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Lost Opportunity: Supreme Court Declines to Resolve Circuit Split on *Brady* Obligations During Plea-Bargaining

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LOST OPPORTUNITY: SUPREME COURT DECLINES TO RESOLVE CIRCUIT SPLIT ON *BRADY* OBLIGATIONS DURING PLEA-BARGAINING

Abstract: On September 18, 2018, the United States Court of Appeals for the Fifth Circuit in *Alvarez v. City of Brownsville* held that prosecutors are not constitutionally required to disclose exculpatory evidence to criminal defendants during the plea-bargaining process. With its decision, the Fifth Circuit entered the circuit split over the meaning of impeachment evidence in the context of the United States Supreme Court’s 2002 decision in *United States v. Ruiz*, where the Court held that the prosecution need not turn over impeachment evidence during the plea-bargaining process. Some circuits interpret impeachment evidence to include exculpatory evidence, whereas others had not. This Comment argues that the Supreme Court should grant certiorari in the next circuit case to clarify the definition of impeachment evidence in *Ruiz*. Further, this Comment argues that as things stand, Supreme Court precedent requires the disclosure of exculpatory evidence during the plea-bargaining process.

INTRODUCTION

George Alvarez spent four years in prison before finding out that the government had evidence demonstrating that he was innocent of the crime for which he had been convicted.¹ In 2005, Alvarez was arrested for public intoxication and burglary of a motor vehicle.² At the time, Alvarez was seventeen years old and a ninth-grade special education student.³ Shortly after his arrest and subsequent arrival at a detention center in Brownsville, Texas, an altercation occurred between Alvarez and Officer Jesus Arias.⁴ Alvarez was charged with, and pled guilty to, assault on a public servant in March 2006.⁵ Four years

¹ *Alvarez v. City of Brownsville*, 904 F.3d 382, 385–86 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2690 (2019).

² *Id.* at 386.

³ *Id.*

⁴ *Id.* at 387–88. The scuffle started when Alvarez was placing a phone call in the holding area of the jail and the phone stopped working, causing Alvarez to become disruptive. Maurice Possley, *George Alvarez*, NAT’L REGISTRY EXONERATIONS (July 6, 2017) <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5166> [<https://perma.cc/8826-8YAN>]. According to Officer Arias, he attempted to move Alvarez to a cell and Alvarez assaulted him. *Id.* Other officers rushed to help Arias restrain Alvarez. *Id.*

⁵ *Alvarez*, 904 F.3d at 388. Assault on a public servant is a felony in Texas. TEX. PENAL CODE ANN. § 22.01(b)(1) (West 2019). The judge did not sentence Alvarez to jail time and instead sentenced him to six months of drug treatment and eight years of probation upon completion of the drug

later, a previously undisclosed exculpatory video of the incident surfaced, which did not show the events described by Officer Arias and instead showed Arias as the initial aggressor.⁶ Because of the Supreme Court's 1963 decision in *Brady v. Maryland*, prior to trial, prosecutors are constitutionally required to turn over any evidence in the government's possession tending to show a defendant's innocence.⁷ Believing that the undisclosed video demonstrated his innocence, Alvarez filed a writ of habeas corpus alleging a violation of *Brady*.⁸

In 2018, in *Alvarez v. City of Brownsville*, the U.S. Court of Appeals for the Fifth Circuit held that withholding the video did not constitute a violation of *Brady* because *Brady*'s requirement that the prosecution disclose exculpatory evidence only applies during trial and not during plea-bargaining.⁹ In deciding *Alvarez*, the Fifth Circuit joined with similar holdings of the First, Second, and Fourth Circuits and split with holdings of the Seventh, Ninth, and Tenth Circuits.¹⁰ After the Fifth Circuit decision, Alvarez filed a petition for a writ of

program. Possley, *supra* note 4. Alvarez violated the terms of his probation by failing to adhere to the drug treatment program specifications. *Id.* Thus, in November 2006, the state revoked Alvarez's probation and sentenced him to eight years in prison. *Id.*

⁶ *Alvarez*, 904 F.3d at 388 (stating that the video surfaced about four years after Alvarez started his prison sentence); Possley, *supra* note 4. Exculpatory evidence is any evidence that tends to show that a criminal defendant did not commit the crime alleged. *Exculpatory Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019); see *infra* note 23 and accompanying text (defining exculpatory evidence as evidence helpful to the accused and material to guilt or punishment).

⁷ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that when the government withholds evidence during trial that is beneficial to the defendant, it is a violation of due process if the evidence is relevant to guilt or punishment, regardless of the government's intentions). The Fifth Amendment of the U.S. Constitution prevents the federal government from depriving any person of life, liberty, or property without due process of law. U.S. CONST. amend. V. The Fourteenth Amendment puts that same responsibility on states. *Id.* amend. XIV § 1. Because a criminal trial could result in the deprivation of a person's liberty by incarceration, the Constitution demands that the accused receive fair treatment. See Michael N. Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3603 (2013) (stating that citizens may not be deprived of life, liberty, or property without due process of law). The Supreme Court previously held in 1935 in *Mooney v. Holohan* that the due process requirement is not met when a conviction is obtained through the intentional deception of the jury and judge. 294 U.S. 103, 112 (1935). The holding in *Brady* extended the holding of *Mooney* to situations where the jury and judge are deceived because of the suppression of exculpatory evidence. *Brady*, 373 U.S. at 86.

⁸ *Alvarez*, 904 F.3d at 388; see Matt Ford, *The Senseless Legal Precedent That Enables Wrongful Convictions*, NEW REPUBLIC (Sept. 21, 2018), <https://newrepublic.com/article/151331/brady-rule-plea-bargaining-wrongful-convictions> [<https://perma.cc/8EEF-TJM4>] (noting that the video showed Officer Arias putting Alvarez in a choke hold and then a head lock, while Alvarez struggled in his grip). Habeas corpus is Latin for "that you have the body." *Habeas Corpus*, BLACK'S LAW DICTIONARY, *supra* note 6. A writ of habeas corpus provides a means for a person who is being detained to come before a court to challenge the legality of the detention. *Id.*

⁹ *Brady*, 373 U.S. at 87; *Alvarez*, 904 F.3d at 394. Plea-bargaining refers to the negotiating process that takes place between defendants and prosecutors prior to trial. *Plea Bargain*, BLACK'S LAW DICTIONARY, *supra* note 6. Prosecutors may offer the defendant a reduced sentence or dismiss certain charges in exchange for the defendant waiving the right to trial and admitting guilt. *Id.*

¹⁰ *Compare* Smith v. Baldwin, 510 F.3d 1127, 1148 (9th Cir. 2007) (asserting that any evidence that would cause a defendant to go to trial rather than take a plea must be turned over at the plea-

certiorari to the U.S. Supreme Court.¹¹ Despite the disagreement among lower courts and the significant impact the review could have had on the fairness of plea-bargaining, the Supreme Court denied certiorari.¹² The Court's review of *Alvarez* would have had enormous implications on due process for criminal defendants who resolve their cases through guilty pleas.¹³

This Comment demonstrates that the prevalence of plea bargains in the modern criminal justice system renders necessary an extension of *Brady* to the plea-bargaining phase.¹⁴ Part I discusses the history of the constitutional obli-

bargaining stage), *United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005) (suggesting that exculpatory evidence must be turned over to the defendant prior to entering a guilty plea), and *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (holding that prosecutors are constitutionally required to disclose exculpatory evidence during the plea-bargaining process), with *Alvarez*, 904 F.3d at 392 (holding that *United States v. Ruiz*, 536 U.S. 622 (2002), applies to exculpatory and impeachment evidence), *United States v. Mathur*, 624 F.3d 498, 507 (1st Cir. 2010) (holding that criminal defendants are not constitutionally entitled to knowledge of all information pertinent to their cases before entering a guilty plea), *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010) (suggesting that *Ruiz* applies to both exculpatory and impeachment evidence because the Supreme Court has treated exculpatory and impeachment evidence the same for *Brady* claims), and *United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010) (citing to its prior interpretation of *Ruiz* to suggest that prosecutors are probably not constitutionally required to disclose exculpatory evidence during the plea-bargaining phase).

