sentences, which incentivizes pleas on lesser or different charges.[100] The Federal Sentencing Guidelines, which provide lengthy

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[93] *Sourcebook of Criminal Justice Statistics Online, Table 5.22.2010*, http://www.albany.edu/sourcebook/pdf/t5222010.pdf.

[94] U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2015 4 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/researchpublications/2016/FY15_Overview_Federal_Criminal_Cases.pdf.

[95] Gramlich, *supra* note 91.

[96] U.S. SENT'G COMM'N, 2012 ANNUAL REPORT 42 (2012).

[97] *See* Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); *see also* Missouri v. Frye, 566 U.S. 134, 144 (2012) (citation omitted) ("[P]lea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system.").

[98] Emily Yoffe, *Innocence is Irrelevant*, THE ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/; WILLIAM J. STUNTZ, THE COLLAPSE OF THE AMERICAN CRIMINAL JUSTICE SYSTEM 264–65, 280 (2011).

[99] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519–20, 531 (2001); *see also* STUNTZ, *supra* note 98, at 262–63 (broader criminal liability rules, increased overlapping offenses, and more specific definitions of crime provide greater inducement to plead guilty).

[100] The Sentencing Guidelines, along with the Anti-Drug Abuse Act of 1986, established these mandatory minimum sentencing laws that remained the law for decades. Anti-Drug Abuse Act of 1986, Pub. L. No 99-570, 100 Stat. 3207; Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, ACLU (Oct. 2006), https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372; *see, e.g.*, 18 U.S.C. § 924(c)(1)(A)(i) (A person who uses or possesses a firearm in furtherance of a drug trafficking crime or crime of violence faces a mandatory additional five years in prison.). In 2016, the average sentence for those convicted of an offense

sentences, give prosecutors another bargaining chip to encourage defendants to plead guilty.[101] Even in state cases, looming federal charges may coerce a plea. And even when individuals do not face mandatory minimums, those who choose to invoke their Sixth Amendment right to trial face significantly higher sentences if they lose.[102] This so-called "trial penalty" coerces criminal defendants to plead guilty because the sentencing discrepancy is too high to risk going to trial.[103] Thus, despite plea deals often requiring a waiver of important rights, defendants "almost uniformly surrender the right to trial" to avoid the risk of higher sentences.[104]

All these dangers and pressures are exacerbated by an information asymmetry between prosecutors and defendants. Under *Ruiz*, at the plea stage, the government need not disclose discrepancies in witness statements, offers of rewards or promises to not prosecute, or other critical information.[105] This leaves the very individuals who may be the least aware of favorable evidence, such as factually innocent individuals and those with mental illnesses, at the greatest disadvantage during plea negotiations.[106] Denying impeachment evidence to the most vulnerable individuals hinders the *Brady* Court's goals of ensuring accuracy and fairness in convictions and sentencing. Conversely, providing impeachment information at the plea stage protects those accused of crime from being "treated unfairly,"[107] and helps ensure that those accused of crimes, including the innocent and the less culpable, have the appropriate information to determine whether to plead guilty or proceed to trial.

In light of the fact that most criminal defendants never go to trial

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with a mandatory minimum was four times longer than those convicted of an offense without a mandatory minimum. *See* U.S. SENT'G COMM'N, 2017 OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 6 (2017).

[101] For example, offering a plea to a lesser crime that does not have as high a prison sentence. *See generally* U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N Nov. 2021)

[102] *The Trial Penalty*, *supra* note 30, at 5. For example, in 2015, the average sentence for fraud was three times higher for defendants who went to trial versus those who pled guilty, and burglary, breaking and entering, and embezzlement sentences were nearly eight times higher for those going to trial. *Id.* at 17 n.28 (calculated based on data from the U.S. Sentencing Commission).

[103] *Id.* at 6.

[104] *Id.* at 5–6.

[105] *See* United States v. Ruiz, 536 U.S. 622, 625, 630 (2002).

[106] *See* Stephanos Bibas, *The Story of* Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence*, 18 FAC. SCHOLARSHIP AT PENN L. (2005).

[107] Brady v. Maryland, 373 U.S. 83, 87 (1963).

and are systematically pressured to plead, following *Ruiz* and continuing to tie *Brady* rights exclusively to trial is inconsistent with the reasoning of *Frye* and *Lafler*.

