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United States v. Ruiz: Are Plea Agreements Conditioned on Brady Waivers Unconstitutional?

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NOTE

UNITED STATES V. RUIZ: ARE PLEA AGREEMENTS CONDITIONED ON BRADY WAIVERS UNCONSTITUTIONAL?

I. INTRODUCTION

Imagine for a moment that you are a defense attorney, representing a client who has been accused of a robbery. You learn that the prosecution's sole witness is the victim, who identified your client from a line-up of individuals with a record of similar criminal conduct. As you expect, the prosecution offers your client a plea agreement. If your client pleads guilty, the prosecution will recommend a reduced sentence to the court for taking responsibility, cooperating and avoiding a time-consuming trial. The prosecution then presents your client with an agreement stating that if your client waives his right to receive impeachment evidence, the prosecution will recommend a reduced sentence to the court. Fearing the consequences of a jury conviction and the maximum sentence being imposed, your client agrees to accept the plea agreement. You advise your client that, while the plea agreement seems attractive, he should not waive his right to receive impeachment evidence. Simultaneously and unbeknownst to you, the prosecution's sole witness expresses doubt regarding the identification of your client. The witness explains that the robbery took place very quickly and he was badly frightened and was now unsure whether he had identified the right man. Because a trial does not appear to be in the foreseeable future and a plea bargain has already been offered, the prosecutor withholds this information. Wanting to avoid a trial and the possibility of a much harsher sentence, and not realizing the witness' reservations, your client ignores your warning, accepts

the plea agreement and pleads guilty. Subsequently, you discover the witness' uncertainty and seek to have your client's guilty plea reversed. The court, however, rules that your client knowingly and voluntarily pleaded guilty and agreed to waive his right to impeachment evidence. Thus, your client's guilty plea and conviction stand.[1]

While the facts above are hypothetical, the situation itself is plausible.[2] And until recently, prosecutors in both the Southern and Northern Districts of California systematically engaged in the practice of including waivers of impeachment evidence in plea agreements.[3] Although including this waiver in plea agreements expedited the processing of simple cases, thereby alleviating the prosecution's heavy workload, the practice has jeopardized the truth-seeking nature upon which our criminal justice system is based.

In *United States v. Ruiz*,[4] the Ninth Circuit ruled that such waivers are unconstitutional, violating the principle that defendants in criminal cases must knowingly and voluntarily plead guilty for the plea to be constitutionally valid.[5] The purpose of this article is to discuss the law leading up to the Ninth Circuit's ruling in *Ruiz*, to examine the court's ruling itself, and to analyze the impact this decision could have on plea bargaining, an integral part of the criminal justice system.

In Part II, this Note discusses *Ruiz's* facts and procedural history. Part III, section A outlines the prosecution's duty to disclose exculpatory and impeachment evidence as set forth by the United States Supreme Court's rulings in *Brady v. Maryland*[6] and its progeny. Part III, section B discusses the nature of guilty pleas, focusing on the several types of waivers that flow from such pleas. Part IV critiques the Ninth Circuit's ruling in *Ruiz*. Finally, Part V concludes that the Ninth Circuit properly held that plea agreements containing *Brady* waivers cannot constitutionally be entered into and that they

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[1] Introduction based in part on facts taken from, Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 957 (1989).

[2] *See id.* at 968-97 (discussing the possibility that without mandatory *Brady* disclosures defendants can be induced into self condemnation).

[3] Erica G. Franklin, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L.REV. 567, 568-69 (1999).

[4] 241 F.3d 1157 (9th Cir. 2001).

[5] *Id.* at 1165.

[6] 373 U.S. 83 (1963).

obstruct the truth-seeking function of our system of criminal justice.

II. FACTS AND PROCEDURAL HISTORY

After Angela Ruiz was arrested for, and subsequently charged with, importing marijuana from Mexico to the United States, the United States Attorney's Office for the Southern District of California offered her a plea agreement.[7] The plea agreement required Ruiz to plead guilty within thirty days of her initial appearance, file no motions, waive her right to an indictment and appeal and waive her right to receive impeachment evidence.[8] In exchange, the Government would recommend a two-level downward departure to the sentencing judge.[9] This type of agreement, known as a "fast track" plea agreement, was adopted to minimize the expenditure of Government resources and expedite the processing of more routine cases.[10] The proverbial "carrot-on-the-stick" for defendants to enter the agreement was the Government's recommendation for a sentence reduction to the sentencing judge.[11]

Ruiz, however, refused to accept the "fast track" agreement on the basis that it contained what she believed to be an

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[7] *Ruiz*, 241 F.3d at 1160.

[8] *Id.* at 1161. The waiver in the plea agreement stated:

> WAIVER OF RIGHT TO BE PROVIDED
> WITH IMPEACHMENT AND
> AFFIRMATIVE DEFENSE INFORMATION
>
> The Government represents that any information establishing the factual innocence of the defendant known to the undersigned prosecutor in this case has been turned over to the defendant. The Government understands it has a continuing duty to provide such information establishing factual innocence of the defendant.
>
> The defendant understands that if this case proceeded to trial, the Government would be required to provide *impeachment information* relating to any informants or other witnesses. In addition, if the defendant raised an affirmative defense, the Government would be required to provide information in its possession that supports such a defense. *In return for the Government's promises set forth in this agreement, the defendant waives the right to this information*, and agrees not to attempt to withdraw the guilty plea or to file a collateral attack based on the existence of this information.

Id. at 1166 (emphasis in original).

[9] *Id.* at 1161.