¹¹ *Alvarez*, 139 S. Ct. at 2690. Certiorari means "to be more fully informed" in Latin. *Certiorari*, BLACK'S LAW DICTIONARY, *supra* note 6. A writ of certiorari, which refers to the process of an appellate court asking a lower court to provide it with the record of a case, is a way for an appellate court to conduct discretionary review of cases that come before lower courts. *Id.*

¹² *Alvarez*, 139 S. Ct. at 2690. Prosecutors currently have much more bargaining power than defendants during the plea-bargaining process because of their greater awareness of the evidence against the defendant. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS, Nov. 20, 2014, <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/EB3Q-SYM4>]. By granting certiorari in *Alvarez*, the Supreme Court could have helped level the playing field for criminal defendants. *See id.* (discussing how prosecutors, who have access to police reports, witness interviews, and other evidence, enter plea bargain negotiations with a significant advantage over defense attorneys because prosecutors can leverage the information imbalance to secure guilty pleas).

¹³ Rakoff, *supra* note 12. Access to exculpatory information is especially important to ensure the fairness of criminal proceedings for indigent and minority defendants, who are more likely to suffer the negative consequences of hurried and haphazard plea bargains. *See* ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 16 (2004), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.auth_checkdam.pdf [<https://perma.cc/DC3F-BL37>] (discussing how indigent defendants are impacted by "meet 'em and plead 'em" attorneys, who are public defenders that meet their clients for the first time on the day of trial with a plea deal prepared for them to sign); Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187, 1191 (2018) (arguing that data on plea bargains shows that prosecutors unintentionally consider race to assess a defendant's likelihood of reoffending and a defendant's criminal nature).

¹⁴ *See* Rakoff, *supra* note 12 (stating that of the 2.2 million people currently incarcerated in the United States, over ninety percent ended up there because of a plea bargain and sentence decided by a prosecutor, instead of a guilty finding by a jury and a sentence determined by a judge). Plea-bargaining has replaced trial by jury as the primary method for resolving criminal cases. *See id.* (stating that in 2013, over ninety-five percent of federal criminal charges ended with a plea bargain). Be-

gations for evidence disclosure and the role of *Alvarez* in that history.¹⁵ Part II discusses the positions of the different circuits regarding whether exculpatory evidence must be turned over during the plea-bargaining phase.¹⁶ Finally, Part III argues that the Supreme Court's jurisprudence requires the disclosure of exculpatory evidence during the plea-bargaining phase.¹⁷

I. MANDATORY DISCLOSURE OF MATERIAL EVIDENCE: *ALVAREZ*'S FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Alvarez v. City of Brownsville is the latest circuit court decision addressing whether prosecutors are constitutionally required to disclose exculpatory evidence during the plea-bargaining process.¹⁸ Part I of this Comment discusses the legal landscape and factual background of *Alvarez*, as well as the case's procedural history.¹⁹ Section A of this Part discusses the holdings of two seminal Supreme Court cases, *Brady v. Maryland*, decided in 1963, and *United States v. Ruiz*, decided in 2002, and analyzes the Court's reasoning for its discovery requirements.²⁰ Section B of this Part discusses the factual background and procedural history of *Alvarez*.²¹

A. The Supreme Court's Jurisprudence on Required Disclosure of Exculpatory Evidence

Current Supreme Court jurisprudence requires the prosecution to disclose to the defense any exculpatory evidence it possesses before the defendant's criminal trial.²² Exculpatory evidence is evidence that is helpful to the accused

cause of the prevalence of plea-bargaining, criminal defendants should receive the same constitutional protections they are given at trial, including access to *Brady* material. *See* Petegorsky, *supra* note 7, at 3612–13 (arguing that the expansion of *Brady* to plea-bargaining would prevent prosecutors from exaggerating the quality of the government's evidence to secure a conviction).

¹⁵ *See infra* notes 18–62 and accompanying text.

¹⁶ *See infra* notes 63–98 and accompanying text.

¹⁷ *See infra* notes 99–124 and accompanying text.

¹⁸ *See* 904 F.3d at 392–94 (noting that this case is the latest in a long line of circuit court cases interpreting *Ruiz*); *infra* notes 32–45 and accompanying text (explaining that the Court in *Ruiz* held that impeachment information need not be disclosed prior to a defendant entering a guilty plea).

¹⁹ *See infra* notes 18–62 and accompanying text.

²⁰ *See infra* notes 22–46 and accompanying text. *See generally* *Ruiz*, 536 U.S. at 633 (holding that *Brady* requirements do not apply during plea-bargaining); *Brady*, 373 U.S. at 87 (holding that when the government withholds evidence at trial that is beneficial to the defendant, it is a violation of due process if the evidence is relevant to guilt or punishment, regardless of the government's intentions).

²¹ *See infra* notes 47–62 and accompanying text.

²² *Brady*, 373 U.S. at 87; *see* Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and Brady in the Balance*, 28 GEO. J. LEGAL ETHICS 1, 32–34 (2015) (describing how the adversarial system still requires protections for the rights of the accused and how the *Brady* decision ensures that the defense can benefit from the facts and information that the government possesses).

and material to the accused's guilt or punishment.²³ Exculpatory evidence differs from impeachment evidence, which tends to be any information that might be helpful to the defendant but would not likely change the outcome of a trial.²⁴ The requirement to disclose such evidence protects defendants' right to due process.²⁵ There are two seminal Supreme Court cases on the topic of required disclosure of exculpatory evidence: *Brady v. Maryland* and *United States v. Ruiz*.²⁶

In *Brady*, decided in 1963, the Supreme Court articulated the pre-trial discovery requirements prescribed by the due process clause of the Constitution.²⁷ There, the trial court convicted the defendant of first-degree murder, and the defendant appealed after discovering that the prosecution withheld his companion's confession to carrying out the murder alone.²⁸ During the trial, the defendant took the stand and admitted to being involved in the robbery of the victim, but maintained that his companion acted alone in killing the victim.²⁹ The Court held that when the government withholds evidence beneficial to the defendant, it is a violation of due process if the evidence is relevant to guilt or punishment, regardless of the government's intentions.³⁰ The Court

²³ *Brady*, 373 U.S. at 87. Evidence is material when it is relevant to the legal questions or facts involved in the case. *Material Evidence*, BLACK'S LAW DICTIONARY, *supra* note 6.

²⁴ See Samuel R. Wiseman, *Brady, Trust, and Error*, 13 LOY. J. PUB. INT. L. 447, 459 (2012) (explaining that impeachment evidence could include information about why a certain witness might be unreliable, which could help a defendant's case, whereas exculpatory evidence might include information about an alibi that would decisively establish factual innocence).

²⁵ *Brady*, 373 U.S. at 87; see *supra* note 7 and accompanying text (explaining that the right of a defendant to receive exculpatory *Brady* evidence before trial is rooted in the Fifth Amendment of the Constitution, which prevents the federal government from depriving any person of life, liberty, or property without due process of law).

²⁶ See *Brady*, 373 U.S. at 87 (holding that prior to trial, prosecutors are required to turn over any evidence favorable to the defendant that is material to the defendant's guilt or innocence); *Ruiz*, 536 U.S. at 633 (holding that prosecutors are not constitutionally required to turn over impeachment evidence during the plea-bargaining process).

²⁷ *Brady*, 373 U.S. at 87; see *supra* note 7 and accompanying text (explaining the requirements the due process clause places on prosecutors).

²⁸ *Brady*, 373 U.S. at 84. First-degree murder is often defined as "murder that is willful, deliberate, or premeditated, or committed during the course of a dangerous felony." *First-Degree Murder*, BLACK'S LAW DICTIONARY, *supra* note 6. The defense had asked the prosecution for any out of court statements made by Brady's companion, Boblit. *Brady*, 373 U.S. at 84. The prosecution turned over some of Boblit's statements, but withheld a statement in which Boblit admitted to committing the murder. *Id.*

²⁹ *Brady*, 373 U.S. at 84. The statement by Boblit, which the prosecution withheld, did not come to light until after the appellate court affirmed Brady's conviction. *Id.* The case came before the Supreme Court on certiorari to determine whether Maryland's Court of Appeals violated Brady's constitutional right to due process when it restricted his new trial to the question of punishment. *Id.* at 85.

