Waiving Goodbye: In Memory of the Reasonable-Doubt Standard

by STEVEN WALL*

> I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.
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> - *In re Winship*, Justice Harlan, (concurring)[1]

Introduction

This note addresses the issue of innocent defendants pleading guilty despite the existence of evidence suggesting their innocence, specifically in cases involving misconduct by government agents. In the trial context, The Due Process Clause guarantees defendants the disclosure of all favorable evidence material to either guilt or punishment.[2] By contrast, plea bargaining lacks these assurances.[3] In limiting the scope of this discovery right, the Supreme Court has whittled away a key due process pre-trial protection for criminal defendants despite repeatedly underscoring the importance of guilty pleas to the administration of criminal justice.

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1. *In re* Winship, 397 U.S. 358, 372 (1970).

2. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that due process requires prosecutors to make pre-trial disclosures of all favorable evidence after the prosecutor withheld a statement in which another man explicitly admitted to committing the crime—evidence that was not discovered by the defendant until after his trial).

3. *See* United States v. Ruiz, 536 U.S. 622, 629 (2002) (holding that failure to make pre-guilty plea disclosures of material impeachment evidence is not a violation of the Fourteenth Amendment because impeachment evidence is important only in its "relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* ('knowing,' 'intelligent,' and 'sufficient[ly] aware')").

The Supreme Court has recognized that our criminal justice system is, for the most part, a system of pleas rather than trials.[4] Over ninety-seven percent of federal cases and ninety-four percent of state cases are settled by guilty pleas.[5] In fact, the Supreme Court explained, "[i]t is not some adjunct to the criminal justice system; it *is* the criminal justice system."[6]

In guilty pleas, defendants elect to forgo trial and voluntarily accept their conviction, usually in exchange for reduced sentencing. In a pretrial process known as "plea bargaining," defendants negotiate with prosecutors by bartering their personal rights, such as their constitutional right to a fair trial, in exchange for a prosecutor's promise not to seek the maximum sentence.[7] As a negotiated settlement, guilty pleas are considered contracts between defendants and prosecutors and are largely beneficial to both parties.[8] Prosecutors are guaranteed a conviction without the difficulties of a trial, and defendants receive more lenient sentences.

Nonetheless, defendants in the plea bargaining process are not entitled to the same due process rights as defendants preparing for trial. In the seminal case *Brady v. Maryland*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires prosecutors to make pretrial disclosures of all favorable evidence material to the guilt or

4. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (finding the government's position that a fair trial counterbalances ineffective assistance of counsel during plea bargaining ignored "the reality that criminal justice today is for the most part a system of pleas, not a system of trials"); Missouri v. Frye, 132 S. Ct. 1399, 1407 (2010) (noting that "[t]o a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.") (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)); *see also* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) (arguing that larger sentences exist mainly to incentivize guilty pleas and are greater than Congress and prosecutors actually believe is appropriate).

5. *See supra* note 4 (referring to the prevalence of guilty pleas in the modern criminal justice system and emphasizing that the Sixth Amendment right to effective assistance of counsel—traditionally a right reserved for trial—extends pre-trial and applies to plea bargaining).

6. *Frye*, 132 S. Ct. at 1407 (quoting Scott & Stuntz, *supra* note 4, at 1912).

7. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) ("The parties to these settlements trade various risks and entitlements: the defendant relinquishes the right to go to trial (along with any chance of acquittal), while the prosecutor gives up the entitlement to seek the highest sentence or pursue the most serious charges possible. The resulting bargains differ predictably from what would have happened had the same cases been taken to trial. Defendants who bargain for a plea serve lower sentences than those who do not.").

8. *Id.* at 1909–10 n.2 (noting that guilty pleas are generally analyzed under contract principles, and highlighting that in 1986, the average sentence of defendants convicted of a serious felony at trial had an average sentence of 145 months, while similar defendants who pled were sentenced to 72 months).

punishment of the accused.[9] Subsequent cases have held that this discovery right extends to material impeachment evidence, which is any evidence material to the credibility of a witness.[10] This duty is uniformly imposed on all prosecutors irrespective of whether the defendant requests the evidence.[11]

Two general characteristics of *Brady* are noteworthy. First, *Brady* due process violations occur regardless of the good or bad faith of the prosecutor.[12] Second, *Brady* imposes an affirmative duty on prosecutors to uncover and disclose all favorable evidence to the defendant. This includes information "known to the others acting on the government's behalf in the case, [such as] the police."[13] In outlining these due process standards, the Court highlighted the disparity between the parties to the case, reasoning that only prosecutors "can know what is undisclosed."[14]

In contrast to defendants going to trial, the Supreme Court has found that defendants in the plea bargaining process have no constitutional right to so-called "*Brady* evidence." In light of the Supreme Court's

9. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

10. *See* Giglio v. United States, 405 U.S. 150, 154–55 (1972) (holding that material impeachment evidence also falls within the general disclosure requirement set forth in *Brady v. Maryland*); *see also* United States v. Bagley, 473 U.S. 667, 676 (1985) (citing *Giglio* and *Brady* to hold that distinguishing between the two types of evidence is improper because "[t]his Court has rejected any such distinction between impeachment evidence and exculpatory evidence"); Kyles v. Whitley, 514 U.S. 419, 433 (1995) (explaining that in *Bagley*, "the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes"); *Brady*, 373 U.S. at 87 (holding that suppression of material evidence "favorable to an accused" violates due process).

11. United States v. Agurs, 427 U.S. 97, 106–07 (1976) (explaining that there is no distinction between situations involving a request for *Brady* evidence and situations with no request at all).

12. *See Brady*, 373 U.S. at 87 (holding explicitly that due process is violated "irrespective of the good or bad faith of the prosecution"); *Agurs*, 427 U.S. at 110 ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."); *Kyles*, 514 U.S. at 437–38 ("But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith . . .) the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.") (citing *Brady*, 373 U.S. at 87).

13. *Kyles*, 514 U.S. at 437 ("This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

14. *Id.* ("While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden . . . . the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure . . . .").

classification of plea bargaining as a "critical stage"—requiring the extension of Constitutional rights traditionally reserved for trial[15]—it was surprising that the Supreme Court in 2002 narrowed, if not completely barred, *Brady v. Maryland*'s application to guilty pleas.[16] In *United States v. Ruiz*, a defendant declined a plea agreement because she did not want to waive her right to receive *Brady* evidence, specifically impeachment evidence. At sentencing, the defendant argued that the *Brady* waiver was unconstitutional, and therefore, she was entitled to the downward departures contained in the original plea agreement.[17] On appeal, the Ninth Circuit held that guilty pleas are constitutionally invalid where the government fails to make the same disclosures of information that would have been required had the defendant insisted upon a trial.[18] However, the Supreme Court reversed, holding that a prosecutor is not required to disclose material impeachment evidence prior to entering a guilty plea for that plea to be constitutionally valid.[19] Since *Brady v. Maryland* was decided, the Supreme Court has refused to treat exculpatory evidence and impeachment evidence differently for *Brady* purposes.[20] Thus, when

15. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2010) ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages . . . . In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."); Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012) ("The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial . . . . The constitutional guarantee applies to pre-trial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial.").

16. *See* United States v. Ruiz, 536 U.S. 622, 629 (2002) (holding that a failure to make pre-guilty plea disclosures of material impeachment evidence is not a violation of the Fourteenth Amendment because "[impeachment evidence] is special in relation to the *fairness of a trial,* not in respect to whether a plea is *voluntary* ('knowing,' 'intelligent,' and 'sufficient[ly] aware')").

17. *Id.* at 625–26 (describing the facts of the case including the details of the plea agreement declined by the defendant and the premise of the defendant's argument).

18. *Id.* at 629 ("In this case, the Ninth Circuit in effect held that a guilty plea is not 'voluntary' (and that the defendant could not, by pleading guilty, waive her right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that the prosecutors would have had to make had the defendant insisted upon a trial.").

19. *Id.* at 633 (concluding that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant").

20. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 676 (1985) (citing *Giglio* and *Brady* that distinguishing between the two types of evidence is improper, because "[t]his Court has rejected any such distinction between impeachment evidence and exculpatory evidence"); Kyles

coupled with the body of cases equivocating impeachment and exculpatory evidence, *Ruiz* effectively holds that plea agreements containing clauses wherein a defendant waives his or her right to *Brady* disclosures, along with any right to challenge the conviction based on such evidence, are enforceable by the government. As a matter of stare decisis, *Ruiz* holds that *Brady v. Maryland*'s disclosure requirements do not apply in the guilty plea context.[21] Thus, the Supreme Court's decision not only deprives criminal defendants of essential information at a "critical stage,"[22] but also eviscerates the legal weight of any exculpating information, including outright governmental misconduct, which may be discovered by the defendant after the plea is accepted.