2. Disclosure of Pre-Plea Impeachment Evidence Is Critical to Prevent Miscarriages of Justice

Tying *Brady* rights to trial is illogical in today's criminal legal system. In 1963, when *Brady* was decided, many more criminal cases were resolved through trial and the justices likely did not contemplate a system composed almost entirely of pleas.[108] Criminal defendants, defense attorneys, and prosecutors faced fewer incentives to adjudicate cases through guilty pleas. During that era, *Brady*'s language, that disclosure would prevent "an unfair trial to the accused," had more significance.[109] Sixty years later, the reality of the criminal legal system has changed dramatically; relying on trials to trigger critical constitutional rights no longer adequately protects criminal defendants. The arguments for early disclosure of impeachment evidence have become even more salient since *Frye* and *Lafler*. As criminal trials have become the exception rather than the rule, the due process rights established in *Brady* and *Giglio* have little meaning if such evidentiary disclosure only applies to the small minority of criminal defendants who go to trial.

The necessity of early disclosure of impeachment evidence can be understood in the context of Antrone Johnson's case. In 1994, 17-year-old high schooler Antrone Johnson was accused of sexually assaulting a 13-year-old girl.[110] Johnson pled guilty to aggravated sexual assault and, after other proceedings, ultimately received life in prison. In 2008, an attorney for Johnson sought the release of his case file, which showed that the day before Johnson was set for trial, the complainant told the prosecutor that Johnson had not had any sexual contact with her. The prosecutor wrote a note in the file stating "Johnson did not make her give him oral sex." This statement completely contradicted the main evidence against Johnson—the alleged victim's prior statement. The file also showed that the prosecutor had interviewed school officials and learned that the complainant had serious credibility issues. The state did not reveal any of this evidence to Johnson's defense attorney before his guilty

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[108] Even since *Ruiz*, the percentage of cases that are resolved through pleas has continued to increase. *See* U.S. SENT'G COMM'N, ANNUAL REPORT FISCAL YEAR 2016 5 (2016); *see also* Gramlich, *supra* note 91.

[109] *Brady*, 373 U.S. at 87.

[110] *Antrone Johnson*, NAT'L REGISTRY OF EXONERATIONS, UNIV. OF MICH. L. SCH., https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3829.

plea.

Had Johnson gone to trial, the prosecutor would have been obligated to turn over this information under *Brady* and *Giglio*.[111] Luckily for Johnson, despite his plea, the District Attorney's office joined his petition to set aside his conviction because of the suppressed evidence (though he still served many years in prison before this was uncovered). However, because federal law does not mandate disclosure if a defendant decides to plead guilty, these types of violations are often never uncovered or remedied.[112]

Johnson's case undermines a key premise of *Ruiz*. The suppressed impeachment evidence was crucial in determining Johnson's guilt and would have affected his decision to plead guilty. Contrary to the *Ruiz* Court's insistence that the benefits of disclosing impeachment evidence are small and the costs large, turning over the evidence in Johnson's case would not have required the prosecution to turn over its entire file or scour their files in search of potentially favorable evidence; and it would have been easy for the defense to understand the utility of such information even without having the context of the prosecution's entire case. If *Brady*'s central promise of "fairness to the accused" and preventing a miscarriage of justice holds true, it is critical to disclose impeachment and exculpatory evidence before a plea is entered.

D. *Brady*'s Materiality Requirement Inappropriately Impedes Access to Exculpatory and Impeachment Information, Particularly at the Plea Stage

Unfortunately, overturning *Ruiz* alone would not ensure that criminal defendants have access to critical exculpatory and impeachment evidence at the plea stage because *Brady* does not require evidence to be turned over unless it is considered "material."[113] *Brady* itself did not define materiality, but suggested that "material" evidence meant "relevant," as it means in the discovery or subpoena context.[114] Regardless, *U.S. v. Bagley* later construed *Brady* to hold that suppressed evidence is only considered "material" if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a

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[111] *See* Giglio v. United States, 405 U.S. 150, 150–51 (1972).
[112] *See* United States v. Ruiz, 536 U.S. 622, 625 (2002).
[113] United States v. Bagley, 473 U.S. 667, 682 (1985). *Bagley* adopted the materiality standard from *Strickland*'s reformulation of the test in *Agurs*. *Id.* *Agurs* developed the basis of this standard by looking to perjury cases. *See* 427 U.S. 97, 103–04 (1976).
[114] *See, e.g.*, Fed. R. Crim. P. 16.