[10] *Id.* at 1160.

[11] *Id.* at 1161.

unconstitutional waiver of her *Brady* rights.[12] As a result, Ruiz was indicted by a grand jury and arraigned.[13] Two months after her initial appearance, Ruiz pled guilty to the charges of marijuana importation without the benefit of the "fast track" plea agreement.[14]Nevertheless, at her sentencing hearing Ruiz requested the two-level downward departure that had originally been offered to her as part of the "fast track" plea agreement.[15] This two-level downward departure would have brought Ruiz's sentencing range to twelve to eighteen months.[16] Despite refusing to sign the plea agreement and thereby waiving her right to impeachment evidence, Ruiz insisted that she had substantially complied with the requirements under the "fast track" program and was entitled to the Government's downward departure recommendation to the sentencing judge.[17] The Government, however, opposed the downward departure because of Ruiz' failure to sign the plea agreement and to consent to the waiver of her right to receive impeachment evidence of government witnesses.[18]

The district court denied Ruiz's request for the sentencing departure because the Government did not make a "fast track" recommendation and Ruiz had not entered into a plea agreement that would require such a departure from the regular sentencing range.[19] Ultimately, Ruiz was sentenced to eighteen months in jail.[20] Ruiz appealed her sentence to the United States Court of Appeals for the Ninth Circuit.[21]

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[12] *Ruiz*, 241 F.3d at 1161. According to Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, prosecutors have a duty to disclose "favorable evidence to an accused" if the evidence is "material either to guilt or punishment." *Id.* at 87. This disclosure requirement applies to impeachment evidence as well. Giglio v. United States, 405 U.S. 150, 154 (1985). While Ruiz argued the waiver was unconstitutional, the dissent pointed out that no evidence showed that she initially refused to sign the "fast track" plea agreement on that premise. *Ruiz*, 241 F.3d at 1171. The lower court had made no factual finding on the matter. *Id.* at 1168.

[13] *Ruiz*, 241 F.3d at 1171. After the arraignment, Ruiz's appearance bond was revoked and she was remanded into custody for testing positive for cocaine and PCP. *Id.*

[14] *Id.* at 1161

[15] *Id.*

[16] *Id.* Without the benefit of the "fast track" plea agreement Ruiz was facing a sentencing range from 18 to 24 months. *Id.*

[17] *Ruiz*, 241 F.3d at 1161.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

The Ninth Circuit granted review of this case for the purpose of deciding two issues: 1) whether the right to *Brady* information can constitutionally be waived as a condition to receiving the benefits of a plea bargain; and 2) whether the Government can constitutionally withhold recommendations for sentencing departures based on a defendant's refusal to waive her right to *Brady* material.[22]

III. BACKGROUND

A. THE *BRADY* RULE

In *Brady v. Maryland*[23] the United States Supreme Court held 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 . . .".[24] In reaching its holding, the Court relied on *Mooney v. Holohan*[25] and *Pyle v. Kansas*[26] and extended the somewhat narrower principles articulated in those cases to create what has become known as the *Brady* rule.[27] In *Mooney*, the Court ruled that the knowing use of perjured testimony by the prosecution to secure a conviction was "inconsistent with the rudimentary demands of justice" and as such was a violation of due process.[28] The Court's holding in *Mooney* was later broadened in *Pyle*.[29] In that case, the Court reaffirmed *Mooney's* holding and extended the scope of due process violations to encompass the deliberate suppression of evidence favorable to the accused by state authorities.[30]

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[22] *Id.*

[23] 373 U.S. 83 (1963).

[24] *Id.* at 87. In *Brady*, the Court overruled John Brady's death sentence because the prosecution failed to produce evidence of the actual killer's confession that had been requested by Brady's lawyer. Id. at 86.

[25] 294 U.S. 103 (1935).

[26] 317 U.S. 213 (1942).

[27] *Brady*, 373 U.S. at 86-88.

[28] *Mooney*, 294 U.S. at 112.

[29] *Brady*, 373 U.S. at 86-87.

[30] *Pyle*, 317 U.S. at 215-16. In *Brady*, the Court adopted the Third Circuit's interpretation of the statement in *Pyle* to mean that "the suppression of evidence favorable to the accused was itself sufficient to amount to a denial of due process. *Brady*, 373 U.S. at 87. The Court further relied on its holding in Napue v. Illinois, 360 U.S. 264 (1959) that a due process violation occurs "when the state, although not soliciting false evidence, allows it to go uncorrected when it appears." *Brady*, 373 U.S.

The *Brady* Court's holding was an extension from prohibiting the knowing use of perjured testimony to obtain a conviction, into a constitutional rule of discovery prohibiting the Government's failure to supply exculpatory information to the defendant upon request.[31] The *Brady* Court set up three requirements for a defendant to challenge the validity of his conviction based on the Government's suppression of evidence.[32] First, the defendant had to show that the evidence the Government withheld was favorable.[33] Second, the defendant had to show the evidence the Government withheld was material either to the determination of guilt or punishment.[34] Finally, the defendant had to request production of the exculpatory information from the prosecution.[35]

Not only did *Brady* require that the accused prove these elements, the wording of *Brady* lent itself to the interpretation that the Government had to be aware of the exculpatory evidence for a duty to disclose the evidence to be triggered.[36] Since *Brady*, however, courts have increased the amount of information presumed to be within the prosecutions knowledge to all information gathered in connection with its office's investigation of a specific case.[37] Thus, while the prosecution has no duty to disclose exculpatory information of which it is not aware, the prosecution cannot avoid its disclosure obligation by keeping itself ignorant of evidence that the investigation has produced.[38]

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at 87.