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v. Whitley, 514 U.S. 419, 433 (1995) (explaining that in *Bagley*, "the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes"); *see also, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that suppression of material evidence, "favorable to an accused," violates due process); Giglio v. United States, 405 U.S. 150 at 154–55 (1972) (holding that material impeachment evidence also falls within the general disclosure requirement set forth in *Brady v. Maryland*).

21. *See* Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 989–95 (2012) (explaining that *Ruiz*'s broader reasoning that guilty pleas are valid despite defendants' ignorance of important facts, and the Court's holding that prosecutors are not required to disclose information pertinent to affirmative defenses undercuts *Brady*'s applicability to plea bargaining); *see also, e.g.*, Jones v. Cooper, 311 F.3d 306, 315 n.5 (4th Cir. 2002) (concluding that "[t]o the extent that appellant contends that he would not have pled guilty had he been provided the information held by the jailor, this claim is foreclosed by *United States v. Ruiz*"); United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (rejecting the argument that the Supreme Court's ruling in *Ruiz* based upon impeachment evidence implied that exculpatory evidence is different and must be turned over before entry of a plea); United States v. Moussaoui, 591 F.3d 263, 285–88 (2010) (stating that *Ruiz* foreclosed *Brady*'s application to guilty pleas, citing both *Jones* and *Conroy*); Friedman v. Rehal, 618 F.3d 142, 154-55 (2d Cir. 2010) (holding that *Ruiz* precluded application of *Brady* to guilty pleas—contrary to the court's previous decisions); *cf., e.g.*, McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003) (stating that *Ruiz* denotes a distinction between impeachment and exculpatory evidence, and therefore, "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors . . . have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea"); United States v. Ohiri, No. 03–2239, 2005 U.S. App. LEXIS 10677, at 562 (10th Cir. June 7, 2005) (interpreting a distinction between impeachment and exculpatory evidence from the *Ruiz* decision, but ultimately holding that the prosecutor should have already made *Brady* disclosures because the plea was entered the day jury selection was slated to begin); United States v. Fisher, 711 F.3d 460, 465, 469 (4th Cir. 2013) (holding that prosecutors are required to make *Brady* disclosures prior to entering guilty pleas, despite *Ruiz*, without overruling or providing any reference to contrary Fourth Circuit precedent set in *Jones* and *Moussaoui*).

22. Lafler v. Cooper, 132 S. Ct. 1376, 1385–86 (2012) (holding that the Sixth Amendment requires effective assistance of counsel during plea bargaining because the protection extends to "pre-trial critical stages of a criminal proceeding"); Missouri v. Frye, 132 S. Ct. 1399, 1405 (2010) (holding that plea bargaining is a "critical stage" of criminal proceedings, and thus, the Sixth Amendment requires effective assistance of counsel).

This due process limitation is significant because there are many indications that innocent individuals plead guilty.[23] The University of Michigan's National Registry of Exonerations contains 276 individuals who pled guilty and were later exonerated.[24] These cases represent nearly sixteen percent of the 1,778 exonerations listed in the registry.[25] The Innocence Project estimates that twenty-five percent of all wrongful convictions in the United States involve guilty pleas.[26]

The Supreme Court's decision in *Ruiz* not only deprives criminal defendants of essential information at a "critical stage,"[27] but also eviscerates the legal weight of any exculpating information, including outright governmental misconduct, which may be discovered by the defendant after their plea is accepted.[28] Thus, innocent defendants pleading guilty are in a uniquely helpless position. As stated, this Note addresses the issue of innocent defendants pleading guilty despite the existence of evidence suggesting their innocence, specifically in cases involving misconduct by government agents. Part I of this Note will highlight the prevalence of innocent defendants pleading guilty. This section will focus on the exploitation of vulnerable defendants and will highlight instances where the government either knew, or had reason to know, that the accused was likely innocent. Part II will explain why the judiciary is not equipped to address this problem. Finally, Part III will explain why the legislature is the proper body to generate a remedy and provide recommendations as to what actions might be viable.

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23. *See generally* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014) (describing known instances of innocent defendants pleading guilty, and highlighting that many cases go unnoticed); *see also When the Innocent Plead Guilty*, THE INNOCENCE PROJECT (Jan. 26, 2009, 12:00 AM), http://www.innocenceproject.org/news-events-exonerations/when-the-innocent-plead-guilty (describing the cases of thirty-one individuals who were convicted under guilty pleas, but were later exonerated); THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx# (last visited Mar. 25, 2016) ; Samuel R. Gross, *Convicting the Innocent*, 4 ANNU. REV. L. SOC. SCI. 173, 181 (2008) (discussing a study of 340 defendants, where 6% who were exonerated pled guilty).

24. *See* THE NATIONAL REGISTRY OF EXONERATIONS, *supra* note, at 23.

25. *Id.*

26. *See False Confessions or Admissions*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/causes/false-confessions-admissions (estimating that false confessions are involved in about twenty-five percent of wrongful convictions later overturned by DNA evidence).

27. *Lafler*, 132 S. Ct. at 1385–86 (holding that the Sixth Amendment requires effective assistance of counsel during plea bargaining because the protection extends to "pre-trial critical stages of a criminal proceeding"); *Missouri*, 132 S. Ct. at 1405 (holding that plea bargaining is a "critical stage" of criminal proceedings, and thus, the Sixth Amendment requires effective assistance of counsel).

28. *See supra* note 21.

It is important to note at the outset that the goal of this Note is *not* to attack the merits of the guilty plea system as a whole—that debate is left to other scholars.[29] The author recognizes that criminal defendants seeking more lenient treatment are justified in pursuing guilty pleas rather than gambling on a trial.[30] Moreover, this Note does not suggest that prosecutors generally ignore their moral obligation to avoid depriving innocent individuals of their liberty. In fact, the author recognizes that prosecutors are assumed to have complied with their moral duty to protect American citizens. Furthermore, this Note does not seek to argue that all law enforcement investigate with a malicious intent to create false convictions. Rather, this Note seeks only to highlight an unfortunate paradox of the American guilty plea system, where incentivizing judicial efficiency has enabled ill-intentioned or careless convictions of innocent individuals to pass unchecked, and often, without recourse.

I. Innocent Individuals Plead Guilty, And In Some Instances, Their Innocence is Either Known or Demonstrated by Evidence Available to The Government

In today's criminal justice system, individuals plead guilty to crimes they did not commit.[31] Institutions such as the Innocence Project and University of Michigan's National Registry of Exonerations maintain extensive public databases devoted to tracking and reporting cases where individuals entered guilty pleas and were later exonerated after proving their innocence.[32] Scholars have argued that the unfairness of the guilty

29. *See* Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 77 n.22 (2014) (*comparing* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 660–661 (1981) (contending that plea bargaining remains an inherently unfair and irrational process), Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467–68 (2004) (arguing that the plea bargaining process require many reforms), Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1610–11 (2005) (arguing that the plea bargaining process favors conflict resolution over truth-finding and accuracy), *and* Stephen J. Schulhofer, *Plea Bargaining As Disaster*, 101 YALE L.J. 1979, 1980 (1992) (concluding that plea bargaining should be abolished), *with* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1972 (1992) (arguing that the plea bargaining process is just as effective as trial at separating the guilty from the innocent), *and* Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1013 (2005) (concluding that sentencing commissions may be successful in regulating prosecutorial authority)).

30. *See* Alschuler, *supra* note 29, at 653 n.2 (citing empirical studies which indicate that pleading defendants receive more lenient punishments than similar defendants who pursued trials).

31. *See supra* notes 23–26.

32. *See id.*

plea process is manifested in these cases.[33] Some argue that the system's unfairness is further defined in part by an asymmetry of information between the government and the criminal defendant, especially with respect to exculpatory and impeachment evidence.[34] Ultimately, the information disparity between the two parties is part of a broader issue—the government using coercive tactics to obtain false convictions despite having evidence that demonstrates the defendant's *actual* innocence.[35]

A. False Guilty Pleas Are Not Uncommon

Evidence suggests that innocent defendants plead guilty with startling frequency.[36] In fact, the Innocence Project estimates that one in four wrongful convictions, which are later overturned by DNA evidence, involve false confessions.[37] In 2009, the Innocence Project published a list of thirty-one individuals who were exonerated after pleading guilty to crimes they did not commit.[38] For example, Phillip Bivens, Bobby Ray Dixon, and Larry Ruffin received life sentences for a 1979 rape and murder they did not commit.[39] Threatened with the death penalty, Bivens and Dixon pleaded guilty and testified against Ruffin. However, in 2010, all

33. *See* Blume & Helm, *supra* note 23, at 166–70 (arguing that the plea bargaining process favors the prosecution); *see also id.* at 167 n.60 (noting how plea bargaining has given prosecutors more power, rather than judges); *see* Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 84 (2005); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) (describing the criminal law as a "menu" of options that prosecutors can use to dictate the terms of plea bargains); Ana Maria Gutiérrez, *The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure*, 87 DENV. U. L. REV. 695, 715–18 (2010) (arguing that the prosecution's unbridled authority to determine the charges levied against defendants puts the government in an insurmountable position of superior bargaining power, and has an unfair, coercive effect on plea negotiations).