³⁰ *Id.* at 87. The Court determined that Boblit's statements would not have been allowed into evidence under Maryland law, so whether the prosecution was required to disclose Boblit's statements was irrelevant. *Id.* at 90–91. Interestingly, during their arguments, neither side addressed whether criminal defendants are entitled to exculpatory evidence prior to trial, and the outcome of *Brady* did not require the Court to answer this question. Thomas L. Dybdahl, "An Odd, Almost Senseless Series of Events," MARSHALL PROJECT (June 24, 2018), <https://www.themarshallproject.org/2018/06/24/an->

reasoned that withholding material evidence causes unfair trials, and unfair trials violate defendants' rights to due process of law.³¹

In *Ruiz*, decided in 2002, the Supreme Court overturned the Ninth Circuit by holding that defendants are not constitutionally entitled to receive impeachment evidence during pre-trial plea bargains.³² There, after law enforcement caught the defendant with thirty kilograms of marijuana, the prosecution offered her a "fast track" plea bargain.³³ Fast track pleas, which were common in the Southern District of California where Ruiz was arrested, require defendants to "waive indictment, trial, and appeal."³⁴ In exchange for waiving those rights, the prosecution suggests a sentence two levels lower than the sentence otherwise recommended under the U.S. Sentencing Guidelines.³⁵ If the defendant in *Ruiz* had accepted the fast track plea she was offered, she would have benefitted from the reduced sentence but waived certain rights, including the right to receive impeachment evidence about witnesses or informants and the right to evidence that would bolster affirmative defenses.³⁶ The defendant

odd-almost-senseless-series-of-events [https://perma.cc/8BL4-E5QE]. Yet, in the majority opinion, Justice William Douglas used the opportunity presented by *Brady* to advance his own desire to make the criminal justice system a vehicle for discovering the truth, rather than an adversarial system. *See Brady*, 373 U.S. at 87 (expressing in dicta that the goals of the criminal justice system are fairness and justice, and the focus should not be on winning or losing at trial).

³¹ *See Brady*, 373 U.S. at 87 (stating that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair"). Justice Douglas sought to make justice and facts the focus of the criminal justice system, rather than focusing on the adversarial nature of the system that can pit prosecutors against defendants at all costs, by ensuring that helpful information cannot be withheld from defendants for the sake of securing a conviction. Dybdahl, *supra* note 30.

³² *See Ruiz*, 536 U.S. at 629 (holding that the Constitution does not require disclosure of impeachment evidence during plea-bargaining).

³³ *Id.* at 625. Fast track pleas were created in the 1990s by the Offices of the United States Attorneys to manage the enormous number of immigration-related cases. Elizabeth Webster, *Fast Sentencing: A Possible Solution to the Divisive Discretion*, 77 MO. L. REV. 1227, 1233 (2012). The pleas were primarily used in cases where undocumented immigrants attempted to return to the United States illegally, and the pleas replaced charges with a maximum sentence of twenty years with charges carrying a maximum sentence of two years. *Id.* at 1234. In exchange for the reduction, defendants waived a variety of rights, like indictment, motions, and appeals, the result of which essentially guaranteed an immediate guilty plea, deportation, and no appeal. *Id.*

³⁴ *Ruiz*, 536 U.S. at 625.

³⁵ *Id.* The U.S. Sentencing Guidelines require judges to consider various factors when determining a sentence, including the defendant's criminal history and the sentencing range recommended by the Guidelines. *Sentencing Guidelines*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 721, 722–23 (2012). The Guidelines provide a sentencing range through a table that contains six criminal history categories and forty-three offense levels. *Id.* Judges are not required to sentence defendants according to the guidelines and may deviate from the guidelines by sentencing the defendant at a higher or lower level when there are "aggravating or mitigating" factors involved. *Id.* at 756. The judge must explicitly state the reason for any deviation from the Guidelines. *Id.* at 757.

³⁶ *Ruiz*, 536 U.S. at 625. In this context, impeachment evidence refers to evidence that casts doubt on the credibility of a witness. *Impeachment Evidence*, BLACK'S LAW DICTIONARY, *supra* note 6. Affirmative defenses are raised not to challenge the facts alleged, but instead to provide a legally

rejected the fast track plea because she did not wish to waive those rights, but, after her indictment, she decided to enter a standard plea that did not offer the reduced sentencing recommendation.³⁷ The defendant appealed on the grounds that the fast track plea violated *Brady* by requiring defendants to waive the right to receive impeachment evidence.³⁸

The Ninth Circuit held that a plea is involuntary if the government withholds the same impeachment evidence that it would be required to disclose before trial.³⁹ In response to the decision of the Ninth Circuit, the government petitioned the Supreme Court for certiorari, which it granted.⁴⁰ The Supreme Court explored whether the Constitution's Fifth and Sixth Amendments required pre-guilty plea disclosure of impeachment evidence.⁴¹ It held that the Constitution contains no such requirement.⁴² The Court reasoned that impeachment information is essential to the fairness of a trial, but because defendants waive their right to a fair trial by entering pleas, the Constitution does not require disclosure of impeachment information during the plea-bargaining process.⁴³ For a plea bargain to be constitutional it must be entered voluntarily, and the Court held that disclosure of impeachment evidence is not relevant to the voluntariness of a plea.⁴⁴ The Court also reasoned that the balance of due process considerations,

recognized excuse for the behavior alleged, like self-defense. *Affirmative Defense*, BLACK'S LAW DICTIONARY, *supra* note 6.

³⁷ *Ruiz*, 536 U.S. at 625–26.

³⁸ *Id.* at 628–29 (explaining that the defendant appealed her sentence on the grounds that it “was imposed in violation of law” because the plea required defendants to waive their right to “exculpatory impeachment information” from the government, which violates the Constitution).

³⁹ *Id.* at 629. Supreme Court precedent requires that guilty pleas be entered voluntarily to be valid. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”).

⁴⁰ *Ruiz*, 536 U.S. at 626.

⁴¹ U.S. CONST. amends. V, XIV § 1; *see Ruiz*, 536 U.S. at 629 (citing *Boykin v. Alabama*, 395 U.S. 238, 242–44 (1969) (“[P]leading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one’s accusers, and the Sixth Amendment right to trial by jury.”)). The language of *Ruiz* suggests that impeachment evidence is any information relevant to the defense that could help the defense’s case. *Ruiz*, 536 U.S. at 632 (stating that, in considering the requirement to disclose impeachment evidence, the Court held that the government has no obligation to disclose all potentially favorable evidence to the defendant).

⁴² *Ruiz*, 536 U.S. at 628–29.

⁴³ *Id.* at 628–29; *see Friedman*, 618 F.3d at 153 (noting that impeachment evidence is often related to the reliability of government witnesses and used to expose issues with witness’s credibility).

⁴⁴ *See Ruiz*, 536 U.S. at 629 (noting that the Ninth Circuit held that a plea cannot be voluntary if the defendant is not aware of material evidence possessed by the government); *United States v. Ruiz*, 241 F.3d 1157, 1164 (9th Cir. 2001) (holding that defendants must have knowledge of any material information possessed by the government in order for a plea to be voluntary). In 1969, the Supreme Court ruled in *Boykin* that valid plea bargains must be voluntary because entering a plea bargain involves waiving important constitutional rights, including the right against self-incrimination, the right to trial by jury, and the right to confront adversarial witnesses. 395 U.S. at 242–43. The Court in *Ruiz* reasoned that access to impeachment evidence was essential to a trial’s fairness, not a plea’s voluntariness. 536 U.S. at 629. The Court classified impeachment evidence at the plea-bargaining phase as

which include (1) the type of individual interest involved, (2) the effectiveness of the proposed protection, and (3) the burden on the government, establish that there is no right to impeachment evidence during the plea-bargaining process.⁴⁵ Lower courts disagree as to whether the ruling in *Ruiz* applies only to impeachment evidence or if it applies to exculpatory evidence as well.⁴⁶

B. Alvarez's Factual Background and Procedural History

In *Alvarez*, the Fifth Circuit grappled with whether the holding in *Ruiz* applied to both exculpatory and impeachment evidence.⁴⁷ George Alvarez was only seventeen years old when the Brownsville Police Department arrested him on suspicion of public intoxication and burglary of a motor vehicle in 2005.⁴⁸ After his arrest and shortly after arriving at a detention center in Brownsville, Texas, a physical confrontation occurred between Alvarez and Officer Jesus Arias.⁴⁹ Alvarez subsequently was charged with and pled guilty to “assault on a public servant.”⁵⁰ A previously undisclosed exculpatory video of the incident surfaced about four years later, and Alvarez filed a writ of habeas corpus alleging that the Brownsville Police Department violated *Brady* when it failed to disclose the video.⁵¹ After a new trial in October 2010, the Texas Court of Criminal Appeals

information that would reveal the strength of the prosecution’s case, which the Constitution does not require the prosecution to disclose. *Id.* at 630.