[31] *Brady*, 373 U.S. at 86-88.

[32] *Id.* at 87.

[33] *Id.*

[34] *Id.*

[35] *Id.* This request requirement was subsequently dropped in United States v. Agurs, 427 U.S. 97 (1976), which held that, "if the [*Brady*] evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." *Agurs*, 427 U.S. at 107.

[36] *See generally* Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995). In *Sanchez*, the Ninth Circuit interpreted Brady as requiring an awareness element by the Government. *Id.* at 1453.

[37] 21A AM. JUR. 2d § 1271 (1998).

[38] *Id.*

1. Ethical Duty to Disclose

In light of the deception engaged in by the prosecution in the cases leading up to and including *Brady*, the United States Supreme Court justified the rule set forth in *Brady* on the ground that the federal government has a duty to seek justice above all else.[39] Society, the Court declared, benefitted not only from the conviction of its criminals, but also from the public belief in the fairness of that process.[40] And for true justice to be achieved, prosecutors must act in a fair manner.[41]

Rule 3.8 of the Model Rules of Professional Conduct[42] echoes the *Brady* rule and its idealism.[43] In fact, Rule 3.8 is more demanding than the *Brady* rule, requiring the disclosure of not only exculpatory evidence, but evidence that mitigates the offense charged to the defendant.[44] Not surprisingly, the comment to Rule 3.8 also reflects the Court's sentiment in *Brady* that "a prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[45]

Despite the obvious ethical grounds underlying the *Brady* rule, however, the Court in *United States v. Agurs*[46] announced that the prosecutor's constitutional obligation to disclose *Brady*

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[39] *Brady*, 373 U.S. at 87-88.

[40] *Id.* at 87.

[41] *Id.* at 87-88.

[42] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8 (1999). Rule 3.8 reads in pertinent part:

> The prosecutor in a criminal case shall:
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]

Id.

[43] *Id.*

[44] *Id.*

[45] MODEL RULES OF PROFESSIONAL CONDUCT, RULE 3.8 cmt. (1999). *See also* Lisa M. Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1213 (2000) (concluding that "the prosecutor's duty to disclose evidence favorable to the defense is an inherent and important part of a prosecutor's ethical responsibilities.").

[46] 427 U.S. 97 (1976).

material is not measured by his "moral culpability or willfulness."[47] Rather, the Court held, "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."[48] Still, in *Agurs*, the Court concluded that the prosecutor's role as the seeker of justice "illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence."[49]

The Court's best expression regarding the purpose underlying the *Brady* rule, however, may be in *United States v. Bagley*.[50] There, the Court stated that "[t]he *Brady* rule is based on the requirement of Due Process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."[51]

2. Brady's Requirements

a. Time of Disclosure

Generally, the Government's duty to disclose *Brady* material is ongoing.[52] Thus, even when information becomes available at trial, the Government has a duty to inform the defendant.[53] The Court of Appeals for the Second Circuit has gone so far as to hold that, "[t]he government's obligation to make such disclosures is pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty."[54] Under this rationale, the time required for the disclosure of *Brady* material by the prosecution would have to be as early as possible, not just before trial, so as to provide a defendant with the capability to enter the most informed plea possible.[55] Regardless of when the prosecutor is required to disclose *Brady* evidence, the Court, since its

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47 *Id.* at 110.
48 *Id.*
49 *Id.* at 111.
50 473 U.S. 667 (1985).
51 *Id.* at 675.
52 21A AM. JUR. 2d §1271 (1998).
53 *Id.*
54 United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998).
55 *Id.*

decision in *Brady*, has eliminated the requirement that the accused must first request the information.[56]

b. Evidence Must Be Favorable to the Defendant

In *Brady*, the Government suppressed evidence of a confession by Brady's co-defendant that he, rather than Brady, actually committed the murder.[57] While not exactly exculpatory, the evidence was important to show the jury that Brady had only helped to plan the murder, rather than actually committing the murder.[58] The Court found this evidence to be important enough to require the reversal of Brady's death sentence because the jury had the option of sentencing Brady to life imprisonment rather than death.[59] Had the jury heard evidence of the co-defendant's confession, the jury could have imposed a different sentence.[60] Thus, the evidence was deemed to be favorable to Brady despite the fact that it was not completely exculpatory.[61]

In *Giglio v. United States*,[62] the Court expanded the scope of favorable evidence to include both evidence that was at some level exculpatory and impeachment evidence of a Government witness or evidence that showed bias or prejudice.[63] In *Bagley* the Court affirmed its holding in *Giglio*, adding that impeachment evidence was favorable to the accused because if "disclosed and used effectively, it [could] make the difference between conviction and acquittal."[64]

This is not to say that the *Brady* rule requires the disclosure of *all* of the prosecution's material for the benefit of

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[56] *Agurs*, 427 U.S. at 107. *See also supra* text accompanying note 35.

[57] *Brady*, 373 U.S. at 84-85 (1969). Brady had requested evidence of several statements made by his co-defendant. *Id.* While the Government turned over several of those statements, the confession was not turned over to Brady until after the trial, appeal, and the affirmation of Brady's guilt by the appellate court. *Id.* at 83.

[58] *Id.* at 84-85.

[59] *Id.*

[60] *Id.* at 83.

[61] *Brady*, 373 U.S. at 88-89.

[62] 405 U.S. 150 (1972).

[63] *Id.* at 154.