probability sufficient to undermine confidence in the outcome."[115] This standard has led to *Brady* becoming less of a discovery doctrine, and more of a post-conviction backstop against evidence suppression.[116]

Brady's materiality standard poses substantial obstacles to disclosure of critical exculpatory and impeachment evidence. The circuitous standard requires prosecutors to determine—before disclosing any evidence—whether a judge reviewing the evidence in hindsight will determine that the evidence could have made a difference in the proceeding. This standard presents particular concerns at the plea-bargaining stage, where prosecutors have not fully investigated the matter and are less aware of the defendant's theory of the case and thus, what evidence may be critical.

The materiality standard is uniquely untenable at the plea-bargaining stage. The problem is two-fold. First, the materiality standard is hard to apply at an early stage because prosecutors and judges lack contextual information about the case that would show the importance of certain pieces of information. Second, the materiality standard disincentivizes investigation that would uncover and potentially require disclosure. The materiality standard is not appropriate for the plea stage, and its backward-looking focus does not work to protect defendants even nominally.

1. The Difficulty of Determining What Evidence Is "Material" at the Plea Stage Hinders Disclosure

While, at least in theory, prosecutors may be better able to judge what evidence is material to defendants by the time of trial, at the plea stage, prosecutors lack the capacity to determine what evidence is critical to the defense. The due process right in *Brady* rests on a pre-trial conjecture: that a reviewing court looking back at a trial will be able to determine that a certain piece of evidence would have been impactful.[117] Just as the *Ruiz* Court explained that defendants are unaware of the prosecutor's case at the plea stage, prosecutors are similarly unaware of the defendant's case and cannot appropriately determine what evidence may be "material." Therefore, requiring evidentiary disclosure before pleas will still result in minimal disclosure if prosecutors are constrained by the materiality standard.

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[115] 473 U.S. at 682.

[116] *See* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE K. REV. 643, 661 (2002).

[117] *Id.* at 659.

Moreover, judges also struggle to determine whether a particular piece of evidence would have made a difference in the proceeding, particularly when the only evidence presented is the plea colloquy.[118] When courts review whether evidence is "material" *after* a plea, it may be even more difficult to determine the import of the evidence. As early as *Bagley* itself, justices were concerned that the materiality standard would result in critical evidence not being disclosed. In his dissent, Justice Thurgood Marshall cautioned that the standard "enables prosecutors to avoid disclosing obviously exculpatory evidence," while still technically complying with their constitutional obligations.[119] Justice Marshall and Justice Stevens were concerned that a result-focused standard would result in courts upholding convictions despite evidentiary suppression.[120] Empirical evidence shows that these concerns have materialized.[121] Even when courts find that prosecutors withheld "undoubtedly favorable" evidence, courts have held that the evidence is not "material" and thus have not found a *Brady* violation.[122]

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[118] *See, e.g.*, Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 690 (2006) [hereinafter Gershman, *Reflections on* Brady] ("[G]iven this retrospective, ad hoc, fact-intensive, and wholly speculative factual and doctrinal analysis required to determine the 'materiality' of suppressed evidence, it is increasingly likely that even in egregious instances of nondisclosure, a court will find the suppression to be not material."); Sundby, *supra* note 116, at 647 (describing how *Brady* has expanded to cover broader types of evidence and government behavior while contracting on the materiality front).

[119] United States v. Bagley, 473 U.S. 667, 700 (1985) (Marshall, J., dissenting).

[120] *Id.* at 714 (Stevens, J., dissenting).

[121] *See* Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1536 (2010) (analyzing studies showing high rates of nondisclosure but noting that "appellate courts found reversible error in only a handful of cases where the mistakes were so glaring, the conduct so heinous, that judges had no other recourse"); Bibas, *supra* note 106, at 13–14 (finding that of 210 *Brady* and *Giglio* cases decided in 2004, only 11.9% of the claims succeeded).