⁴⁵ *Ruiz*, 536 U.S. at 631. The Court reasoned that there are already sufficient protections to allay *Brady* concerns. *Id.* The Court pointed out that the fast track plea stipulated that evidence that would establish a defendant’s factual innocence would be turned over before the defendant entered a guilty plea. *Id.* Additionally, the Court reasoned that defendants are protected by Rule 11 of the Federal Rules of Criminal Procedure, which requires that the government present facts supporting the charge that are sufficient for a judge to accept a guilty plea. *Id.*; see FED. R. CRIM. P. 11(b)(3) (requiring that “[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea”). On the other hand, requiring the disclosure of impeachment evidence would adversely impact the government’s interests by requiring greater pre-plea preparation, interfering with investigations, and possibly decreasing the government’s reliance on pleas. *Ruiz*, 536 U.S. at 631–32.

⁴⁶ See *supra* note 10 and accompanying text (detailing the circuit split between the First, Second, Fourth and Fifth Circuits and the Seventh, Ninth, and Tenth Circuits).

⁴⁷ See *Alvarez*, 904 F.3d at 392 (noting that although the Supreme Court held in *Ruiz* that defendants are not constitutionally entitled to impeachment evidence during the plea-bargaining process, it did not directly decide whether defendants are entitled to exculpatory evidence).

⁴⁸ *Id.* at 385–86.

⁴⁹ *Id.* at 386.

⁵⁰ TEX. PENAL CODE ANN. § 22.01(b)(1); *Alvarez*, 904 F.3d at 388.

⁵¹ *Alvarez*, 904 F.3d at 388. The video of the altercation between Alvarez and Arias surfaced during the investigation of another lawsuit involving Officer Arias. Possley, *supra* note 4. In 2008, Jose Lopez sued Officer Arias for use of excessive force after an incident occurred with Officer Arias that was similar to the incident involving Alvarez. *Id.* Like Alvarez, Lopez faced a charge of assaulting a public officer after his scuffle with Office Arias, but Lopez refused to plead guilty. *Id.* At trial, Lopez’s defense attorney asked if there were any videos of the incident and only then did the Brownsville police turn over a recording that demonstrated Lopez’s innocence and Arias’s misconduct. *Id.* The jury acquitted Lopez and Lopez filed his excessive force civil suit. *Id.* During the investigation for

determined that Alvarez was “actually innocent” of committing the assault.⁵² The court annulled his conviction and the prosecution dropped all corresponding charges.⁵³ Alvarez filed civil suit against the City of Brownsville in 2011, claiming it had violated *Brady* through its nondisclosure of exculpatory evidence during his criminal trial.⁵⁴

The parties filed cross motions for summary judgment addressing whether the Brownsville Police Department’s failure to disclose the video constituted a *Brady* violation.⁵⁵ Although the parties disagreed over whether the video was exculpatory, the ultimate question for the court involved whether the government had a duty to disclose this potentially exculpatory evidence during the plea-bargaining phase.⁵⁶ The district court agreed with Alvarez’s assertion that

the civil suit, Lopez’s attorney discovered the video of the scuffle between Alvarez and Officer Arias and gave it to Alvarez’s attorney. *Id.*

⁵² *Ex parte Alvarez*, No. AP–76,434, 2010 WL 4009076 (Tex. Crim. App. Oct. 13, 2010). The Texas Court of Criminal Appeals’ decision that Alvarez was “actually innocent” created controversy, which is detailed in the concurrence by Judge Edith Jones. *Alvarez*, 904 F.3d at 394–95 (Jones, J., concurring). Justice Jones questioned whether the defense doctored the newly discovered video by only showing the part of the video where Officer Arias restrains Alvarez, and not the events leading up to that moment. *Id.* Judge Jones also probed whether the defense colluded with District Attorney Armando Villalobos, who never questioned the video and instead agreed to a new trial right away. *Id.* Judge Jones also added that Alvarez’s then-attorney Eduardo Lucio and D.A. Villalobos together faced charges in a federal Racketeer Influenced and Corrupt Organizations Act (RICO) and bribery case. *Id.*

⁵³ *Alvarez*, 904 F.3d at 388. Judge Jones also expressed suspicion about District Attorney Villalobos dismissing the charges against Alvarez when the Court of Appeals remanded the case. *See id.* at 394–95 (Jones, J., concurring) (questioning if Alvarez’s release was a managed job). Judge Jones pointed out that Alvarez had to be “exonerated” to move forward with a civil suit against the city seeking monetary damages. *Id.* That, combined with the fact that Alvarez’s civil suit occurred in federal court at the same time as the RICO and bribery trial involving attorneys Villalobos and Lucio, should have been enough for the lower court to inquire further into whether Alvarez’s claim of innocence was legitimate. *Id.* Judge Jones suggested the claim could instead be the result of a scheme hatched by the attorneys involved to get a payout from Alvarez’s civil suit. *Id.*

⁵⁴ *Id.* at 388. Alvarez also sued Officer Arias and other members of the Brownsville Police Department. *Id.* The court dismissed some of those charges at summary judgment, and it also dismissed the claim against Officer Arias in his individual capacity after both parties filed a voluntary stipulation of dismissal. *Id.* The only matters left for trial related to Alvarez’s claim of a *Brady* violation against the City of Brownsville for nondisclosure of exculpatory evidence. *Id.* 388–89.

⁵⁵ *Id.* The parties filed motions for summary judgment concerning the Brownsville Police Department’s policy of nondisclosure and the possibility that this policy caused the *Brady* violation. *Id.* A party requests a motion for summary judgment when there are no facts in dispute and the only issue before the court is how the law applies to the undisputed facts. FED. R. CIV. P. 56(a); *Motion for Summary Judgment*, BLACK’S LAW DICTIONARY, *supra* note 6.

⁵⁶ *See Alvarez*, 904 F.3d at 392 (explaining that prior to reviewing Alvarez’s petition, the Fifth Circuit’s precedent held that the Constitution did not require the disclosure of exculpatory evidence during the plea-bargaining phase and that this case provided an opportunity to upset established precedent, which the court declined to take); *id.* at 394 (Jones, J., concurring) (highlighting the controversy surrounding the video shown during trial, which in her opinion cut out over thirty critical seconds of the encounter between Alvarez and Arias and seriously cast doubt upon Alvarez’s claim of innocence); *supra* note 9 and accompanying text (explaining that plea-bargaining occurs prior to trial and

the City violated *Brady* when it failed to turn over the exculpatory video and granted summary judgment in favor of Alvarez.⁵⁷ The matter went to a jury to determine monetary damages, and the court awarded Alvarez \$2,300,000.⁵⁸ The City appealed to the Fifth Circuit.⁵⁹

The Fifth Circuit reversed the district court and granted summary judgment in favor of the City, holding that the failure to disclose *Brady* material during the plea-bargaining process does not violate the Constitution.⁶⁰ Alvarez filed a petition for a writ of certiorari, which the Supreme Court denied on June 13, 2019.⁶¹ The denial has left the lower courts in a state of disagreement over the *Ruiz* decision and has also left criminal defendants at risk for unfair treatment during the plea-bargaining process.⁶²

II. THE CIRCUIT SPLIT

In 2018, in deciding *Alvarez v. City of Brownsville*, the Fifth Circuit entered into the debate over whether criminal defendants are constitutionally entitled to

involves the prosecution negotiating with the defendant to admit guilt in exchange for a reduced sentence).

⁵⁷ See *Alvarez v. City of Brownsville*, No. CV B: 11-78, 2013 WL 12141360, at *12 (S.D. Tex. Feb. 25, 2013), *report and recommendation adopted*, No. B-11-078, 2013 WL 12141361 (S.D. Tex. Mar. 19, 2013), *rev'd in part*, 860 F.3d 799 (5th Cir. 2017), *on reh'g en banc*, 904 F.3d 382 (5th Cir. 2018), and *rev'd*, 904 F.3d 382 (5th Cir. 2018) (finding that a *Brady* violation occurred because (1) Alvarez admitted that he only pleaded guilty because he thought the government had a strong case against him, and therefore, he had a right to see the exculpatory video before entering a guilty plea, and (2) the policy goal of finality of convictions did not apply here because the Court of Appeals already overturned Alvarez's conviction).