[64] *Bagley*, 473 U.S. at 675. The impeachment evidence in *Bagley* and *Giglio* was evidence that the Government would promise not to prosecute the key witness in return for his testimony on behalf of the Government. *See generally* Giglio v. United States, 405 U.S. 150 (1972) and United States v. Bagley, 473 U.S. 667 (1985).

the defense.[65] As the *Bagley* Court held, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial . . .".[66] Thus, while it is clear that the government must disclose exculpatory and impeachment evidence to the defendant, it is not required to "divulge every scintilla of evidence that might conceivably inure to the defendant's benefit . . .".[67]

c. The Materiality Standard and Guilty Pleas

The United States Supreme Court has held that a finding of materiality is proper if an evaluation of the *Brady* evidence would lead the court to conclude that in any reasonable likelihood the evidence would have affected the judgment of the jury.[68] As the Fifth Circuit stated, in *Matthew v. Johnson*,[69] this standard of materiality indicates that the *Brady* rule was meant to apply exclusively to exculpatory evidence withheld during a *trial*, and not during the entry of a guilty plea.[70] In *Matthew*, the defendant sought to have a plea of *nolo contendere* for aggravated sexual assault of a minor set aside after discovering that the assistant district attorney had withheld documents in which the victim had at one point told Child Protective Services that Matthew had not abused her.[71] On appeal the Fifth Circuit refused to recognize the prosecutor's failure to disclose this information as a *Brady* violation.[72]

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[65] *Bagley*, 473 U.S. at 675.

[66] *Id.*

[67] 21A AM JUR 2d § 1271 (West 1998).

[68] *Bagley*, 473 U.S. at 676 (citing Giglio v United States, 405 U.S. 150, 154 (1972)).

[69] 201 F.3d 353 (5th Cir. 2000).

[70] *Matthew*, 201 F.3d at 361-62.

[71] *Id.* at 356-57. Before reaching the Fifth Circuit on appeal, the focus in the trial court was whether Matthew had waived his right to assert a *Brady* claim after pleading no contest. *Id.* at 356-68. Initially, the magistrate judge held that Matthew had not waived his right to raise a *Brady* claim and "reasoned that the allegation that the prosecution had withheld evidence, if true, would affect 'the very integrity of the plea process.'" *Id.* at 356. After conducting an evidentiary hearing, the magistrate applied the *Sanchez* standard of materiality and found that had Matthew possessed the *Brady* evidence, he would not have pled no contest and would have insisted on going to trial. *Id.* at 357. The magistrate's decision to vacate the plea, however, was subsequently reversed on appeal to the district court, which found that Matthew had "waived" his right to raise a *Brady* claim upon pleading no contest. *Id.* at 358.

[72] *Matthew*, 201 F.3d at 360-64.

To support the conclusion that *Brady* was only meant to be applied in the context of a trial, the Fifth Circuit focused on the *Brady* rule's materiality standard.[73] The court noted several United States Supreme Court decisions in which the materiality standard had been framed in the context of trials.[74] In one such opinion, the court observed that the United States Supreme Court had explicitly rejected "[a]n earlier argument that the materiality test should be defined in terms of the defendant's ability to prepare for trial . . .".[75] Given the deeply intertwined nature of the *Brady* rule with trials, the Fifth Circuit held that no constitutional violation could occur where there was no trial.[76] Thus, because Matthew had pled no contest, waiving his right to a trial, the prosecutor had no duty to disclose *Brady* evidence and no due process violation had occurred.[77]

Despite *Matthew*, however, some courts and Justices have phrased the materiality standard broad enough to countenance non-trial situations, including *Brady* claims that involve a guilty plea.[78] For example, in Justice Blackmun's opinion in

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[73] *Id.* at 361.

[74] *Id.* To support its position, the Fifth Circuit pointed to the United States Supreme Court's decisions in Mooney v. Holohan, 294 U.S. 103, 112 (1935) (discussing the invalidity of convictions obtained at trial through deceptive means); Brady v. Maryland, 373 U.S. 83, 87-88 (1963) (discussing a prosecutor's duty to disclose exculpatory evidence at trial); United States v. Bagley, 473 U.S. 667, 676 (1985) and Giglio v. United States, 405 U.S. 150, 154 (1972) (discussing disclosure of impeachment evidence of government witnesses during trial); United States v. Agurs, 427 U.S. 97, 112 n.20 (1976) (rejecting as over broad a disclosure requirement that would encompass pre-trial situations); Kyles v. Whitley, 514 U.S. 419, 434 (1995) (framing the *Brady* materiality requirement in the context of trials). *Id.*

[75] *Matthew*, 201 F.3d at 361. The portion of *Agurs* to which the Fifth Circuit referred stated that: "It has been argued that the [materiality] standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. Such a standard would be unacceptable . . . [in part, because it] would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense." *Agurs*, 427 U.S. at 112 n.20 (internal citations omitted); *Matthew*, 201 F.3d at 361.

[76] *Matthew*, 201 F.3d at 361.

[77] *Id.* at 361-362.

