ENTITLING THE ACCUSED TO EXCULPATORY EVIDENCE: WHY PROSECUTORS SHOULD HAVE TO DISCLOSE DURING PLEA BARGAINING

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INTRODUCTION

Innocent until proven guilty[1] is one of the most repeated phrases on crime television dramas and blockbuster thrillers.[2] In reality, life is not so simple. While a criminal defendant is not assumed guilty at trial until a jury convicts him, what happens to this presumption for all of the cases that never reach trial? Over the last 50 years, defendants chose to proceed to a trial in less than three percent of state and federal criminal cases.[3] The other 97 percent of cases were resolved through plea deals.[4] Federal courts are currently split on the stage at which exculpatory evidence must be disclosed under the *Brady* doctrine.[5]

The Supreme Court has yet to give an answer as to whether a defendant in a criminal case is entitled to receive exculpatory evidence the prosecution possesses during the plea-bargaining stage or if they only get such evidence if the case reaches the trial stage. While the Supreme Court has yet to take up this question, the Fifth Circuit's recent decision in *Alvarez v. City of Brownsville*[6] has those in the legal field wondering if it is just a matter of time before we get an official answer.

This contribution will first evaluate where courts around the country currently stand on when exculpatory evidence must be handed over. Next, this contribution will argue that based on the Constitution and Supreme Court precedent, exculpatory evidence can and should be handed over to criminal defendants before plea bargains are accepted. Finally, this

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[1] *See* Coffin v. United States, 156 U.S. 432, 452 (1895).

[2] *See generally* Gray Cavender, *Media and Crime Policy: A Reconsideration of David Garland's The Culture of Control* 6 PUNISHMENT & SOC'Y 335, 337 (2004).

[3] Innocence Staff, "Report: Guilty Pleas on the Rise, Criminal Trials on the Decline," *The Innocence Project* (online, Aug. 7, 2018), https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/.

[4] *Id.*

[5] *See generally* Alvarez v. City of Brownsville, 904 F.3d 382 (5th Circuit 2018); United States v. Mathur, 624 F.3d 498 (1st Cir. 2010); Friedman v. Rehal, 618 F.2f 142 (2d Cir. 2010); United States v. Moussaoui, 591 F.3d 263 (4th Cir. 2010); McCann v. Mangialardi, 337 F.3d 782 (7th Cir. 2003); Smith v. Baldwin, 510 F.3d 1127 (9th Cir. 2007); United States v. Ohiri, 133 F.App'x 555 (10th Cir. 2005).

[6] *Alvarez*, 904 F.3d at 382.

contribution will argue that—regardless of if the Court one day finds this to be constitutionally required or not—prosecutor's offices should adopt this behavior as a practical matter.

I. THE HISTORY OF EXCULPATORY EVIDENCE

In 1963, the Supreme Court established the *Brady* doctrine, which maintained that there is a constitutional right for a criminal defendant to receive all evidence favorable to him from the prosecution during a criminal trial.[7] Specifically, the *Brady* doctrine states that any evidence that is "material either to [the defendant's] guilt or to punishment" must be disclosed.[8] In a subsequent case—*Brady v. United States*—the Supreme Court held that a guilty plea is essentially a waiver of the constitutional guarantees that are provided in a jury trial; however, a guilty plea must be voluntary as well as knowing and intelligent, and "done with sufficient awareness of the relevant circumstances and likely consequences."[9] But the question still remains whether a defendant in a criminal case is entitled to receive exculpatory evidence the prosecution possesses during the plea bargaining stage rather than the criminal trial itself.

The last major case where the Supreme Court dealt with this type of situation was *United States v. Ruiz* in 2002.[10] In *Ruiz*, the defendant was arrested after immigration agents found 30 kilograms of marijuana in her luggage.[11] Following the charge, federal prosecutors offered the defendant a "fast track" plea bargain in which she would waive the indictment, trial, and appeal in exchange for the government recommending a reduced sentencing.[12] The out-held offer required the defendant to waive the right to receive any impeachment information relating to any witnesses as well as waive the right to any information supporting an affirmative defense she would raise if she went to trial.[13] The defendant rejected the offer, but ultimately ended up pleading guilty after the prosecutors withdrew their plea bargain and indicted her for unlawful drug possession.[14] When Ruiz requested the reduced sentence that the Government originally offered, the District Court denied the request.[15] The Court of Appeals vacated the sentence and found that the Constitution prohibits defendants from