⁵⁸ *Alvarez*, 904 F.3d at 388–89. The jury determined that Alvarez was entitled to \$2,000,000 in compensation for his wrongful imprisonment, and the parties agreed that Alvarez was owed \$300,000 in attorney's fees, leading Alvarez to receive \$2,300,000 in damages. *Id.*

⁵⁹ *Id.* at 389.

⁶⁰ *Id.* A panel of the Fifth Circuit court first heard the appeal. *Id.* It reversed the monetary damages awarded to Alvarez and dismissed his claim against the City. *Id.* The Fifth Circuit reheard the case en banc and reached the same conclusion as the panel. *Id.*

⁶¹ *Alvarez*, 139 S. Ct. 2690 (2019); see *supra* note 11 and accompanying text (defining writ of certiorari).

⁶² *Alvarez*, 904 F.3d at 394. Compare *Smith*, 510 F.3d at 1148 (suggesting that exculpatory evidence should be disclosed during plea bargains), *Ohiri*, 133 F. App'x at 562 (suggesting that exculpatory evidence must be turned over to the defendant prior to entering a guilty plea), and *McCann*, 337 F.3d at 788 (determining that exculpatory evidence should be disclosed during the plea-bargaining process), with *Alvarez*, 904 F.3d at 385–86 (holding that *Ruiz* applies to exculpatory and impeachment evidence), *Mathur*, 624 F.3d at 507 (holding that exculpatory evidence need not be disclosed during the plea-bargaining process), *Friedman*, 618 F.3d at 154 (suggesting that *Ruiz* applies to impeachment and exculpatory evidence), and *Moussaoui*, 591 F.3d at 286 (suggesting that prosecutors are probably not constitutionally required to disclose exculpatory evidence during the plea-bargaining phase). The absence of a *Brady* requirement during the plea-bargaining process enables prosecutors to be vague or in some cases misleading about the strength of the government's case. See Rakoff, *supra* note 12 (explaining that prosecutors' exclusive access to evidence, combined with their discretion in charging and sentencing, creates a power imbalance that can pressure defendants into pleading guilty).

exculpatory evidence prior to entering a guilty plea.⁶³ The First, Second, and Fourth Circuits, like the Fifth Circuit, have suggested that they are not.⁶⁴ The Seventh, Ninth, and Tenth Circuits, on the other hand, have acknowledged that they might be.⁶⁵ Part A of this section discusses the decision of the Seventh, Ninth, and Tenth Circuits to allow defendants to make *Brady* claims after entering guilty pleas.⁶⁶ Part B of this section discusses the decisions of the First, Second, Fourth, and Fifth Circuits to reject such claims.⁶⁷

A. *In Favor of Brady Claims After Guilty Pleas:
The Seventh, Ninth, and Tenth Circuits*

The Seventh, Ninth, and Tenth Circuits have suggested that the government is constitutionally required to disclose exculpatory evidence to defendants before defendants plead guilty.⁶⁸ In 2003, in *McCann v. Mangialardi*, the Seventh Circuit considered whether *Brady v. Maryland* requires the pre-guilty plea disclosure of exculpatory evidence.⁶⁹ The court identified two aspects of

⁶³ See 904 F.3d 382, 392–93 (5th Cir. 2018) (detailing the positions of other circuit courts regarding whether defendants are constitutionally entitled to exculpatory evidence prior to entering a guilty plea).

⁶⁴ See *id.* at 385–86 (holding that *United States v. Ruiz*, 536 U.S. 622 (2002), applies to exculpatory and impeachment evidence); *United States v. Mathur*, 624 F.3d 498, 507 (1st Cir. 2010) (holding that criminal defendants are not constitutionally entitled to knowledge of all information pertinent to their cases before entering a guilty plea); *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010) (suggesting that *Ruiz* applies to both exculpatory and impeachment evidence because the Supreme Court has treated exculpatory and impeachment evidence the same for *Brady* claims); *United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010) (citing to its prior interpretation of *Ruiz* to suggest that prosecutors are probably not constitutionally required to disclose exculpatory evidence during the plea-bargaining phase).

⁶⁵ See *Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007) (asserting that any evidence that would cause a defendant to go to trial rather than take a plea must be turned over at the plea-bargaining stage); *United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005) (suggesting that exculpatory evidence must be turned over to the defendant prior to entering a guilty plea); *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (holding that prosecutors are constitutionally required to disclose exculpatory evidence during the plea-bargaining process).

⁶⁶ See *infra* notes 68–83 and accompanying text.

⁶⁷ See *infra* notes 84–98 and accompanying text.

⁶⁸ See *infra* notes 69–83 and accompanying text.

⁶⁹ *Brady v. Maryland*, 373 U.S. 83 (1963); see *McCann*, 337 F.3d at 787 (exploring the possibility that, after *Ruiz*, defendants may claim that their guilty pleas were invalid if they were entered without knowledge of undisclosed exculpatory evidence). Demetrius McCann was a top associate of a cocaine trafficker in Chicago, Otis Moore. *McCann*, 337 F.3d at 783. Moore also employed Sam Mangialardi, the deputy chief of the Chicago Heights police. *Id.* Mangialardi assisted with Moore's operation by protecting Moore from detection by the Chicago police and arresting Moore's rivals. *Id.* Moore and Mangialardi grew concerned that McCann was an informant, so they hatched a scheme to plant cocaine in McCann's car and get him arrested. *Id.* Their plan worked. *Id.* After serving his sentence, McCann learned that Mangialardi had been caught and prosecuted for his involvement with Moore's trafficking business. *Id.* 783–84. McCann sued Mangialardi on the grounds that Mangialardi's failure to reveal to the court that the drugs in McCann's car had been planted constituted a *Brady* violation. *Id.* at 784, 787.

the *United States v. Ruiz* decision that suggested a difference between the treatment of exculpatory and impeachment evidence.⁷⁰ First, *Ruiz* relied on the idea that impeachment evidence is not essential information that a defendant must be aware of for a plea to be entered knowingly and voluntarily.⁷¹ The Seventh Circuit suggested that the Supreme Court must have intended for *Ruiz* only to apply to impeachment evidence, because a plea cannot be entered knowingly and voluntarily if a defendant is not aware of critical information like evidence unequivocally establishing the defendant's innocence.⁷² Second, the fast track plea agreement challenged in *Ruiz* stipulated that the government would turn over any information establishing the defendant's factual innocence.⁷³ In *Ruiz*, the Court relied on this protection to conclude that disclosure of impeachment evidence is not necessary to eliminate the risk that an innocent person might plead guilty.⁷⁴ The Seventh Circuit reasoned that, when the Supreme Court acknowledged the value that required disclosure of exculpatory evidence has in protecting against wrongful convictions, it confirmed that such a disclosure is constitutionally required under *Ruiz*.⁷⁵

In 2007, the Ninth Circuit reached a similar conclusion to the Seventh Circuit when it addressed whether *Brady* applied to plea bargains in *Smith v. Baldwin*.⁷⁶ Interestingly, the court made no reference to *Ruiz* and instead applied its existing precedent on the matter of *Brady* in the context of plea bar-

⁷⁰ *McCann*, 337 F.3d at 787–88 (suggesting that, if exculpatory and impeachment evidence are distinct concepts, the Court's ruling in *Ruiz* would mean that defendants are constitutionally entitled to exculpatory evidence before entering a guilty plea).

⁷¹ *Id.* at 787; *see Ruiz*, 536 U.S. at 630 (noting that the required disclosure of favorable information would be unreasonable because such information may be helpful to the defendant, depending on how much they know about the prosecution's case).

⁷² *See McCann*, 337 F.3d at 787–88 (noting that impeachment evidence is distinct from exculpatory evidence, which is critical information a defendant must be aware of to enter a plea voluntarily).

⁷³ *Id.*; *see Ruiz*, 536 U.S. at 631 (pointing out that the plea involved already requires that evidence showing the defendant's innocence be turned over).

⁷⁴ *McCann*, 337 F.3d at 787–88; *see Ruiz*, 536 U.S. at 631 (stating that because the prosecution must turn over evidence demonstrating factual innocence, the risk that an innocent person would plead guilty is negated).

⁷⁵ *See Ruiz*, 536 U.S. at 631 (reasoning that because the plea agreement required the government to turn over materials showing factual innocence, innocent defendants would not be pressured into accepting a plea deal because they lacked information); *McCann*, 337 F.3d at 788 (reasoning that because the Court in *Ruiz* relied on the fast track plea's requirement that evidence of factual innocence be disclosed as a protection for defendants, the Court would likely find that defendants are always entitled to this protection).