[78] *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J). It should be noted that a significant debate has developed as to whether or not *Brady's* materiality requirement makes the rule inherently inapplicable to plea bargaining and pre-plea discovery. *See e.g.*, John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001) (modification of the traditional materiality requirement is necessary to apply *Brady* to plea bargaining); Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and*

Bagley, he announced a liberal materiality standard, stating that "evidence is material . . . if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the *proceeding* would have been different."[79] In a concurring opinion, Chief Justice Burger and Justices White and Rehnquist supported Justice Blackmun's standard of materiality stating that, Justice Blackmun's standard of materiality "is 'sufficiently flexible' to cover all instances of prosecutorial failure to disclose evidence favorable to the accused."[80] This standard seemed to gain yet more support by Justice Souter in *Kyles v. Whitley*[81] and Justice Stevens in *Strickler v. Greene*.[82] While Justice Stevens in *Strickler* stated that for practical purposes, "there is never a real '*Brady* violation' unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different *verdict*," he also stated that the term "*Brady* violation" has at times been used to refer to "any breach of the broad obligation to disclose exculpatory evidence."[83]

Applying this broad standard to plea bargaining, the test in a *Brady* claim arising out of a guilty plea would then be whether the defendant would have pled differently had the *Brady* information been available.[84] This was the standard

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Alienation, 68 FORDHAM L.REV. 2011 (2000) (*Brady* rule can apply to plea bargaining); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989) (same); Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995) (accused can raise a post-plea *Brady* claim); Matthew v. Johnson, 201 F.3d 353, 360 (2000) (accused cannot raise a post-plea *Brady* claim). *See also supra* note 67.

[79] *Bagley*, 473 U.S. at 682 (emphasis added).

[80] *Id.* at 685.

[81] 514 U.S. 419, 437-40 (1995). After quoting the STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION 3-3.11(a)(1993) and MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8, Justice Souter stated that prosecutors alone can know when evidence rises to the level requiring disclosure under *Brady* and thus bear the burden of timely disclosure. *Id.* at 437-38. Recognizing that *Brady* and its progeny impose a certain amount of leeway, and thus uncertainty, on when prosecutors must act, Justice Souter concluded that prosecutors "anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Id.* at 439 (citing *Agurs*, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.")).

[82] 527 U.S. 263, 280-81 (1999).

[83] *Strickler*, 527 U.S. at 281 (emphasis added).

[84] John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001) stating that "If we apply the Brady-Bagley standard literally to that proceeding and that result, the information is material if there is a reasonable probability that, had it been disclosed, the court would not have accepted the plea." *Id.* at 473. This, however, Douglass asserts would create a

applied by the Ninth Circuit in *Sanchez v. United States*.[85] In *Sanchez*, the defendant sought to vacate his guilty plea for conspiracy to distribute cocaine and possession with intent to distribute after discovering that the party who supplied the drugs and convinced him to plead guilty had been a sheriff's informant.[86] After finding that Sanchez had not forfeited his right to raise a *Brady* claim by pleading guilty, the court focused on *Brady's* materiality standard.[87]

While the *Sanchez* court recognized that the "usual" standard of materiality focuses on *Brady* challenges in the context of a trial, the court held that in cases in which the defendant has pled guilty and then raises a *Brady* claim, the standard is "whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial."[88] In further defining this standard, the court stressed that Sanchez's simple assertion that he would have chosen to go to trial had he been in possession of the undisclosed *Brady* information, was inadequate.[89] Rather, the court held that "the test for whether the defendant would have chosen to go to trial is an objective one that centers on 'the likely persuasiveness of the withheld information.'"[90] Applying this standard, the court found that it would not have been objectively reasonable, given the lack of favorable evidence, for Sanchez to go to trial and assert an entrapment defense against the government.[91]

"meaningless circle" as courts defined materiality in terms of whether the plea was voluntarily and intelligent and would not accept a plea as voluntary and intelligent if any material evidence was excluded. *Id.* Douglass points out that this could be avoided, however, by shifting the courts focus so that "instead of assessing materiality in relation to the adjudicated 'outcome' of the guilty plea 'proceeding'- that is the courts acceptance of the plea - courts have shifted the focus to defendants' tactical decision to plead guilty." Id. at 474-75.

85 50 F.3d 1448, 1454 (9th Cir. 1995).

86 *Id.* at 1450-51. Apparently the informant told Sanchez that if he pled guilty, the informant would be able to insure that Sanchez's wife would not be prosecuted and he would help Sanchez escape from prison. *Id.*

87 *Id.* at 1453-54. *See also infra* text accompanying note 139 for the forfeiture discussion in *Sanchez*.

88 50 F.3d at 1454.

89 *Id.*

90 *Id.* (quoting Miller v. Angliker, 848 F.2d 1312, 1322 (2d Cir. 1988)).

91 50 F.3d at 1454. As is apparent, the circuit courts are sharply divided on what standard to apply, as well as the equally significant issue of whether or not the *Brady* rule is applicable to plea bargaining. *See also supra* note 78.

B. GUILTY PLEAS

The guilty plea has become the most routine method by which a criminal defendant is convicted in the American justice system.[92] In fact, nearly ninety percent of all federal and state convictions are the result of a guilty plea, usually involving some form of plea agreement.[93] Indeed, the United States Supreme Court has acknowledged that, "[t]he state to some degree encourages pleas of guilty at every important step in the criminal process."[94] There are several reasons why a defendant may plead guilty, including: the defendant's respect for the law; apprehension of the charge; threats made by the government; accumulation of evidence against the defendant; limiting liability to which the defendant himself is exposed; or reducing the financial and emotional burden facing the defendant or his family.[95]

Regardless of a defendant's motivation to plead guilty, "[a] guilty plea is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."[96] A guilty plea "serves as a stipulation that no proof by the prosecution need be advanced . . . . It supplies both evidence and verdict, ending controversy."[97] Because of the influence the guilty plea has upon our criminal justice system, great precautions are taken to ensure that a defendant's conviction pursuant to a guilty plea is obtained in a constitutionally sound manner.[98] Thus, strict requirements have been established to ensure that a defendant's guilty plea is entered both voluntarily and intelligently.[99]

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92 U.S. SENTENCING GUIDELINES MANUAL § ch. 1, pt. A, introductory cmt. (2001); SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, page 454.