[7] Brady v. Maryland, 373 U.S. 83, 87 (1963).
[8] *Id.*
[9] Brady v. United States, 397 U.S. 742, 748 (1970).
[10] United States v. Ruiz, 536 U.S. 622 (2002).
[11] *Id.* at 625.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 625-26.
[15] *Id.* at 626

waiving their right to certain impeachment information.[16] Ultimately, however, the Supreme Court disagreed with the Ninth Circuit and held that the Constitution does not require the government to disclose impeachment information prior to entering a plea agreement with a criminal defendant.[17] The Court reasoned that a waiver of one's constitutional rights made during a guilty plea by a defendant will typically be considered knowing, intelligent, and sufficiently aware under *Brady* when the waiver is made with a full understanding of "the nature of the right and how it would apply in general circumstances—even though the defendant may not know the specific detailed consequences invoking it."[18] According to the decision, impeachment evidence is not considered "critical" to the knowledge required for a defendant to voluntarily plead guilty.[19]

II. THE CIRCUIT SPLIT TODAY

With the recent decision in *Alvarez*, the Fifth Circuit joined the First, Second, and Fourth Circuits finding that a criminal defendant has no right to exculpatory evidence possessed by the prosecution before pleading guilty.[20] The Seventh, Ninth, and Tenth Circuits on the other hand have found that prosecutors are likely violating the *Brady* doctrine if they keep exculpatory evidence from the criminal defendant before he pleads guilty.[21] The variations among the circuits largely comes down to different readings of the *Ruiz* decision.

In *United States v. Mathur*, the First Circuit decided that a defendant's right to receive exculpatory evidence under the *Brady* doctrine is restricted to the trial context.[22] The court relied on the policy reasons for the *Brady* doctrine, stating that the main reason for its existence was the "avoidance of an unfair trial."[23] The court further argued that "courts enforce *Brady* in order 'to minimize the chance that an innocent person [will] be found guilty.'"[24] In *United States v. Moussaoui*, the Fourth Circuit focused in on language used by the Supreme Court in *Ruiz*.[25] In *Ruiz*, the Court noted that prosecutors are not required by due process to provide the defendant

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[16] *Id.*
[17] *Id.* at 633.
[18] *Id.* at 629.
[19] *Id.* at 630.
[20] *See generally Alvarez*, 904 F.3d at 382; *Mathur*, 624 F.3d at 498; *Friedman*, 618 F.2d at 142; *Moussaoui*, 591 F.3d at 263.
[21] *See generally McCann*, 337 F.3d at 782; *Smith*, 510 F.3d at 1127; *Ohiri*, 133 F.App'x at 555.
[22] *Mathur*, 624 F.3d at 506-07.
[23] *Id.*
[24] *Id.* (quoting *Moussaoui*, 591 F.3d at 285).
[25] *Moussaoui*, 591 F.3d at 286.

with any and all information that might be beneficial to the defendant in a criminal case.[26] The Supreme Court had previously allowed courts to accept guilty pleas where the defendant lacked knowledge of many different circumstances, including the strength of the government's case.[27]

Most recently, the Fifth Circuit found in *Alvarez* that a lower court decision giving a defendant access to *Brady* material before trial was wrong and departed from years of precedent in other circuit courts as well as the Supreme Court.[28] By coming to this decision, the Fifth Circuit joined the First, Second, and Fourth Circuit Courts in refusing to expand the *Brady* doctrine to exculpatory evidence without a direct ruling from the Supreme Court.[29]

Conversely, in *McCann v. Mangialardi*, the Seventh Circuit chose to differentiate exculpatory evidence from impeachment evidence.[30] The court in this case relied on the Supreme Court's reasoning in Ruiz that "impeachment information is special in relation to the fairness of the trial, not in respect to whether a plea is voluntary."[31] The Tenth Circuit used similar reasoning in *United States v. Ohiri*.[32] In *Smith v. Baldwin*, the Ninth Circuit ultimately found against the defendant for procedural reasons, but explained that "materiality is determined by 'whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial.'"[33]

III. THE FUTURE OF PROSECUTION

While the Supreme Court has yet to answer the question of when *Brady* rights are triggered during the course of a prosecution, it is only a matter of time before that happens. In the interim, and regardless of what the Court decides, prosecutors' offices should adopt the practice of disclosing any exculpatory evidence they have during the plea bargaining process. There are three reasons for this: (1) to ensure only the guilty, not the innocent, are imprisoned, (2) to lessen the burdens put on our current prison systems, and (3) to move the criminal justice system toward better protecting marginalized groups.