⁷⁶ *Smith*, 510 F.3d at 1148. Either Roger Smith or his codefendant Jacob Edmunds, while jointly carrying out a burglary, beat the homeowner to death. *Id.* at 1130. Edmunds claimed that Smith had carried out the murder and agreed to take a polygraph test to prove it. *Id.* The prosecution told Edmunds that if the results confirmed his claim, they would give him a plea deal in exchange for testifying against Smith. *Id.* In preparation for his defense, Smith requested the results of the polygraph, but the prosecution failed to turn them over. *Id.*

gains.⁷⁷ Prior to *Smith*, the Ninth Circuit decided in 1995 in *Sanchez v. United States* that evidence must be turned over during the plea-bargaining process if knowledge of that evidence would have resulted in the defendant rejecting any plea offer and instead going trial.⁷⁸ This suggested that the Ninth Circuit did not interpret *Ruiz* as controlling in situations involving exculpatory evidence.⁷⁹

Finally, in 2005, the Tenth Circuit also agreed that defendants may raise *Brady* claims after entering guilty pleas in *United States v. Ohiri*.⁸⁰ There, the court reasoned that the evidence withheld constituted exculpatory evidence, not impeachment evidence, which differentiated the case from *Ruiz*.⁸¹ Additionally, the court was persuaded by the fact that the defendant entered his plea on the day of jury *voir dire*, whereas the fast track plea offered to the defendant in *Ruiz* had to be entered before indictment.⁸² The Tenth Circuit reasoned that

⁷⁷ See *id.* at 1148 (outlining the pretrial disclosure requirements enumerated by the Supreme Court in *Brady* and subsequent cases, but turning to its own precedent in *Sanchez v. United States* to explain disclosure requirements during plea-bargaining); *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995) (holding that during a plea, evidence must be turned over if it is likely that the evidence would have encouraged a defendant to go to trial rather than accept a plea). In *Sanchez*, the Los Angeles County Sheriff's Department arrested Hincapie Sanchez for dealing drugs. 50 F.3d at 1451. He entered a guilty plea for possession with intent to distribute and conspiracy to distribute cocaine. *Id.* After pleading guilty, Sanchez became aware that two of the individuals who supplied the cocaine Sanchez sold were informants for the Los Angeles Sheriff's Department. *Id.* Sanchez claimed that if he had known this, he would not have pled guilty and instead "asserted defenses of entrapment and outrageous government conduct." *Id.* Entrapment is a defense that can be raised when the government uses an undercover agent to coerce someone into committing a crime that they would not have committed if not for the influence of the undercover agent. *Entrapment*, BLACK'S LAW DICTIONARY, *supra* note 6. Outrageous government conduct is a defense claiming that the government's egregious conduct created the crimes. *Outrageous-Conduct Defense*, BLACK'S LAW DICTIONARY, *supra* note 6.

⁷⁸ *Sanchez*, 50 F.3d at 1454.

⁷⁹ See *Smith*, 510 F.3d at 1148 (implying that the Ninth Circuit's standard for disclosure during pleas as articulated in *Sanchez* requires the disclosure of material information, not impeachment evidence, because including impeachment evidence in the standard would mean the standard conflicted with the Supreme Court's holding in *Ruiz*, which the court in *Smith* did not address).

⁸⁰ 133 F. App'x at 562. Emmanuel Ohiri served as the Chief Executive Officer of General Waste Corporation (GWC). *Id.* at 557. Ohiri and GWC's Hazardous Waste and Construction Debris Operations Manager, John Thomas Morris, were charged with violating the Resources and Conservation Recovery Act. *Id.* at 556–57. Morris pleaded guilty to certain charges and signed an Acceptance of Responsibility Statement in which he asserted that Ohiri had no knowledge of some of his illegal waste management decisions. *Id.* at 557–58. The prosecution did not provide Morris's statement to Ohiri prior to Ohiri's entering a guilty plea. *Id.* at 557.

⁸¹ See *id.* at 562 (determining that a statement in which the co-conspirator admitted that the defendant was unaware of any illegal behavior constituted exculpatory evidence).

⁸² See *id.* (concluding that because all exculpatory evidence must be turned over to the defendant before trial, the defendant in *Ohiri* should have had access to the co-conspirator's statement at the time of the plea, which he entered on the day scheduled for jury selection). Jury *voir dire* is the process of selecting a jury that takes place immediately before trial. *Voir Dire*, BLACK'S LAW DICTIONARY, *supra* note 6.

the holding in *Ruiz* did not shield the government from *Brady* claims resulting from pleas entered immediately before trial.⁸³

*B. Against Brady Claims After Guilty Pleas:
The First, Second, Fourth, and Fifth Circuits*

The First, Second, Fourth, and Fifth Circuits disagree with the Seventh, Ninth, and Tenth Circuits and have suggested that defendants are not constitutionally entitled to exculpatory information prior to entering guilty pleas.⁸⁴ In 2010, in *United States v. Mathur*, the First Circuit employed the same reasoning that the Supreme Court used in *Ruiz* to conclude that the *Brady* requirement does not apply to the plea-bargaining process.⁸⁵ The First Circuit held that *Ruiz* affirmed that the Court in *Brady* did not intend to protect defendants from any negative repercussions that may result from entering a guilty plea without knowledge of all pertinent information.⁸⁶ Instead, the policy concerns that animate *Brady* pertain to a fair trial and, therefore, disappear when defendants decide to concede their guilt through a plea.⁸⁷

Similarly, in 2010, the Second Circuit ruled in *Friedman v. Rehal* that a *Brady* violation did not occur when the prosecution failed to disclose prior to the defendant pleading guilty that it had used hypnosis to interview witnesses.⁸⁸ The court first explained that the evidence at issue unquestionably consti-

⁸³ See *Ohiri*, 133 F. App'x at 562 (“[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.”).

⁸⁴ See *infra* notes 85–98 and accompanying text.

⁸⁵ *Mathur*, 624 F.3d at 507. In *Mathur*, the defendant and his business partner ran a hedge fund called Entrust Capital Management. *Id.* at 500–01. Both individuals were involved in an elaborate plot to cheat investors, resulting in the embezzlement of millions from client funds. *Id.* Despite the overwhelming evidence against the defendant, he seized the opportunity to make a *Brady* claim when the prosecution waited until halfway through the trial to disclose a report containing mostly useless information, though some of it could be construed as impeachment information. *Id.* at 502–03. When his motion for a new trial on the grounds of a *Brady* violation failed and the court sentenced him to 120 months of incarceration, the defendant appealed. *Id.* at 503. The defendant claimed that if he had access to the belatedly disclosed information before the trial, he may have exercised the option to take a more lenient plea deal. *Id.* at 506.

⁸⁶ See *id.* at 507 (explaining that, according to *Ruiz*, *Brady* does not guarantee that defendants will gain access to all pertinent information before they enter a plea).

⁸⁷ See *id.* (noting that when a *Brady* claim is raised, the relevant concern is whether the defendant received a fair trial, which is not explicitly defined by the court, despite not having access to the suppressed evidence).

⁸⁸ See *Friedman*, 618 F.3d at 153–54 (holding that the evidence constituted impeachment, not exculpatory evidence, and even still, there is no constitutional requirement to disclose exculpatory evidence during plea-bargaining). In *Friedman*, the defendant ran computer classes for kids out of his home. *Id.* at 146. Police began an investigation into his business after a customs agent found a package with child pornography mailed to the defendant. *Id.* The government alleged that former students of Friedman accused him of sexual assault, but the government did not disclose the aggressive interview tactics they used with the alleged victims. *Id.* Friedman claimed his constitutional rights were

tuted impeachment evidence, not exculpatory evidence, meaning a *Brady* claim is precluded by *Ruiz*.⁸⁹ Nonetheless, the court foreclosed the possibility that the outcome of the case would have been different had the evidence been exculpatory by reasoning that the Supreme Court regarded impeachment and exculpatory evidence as equal in its *Brady* jurisprudence, so it would likely do so in the plea-bargaining context as well.⁹⁰ As a result, the Second Circuit suggested that *Ruiz* applies to both impeachment and exculpatory evidence.⁹¹

In 2010, the Fourth Circuit also suggested that it would be unwilling to extend *Brady* to the guilty plea context in *United States v. Moussaoui*.⁹² The court cited language asserting that the *Brady* requirement existed to ensure fair trials.⁹³ Although the court recognized the possibility that *Ruiz* applied only to impeachment evidence and not exculpatory evidence, it cited a previous decision of the Fourth Circuit which held that undisclosed death penalty mitigation evidence did not invalidate a defendant's guilty plea.⁹⁴ The court ultimately determined that it did not need to decide whether the evidence withheld constituted a *Brady* violation because the defendant failed to show that the withheld evidence rendered his plea involuntary.⁹⁵ Still, the language of the opinion would suggest the Fourth Circuit opposes an expansion of *Brady*.⁹⁶

violated when the prosecution failed to disclose that it had used hypnosis during alleged victim interviews. *Id.* at 151.