93 U.S. SENTENCING GUIDELINES MANUAL § ch. 1, pt. A, introductory cmt. (2001).

94 Brady v. United States, 397 U.S. 742, 750 (1970). In *Brady*, the defendant on the advice of counsel pleaded guilty to first degree murder later challenging the jury selection as race-based. *Id.* at 743-44. This case should not to be confused with Brady v. Maryland, 373 U.S. 83 (1963), which announces the rule that exculpatory information must be disclosed by the prosecution. *Id.* at 87.

95 *Brady*, 397 U.S. at 750. *See also* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989) (proposing the possibility that defendants enter into guilty pleas after inaccurately assessing the facts against them).

96 Boykin v. Alabama, 395 U.S. 238, 242 (1969).

97 *Id.* at 242-43 n.4.

98 *Brady*, 397 U.S. at 750-53.

99 FED. R. CRIM. P. 11.

1. Voluntary & Intelligent; Requirements of a Valid Guilty Plea

Among the mostly deeply rooted principles concerning guilty pleas is that a defendant's guilty plea will only be considered constitutionally valid when it is entered into voluntarily and intelligently to the satisfaction of the court.[100] Rule 11 of the Federal Rules of Criminal Procedure[101] explicitly states that before the district court may accept a guilty plea, it must first determine that the plea is voluntary.[102] Rule 11 requires the court to address the defendant personally, rather than through his lawyer, and to ensure the guilty plea is made voluntarily, not under force or duress.[103] As part of this inquiry, the court must inform the defendant of the rights he is waiving,

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[100] McCarthy v. United States, 394 U.S. 459, 466 (1969) (Defendant's conviction, by way of guilty plea, for wilfully and knowingly evading tax payments was set aside on the grounds that the district judge failed to determine directly from the defendant himself whether the plea he was entering was voluntary and knowing).

[101] FED. R. CRIM. P. 11 states in pertinent part:

> (c) Before accepting a guilty plea . . . the court *must address* the defendant *personally* in open court and *inform* the defendant of, and determine that the defendant *understands*, the following:
>
> (1) the *nature of the charge* to which the plea is offered, the mandatory minimum *penalty* provided by law . . . and the mandatory maximum possible penalty provided by law including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and
>
> (2) if the defendant is not represented by an attorney, that the defendant has the *right to be represented by an attorney* at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and
>
> (3) that the defendant has the *right to plead not guilty* or to persist in that plea if it has already been and, the *right to be tried by a jury* and at that trial the *right to the assistance of counsel*, the *right to confront and cross-examine adverse witnesses*, and the *right against compelled self-incrimination*; and
>
> (4) that if a guilty plea . . . is accepted by the court there *will not be a further trial* or any kind, so that by pleading guilty . . . the defendant *waives his right to a trial...*
>
> (d) The court *shall not accept* a guilty plea . . . without first, by addressing the defendant *personally* in open court, *determining that the plea is voluntary* and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty . . . results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.
>
> (f) Notwithstanding the acceptance of a guilty plea, the court *should not enter a judgment* upon such plea *without making such inquiry* as shall satisfy it that there is a *factual basis* for the plea.

Id. (emphasis added).

[102] FED. R. CRIM. P. 11.

[103] *Id.*

the rights he retains and the charges and possible consequences he faces by pleading guilty.[104]

In *McCarthy v. United States*,[105] the United States Supreme Court labored to ensure that Rule 11 was understood and properly followed by the federal courts.[106] In *McCarthy*, after the district court judge briefly inquired of the defendant's lawyer as to whether the defendant's plea was voluntary, the court accepted the defendant's guilty plea to tax evasion.[107] During the sentencing, however, the defendant stated his failure to file was "not deliberate," thus negating one of the elements of the charge.[108] Subsequently, the defendant sought to have his guilty plea withdrawn on the basis that the district court failed to comply with the requirements of Rule 11.[109]

In reversing the defendant's conviction, the Court found that the first error occurred when the district court failed to address the defendant directly.[110] This is an important requirement which enables the judge to get a better sense of the defendant's actual willingness to enter the plea, in essence exposing his state of mind and ensuring the creation of a more complete record in the event the district court's determination is subsequently attacked.[111] In addition to ensuring a voluntary plea in the sense that it is not coerced, the Court held that the district court must also ensure that the defendant "possesses an understanding of the law in relation to the facts."[112] Thus, the district court must satisfactorily conclude that the defendant is admitting to conduct which also comprises the elements of the crime to which he is pleading guilty.[113] Because the district court failed to inquire of the defendant regarding the facts of the offense to which he was admitting, the Court reversed the conviction.[114]

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104 *Id.*
105 394 U.S. 459 (1969).
106 *Id.* at 463.
107 *Id.* at 461.
108 *Id.*at 461-62.
109 *Id.* at 462-63.
110 *Id.* at 459.
111 *McCarthy*, 394 U.S. at 467.
112 *Id.* at 466.
113 *Id.* at 467.
114 *Id.* at 471-72.