[122] *Bagley*, 473 U.S. at 700 (Marshall, J., dissenting) (citing United States v. Sperling, 726 F.2d 69, 71–72 (2d Cir. 1984) (prior statement disclosing motive of key government witness to testify); King v. Ponte, 717 F.2d 635 (1st Cir. 1983) (prior inconsistent statements of government witness); *see also* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 432 (2001) (citing Bill Moushey, *Out of Control Legal Rules Have Changes, Allowing Federal Agents, Prosecutors to Bypass Basic Rights*, PITT. POST-GAZETTE, Nov. 22, 1998, at A1) (citing a study finding that "prosecutors withheld evidence in hundreds of cases during the past decade, but that courts overturned verdicts in only the most extreme cases").

2. The Materiality Standard and the Nature of the Adversarial System Disincentivize Prosecutorial Investigation at the Plea Stage

Another obstacle posed by the materiality standard is its reliance on prosecutors to search for potentially favorable information when they often do not have the ability, time, or inclination to do so. This is particularly problematic at the plea stage where prosecutors have even less incentive to investigate, given the low likelihood that evidence will later be deemed "material."

The very nature of the adversarial criminal legal system means that prosecutors are often unaware of the defense's theory or evidence until trial, so they may inadvertently overlook favorable evidence.[123] Indeed, most *Brady* and *Giglio* claims involve ambiguous evidence, not "smoking guns."[124] The *Bagley* standard requires the prosecutor "to speculate, without foundation, since the prosecutor will not normally know what strategy the defense will pursue or what evidence the defense will find useful."[125] This concern is heightened at the plea stage because the prosecutor is usually unaware of the defense strategy and theory of the case, or even what witnesses the defense will call.

Moreover, prosecutors' ethical duty to only pursue cases where there is probable cause[126] influences prosecutors' perceptions of what evidence is important. When prosecutors uncover potentially favorable evidence for the defense, their understanding of its significance is likely influenced by their strong belief that the individual is guilty. This anchoring effect is even worse with pleas, where the prosecutor is solely responsible for the charges, the conviction, and the recommended sentence.[127] Even a prosecutor intending to comply with his or her ethical duties may inadvertently dismiss evidence that could be critical to the defense. A more cynical reason for nondisclosure suggested by Justice Marshall, and perhaps demonstrated by the Johnson case, is that the materiality standard invites prosecutors "to gamble, to play the odds, and to take a chance that the evidence will later not turn out to have been

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[123] *See* Bibas, *supra* note 106, at 12. This makes it difficult to assess whether certain evidence must be disclosed until after the proceedings have ended. *See* Gershman, *Reflections on* Brady, *supra* note 118, at 713.

[124] Bibas, *supra* note 106, at 14.

[125] *Bagley*, 473 U.S. at 701 (Marshall, J., dissenting).

[126] *See* A.B.A. Std. 3–4.3.

[127] *See Bagley*, 473 U.S. at 702 (Marshall, J., dissenting) ("The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question.").

potentially dispositive."[128]

High caseloads further disincentivize prosecutors from investigating cases thoroughly early on, meaning *Brady* evidence may not be uncovered before a plea.[129] Many *Brady* violations arise unintentionally because of overburdened prosecutors.[130] Certain types of impeachment evidence, such as promises of rewards or leniency, may be immediately obvious to a prosecutor. But without a requirement that prosecutors investigate and turn over all relevant impeachment evidence before pleas, they will be disincentivized to thoroughly investigate a case in its early stages (when it is not yet clear what evidence may ultimately be "material"), and certain evidence such as inconsistent statements may not be discovered or disclosed.[131] This means that defendants who plead guilty may never learn about favorable impeachment evidence.[132]

Often, trial preparation "prompts prosecutors to notice discrepancies" that may be useful for impeaching witnesses.[133] The fact

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[128] *Id.* at 701 (Marshall, J., dissenting); *see also* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 533 (2007) [hereinafter Gershman, *Litigating* Brady] (explaining that *Brady* relies on the "good faith" of prosecutors while also representing a "significant and unique departure from the traditional, adversarial mode of litigation," and provides prosecutors with broad discretion, creating opportunities for gamesmanship).

[129] *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261 (2011) (detailing prosecutor caseloads across jurisdictions in 2006 and analyzing the harmful consequences for criminal defendants of overwhelming caseloads).

[130] *See* Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 401–05 (2009); Santobello v. New York, 404 U.S. 257, 260 (1971) (noting "an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices").