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[26] *Id.*
[27] *Id.*
[28] *Alvarez*, 904 F.3d at 394.
[29] *Id.*
[30] *McCann*, 337 F.3d at 787-88.
[31] *Id.* (quoting *Ruiz*, 536 U.S. at 629).
[32] *Ohiri*, 133 F.App'x at 562.
[33] *Smith*, 510 F.3d at 1148 (quoting Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995)).

First and foremost, the *Brady* doctrine was established to "minimize the chance that an innocent person would be found guilty."[34] The Fourth Circuit's opinion that "when a defendant pleads guilty, those concerns are almost completely eliminated because his guilt is admitted,"[35] constitutes an extremely naïve view. Such a view fails to account for the many reasons an innocent defendant may choose to plead guilty.[36] The most common theory for why innocent defendants plead guilty is that "individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if invoke the right to trial and lose."[37] Ample evidence exists to support the idea that federal defendants are being coerced to plead guilty because the penalty for exercising their Sixth Amendment right to a trial is too high.[38] By ignoring this reality courts are doing a wide disservice to the credibility of the criminal justice system.

Second, prosecutors should look at this as a way to reduce overcrowded prisons without appearing weak on crime. As of 2015, eighteen states and the Federal Bureau of Prisons operated their prison facilities at more than 100 percent capacity.[39] Prison overcrowding is known to endanger the safety of both prisoners and staffers, create poor living conditions, and breed illness.[40] Unlike other solutions to lower the number of people going to prison—like sending fewer people to prisoner for drug crimes and allowing nonviolent offenders to serve short prison sentences—providing exculpatory evidence to defendants prior to a defendant pleading guilty, would only result in innocent people, with valid evidence on their side, going free.[41]

Finally, prosecutors' offices should embrace our current era of progressive prosecution and criminal justice reform. In cities across America, people are voting out traditional prosecutors and opting instead for reform-minded prosecutors.[42] More and more people are recognizing

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[34] *Moussaoui*, 591 F.3d at 285.
[35] *Id.*
[36] Walter Pavlo, "Are Innocent People Pleading Guilty? A New Report Says Yes," *Forbes* (online, July 31, 2018) https://www.forbes.com/sites/walterpavlo/2018/07/31-/are-innocent-people-pleading-guilty-a-new-report-says-yes/#69772d285193.
[37] NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018), *available at* https://www.nacdl.org/trialpenaltyreport/.
[38] *Id.* at 5.
[39] Dana Liebelson, "18 States Packed Their Prisons Over Maximum Capacity," *Huffington Post* (online, Sept. 17, 2015) https://www.huffingtonpost.com/entry/18-states-have-packed-prisons-over-maximum-capacity_us_55fb3025e4b0fde8b0cd9ea1.
[40] *Id.*
[41] Saki Knafo, "10 Ways to Reduce Prison Overcrowding and Save Taxpayers Millions," *Huffington Post* (online, Nov. 8, 2013) https://www.huffingtonpost.com/2013-/11/08/prison-overcrowding_n_4235691.html.
[42] Ben Austen, "In Philadelphia, a Progressive D.A. Tests the Power—and Learn the Limits—of His Office," *The New York Times* (online, Oct. 30, 2018)

that the criminal justice system the United States has always known was never intended to keep marginalized people and groups safe. By prioritizing the truth over win counts, prosecutors can add an element of inherent fairness to the system.

CONCLUSION

Ultimately, the Supreme Court will need to decide if exculpatory evidence is the virtual equivalent of impeachment evidence or if is entitled to stronger procedural protections. While some of the lower courts have relied on the policy reasons for the *Brady* doctrine to decide these cases, the Court should take into account today's reality that the vast majority of cases will never make it to trial. For these cases that never make it to trial, what procedural protections do we have to ensure the innocent are not being sent to jail? A ruling from the Supreme Court that exculpatory evidence must be turned over to the defense before a plea deal may be entered would go a long way to show the criminal justice system is committed to its bedrock principle: innocent until proven guilty.

https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html.