34. *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J., 957, 958 (1989); *see also* Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599 (2013); Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatists Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV., 2011, 2037 (2000).

35. *See* Brady v. Maryland, 373 U.S. 83 (1963); *see also* United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972).

36. *See supra* notes 23–26.

37. *See False Confessions or Admissions*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/causes/false-confessions-admissions (estimating that false confessions are involved in about twenty-five percent of wrongful convictions later overturned by DNA evidence).

38. *See When the Innocent Plead Guilty*, THE INNOCENCE PROJECT (Jan. 26, 2009, 12:00 AM), http://www.innocenceproject.org/news-events-exonerations/when-the-innocent-plead-guilty.

39. *Id.*

three were exonerated by DNA evidence. Unfortunately, both Dixon and Ruffin died before their names were cleared.[40] Another exonerated individual, John Dixon, also pled guilty to a rape he did not commit.[41] Initially, John asked to withdraw his plea and pursue a trial, but the court denied his request, and he was sentenced to forty-five years in prison.[42] John served ten years of his sentence before DNA evidence proved his innocence.[43] Similarly, Rodney Roberts pled guilty to kidnapping after police stated that a rape victim identified Roberts in a photo lineup.[44] However, when the case was remanded in 2007, the victim denied that she had picked any suspect from a lineup.[45] In 2013, DNA testing excluded Roberts from the crime, and he was released a year later.[46] In total, the group of thirty-one individuals identified by the Innocence Project served over a century and a half in prison before they were exonerated.[47] The Innocence Project is not the only source documenting empirical evidence of innocent individuals pleading guilty. The National Registry of Exonerations also lists over 200 individuals who pled guilty to crimes and were later exonerated.[48]

B. In Some Instances, False Guilty Pleas Are Produced by Nefarious Governmental Conduct, or Made Even When the Government Knows or Suspects That the Accused Is Innocent

Many have argued that the plea bargaining process is coercive and unfairly favors the government.[49] Yet, many governmental tactics, although scrutinized for their coercive effects, are sanctioned by the Court.[50] Notably, prosecutors are free to offer lenient sentences to criminal

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *See When the Innocent Plead Guilty*, THE INNOCENCE PROJECT (Jan. 26, 2009, 12:00 AM), http://www.innocenceproject.org/news-events-exonerations/when-the-innocent-plead-guilty.

45. *Id.*

46. *Id.*

47. *Id.*

48. *See* THE NATIONAL REGISTRY OF EXONERATIONS, *supra* note 23.

49. *See supra*, note 29.

50. For example, prosecutors are afforded wide latitude to induce guilty pleas by charging one criminal act under multiple overlapping criminal statutes. Gutiérrez, *supra* note 33. Such activity falls within the permissible bounds of the Constitution, because "the Executive Branch has exclusive authority and absolute discretion" to select its charges. Greenlaw v. United States, 554 U.S. 237, 247 (2008) (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)). This authority enables prosecutors to invoke "overly broad and weighty charges that would not have arisen, but for the possibility of procuring a guilty plea." Gutiérrez, *supra* note 33. In this

defendants as a reward for waiving their constitutional rights and pleading guilty.[51] Nevertheless, the goal of this Note is *not* to weigh the merits of the guilty plea system,[52] but to highlight the prominence of governmental coercion used to obtain false convictions despite evidence suggesting inaccuracy or innocence.

The case of the "West Memphis Three" illustrates the prevalence of this problem. This case centered on the murder of three young boys whose bodies were discovered naked and hogtied with their own shoelaces in 1993.[53] The three defendants, Misskelley, Echols, and Baldwin—the "West Memphis Three"—were arrested and convicted in connection with the murders; however, post-trial revelations of the highly suspicious circumstances surrounding the convictions led the Arkansas Supreme Court to order the trial court to reconsider their convictions in 2010.[54]

Following the trials, evidence emerged detailing suspicious weaknesses in the government's case, including evidence of outright governmental misconduct. In fact, the case against the defendants was so questionable that HBO released a three-part film documenting the inaccuracy of their convictions.[55] No DNA evidence from the three defendants was ever found at the scene, nor any physical evidence linking the defendants to the murders.[56] Moreover, the government's principal witness, who provided the testimony that catalyzed the case against the

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manner, prosecutors are free to parade vastly more lenient sentences before criminal defendants as a reward for waiving their constitutional rights and pleading guilty—a coercive technique repeatedly recognized as permissible by the Supreme Court. United States v. Mezzanatto, 513 U.S. 196, 210 (1995) (citing Corbitt v. New Jersey, 439 U.S. 212, 219 (1978)) (reasoning that "[t]he plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government 'may encourage a guilty plea by offering substantial benefits in return for the plea.'"). This inherent disparity in plea bargaining power has been referred to by scholars as the "Overcharging Dynamic." Gutiérrez, *supra* note 33.

51. *Mezzanatto*, 513 U.S. at 210 (explaining "[w]hile confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas") (internal quotation marks and citations omitted).

52. *See* Klein et al., *supra* note 29.

53. *See Who Are the West Memphis Three?*, ARK. TIMES (Aug. 19, 2011), http://www.arktimes.com/arkansas/who-are-the-west-memphis- three/Content?oid=1886216.

54. *Id.*

55. *See* PARADISE LOST: THE MURDERS AT ROBIN HOOD HILLS (Home Box Office 1996) (documenting the story of the "West Memphis Three" and their likely innocence); *see also* PARADISE LOST 2: REVELATIONS (Home Box Office 2000) (chronicling the development of the case); PARADISE LOST 3: PURGATORY (Home Box Office 2011) (documenting the end of the appeal process for the three defendants).

56. *Id.*

three defendants, later claimed that her statements were fabricated due to coercion by the police.[57] This witness also alleged that she knew of at least one piece of evidence destroyed by the government during the investigation.[58] Additionally, this witness's son, who was eight at the time and friends with the victims, later stated that the police "tricked" him into making false statements.[59] Evidence also suggested that the government coerced a confession from the defendant, Misskelley—who had an IQ of seventy-five[60]—during a twelve hour interrogation,[61] then leaked that confession to the public after the trial court separated the trials and ruled the confession inadmissible against the other defendants.[62] Although the Misskelley confession incorrectly stated several key details and was later recanted,[63] jurists nonetheless admitted to relying on the statement in convicting the defendants.[64]

Ultimately, Misskelley was sentenced to life imprisonment plus forty years,[65] Echols was sentenced to life imprisonment without the possibility of parole, and Baldwin, characterized as the ringleader, was sentenced to death by lethal injection.[66] Yet, in 2007, new evidence surfaced—DNA testing revealed that a hair found in one of the knots likely belonged to the stepfather of one of the victims,[67] and the government's key witness recanted her testimony, leading the Arkansas Supreme Court to order that

57. Tim Hackler, *Complete Fabrication*, ARK. TIMES (Oct. 7, 2004), http://www.arktimes.com/arkansas/complete-fabrication/Content?oid=1886107.

58. *Id.*

59. *Id.*

60. *See Who are the West Memphis Three?*, *supra* note 53 (referring to Jessie Misskelley, Jr. as "mentally challenged"); *see also* Shaila Dewan, *Defense Offers New Evidence in a Murder Case that Shocked Arkansas*, N.Y. TIMES (Oct. 30, 2007), http://www.nytimes.com/2007/10/30/us/30satanic.html?_r=0 (calling Misskelley "mildly retarded").

61. *See* Blume & Helm, *supra* note 23, at 159 (noting that the confession also implicated the other two defendants and was later recanted).

62. *See* Dewan, *supra* note 60.

63. Notably, Misskelley had been incorrect about several key details in his confession, such as time of the crime, the way the victims were tied, and their manner of deaths. *See* Dewan, *supra* note 60.

64. *See* Blume & Helm, *supra* note 23, at 160 n.16; *see also* Dewan, *supra* note 60.