2. Waivers, Guilty Pleas, and the Loss of Rights.

Generally, a guilty plea necessarily involves the waiver of several important constitutional rights.[115] In addition, by entering a guilty plea, a defendant also forfeits the right to raise a broad range of legal and constitutional claims on appeal.[116] For those rights which are not necessarily waived or forfeited as the result of a guilty plea, a defendant may be able to expressly waive others during a plea agreement in order to obtain a more favorable sentence.[117] While most rights are or can be waived during the course of a guilty plea or plea agreement,[118] some rights cannot be waived at all, either by pleading guilty or by agreeing to do so in a plea agreement.[119]

As can be seen from the several types of waivers that exist, one commentator has noted that such a broad use of the word "waiver" has led to considerable confusion as to what exactly constitutes a waiver.[120] Rather than trying to lump "waivers" into one category in which they do not all fit, Assistant Federal Public Defender, Daniel Blank, has suggested that there are

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[115] Boykin v. Alabama, 395 U.S. 238, 243 (1969) (stating that "[s]everal constitutional rights are involved in a waiver that takes place when a guilty plea is entered . . . . First, is the privilege against compulsory self-incrimination . . . . Second, is the right to trial by jury. Third, is the right to confront one's accusers.") (internal citations omitted)).

[116] *See* United States v. Broce, 488 U.S. 563, 573 (1989). *See also* Tollett v. Henderson, 411 U.S. 258, 267-69 (1973).

[117] *Ruiz*, 241 F.3d at 1164. *See also* United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996) (defendants may generally agree to waive the right to appeal their sentence); and Newton v. Rumery, 480 U.S. 386, 397 (1987) (defendants may agree to waive the right to file a civil suit under 43 U.S.C. § 1983 seeking redress for government violations of constitutional rights).

[118] United States v. Mezzanatto, 513 U.S. 196, 203 (1995) (holding that there is a "presumption that legal rights generally . . . are subject to waiver by voluntary agreement of the parties").

[119] *Mezzanatto*, 513 U.S. at 204 (holding that "[t]here may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irrparably 'discredit[ing] the federal courts'"). *See generally* Wheat v. United States, 486 U.S. 153, 162 (1988) (a defendant may not waive his right to conflict free counsel); United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996) (holding that a plea agreement cannot bar defendants from asserting "claims involving a breach of the plea agreement, racial disparity in sentencing among codefendants or an illegal sentence impose in excess of a maximum statutory penalty"); United States v. Ullah, 976 F.2d 509 (9th Cir. 1992) (in which the court held the right to a unanimous jury verdict can never be waived); United States v. Lloyd, 125 F.3d 1263 (9th Cir. 1997) (which provides for an unwaivable right to a speedy trial).

[120] Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2048 (2000).

several types of waivers that must be evaluated before a court can decide how a defendant's rights are or have been extinguished.[121] It is sufficient here to recognize that when a defendant pleads guilty: 1) most of his rights are either automatically lost or forfeited; 2) some are withheld and may bargain away at the defendant's discretion; and 3) a select few are unwaivable.[122]

a. Automatic Waiver of Rights after a Guilty Plea

One of the most significant and immediate consequences a guilty plea imposes on the defendant who decides to admit to guilt is the defendant's automatic loss of several constitutional protections.[123] After a defendant admits in court that he as committed a crime, not only is he subject to an inevitable determination of punishment, but he also loses his right to invoke the privilege against self-incrimination, request a jury trial, or confront his accusers.[124] Because of the dire consequences and generally irreversible nature of a guilty plea, courts must diligently ensure that the defendant understands he is waiving these rights before accepting the guilty plea.[125] Failure to do so may otherwise result in an unconstitutional and thus void plea.[126]

b. Forfeiture of Rights

Not significantly different from automatic waivers, is a defendant's loss of rights by forfeiture.[127] This type of waiver is embodied by the United States Supreme Court's decision in

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[121] *Id.* at 2049-50. These types of waivers include: 1) the intentional relinquishment of known rights; 2) the forfeiture of rights; 3) the loss of rights through the process of election; and 4) the attempt to waive rights that are inalienable. *Id.*

[122] *Ruiz*, 241 F.3d at 1163-64.

[123] *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969).

[124] *Id.* at 243.

[125] *Id.*

[126] *Id.* at 243-44.

[127] *See* Tollett v. Henderson, 411 U.S. 258, 267 (1973). *See also* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 131 (1995) ("in a series of United States Supreme Court cases beginning with the *Brady* trilogy, and culminating in *Tollett v. Henderson*, the Court has held that, by entering a guilty plea, a defendant forfeits a broad range of potential legal and constitutional appellate claims that would otherwise have been available had the case gone to trial.").

Tollett v. Henderson.[128] In *Tollett*, after pleading guilty to murder, the defendant discovered that blacks had been unconstitutionally excluded during the grand jury selection and sought to have his guilty plea withdrawn on the basis that his Fourteenth Amendment right to have a grand jury selected in accordance with the constitution had been violated.[129]

Since a waiver in the traditional sense required an intentional relinquishment of a known right, the Court held that the defendant could not have "waived" his right to challenge the constitutionality of the grand jury because he was unaware that such discrimination was occurring at the time the grand jury was selected.[130] Nonetheless, the right had been forfeited.[131] Following a line of cases which have popularly become known as the *Brady* trilogy,[132] the Court held that:

> a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.[133]

Thus, while the defendant had not waived his right to challenge the constitutionality of the grand jury selection upon pleading guilty, the Court found that because of the guilty plea, the claim was lost, or forfeited.[134] In *United States v. Broce*,[135] the Court echoed its holding in *Tollett* and upheld the defendants' guilty pleas despite their challenges that the

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128 411 U.S. 258 (1973).