⁸⁹ *See id.* at 153 (explaining that the use of hypnosis to possibly encourage inaccurate recollections falls precisely into the category of impeachment evidence); *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5th Cir. 1993) (stating that impeachment evidence is any evidence that could tarnish a witness's testimony and make it less effective by showing the jury that it may be unreliable).

⁹⁰ *Friedman*, 618 F.3d at 154.

⁹¹ *See id.* at 155 (pointing to a previous Fifth Circuit opinion in which the court declined to extend *Brady* to the plea-bargaining stage because doing so would expand *Brady* to protect defendants who regret their own decision to reap the benefits of a plea deal). The events of *Friedman* were portrayed in a film entitled *Capturing the Friedmans*, which detailed the aggressive and suggestive investigation tactics used by detectives in the case. *Id.* at 151; CAPTURING THE FRIEDMANS (HBO Documentary 2003).

⁹² *See Moussaoui*, 591 F.3d at 286 (citing its own precedent which declined to extend *Brady* to mitigation evidence, which is evidence used to diminish the culpability of defendants facing the death penalty, withheld during a death penalty trial to suggest it would be hesitant to do so for plea bargains). The defendant, Zacarais Moussaoui, faced charges for conspiracy in relation to the 9/11 attacks. *Id.* at 266. Weeks before the attacks, he aroused the skepticism of his instructor at a pilot school, prompting law enforcement to bring him into custody for an expired visa. *Id.* Moussaoui alleged a *Brady* violation occurred because the prosecution failed to provide him with multiple statements that might have collectively shown that the organizers of 9/11 never slated him to participate in the first round of attacks. *Id.* at 285.

⁹³ *See id.* ("The *Brady* right, however, is a trial right.")

⁹⁴ *See id.* at 286 (citing *Jones v. Cooper*, 311 F.3d 306, 315 (4th Cir. 2002)) (holding that *Ruiz* prevented a defendant from attempting to invalidate his guilty plea when the government withheld information that might be relevant mitigation evidence during a defendant's death penalty trial).

⁹⁵ *See id.* (stating that the court need not resolve the issue of whether *Jones* applied to *Moussaoui*, because Moussaoui did not have any evidence showing that the prosecutor's failure to disclose exculpatory evidence during the plea phase made his plea involuntary). The government not only notified

Finally, in *Alvarez*, the Fifth Circuit held that the Constitution does not require disclosure of exculpatory evidence during the plea-bargaining process.⁹⁷ The court reasoned that, because no case law from the Supreme Court or other circuit courts decisively establishes that failure to disclose evidence during the plea-bargaining process constitutes a *Brady* violation, it will defer to its existing precedent, which held that it does not.⁹⁸

III. THE SUPREME COURT NEEDS TO CLARIFY THE HOLDING OF *RUIZ* AND MAKE THE DISCLOSURE OF EXCULPATORY EVIDENCE MANDATORY

It would have been beneficial for the Supreme Court to grant certiorari in *Alvarez v. City of Brownsville* to settle the disagreement among lower courts on the holding of *United States v. Ruiz*.⁹⁹ When given another opportunity to clarify *Ruiz*, the Court should hold that the disclosure of exculpatory evidence is mandatory during the plea-bargaining process.¹⁰⁰ Plea-bargaining has replaced jury trials as the primary method for resolving criminal charges, and the constitutional rights of the accused must be redefined to reflect this shift.¹⁰¹

In 2013, more than ninety-five percent of federal criminal charges ended with a plea bargain.¹⁰² This reflects a drastic departure from what the Founding Fathers of the United States imagined for the justice system and the constitu-

Moussaoui that it intended to eventually provide him with exculpatory, confidential information, it also informed him why the evidence might be exculpatory. *Id.* at 287. Still, Moussaoui chose to plead guilty before the conclusion of the discovery process. *Id.* As a result, the court concluded that Moussaoui entered his plea knowingly and voluntarily. *Id.* at 288.

⁹⁶ See *id.* at 285–86 (noting that it is possible that a prosecutor’s failure to disclose exculpatory evidence could render a plea involuntary, but also reiterating all of the reasons the Supreme Court provided that would make that possibility unlikely, including that *Brady* only applies to trials and that required disclosure would place a burden on the government).

⁹⁷ See *Alvarez*, 904 F.3d at 392–94 (reasoning that *Ruiz* applies to exculpatory evidence in addition to impeachment evidence, and therefore criminal defendants are not entitled to exculpatory evidence during the plea-bargaining phase).

⁹⁸ *Id.*

⁹⁹ *Alvarez v. City of Brownsville*, 904 F.3d 382 (5th Cir. 2018); see *supra* note 10 (detailing the circuit split). See generally *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (summarizing the circuit split).

¹⁰⁰ See *Ruiz*, 536 U.S. at 633 (holding that impeachment evidence does not need to be disclosed during the plea-bargaining phase); *Alvarez*, 904 F.3d at 382, 410, 412, 416 (Costa, J., dissenting) (stating that “[d]ue process requires more than we afford the accused today” because Supreme Court precedent surrounding *Brady* and plea-bargaining suggest *Brady* extends to plea-bargaining, *Ruiz* is not controlling, and state court systems offer proof that requiring the disclosure of exculpatory evidence during plea bargains will not over burden the government).

¹⁰¹ See Rakoff, *supra* note 12 (stating that of the 2.2 million people currently incarcerated in the United States, over two million of them are there because they took a plea bargain).

¹⁰² *Id.* Of the federal criminal charges in 2013, eight percent of charges were dropped. *Id.* Of the remaining charges, ninety-seven percent were resolved with a plea bargain, and three percent were resolved with a jury trial. *Id.*

tional mechanisms they put into place to ensure fairness within the system.¹⁰³ It is very concerning that many of the constitutional protections offered to criminal defendants are waived or inapplicable during the plea-bargaining process.¹⁰⁴ According to the National Registry of Exonerations, approximately ten percent of legally recognized exonerations since 1989 have involved individuals who pled guilty to a crime they did not commit.¹⁰⁵ Although it may seem unlikely that someone would plead guilty to a crime they did not commit, the data suggests there are persuasive reasons to do so in some circumstances.¹⁰⁶ There is an enormous power imbalance that allows prosecutors virtually unchecked discretion to determine the terms of a plea deal.¹⁰⁷ When the accused do not have a clear idea of the case the prosecutor has against them, it may feel impossible to risk a jury trial and the maximum sentence for a guilty verdict.¹⁰⁸

¹⁰³ *Id.* Jury trials were intended to locate the truth, ensure fairness, and bolster against tyranny. *Id.* The authors of the Constitution overwhelmingly agreed that jury trials were an essential part of the U.S. criminal justice system. See THE FEDERALIST NO. 83 (Alexander Hamilton) (pointing out that those involved in the creation of the United States all agreed on the importance of trial by jury: those who favored a strong central government viewed trial by jury as an essential protection of liberty, and those who favored a weak central government viewed it as a central pillar of free government); Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), <https://founders.archives.gov/documents/Jefferson/01-15-02-0259> [<https://perma.cc/GY93-M78V>] (“I consider [trial by jury] as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution.”).

¹⁰⁴ See NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 14–15 (2018) [hereinafter THE TRIAL PENALTY] (explaining that by entering pleas, criminal defendants forfeit access to discovery, the opportunity to cross examine witnesses, the ability to appeal, the ability to make constitutional objections, and a trial by a jury of their peers who must unanimously find them guilty beyond a reasonable doubt); *supra* note 13 and accompanying text (explaining that the waiver of these protections during pleas contributes to a criminal justice system that disproportionately punishes poor and minority citizens).

¹⁰⁵ Rakoff, *supra* note 12. An exoneration occurs when someone who was convicted of a crime is formally relieved of all wrongdoing. *Exonerate*, BLACK’S LAW DICTIONARY, *supra* note 6.