65. *Youth Is Convicted in Slaying of 3 Boys in an Arkansas City*, N.Y. TIMES (Feb. 5, 1994), http://www.nytimes.com/1994/02/05/us/youth-is-convicted-in-slaying-of-3-boys-in-an-arkansas-city.html; Misskelley v. State, 915 S.W.2d 702, 707 (Ark. 1996) ("The statements [of Misskelley's confession] were the strongest evidence offered against the appellant at trial. In fact, they were virtually the only evidence, all other testimony and exhibits serving primarily as corroboration.").

66. *Id.*

67. *Id.* (pointing out that this individual was the stepfather of the most badly mutilated victim and that the hair was found in a knot of a victim other than the individual's stepson).

the convictions be reconsidered.[68] However, before the trial commenced, the prosecution offered the three men plea deals,[69] which allowed them to plead—despite maintaining their innocence—because it was in their own best interests.[70] In this instance, the defendants received sentences for timeserved and would be released, *if* all three agreed to the terms unanimously.[71]

The trial outlook was bright for the "West Memphis Three," and even the prosecutor admitted that the defendants would likely be acquitted if the case went to trial.[72] However, refusing to take the deal would leave Echols on death row—a result that Baldwin explained was unacceptable.[73] All three defendants agreed to take the deal.[74] In the end, the "West Memphis Three" pled guilty to crimes they adamantly denied committing, and which the weight of evidence suggested they did not commit.[75]

C. Guilty Pleas Produced by Government Misconduct Represent an Especially Troublesome Legal Niche, Where False Convictions Stand Free From Traditional Constitutional Oversight

The case of the "West Memphis Three" is a beacon, illuminating the problems that arise at the intersection of governmental misconduct and guilty plea doctrines. Though the prosecutor later admitted that he believed the defendants would be acquitted at trial[76] and ample evidence indicated the innocence of the three men[77] as well as governmental misconduct, he offered a plea agreement designed to force the defendants into acceptance.[78] Nevertheless, because these defendants were initially convicted at trial, they maintained their right to attack the validity of those trial convictions. As this Note will further discuss, innocent defendants

68. Echols v. State, 373 S.W.3d 892, 902 (Ark. 2010).

69. Campbell Robertson, *Deal Frees 'West Memphis Three' in Arkansas*, N.Y. TIMES (Aug. 19, 2011), http://www.nytimes.com/2011/08/20/us/20arkansas.html.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* (quoting Baldwin as stating, "This was not justice .... However, they're trying to kill Damien.").

74. *Id.*

75. *See* PARADISE LOST: THE MURDERS AT ROBIN HOOD HILLS (Home Box Office 1996) (documenting the story of the "West Memphis Three" and their likely innocence); *see also* PARADISE LOST 2: REVELATIONS (Home Box Office 2000) (chronicling the development of the case); PARADISE LOST 3: PURGATORY (Home Box Office 2011) (documenting the end of the appeal process for the three defendants).

76. *See* Robertson, *supra* note 69.

77. *Id.*

78. *Id.*

who forgo trial and plead guilty are commonly left with no opportunities for recourse despite the availability of exculpating evidence.

While an extreme circumstance, the case of the "West Memphis Three" is not a factual outlier. Instances of wrongful convictions, especially those involving governmental misconduct, have been popular subjects for documentary films and television shows,[79] and relevant case law is also readily available. In *Ferrera v. United States*, the First Circuit overturned a guilty plea conviction because the government: (1) promised immunity from prosecution to coerce an individual to provide false and incriminating testimony against a defendant; and (2) actively withheld evidence of that witness' clear recantation, which excluded the defendant from the crime, and moved the defendant to accept a plea agreement.[80] In fact, heavy sentencing and capital punishment are frequently used to coerce defendants into both pleading guilty and providing false testimony against others despite their innocence.[81] The information disparity between the government and the accused leaves defendants in a vulnerable position during plea negotiations, as defendants' decisions are largely premised on their assessment of the prosecution's case, rather than any individual perception of guilt or innocence.

79. *See, e.g.*, CAPTURING THE FRIEDMANS (Magnolia Pictures 2003) (documenting *Friedman v. Rehal*, 618 F.3d 142 (2d Cir. 2010), in which, a defendant plead guilty after: (1) the prosecutor continuously added more counts to the indictment; (2) a public leak of specific allegations against the defendant created an especially hostile trial environment; and (3) the judge explicitly stated her belief that the defendant was guilty; and in which a post-conviction documentary revealed: (1) questionable investigatory practices, such as hypnotizing child witnesses to obtain statements against the defendant; (2) outright prosecutorial misconduct, such as lying to child witnesses to procure statements against the defendant; and (3) an obvious lack of sufficient evidence to support the government's case against the defendant); *see generally*, MAKING A MURDER (Netflix Dec. 18, 2003) (documenting another case of governmental misconduct—though unrelated to the guilty plea issue).

80. Ferrara v. United States, 456 F.3d 278 at 291–92 (1st Cir. 2006) (explaining "the government manipulated the witness (Jordan) into reverting back to his original version of events, then effectively represented to the court and the defense that the witness was going to confirm the story (now known by the prosecution to be a manipulated tale) that the petitioner was responsible for [the murder].").

81. *See e.g.*, Friedman v. Rehal, 618 F.3d 142 (2d Cir. 2010) (involving a defendant who pled guilty, despite maintaining his innocence, because the prosecutor continuously added hundreds of allegations to the indictment; most, if not all, of which were later revealed to have a higher probability of falsity than truth); *see also*, *When the Innocent Plead Guilty*, *supra* note 23 (describing the case of Bivens, Dixon, and Ruffin, in which two defendants pleaded guilty and testified against the third but were all later exonerated by DNA evidence; as well as the case of Winslow, White, Taylor, Sheldon, Gonzalez, and Dean, in which four of six defendants gave false confessions and testified against the lone defendant that did not plead guilty but all six were later exonerated by DNA evidence); *see also id.* (listing numerous instances involving threats of capital punishment).

It is circular to state that the defendant, above all others, should know of his or her own innocence, because in the American criminal justice system the accused bears no burden of proof. Rather, the prosecution bears the weight of demonstrating the accused's guilt beyond a reasonable doubt. This alone should mandate the prosecution to disclose evidence favorable to the accused during the guilty plea process. However, as will be discussed below, the traditional trial-centric approach to due process is ill-suited to cope with modern guilty plea doctrines. In fact, guilty pleas have effectively rendered the reasonable doubt standard moot because they require defendants to demonstrate their innocence outside of the courtroom to prosecutors looking to prey on uninformed defendants relying on similarly uninformed defense counsel for guidance.

III. The Supreme Court Attempted to Counteract Governmental Misconduct by Mandating Evidentiary Disclosure Requirements in *Brady v. Maryland*, But *Brady* Doctrine Remedies Are Insufficient for Application to Guilty Plea Convictions

As the architect of a criminal proceeding, the government has a propensity to leverage its unilateral access to information and abuse its position in order to obtain false convictions.[82] *Brady v. Maryland* and its progeny, which mandated evidentiary disclosure requirements in order to neutralize the effect of governmental misconduct in obtaining convictions, epitomize the rampant nature of this problem.[83] These cases require the

82. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 86–87 (1963) (ordering a new trial due to prosecutorial suppression of a statement in which a separate defendant admitted to committing the charged murder, and holding that voluntary suppression of evidence favoring the accused and material to guilt or punishment violates the Fourteenth Amendment); Giglio v. United States, 405 U.S. 150, 154–55 (1972) (ordering a new trial due to suppression of the government's promise to avoid prosecuting its key witness, who was intimately involved in the charged crime, if he cooperated with the government and holding that impeachment evidence falls under the disclosure requirements of *Brady v. Maryland*); United States v. Bagley, 473 U.S. 667, 676 (1985) (ordering a new trial due to the suppression of payments made to key governmental witnesses in exchange for trial testimony against the defendant); Kyles v. Whitley, 514 U.S. 419, 433 (1995) (ordering a new trial due to governmental suppression of numerous items of evidence, including eyewitness testimony, multiple inconsistent statements by the government's key witness, and a list of cars inconsistent with the government's theory—all of which cumulatively could have indicated: (1) that the defendant was not responsible for the crime; and (2) that the government's key witness had himself committed the crime).