[131] *See* Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 34 (2015). The research imbalance between most criminal defendants and prosecutors' offices also makes it difficult for defendants to uncover favorable evidence. *See Bagley*, 473 U.S. at 694 (Marshall, J., dissenting); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1033–36 (2005) (discussing the lack of lawyers in public defenders' offices to adequately represent an overwhelming number of clients and the underfunding of indigent criminal defense).

[132] For a deeper look into timing issues with *Brady* and the higher administrative and reputational costs to prosecutors the later they discover impeachment or exculpatory evidence, see Baer, *supra* note 131, at 39, 41.

[133] R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1471 (2011); *see also* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2242 (2010) ("Given

that the criminal legal system skews so heavily toward plea bargaining incentivizes "resource-deprived prosecutors" to "rationally delay some of their preparation" until they know that a defendant will not plead guilty.[134] Thus, prosecutors may not uncover inconsistencies in a case until after plea bargaining has failed and the prosecutor has started to prepare for trial.[135] For cases that resolve at the plea-bargaining stage, then, defendants may never learn about those inconsistencies or critical favorable evidence.[136] Unfortunately, this also means that innocent individuals may never learn about material evidence that could have prevented their conviction.[137]

In summary, even with the most well-intentioned prosecutors, the realities of heavy caseloads, pressure to resolve cases quickly, and prosecutors' inability to determine what evidence is "material," have resulted in the materiality standard being unworkable at the plea stage.

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the burdensome caseloads of prosecutors, police, defense attorneys and judges, and the natural proclivity . . . to triage work according to deadlines, it is likely that most previously unknown, unrecognized, and unidentified *Brady* material is going to emerge during last minute pre-trial preparation when the prosecutor starts reviewing all documents in the file intensively, interviewing or re-interviewing witnesses, anticipating the defense theory, and tying up loose ends with additional investigation.").

[134] Baer, *supra* note 131, at 44.

[135] *Id.* at 45.

[136] Many *Brady* violations are never uncovered, making it difficult to analyze the true scope of the problem. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 108–11, 111 n.206 (2008) ("[O]ne reason why relatively few exonerees brought *Brady* claims is that suppression of exculpatory evidence is difficult to uncover . . . even after exoneration."); Gershman, *Litigating* Brady, *supra* note 128, at 536 ("It is commonly believed that most Brady evidence never gets disclosed."); *see, e.g.*, United States v. Alvarez, 86 F.3d 901, 905 (9th Cir. 1996) ("[T]he government's failure to turn over exculpatory information in its possession is unlikely to be discovered and thus largely unreviewable."); United States v. Oxman, 740 F.2d 1298, 1310 (3d Cir. 1984) ("[M]aterial favorable to the defense may never emerge from secret government files.").

[137] *See* Medwed, *supra* note 121, at 1540; Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23–24, 57 (1987) (citing data showing that 10% of 350 wrongful convictions studied involved suppression of evidence by prosecutors); Gershman, *Litigating* Brady, *supra* note 128, at 533 (finding that "violations of Brady are the most recurring and pervasive of all constitutional procedural violations, with disastrous consequences: innocent people are wrongfully convicted, imprisoned, and even executed . . .").

III. SOLUTIONS

In *Frye* and *Lafler*, the Supreme Court reasoned that the reality of the current criminal legal system changed the understanding of how critical constitutional rights apply to criminal defendants. Given that most criminal cases are adjudicated at the plea stage, and that impeachment evidence is critical to defendants even at that early stage, the *Brady* doctrine must shed its trial-centric focus to remain a meaningful right. Two main doctrinal changes are thus critical: required disclosure of all favorable evidence before pleas, both exculpatory and impeachment; and no required showing of materiality, at least at the plea stage.

A. Disclosure of All Favorable Evidence Before Pleas

Brady's purpose of preventing unfairness to the accused necessitates disclosure of impeachment and exculpatory evidence to the 97% of criminal defendants who resolve their cases through pleas. Today, the concept of avoiding an "unfair trial" may be better framed as avoiding an unfair *proceeding*, encapsulating a larger part of the adjudicatory process. This would better ensure that the promises of *Brady* apply to all individuals accused of crimes, not just the small percentage who go to trial. When the government withholds relevant information from the defense, the accused individual suffers—regardless of whether that individual elected to go to trial or to resolve their case through a plea.