¹⁰⁶ See Rakoff, *supra* note 12 (noting that innocent people may choose to plead guilty because they fear they do not have a strong enough defense to win at trial or to guarantee they will not receive the death penalty).

¹⁰⁷ *Id.* The plea-bargaining process is off the record and often coercive due to the “trial penalty,” which refers to the difference between the sentence offered during the plea-bargaining phase and the sentence the defendant would receive if found guilty at trial. See THE TRIAL PENALTY, *supra* note 104, at 16 (explaining how there are often multiple statutes, each carrying a different penalty, that punish the same criminal conduct, which enables prosecutors to dictate the length of the sentence a defendant will receive based on how they charge the conduct). Prosecutors are free to offer a defendant the opportunity to plea to one crime and tell the defendant that if they turn down the plea, they will be charged with more serious crimes at trial. See Rakoff, *supra* note 12 (explaining how the trial penalty can play out in cases involving illegal drug distribution, where prosecutors can charge defendants as individual sellers, carrying a light sentence, or as co-conspirators in an enormous distribution scheme, carrying a far lengthier sentence).

¹⁰⁸ See Rakoff, *supra* note 12 (noting that in 2012, federal narcotics defendants who pled guilty received an average sentence of five years and four months; in contrast, defendants sentenced after a guilty verdict at trial received an average sentence of sixteen years).

For many of the legally recognized exonerees, the decision to enter a guilty plea could have been one between life and death; the exonerees may have plead guilty to guarantee life in prison rather than risk the possibility of being sentenced to death if found guilty at trial.¹⁰⁹

The implications of plea-bargaining illustrate why it is essential for disclosure of exculpatory evidence to be constitutionally required.¹¹⁰ Although subsequent interpretations of *Brady* have focused on the right to a fair trial, the opinion clearly articulated that the right to a fair trial is rooted in principles of justice.¹¹¹ The Court emphasized that the government has succeeded in its role, not when the accused are labeled guilty, but instead when a just outcome is reached.¹¹² The reality of the plea-bargaining system is that defendants are negatively impacted by the power imbalance and by the possibility of a secretive process.¹¹³

The conclusion that exculpatory evidence must be disclosed during the plea-bargaining process is not at odds with the holding of *Ruiz*.¹¹⁴ There are compelling arguments that exculpatory and impeachment evidence are distinct concepts.¹¹⁵ First, the Court in *Ruiz* reasoned that impeachment evidence did not fit into the category of critical evidence that must be turned over for a plea

¹⁰⁹ See *id.* (noting that defendants charged with death penalty eligible offenses may plead guilty to a deal that assures a sentence of life in prison, because they are not willing to risk being found guilty and sentenced to death at trial).

¹¹⁰ See *id.* (arguing that the information imbalance during plea-bargaining can cause wrongful convictions).

¹¹¹ *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963). In his dissenting opinion in *Alvarez*, Judge Gregg Costa sums up how the majority opinion violates due process. 904 F.3d at 416 (Costa, J., dissenting) (reasoning that the government imprisoning a person while withholding evidence that may prove the person’s innocence violates the principle foundation of the United States’ justice system, “which is that guilt shall not escape or innocence suffer”); see *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (stating that the due process requirement is not satisfied when a conviction is obtained by intentionally misleading the jury and court while simultaneously pretending the trial is fair).

¹¹² *Brady*, 373 U.S. at 87; see Dybdahl, *supra* note 30 (explaining that Justice William Douglas believed that the goals of the criminal justice system were to find the truth and to do justice, and that he fully intended to use his opinion in *Brady* to promote this agenda).

¹¹³ See *supra* note 12 and accompanying text (explaining that during plea bargains, prosecutors control the charge, sentence, and flow of information to the defendant).

¹¹⁴ See *Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007) (asserting that any evidence that would cause a defendant to go to trial rather than take a plea must be turned over at the plea-bargaining stage); *United States v. Ohiri*, 133 F. App’x 555, 562 (10th Cir. 2005) (suggesting that exculpatory evidence must be turned over to the defendant prior to entering a guilty plea); *McCann v. Mangialardi*, 337 F.3d 782, 786 (7th Cir. 2003) (holding that prosecutors are constitutionally required to disclose exculpatory evidence during the plea-bargaining process).

¹¹⁵ See *Alvarez*, 904 F.3d at 406 (Costa, J., dissenting) (explaining that exculpatory evidence was not included in the holding of *Ruiz* because the plea at issue in *Ruiz* stipulated that any evidence demonstrating the defendant’s innocence, which is the precise definition of exculpatory evidence, must be turned over to the defendant); *Ohiri*, 133 F. App’x at 562 (holding that the evidence at issue constituted exculpatory evidence, and therefore *Ruiz* did not apply); *McCann*, 337 F.3d at 787–88 (noting that impeachment evidence is very difficult to identify and is consequently different from exculpatory evidence).

to be voluntary.¹¹⁶ What critical evidence would the Court be referring to if not exculpatory evidence?¹¹⁷ Exculpatory evidence is critical to defendants because receiving such evidence would likely guarantee a defendant would choose to go to trial rather than plead guilty.¹¹⁸ Second, the Court in *Ruiz* relied on the fact that the plea in *Ruiz* contained a requirement that the prosecution turn over exculpatory evidence to conclude that the defendant was sufficiently protected.¹¹⁹ The mere acknowledgement of this provision is evidence that the Court believes exculpatory evidence to be unique.¹²⁰ The most compelling indication that the Court did not intend for *Ruiz* to apply to exculpatory evidence can be gleaned from Justice Clarence Thomas's concurring opinion, which stated that no part of *Brady* applies to the plea-bargaining stage.¹²¹ Not a single Justice joined his opinion, meaning that not a single justice on the Court agreed with the proposition that *Brady* does not apply at all to plea bargains.¹²²

Because of the disagreement in the Circuit Courts and the new constitutional quandaries present in the plea-bargaining process, the Supreme Court should grant *certiorari* in the next circuit case to address the issue.¹²³ In doing so, the Court should hold that exculpatory evidence must be disclosed prior to guilty pleas.¹²⁴

CONCLUSION

The Fifth Circuit's decision in *Alvarez v. City of Brownsville*, that criminal defendants are not entitled to exculpatory evidence during the plea-bargaining process, places it in the ongoing debate among the circuit courts on

¹¹⁶ See *McCann*, 337 F.3d at 787 (pointing out that the Court in *Ruiz* held that the government is not constitutionally required to turn over exculpatory evidence because impeachment evidence, which is helpful to the defendant but not proof of factual innocence, can hardly be classified as crucial evidence that the defendants must know about before entering a guilty plea).

¹¹⁷ *Id.*

¹¹⁸ See *Ruiz*, 536 U.S. at 630 (reasoning that prosecutors are not required to turn over impeachment information during plea bargains because such information would not necessarily help defendants and therefore ignorance of the information would not render a plea involuntary).

¹¹⁹ *Ruiz*, 536 U.S. at 631; see *Alvarez*, 904 F.3d at 412 (Costa, J., dissenting) (explaining that *Ruiz* did not have to address whether exculpatory evidence must be disclosed pre-plea because the plea in *Ruiz* explicitly stated that such evidence must be disclosed).

¹²⁰ See *Alvarez*, 904 F.3d at 412 (Costa, J., dissenting) (noting that the Court in *Ruiz* went to great lengths to explain its reasoning for holding that impeachment information need not be turned over prior to a plea, yet it could have simply stated that *Brady* did not apply to guilty pleas if that is what it meant).

¹²¹ See *Ruiz*, 536 U.S. at 633–34 (Thomas, J., concurring) (explaining that *Brady* was intended to prevent unfair trials, and therefore, it does not apply during plea bargains).

¹²² *Id.*; see *supra* note 120 and accompanying text.

¹²³ See *supra* notes 10, 100–101 and accompanying text (outlining the split in the understanding of the holding of *Ruiz* among circuits and arguing that the holding of *Ruiz* does not apply to exculpatory evidence).

¹²⁴ *Id.*

the applicability of the Supreme Court's decision in *United States v. Ruiz*. Although the Supreme Court does not explicitly provide an answer, the fundamental focus on justice throughout the Court's jurisprudence suggests that the Court would disagree with the Fifth Circuit. Until the Supreme Court addresses the topic itself, criminal defendants weighing whether to accept a guilty plea could be at the mercy of prosecutor's discretion on what evidence to disclose during the plea stage.

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