83. *Id.*; *see, e.g.*, Friedman v. Rehal, 618 F.3d 142 (2d Cir. 2010) (involving interviews made by children who later claimed they were pressured to give false testimony); *Ferrara*, 456 F.3d at 291–92 (involving governmental suppression of a key witness' recantation, which excluded the defendant from the crime); Smith v. Baldwin, 510 F.3d 1127 (9th Cir. 2007) (involving a situation where the government falsified the polygraph test results of a co-defendant to induce a no-contest plea by the named defendant, and later, precluded the co-defendant from testifying against the government by threatening him with additional prosecution).

government to disclose all evidence favorable to the accused, which is material either to punishment or guilt (i.e., material exculpatory evidence and material impeachment evidence) prior to trial.[84] These requirements follow from the Court's longstanding prohibition against the willful use of false evidence and are rooted in the constitutional guarantee of due process.[85] However, the *Brady* Doctrine was developed explicitly under the *trial* context and fails to address the problems created when defendants plead guilty before entering trial. Additionally, even if *Brady v. Maryland* applies to guilty pleas, prosecutors have nearly dismantled the force of the *Brady* Doctrine in this context, by conditioning guilty pleas on the defendant's agreement to waive his or her rights to challenge the resulting conviction.

A. The Evidentiary Disclosure Requirements Enumerated in *Brady v. Maryland* and Its Progeny Were Designed to Balance the Inherent Power Disparity in Criminal Proceedings, which Otherwise Favors the Government as the Sole Possessor of Evidence Against the Accused

In the preeminent case *Brady v. Maryland*, the Court was asked to determine whether a prosecutor's voluntary suppression of a confession, despite defense counsel's pretrial request for exculpatory evidence, violated a defendant's Fourteenth Amendment right to due process.[86] Defense counsel for the defendant, Brady, asked the prosecutor to examine the extrajudicial statements of another defendant, Boblit, before entering trial.[87] The prosecutor provided several documents, but withheld a statement in which Boblit admitted to committing the actual homicide.[88] The suppressed confession only came to light after Brady was tried, convicted, and sentenced.[89] The Court held that "suppression of evidence favorable to an accused, upon request, violates due process where the evidence is material[90] either to guilt or punishment, irrespective of the good or bad

84. United States v. Bagley, 473 U.S. 667 (1985).

85. *Brady*, 373 U.S. at 86 (explaining that the Court's decision was an extension of *Mooney v. Holohan*, which proscribed the knowing use of perjured testimony; and *Pyle v. Kansas*, which further prohibited knowing suppression of evidence favorable to the accused).

86. *Brady*, 373 U.S. at 84.

87. *Id.*

88. Brady v. Maryland, 373 U.S. 83, 84 (1963).

89. *Id.*

90. As explained by the Court, "material" means a reasonable probability that disclosure would have changed the result of the proceeding. United States v. Bagley, 473 U.S. 667, 682 (1985).

faith of the prosecution."[91] This rule aligned with the Court's holding that convictions obtained through the use of perjured testimony were fundamentally unfair.[92]

Since *Brady v. Maryland*, the Court has expanded the scope of this disclosure requirement to include material impeachment evidence.[93] The Court has also held this requirement to apply with equal force whether the defense made a request for the material evidence or not.[94] Impeachment evidence relates to the credibility of a witness and is best illustrated in *Giglio v. United States*.[95] In *Giglio*, the government suppressed an alleged promise made to the prosecution's key witness, which provided for the witness's immunity in exchange for testimony at trial.[96] The controversial witness ("Taliento") was the alleged co-conspirator and, in fact, was the sole witness connecting the defendant to the charged crime.[97] The witness testified that no arrangements with the prosecution existed and the government attorney stated that Taliento "received no promises that he would not be indicted."[98] However, the defense later discovered that at least one governmental officer, an Assistant United States Attorney, promised the witness immunity in exchange for cooperation with the government.[99] The Court held the suppression of such a promise violated the defendant's right to due process because the witness's credibility was a pivotal issue in the case.[100] In fact, the government relied so heavily on Taliento's testimony that failure to disclose the promise violated the "rudimentary demands of justice" as a willful deception of the court.[101] As in *Brady v. Maryland*, the Court in *Giglio* rooted its holding in the general bar of presenting false evidence.[102] The Court considered disclosures of

91. *Brady*, 373 U.S. at 87.

92. United States v. Agurs, 427 U.S. 97, 103 (1976).

93. *See* Giglio v. United States, 405 U.S. 150 (1972); *Agurs*, 427 U.S. at 97; *Bagley*, 473 U.S. at 667; Kyles v. Whitley, 514 U.S. 419 (1995).

94. *See Agurs*, 427 U.S. at 107; *Bagley*, 473 U.S. at 682 (relying on Strickland v. Washington, 466 U.S. 668, 674 (1984)); *Kyles*, 514 U.S. at 434 (citing *Bagley* as an abandonment of allocating weight to requests for *Brady* material).

95. *Giglio*, 405 U.S. at 150–51.

96. *Id.*

97. *Id.* at 154–55.

98. *Id.* at 152 (internal quotations omitted).

99. *Id.* at 153.

100. *Id.* at 151.

101. Giglio v. United States, 405 U.S. 150, 153–55 (1972) (internal quotations omitted) (summarizing *Mooney v. Holohan*as holding, "deliberate deception of the court and juror's by the presentation of known false evidence is incompatible with 'rudimentary demands of justice;'" and further citing, *Napue v. Illinois* as an expansion of the rule established in *Mooney*).

102. *Giglio*, 405 U.S. at 153–55.

material impeachment evidence, like disclosures of material exculpatory evidence, to be indispensable to the integrity of trials and thus held that such evidence falls within the scope of *Brady v. Maryland*.[103]

Ultimately, *Brady v. Maryland* and its progeny evince the government's lengthy history of abusing its position as the "architect" of criminal proceedings and abandoning its duty to administer justice in favor of obtaining convictions unconstitutionally.[104] The *Brady* disclosure requirements are the Court's reaction to the government's propensity for violating the due process rights of accused individuals as well as an ongoing attempt to maintain the integrity of the American criminal justice system. According to the Court, American prosecutors play a special role in the search for truth in criminal trials.[105] The requirement of disclosure is imperative because prosecutors serve as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[106]

Similarly, ethical authorities also impose strict standards which command disclosure of *Brady* evidence.[107] Under the American Bar Association's *Model Rules for Professional Conduct*, prosecutors are prohibited from prosecuting a charge they know to be unsupported and must make "timely" disclosures of evidence that "tends to negate the guilt of the accused or mitigates the offense."[108] Likewise, in 2010, the Department of Justice's ("DOJ") *United States Attorneys' Manual*, required prosecutors to disclose exculpatory information to defendants "reasonably promptly" after discovery.[109] Yet, while ethical authorities like the ABA and the DOJ may require prosecutors to disclose evidence tending to exculpate accused individuals, neither the *Model Rules for Professional Conduct* nor the DOJ's *United States Attorneys' Manual* explicitly require

103. *Id.*

104. *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1963)("The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'"); *see also* Strickler v. Greene, 527 U.S. 263, 281 (1999) (justifying the disclosure obligation of prosecutors "the special role played by the American prosecutor in the search for truth in criminal trials").

105. *See Strickler*, 527 U.S. at 281.

106. Kyles v. Whitley, 514 U.S. 419, 439 (1995) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

107. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2015); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-165 (2010).

108. *See* MODEL RULES, *supra* note 107.

109. *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 107.

disclosure of such evidence prior to entering a guilty plea.[110] Regardless of their requirements, these rules are nonetheless inconsequential as they fail to provide a remedy for defendants affected by such nondisclosures.

B. Under the Supreme Court's Construction of Guilty Plea Validity, the *Brady* Doctrine Fails to Provide a Remedy for Innocent Defendants that Plead Guilty

Guilty pleas and waivers of rights cannot be invalidated where a criminal defendant enters the agreement knowingly, voluntarily, and intelligently.[111] The Constitution shields individuals from admitting guilt by guaranteeing the right to avoid self-incrimination and the right to a jury trial.[112] However, in today's criminal justice system, many defendants choose to waive these rights and plead guilty.[113] Waivers of constitutionally mandated rights are central to guilty pleas, and the Supreme Court has repeatedly affirmed the criminal defendant's right to do so.[114] However, this ability is not without bounds.[115] The Fourteenth Amendment guarantees criminal defendants the right to due process and requires that a defendant's waiver of constitutional rights be a "knowing, intelligent acts done, feely given, with sufficient awareness of the relevant circumstances and likely consequences."[116] The weight of these principles was reaffirmed in *Hill v. Lockhart*, which held that "the longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."[117] Guilty pleas and waivers of rights are invalid where they have been extracted by threats, violence, misrepresentation, or improper influence.[118] Such activity deprives the act of its voluntary character.[119] Under these narrow circumstances, criminal defendants may challenge the validity of their pleas and waivers of rights based on information not available at the time of the plea.[120] In *Brady v. United States*, the Court emphasized that these challenges cannot succeed absent

110. *See* MODEL RULES, supra note 107.