Overruling *Ruiz* and making clear that all *Brady* evidence must be disclosed pre-plea, is a crucial first step toward ensuring that the policy and substance of *Brady*'s due process rights continue to meaningfully manifest in our plea-centric system. Since impeachment evidence may be just as critical as exculpatory evidence, prosecutors must be required to disclose both types of evidence before an individual pleads guilty.[138] Ensuring that *Brady* and its progeny apply pre-plea does not expand the doctrine, but follows Supreme Court precedent and returns to *Brady*'s original promise: avoiding unfairness to the accused.

The Supreme Court showed in *Frye* and *Lafler* that critical constitutional rights may be interpreted to remain relevant in the modern age.[139] The Court must apply this same lens to *Brady* rights—or, as the Court reasoned with the Sixth Amendment right to effective assistance of

[138] Disclosing Jencks material may also be necessary before a plea, regardless of whether it is clearly favorable. The Jencks Act requires the government to disclose statements and reports by government witnesses after they have been called on direct examination. 18 U.S.C. § 3500.

[139] *See, e.g.*, Missouri v. Frye, 566 U.S. 134, 143–44 (2012); Lafler v. Cooper, 566 U.S. 156, 165 (2012).

counsel, the due process right to disclosure of critical exculpatory and impeachment evidence will not have meaning at the very stage where it could make the biggest difference.

B. Eliminating the Materiality Standard

However, requiring disclosure of material impeachment and exculpatory evidence before a plea is not enough to ensure such disclosure is meaningful if it does not address the materiality standard itself. To the extent the materiality standard has any meaning at trial, it is even more problematic during plea negotiations. At this early stage in a proceeding, a prosecutor likely has little to no knowledge of the defense theory or the defense's evidence.[140] It is thus extraordinarily difficult for prosecutors to make an *ex ante* determination of the value of an out-of-context piece of evidence. Requiring the prosecutor to disclose all relevant, favorable information will help ensure that the prosecutor does not unintentionally overlook or disregard important information.

More than that, the materiality standard, as prescribed by *Bagley*, directly contemplates whether certain evidence would have impacted the outcome of a trial.[141] Evidence is only "material" if there is a reasonable probability of a different result in the proceeding, meaning a probability that "undermine[s] confidence in the outcome."[142] When the entire proceeding is the plea, asking whether evidence would have made a difference in the proceeding would require a subjective inquiry into whether the evidence would have caused the defendant to decide not to plead guilty.[143]

There are myriad reasons, as explained above, why individuals choose to, or are pressured to, plead guilty, such as avoiding punitive sentencing laws. Continuing to assess suppressed evidence under the materiality standard misses the issue at the heart of *Brady*: that evidentiary suppression renders a proceeding unfair, and that the defendant suffers as a result. The fact that certain evidence may or may not have convinced a person to plead guilty requires a different analysis than the *Bagley* materiality standard.[144] Imposing the materiality standard at the plea stage

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[140] And indeed, the defense theory may be shaped by the existence of impeachment evidence.

[141] United States v. Bagley, 473 U.S. 667, 678–79 (1985).

[142] *Id.* at 682.

[143] *See, e.g.*, United States v. Persico, 164 F.3d 796, 804–05 (2d Cir. 1999).

[144] In *Lee v. United States*, the Supreme Court analyzed an ineffective assistance of counsel question by examining whether the defendant showed that if he had been properly advised, he would have elected to go to trial rather than plead guilty. Lee v. United States,

would require a different inquiry, without the context of evidence presented at trial.

Trial judges could easily confirm that the government complied with disclosure requirements. For example, judges could inquire at the plea colloquy whether the government has informed the defendant that they have disclosed all favorable evidence in their possession, whether or not they deem the evidence material. Of course, this will not guarantee that the prosecution turns over all favorable information and there will need to be a remedy in place for the inevitable violations of this new rule.[145]

One possibility is analyzing whether a new trial (or, presumably, a new opportunity to plead guilty) is warranted under the harmless error rule in *Chapman* for constitutional violations.[146] *Chapman* asks "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[147] This standard "emphasizes an intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party."[148] Distinct from the current materiality standard, under *Chapman*, the prosecution would bear the burden of proving that the constitutional violation was harmless beyond a reasonable doubt, and did not lead to the defendant's conviction.[149] This would be a less onerous hurdle for defendants to overcome than the current materiality standard. Disclosing all favorable evidence to the defense before pleas will help "return to the original theory and promise of *Brady*"[150] and, as was the concern in *Frye* and *Lafler*, prevent the right from being rendered meaningless.