111. Brady v. United States, 397 U.S. 742, 748 (1970).

112. U.S. CONST. amend. V, VI.

113. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012).

114. *See* United States v. Mezzanatto, 513 U.S. 196, 200–01 (1995); United States v. Ruiz, 536 U.S. 629 (2002) (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969)).

115. McCarthy v. United States, 394 U.S. 459, 466 (1969).

116. *Brady*, 397 U.S. at 748.

117. Hill v. Lockhart, 474 U.S. 52, 56 (1985).

118. *Brady*, 397 U.S. at 748.

119. Machibroda v. United States, 368 U.S. 487, 493 (1962)

120. *Id.*

impermissible conduct by governmental agents.[121] Like jury verdicts, guilty pleas are conclusive and their finality cannot be challenged outside of this context.[122] Criminal defendants are not entitled to rescind their admissions of guilt merely because they have misapprehended the quality of the State's case.[123]

1. Brady *Disclosures Are Irrelevant to Guilty Pleas Because Irrespective of Any Disclosure or Suppression such Evidence Cannot Affect the Validity of a Guilty Plea*

Unfortunately for innocent defendants, the Court's construction of valid guilty pleas is extremely basic and, by design, leaves little opportunity for subsequent challenges.[124] Valid pleas are comprised of two elements: (1) voluntariness and (2) intelligence.[125] The first requirement, "voluntariness," is defined by the Supreme Court as being "fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel."[126] The second element, "intelligence," is presumed where the defendant pleads guilty under the advice of counsel and is competent "or otherwise . . . in control of his mental faculties."[127] Over time, these elements have surfaced in several different forms and are commonly referred to as the "knowing and voluntary" standard.[128] Ultimately, the test only requires that the pleading defendant understand the nature of the charges against him or her and the consequences of his or her plea.[129]

Under this standard, *Brady* evidence is wholly irrelevant to the assessment of a guilty plea's validity. Although some circuit courts have

121. *Brady*, 397 U.S. at 757.

122. *Machibroda*, 368 U.S. at 493

123. Brady v. United States, 397 U.S. 742, 757 (1970).

124. FED. R. CRIM. P. 11 (outlining a procedure where the defendant expressly lays the foundations for plea validity in their plea colloquy); *see also* Missouri v. Frye, 132 S. Ct. 1399, 1406 (2010) (interpreting Rule 11 as protecting guilty pleas against claims of invalidity by requiring judges to extensively develop the record with testimony demonstrating that the elements of a valid plea are met); McCarthy v. United States, 394 U.S. 459, 466 (1969) (interpreting Rule 11 as designed to preclude challenges by pleading defendants at the outset).

125. Hill v. Lockhart, 474 U.S. 52, 56 (1985).

126. *Brady*, 397 U.S. at 755.

127. *Id.* at 756.

128. Initially, the Supreme Court included the term "knowing" as an element of validity. *See Brady*, 397 U.S. at 755. However, in the cases that followed, "knowing" was interpreted as falling within the scope of "voluntariness." *See Hill*, 474 U.S. at 56.

129. *Hill*, 474 U.S. at 61.

held that due process requires *Brady* disclosures during plea bargaining,[130] in 2002, the Supreme Court severely limited the scope of *Brady v. Maryland* in *United States v. Ruiz*.[131] In *Ruiz*, the Court considered whether, under the Fifth and Sixth Amendments, federal prosecutors are required to disclose material impeachment information before entering into a binding plea agreement with a criminal defendant.[132] The Supreme Court held that prosecutors are not required to disclose material impeachment evidence prior to entering a guilty plea; any failure to do so cannot affect the validity of a guilty plea.[133] The Court's reversal of the Ninth Circuit's determination that a guilty plea could not be valid where the prosecutor fails to make the same disclosures of material impeachment evidence, which would otherwise be required had the defendant insisted on trial, implicitly holds that guilty pleas do not require the same disclosures as a trial to avoid violating the defendant's due process right.[134]

Consequently, the *Ruiz* decision eradicates any possibility of extending *Brady* disclosures to the guilty plea context. Under *Ruiz*, *Brady* evidence is wholly irrelevant to the question of whether the defendant's guilty plea was "valid." In *Ruiz*, the Supreme Court held that material impeachment evidence is "special in relation to the *fairness of a trial*, not in respect to whether a plea is sufficiently *voluntary* (knowing, intelligent,

130. Some circuit courts responded to instances where suppression of *Brady* evidence coerced defendants into pleading guilty by holding that the *Brady* doctrine applied to plea bargaining. *See, e.g.*, United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998); United States v. Veras, 51 F.3d 1365, 1375 (7th Cir. 1995); Tate v. Wood, 963 F.2d 20, 26 (2d Cir. 1992); White v. United States, 858 F.2d 416 (8th Cir. 1988); Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); Ferrara v. United States, 456 F.3d 278, 291–92 (1st Cir. 2006); Wilkins v. United States, 754 F.3d 24, 28 (1st Cir. 2014); Smith v. Baldwin, 510 F.3d 1127, 1148 (9th Cir. 2007); United States v. Fisher, 711 F.3d 460, 465, 469 (4th Cir. 2013). However, most of these cases were decided pre-*Ruiz*, and only a few circuits have held this way post-*Ruiz*. *Compare* Friedman v. Rehal, 618 F.3d 142 (2d Cir. 2010) (holding that *Ruiz* precluded application of *Brady v. Maryland* to guilty pleas—contrary to the court's previous decisions, *Avellino* and *Tate*), *with* United States v. Fisher, 711 F.3d 460, 465, 469 (4th Cir. 2013) (holding post-*Ruiz* that failure to disclose *Brady* evidence during plea bargaining violated due process, without addressing the court's previous decision, *United States v. Moussaoui,* which held that *Ruiz* precluded the application of *Brady*). Nonetheless, holdings in favor of applying the *Brady* doctrine have been the focal point of academic support. *See* Eric Hawkins, *A Murky Doctrine Gets a Little Pushback: The Fourth Circuit's Rebuff of Guilty Pleas in* United States v. Fisher, 55 B.C. L. REV. 103 (2014).

131. *See* United States v. Ruiz, 536 U.S. 629, 631 (2002).

132. *Id.* at 625.

133. *Id.* at 629–32.

134. *Id.* at 629 (describing the Ninth Circuit's decision as holding "that a guilty plea is not 'voluntary' (and that the defendant could not, by pleading guilty, waive her right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that they would have had to make had the defendant insisted upon a trial").

and sufficiently aware)."[135] The Supreme Court has consistently disavowed any distinction between material impeachment evidence and material exculpatory evidence.[136] Rather, these categories of evidence are to be treated the same for *Brady* purposes.[137] Thus, in light of the Court's precedent, the *Ruiz* decision applies broadly and holds that neither material impeachment evidence nor material exculpatory evidence can affect the validity (voluntary, knowing, intelligent, and sufficiently aware nature) of a guilty plea. In fact, "it has *always* been the [Supreme] Court's view that the notice component of due process refers to the *charge* rather than the *evidentiary support* for the charge."[138] This distinction is imperative because it establishes that evidence cannot affect the voluntary and intelligent nature of a plea.

2. Once Entered, Guilty Pleas Carry a Strong Presumption of Validity, which Can Only Be Overcome Under Narrowly Defined Circumstances—None Arise Under the Brady *Doctrine*

The Supreme Court holds that guilty pleas do not require defendants' complete knowledge of the relevant circumstances to be valid; rather, the Constitution permits acceptance of guilty pleas (including their subsequent waivers of rights) despite any misconceptions the defendants might have.[139] Pleading defendants are not entitled to withdraw their plea simply because they have misapprehended the quality of the state's case.[140] Conversely, modern guilty pleas and their subsequent waivers of rights are presumptively valid.[141] Rule 11 of the Federal Rules of Criminal Procedure ("Rule 11") requires judges to address defendants personally and thoroughly vet each plea before acceptance.[142] As a result, the fundamental elements of validity are established on the record before the plea is entered.[143] Judges thereby establish the defendant's understanding of the

135. *Id.* (internal quotation marks omitted).

136. *See* United States v. Bagley, 473 U.S. 667, 676 (1985) (rejecting distinctions between impeachment evidence and exculpatory evidence); *see also* Kyles v. Whitley, 514 U.S. 419, 433 (1995) (citing *Bagley* for the same proposition); Giglio v. United States, 405 U.S. 150, 154 (1972).

137. *Bagley*, 473 U.S. at 676.

138. United States v. Agurs, 427 U.S. 97, 112 n.20 (1976) (emphasis added).

139. United States v. Ruiz, 536 U.S. 622, 630–31 (2002) (citing a litany of misunderstandings accepted by the Supreme Court).

140. Brady v. United States, 397 U.S. 742, 757 (1970).

141. Missouri v. Frye, 132 S. Ct. 1399, 1406 (2012); McCarthy v. United States, 394 U.S. 459, 466 (1969).

142. *See* FED. R. CRIM. P. 11; *McCarthy*, 394 U.S. at 465–66.

143. *Frye*, 132 S. Ct. at 1406; *McCarthy*, 394 U.S. at 466.

relevant rights and consequences at the outset.[144] As such, the Supreme Court recognizes that plea entry proceedings provide substantial protection against later claims seeking invalidation by establishing validity on the record.[145] Absent threats, misrepresentation, improper promises, or undue influence, guilty pleas and their accompanying waivers of rights must stand.[146] Such activity would deprive the plea of its voluntary character, and, under these narrow circumstances, criminal defendants may collaterally attack the validity of their guilty pleas.[147] Notably, failure to disclose *Brady* evidence does not square with any of the Court's specifically defined instances where invalidation is proper.

Nevertheless, some Circuit courts have expanded *Brady v. Maryland's* disclosure requirements by testing the validity of pleas based on whether a defendant would have insisted on going to trial had *Brady* evidence been disclosed.[148] However, the longstanding standard for voluntariness requires only that a pleading defendant be fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel.[149] Because these circuit courts fail to assess the validity of guilty pleas in light of this standard, reliance on such decisions is improper.

C. Waivers of Rights Play a Unique and Essential Role in the Guilty Plea System; But, Today, Waivers of Rights Are Designed to Frustrate Attempts to Provide Recourse to Innocent Defendants

The essential limitation of *Brady v. Maryland* is that *Brady's* disclosure protections were developed specifically as *trial* rights. Thus, while the Supreme Court has recognized that the government alone is in the unique position of knowing the full extent of the evidence at play in each case, which in turn establishes an affirmative duty on the prosecution to discover and disclose material evidence favorable to the accused,[150] the

144. *McCarthy*, 394 U.S. at 466.

145. *Frye*, 132 S. Ct. 1399 at 1406.

146. Brady v. United States, 397 U.S. 742, 753–55 (1970).

147. Machibroda v. United States, 368 U.S. 487, 493 (1962).

148. *See, e.g.*, Ferrara v. United States, 456 F.3d 278, 291–92 (1st Cir. 2006); Wilkins v. United States, 754 F.3d 24, 28 (1st Cir. 2014); Smith v. Baldwin, 510 F.3d 1127, 1148 (9th Cir. 2007); United States v. Fisher, 711 F.3d 460, 465–69 (4th Cir. 2013).

149. *See Brady*, 397 U.S. at 755.

150. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *see also* Giglio v. United States, 405 U.S. 150, 154 (1972) (explaining that the

applicability of *Brady v. Maryland* and its progeny to plea bargaining, while unsettled, appears unlikely.[151] These decisions stemmed explicitly from the Court's desire to ensure the fairness and reliability of *trials*.[152] Potential harm to the sanctity of jury trials factored deeply into the Court's decisions[153] and, in the end, guilty pleas are vastly different than jury trials.[154] In fact, the act of pleading guilty not only waives the criminal defendant's constitutional right to a jury trial, but it also waives the defendant's right to confront accusers and avoid self-incrimination.[155] As such, the act of waiving rights is an inseparable element of guilty pleas.

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prosecution's duty, as spokesperson of the state, is to know of all information pertinent to their case, assess such information, and make proper disclosures to the defense).

151. *See* Klein et al., *supra* note 29, at 110 n.214 (arguing that there is much disagreement over *Brady v. Maryland*'s application to guilty pleas); *see also*, ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 454, at 6–7 (2009) (opining that prosecutors must disclose exculpatory evidence before a plea-agreement is signed, and this cannot be waived); United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) ("Thus, we have noted that where prosecutors have withheld favorable material evidence, even a guilty plea that was knowing and intelligent may be vulnerable to challenge.") (internal quotation marks and citations omitted); Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) (holding pre-*Ruiz*, that defendant can argue that his plea was not voluntary and intelligent because it was made in the absence of withheld *Brady* material and this is an exception to the general rule that a defendant who pleads guilty waives independent claims of constitutional violations); *but see, e.g.*, Matthew v. Johnson, 201 F.3d 353, 361–62 (5th Cir. 2000) ("Because a *Brady* violation is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt, it follows that the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation."); *see* UNITED STATES ATTORNEYS' MANUAL, *supra* note 107 (establishing that federal prosecutors do not need to disclose exculpatory information to defendant before plea entered but rather 'reasonably promptly' after discovery); *see generally*, *supra* note 34 and accompanying text.

152. *See* Brady v. Maryland, 373 U.S. 83, 87–88 (explaining that the disclosure requirement derived explicitly from the notion of "avoidance of an unfair *trial* to the accused") (emphasis added); *see also* United States v. Agurs, 427 U.S. 97, 107 (1976) (stating that defendant's right to a fair trial is mandated by the Due Process Clause); *Kyles*, 514 U.S. at 453 (stating that "the question is . . . whether we can be confident that the jury's verdict would have been the same"); *Giglio*, 405 U.S. at 154–55 (1972) (explaining that failure to disclosure material impeachment evidence at trial violates due process, because "evidence of any understanding or agreement of future prosecution would be relevant to [the witness'] credibility and the jury was entitled to know of it").

153. Such emphasis has spawned much disagreement over *Brady v. Maryland*'s authority outside of trial. *See* Klein et al., *supra* note 29, at 83 (identifying a circuit split on his issue); Wiseman, *supra* note 21 (discussing the current state of *Brady v. Maryland*'s application to guilty pleas and identifying key decisions in various jurisdictions); *see also* United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010) (identifying cases that illustrate the circuit split).

154. *See* Klein et al., *supra* note 29, at 73 (comparing modern guilty pleas with traditional criminal trials).

155. *See* United States v. Ruiz, 536 U.S. 622, 629 (2002) (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969)).

1. The Scope of Rights Subject to Waiver in Guilty Plea Agreements Is Expanding Rapidly

In today's guilty plea system, waivers have expanded to cover rights far beyond just basic constitutional guarantees.[156] Guilty plea waivers are considered to be negotiated and bargained for between the parties and thus are governed by contract principles rather than constitutional law.[157] Consequently, over the last decade, prosecutors began incorporating additional waivers as defensive measures to preempt later challenges and guarantee the finality of guilty plea convictions.[158] For example, prosecutors now frequently request waivers of all discovery materials, including both impeachment and exculpatory evidence subject to the disclosure requirements of *Brady v. Maryland*.[159] Such waivers are often also accompanied by a waiver of the defendant's right to raise claims of prosecutorial misconduct in failing to disclose such materials,[160] waivers of the right to appeal,[161] and waivers of the defendant's right to collaterally attack the conviction.[162]

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156. *See* Klein et al., *supra* note 29 (discussing the emergence of modern waivers and identifying those most prevalent in written plea agreements filed in federal courts); *see also* Wiseman, *supra* note 21, at 971–74 (discussing the growth of waivers—focusing specifically on DNA waivers); *see also* Robert K. Calhoun, *Waiver of the Right to Appeal,* 23 HASTINGS CONST. L.Q. 127, 160 (1995) (arguing that the Supreme Court is "decidedly inhospitable to the notion that any agreement by a criminal defendant to waive a right—either constitutional or statutory—could be presumptively against public policy").

157. *See* Ricketts v. Adamson, 483 U.S. 1, 16 (1987) (Brennan, J., dissenting) (treating a guilty plea entered into voluntarily and knowingly as a contract between the government and the defendant); Santobello v. New York, 404 U.S. 257, 262 (1971) (holding that the petitioner had bargained and negotiated for the plea); *see* Klein et al., *supra* note 29; *see* Scott & Stuntz, *supra* note 4, at 1909–11 (examining different contract theories and their applicability to plea bargaining).

158. *See* Klein et al., *supra* note 29, at 78 (describing defensive waivers as "non-trial related waivers," and discussing extensively the national growth of such waivers in guilty pleas).

159. *Id.* at 77 n.21 (citing empirical evidence demonstrating the widespread incorporation of such waivers in plea agreements).

160. *Id.* at 77.

161. *Id.*; *see* NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 913–14 (West, 5th ed. 2010); *see* Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 562 (2013) ("Most constitutional criminal procedural guarantees that protect suspects during the investigation and prosecution of state and federal crimes are largely irrelevant in our world of guilty pleas and appeal waivers.") (referencing the empirical data collected in Klein's study).