C. Addressing Potential Counterarguments

A potential concern with providing *Brady* rights pre-plea, raised in *Ruiz* itself, is that it would risk making pleas less efficient.[151] The *Ruiz*

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137 S. Ct. 1958, 1965 (2017).

[145] For disclosure to be effective, courts must also implement an enforcement mechanism, such as requiring prosecutors to complete certain steps before pleas. For example, courts could require prosecutors to have reviewed the case file and have completed a certain level of investigation before attesting to the fact that they have disclosed favorable evidence.

[146] *See* Chapman v. California, 386 U.S. 18, 23 (1967).

[147] *Id.* (citation omitted).

[148] *Id.*

[149] *Id.*

[150] United States v. Bagley, 473 U.S. 667, 702 (1985) (Marshall, J., dissenting).

[151] *See* United States v. Ruiz, 536 U.S. 622, 631 (2002) ("[A] constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea,

Court was concerned that prosecutors would be required to "devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages."[152]

However, this concern is unlikely to come to fruition. First, many lower courts have required *Brady* disclosure before pleas for years without any hindrance to the plea process.[153] Second, eliminating the materiality requirement at the pre-plea stage will permit quicker disclosure without the onerous task of determining what will be later considered "material." Finally, at such an early stage in the proceeding, the government has likely only begun its investigation, meaning there is less information to turn over. Indeed, after the Ninth Circuit ruled that *Brady* evidence must be disclosed before pleas, the plea bargain program at issue in the case continued to operate as it had prior to any disclosure requirement.[154]

Of course, this suggests the proposal for broader early disclosure might not be very impactful because prosecutors have done little investigation early on. But while the lack of early investigation might make the import of some evidence difficult to discern, prosecutors will still be able to identify "favorable" evidence at an early stage, making disclosure worthwhile. Certain information, such as rewards and promises or witness recantations, should be immediately obvious and easily disclosed. To be sure, other impeachment evidence may only arise after a more thorough investigation, so there may be a need for requiring prosecutors to complete certain investigatory steps (e.g., interviewing key witnesses, reviewing physical evidence, etc.) before offering a plea.

CONCLUSION

Providing favorable impeachment and exculpatory evidence to criminal defendants before pleas will help ensure that individuals are not over-punished, and that pleas are accurate and fair. Given that most cases are resolved through pleas, it is incumbent on the courts to ensure that this

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could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.").

[152] *Id.* at 632.

[153] *See, e.g.*, United States v. Walters, 269 F.3d 1207, 1214 (10th Cir. 2001); United States v. Ross, 245 F.3d 577, 583 n.1 (6th Cir. 2001); White v. U.S., 858 F.2d 416, 423–24 (8th Cir. 1988); Banks v. United States, 920 F. Supp. 688, 691–92 (E.D. Va. 1996).

[154] Brief for the Respondent at 41, United States v. Ruiz, 536 U.S. 622 (2002) (No. 01-595), 2002 WL 523026, at *25.

discretionary process still provides defendants with constitutional rights.[155]

Requiring disclosure of all relevant information before pleas will require prosecutors to do some preliminary investigation before offering a plea. But the alternative, denying disclosure of such evidence, means that the vast majority of criminal cases will remain outside of the *Brady* framework. Defendants will be forced to decide whether to risk more punitive sentencing at trial or plead guilty without knowledge of relevant, and potentially critical, information. For *Brady*'s promises of ensuring fairness and accuracy and preventing miscarriages of justice to remain true today, the government must disclose all favorable evidence to defendants, regardless of materiality, before they plead guilty.

[155] A pretrial, pre-plea *Brady* right would not require overturning *United States v. Williams* or otherwise disrupting the grand jury. The government need not disclose *Brady* evidence before a grand jury proceeding because the grand jury is distinct and separate from the criminal adjudicatory process. United States v. Williams, 504 U.S. 36, 53 (1992). This is because, unlike the rest of a criminal proceeding, the grand jury does not determine guilt or innocence, but "assess[es] whether there is adequate basis for bringing a criminal charge." *Id.* at 51.