162. *See* Klein et al., *supra* note 29, at 81 (explaining that the majority of courts have upheld collateral attack waivers unless such waivers were the result of ineffective assistance of counsel); *see, e.g.*, United States v. Mabry, 536 F.3d 231, 243–44 (3d Cir. 2008); Hurlow v. United States, 726 F.3d 958, 967 (7th Cir. 2013).

2. *Widespread Incorporation of Defensive Waivers into Guilty Plea Agreements Removes the Teeth from Any Potential Claim that an Innocent Defendant May Develop After Entering the Plea*

Today, such defensive waivers are essentially boilerplate terms in plea agreements around the country,[163] and they place substantial limitations on any innocent defendant's ability to attack a false conviction.[164] Ultimately, by conditioning guilty pleas on defendants' "agreement" to waive their rights, a prosecutor can foreclose any opportunity for a defendant to challenge his or her conviction, even if the defendant later asserts constitutional violations.[165] For example, subsequent discovery of suppressed *Brady* evidence or impermissible government conduct, which may have factored heavily into an innocent defendant's decision to plead guilty, are rendered useless where the defendant has waived his or her right or opportunity to use such information.[166] Consequently, these defendants face an uphill battle to invalidate their guilty pleas and corresponding waivers of rights. In fact, absent an affirmative indication that the guilty plea failed to meet the Court's low standard for validity, an ineffective assistance of counsel ("IAC") claim may be an innocent defendant's only avenue for recourse[167]—yet, even this right may be subject to waiver.[168]

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163. *See* Klein et al., *supra* note 29, at 83–84 (discussing Klein's findings in her examination of all written plea agreements entered in federal courts, and using plea agreements made in the Western District of Texas as an example).

164. *Id.* at 92–93 (arguing that defensive waivers severely limit a pleading defendant's ability to challenge his or her plea, and if defendants are permitted to waive their right to the effective assistance of counsel, these defendants will be left without a forum for judicial review of constitutional violations).

165. *Id.* at 79 (explaining that "an intelligent and voluntary plea of guilt generally bars the collateral attack of . . . claims relating to the deprivation of constitutional rights that occurred antecedent to the entry of a guilty plea"); *see, e.g.*, Haring v. Prosise, 462 U.S. 306, 321–22 (1983) (stating that a Fourth Amendment claim ordinarily may not be raised in a habeas proceeding following a guilty plea); McMann v. Richardson, 397 U.S. 759, 770 n.13 (1970) (refusing to address whether defendant's confession was coerced because his guilty plea was knowing, voluntary, and intelligent).

166. *See, e.g.*, Watson v. United States, 165 F.3d 486, 489 (6th Cir. 1999) (holding that a defendant's informed and voluntary waiver of the right to collaterally attack a sentence in plea agreement bars relief); United States v. Khattack, 273 F.3d 557, 560–61 (3d Cir. 2001) (listing ten other circuits upholding appeal waivers as barring later challenges).

167. Hill v. Lockhart, 474 U.S. 52, 56–57 (1985) (stating "a defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*").

168. *See* Klein et al., *supra* note 29, at 88 (citing data Klein gathered, which was represented in Appendix H of her article, and, Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance—Waiving* Padilla *and* Frye, 51 DUQ. L. REV. 647, 648–50 (2013), which cited "broad plea agreements requiring defendant to waive the right to appeal or collaterally attack the

Moreover, successfully appealing a guilty plea conviction under an IAC claim is highly unlikely.[169] Innocent defendants cannot succeed in an IAC action on the basis of prosecutorial nondisclosure because defense counsel cannot be expected to discover suppressed exculpatory or impeaching evidence in the sole possession of the government, much less provide counsel on such information.[170] As a result, innocent defendants that plead guilty due to either governmental misconduct or a hopeless outlook—or both—are left without recourse.

IV. Congress Must Act to Preserve the Integrity of Our Justice System

A. *Winship*—the Reasonable Doubt Standard Is the Bedrock of Our System

In 1970, the Supreme Court explicitly held that the constitutional requirement of "proof beyond a reasonable doubt" for criminal convictions applies with equal force throughout the criminal justice system.[171] The reasonable-doubt standard is recognized as a pillar of American criminal procedure, which is grounded in the Due Process Clause of the Constitution.[172] This standard is a foundational element, vital to the American scheme of criminal procedure, as "it is a prime instrument for reducing risk of convictions resting on factual error."[173] The Supreme Court considers this standard to be so fundamental to the fair administration of justice, that its necessity is obvious—the "standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at

conviction and sentence in any post-conviction proceeding on any ground, except [if the sentence exceeds the statutory maximum]") (internal quotation marks omitted).

169. For example, in *McMann*, the Supreme Court refused to consider the merits of the defendant's claim that his guilty plea was induced by impermissible threats, violent beatings, intentional misinformation, and deprivation of counsel, because his plea colloquy established a prima facie case of voluntariness that could not be overcome absent a showing that his counsel's advice was incompetent. McMann v. Richardson, 397 U.S. 759, 772 (1970) (explaining "a plea of guilty in a state court is not subject to collateral attack in a federal court on the ground that it was motivated by a coerced confession unless the defendant was incompetently advised by his attorney").

170. Hill v. Lockhart, 474 U.S. 52, 58–59 (1985) (holding that ineffective assistance of counsel claims related to guilty pleas follow the two-part test of *Strickland v. Washington* and requires the defendant to demonstrate that the attorney's advice fell below the objective standard of reasonableness).

171. *In re* Winship, 397 U.S. 358, 362–64 (1970).

172. *Id.* at 361–62 (citing a body of Supreme Court precedent).

173. *Id.* at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

the foundation of the administration of our criminal law.'"[174] Moreover, "a society that values the good name and freedom of every individual should not condemn a man for the commission of a crime when there is reasonable doubt about his guilt."[175] Ultimately, the Court views the reasonable-doubt standard as indispensable to commanding the respect and confidence of the public in the criminal justice system. The Court explained:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.[176]

Concurring with this ruling, Justice Harlan stated, "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[177]

Yet, evidence suggests that innocent defendants are convicted with startling frequency.[178] While the requirement of proof beyond a reasonable doubt is enforced as a fundamental protection against the unjust conviction of defendants at trial, defendants who forgo trial proceedings and plead guilty are not afforded the deference that inherently lies within the reasonable doubt standard. Thus, the force of the reasonable-doubt standard seems to crumble under the weight of our new criminal justice system ("a system of pleas rather than trials"),[179] especially as defendants are increasingly asked to waive their right to receive any material information that may demonstrate reasonable doubt as to their guilt.[180]

174. *Id.*

175. *Id.* at 364.

176. *Id.*

177. *In re* Winship, 397 U.S. 358, 372 (1970).

178. *See generally, supra* notes 23–26 and accompanying text.

179. Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1407 (2010).

180. *See* Klein et al., *supra* note 29 (discussing the emergence of appeal waivers, collateral attack waivers, discovery waivers, waivers of the right to effective assistance of counsel, and others).

B. The Legislature Can Create a Sufficiently Flexible Remedy

Unfortunately, though some may argue for the expansion of *Brady v. Maryland*'s interpretation by the Court, the judiciary faces many hurdles if they intend to respond to the recent development of this problem. Bound by an insurmountable body of precedent, the Court would need to completely deconstruct its current approach to guilty pleas. On the other hand, the legislature is poised with the flexibility required to respond to this problem without overly burdening or destroying the beneficial nature of the plea bargaining system. Simply placing an affirmative duty on prosecutors, greater than that of the ABA, to make disclosures of *Brady* evidence prior to entrance of plea agreements would provide pleading defendants with a remedy should they discover that the government has withheld critical information.

However, a much more viable solution may be establishing a statutory remedy, which enables defendants to overcome waivers contained in their plea agreements and challenge their guilty pleas under very narrow circumstances, such as where material exculpatory or impeachment evidence is discovered after conviction. Essentially, this remedy would expand upon the right to appeal guilty plea convictions, which is statutorily derived.[181] However, unlike the current right to appeal, the Legislature should affirmatively deny waivability. This would ensure that the statute's social benefit is not neutralized by guilty plea waivers. Ironically, the strongest way to protect innocent defendants may be to restrict their freedom to relinquish their rights.

Plea bargaining plays a vastly important role in the American criminal justice system, but at what cost? If the reasonable-doubt standard is so indispensable to the integrity of our justice system, as to be the basis for confidence by the common citizen, is not the conviction of even one innocent man too many?[182]

> I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.
>
> - *In re Winship*, Justice Harlan, (concurring).[183]

181. 28 U.S.C. § 1291 (2012).

182. *In re* Winship, 397 U.S. at 364 ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.").

183. *Id* at 372.