129 *Id.* at 259-60.

130 *Id.* at 266.

131 *Id.*

132 This *Brady* should not be confused with *Brady v. Maryland* in which the *Brady* rule was set forth. The *Brady* Trilogy consists of: Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); and Parker v. North Carolina, 397 U.S. 790 (1970).

133 *Tollett*, 411 U.S. at 267.

134 *Id. See also* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 131 n.18 (1995) ("the operative effect of *Tollett* and its progeny [is] the 'forfeiture' of appeal rights.").

135 488 U.S. 563 (1989).

principle of double jeopardy had been violated.[136] In *Broce*, the Court held that a "conscious waiver is [not] necessary with respect to each potential defense relinquished by a guilty plea," instead, "[r]elinquishment derives . . . from the admissions necessarily made upon entry of a voluntary guilty plea."[137] Simply put, the Court stated that "[r]espondents had the opportunity, instead of entering their guilty pleas, to challenge the theory of the indictments... in a trial-type proceeding. They chose not to, and hence relinquished that entitlement."[138]

While *Tollett* and its progeny generally bar defendants from raising antecedent constitutional claims, this rule is not absolute.[139] The Ninth Circuit, is among the several circuits that have carved out an exception to the *Tollett* rule.[140] Generally, this exception allows defendants to raise constitutional challenges to alleged violations that precede guilty pleas if the defendants entered these pleas without the

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[136] *Id.* at 565.

[137] *Id.* at 573-74.

[138] *Id.* at 571. This is the position the Eighth Circuit has taken on post-plea *Brady* claims. In Smith v. United States, 876 F.2d 655 (8th Cir. 1989), the court summarily held that a defendant, upon pleading guilty, waives any claim against the Government for failure to disclose favorable *Brady* evidence. *Id.* at 657. From the Eight Circuit's brief opinion, it appears that the court deemed the defendant to have forfeited his claim against the Government for withholding *Brady* evidence based on the same principles in *Tollett*, that a defendant is deemed to forfeit his right to raise an antecedent constitutional claim after pleading guilty. *See id.*

[139] *See e.g.* Blackledge v. Perry, 417 U.S. 21, 31 (1974) (holding that a violation of the right not to be haled into court at all to answer a felony charge is not a claim of an "antecedent constitutional violation" or a "deprivation of constitutional rights that occurred prior to the entry of a guilty plea" that is barred by *Tollett*); Menna v. New York, 423 U.S. 61, 62 (1975) (holding that a double jeopardy claim was not waived "where the state is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.").

[140] *See* Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995). *See also* White v. United States, 858 F.2d 416, 422 (8th Cir. 1988) (stating that the *Tollett* line of cases does not preclude a collateral attack upon a guilty plea based on a claimed *Brady* violation.); Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988) (holding that a guilty plea entered absent *Brady* material is subject to collateral attack because it cannot be intelligently and voluntarily entered); Campbell v. Marshall, 769 F.2d 314, 321 (6th Cir. 1985) (stating that the Supreme Court in *Tollett* and the *Brady* trilogy did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent."); United States v. Wright, 43 F.3d 491, 495-96 (10th Cir. 1994) (holding that under certain limited circumstances, a *Brady* violation can render a defendant's plea involuntary, thus a defendant who has pleaded guilty is not automatically barred from claiming later that the prosecution withheld material evidence).

necessary disclosure of *Brady* evidence by the prosecution.[141] The Ninth Circuit adopted this exception in *Sanchez v. United States*, in which the defendant sought to vacate his guilty plea after learning that the Government allegedly suppressed impeachment evidence.[142] The court reasoned that this exception was warranted because defendants, without having access to exculpatory *Brady* evidence, could not appropriately assess the prosecution's case.[143] Thus, they could not enter constitutionally sound voluntary and intelligent guilty pleas.[144]

Similarly, the Ninth Circuit held that Sanchez could not have waived his right to raise a *Brady* claim after pleading guilty because "[a] waiver cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.'"[145] Ultimately the driving force behind the adoption of this exception was the courts concern that if defendants were barred from raising *Brady* claims after pleading guilty, "prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas."[146]

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[141] *See Sanchez*, 50 F.3d at 1453.

[142] *See id.* Specifically, Sanchez alleged that the Government failed to disclose the fact that two "friends" that had visited Sanchez in jail and counseled him to plead guilty were also Government informants. *Id.* at 1450. Apparently these informants (whom Sanchez believed to be his friends) told Sanchez that if he pled guilty they would be able to secure his release through contacts they had in Washington D.C. and that his wife would not be indicted. *Id.* at 1451. *See also supra* text accompanying note 85 for a discussion of *Brady's* materiality standard as applied by the Ninth Circuit in *Sanchez*.

[143] *Sanchez*, 50 F.3d at 1453.

[144] *See id.*

[145] *See id.* (quoting Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988)).

[146] *Sanchez*, 50 F.3d at 1453. The Fifth Circuit has taken a different view of this issue, however. In *Matthew v. Johnson*, the court concluded that when a defendant enters guilty plea, it is not involuntary or unintelligent if the prosecutor withholds material *Brady* evidence because courts do not need this information to accept a guilty plea. 201 F.3d at 364-69. Further, the court categorized as "weak" the argument that, because defendant's often rely on an assessment of the prosecutions case in pleading guilty, voluntary and intelligent plea cannot be entered absent *Brady* material. *Id.* at 368-69. The court stated that defendants often enter guilty pleas with incomplete or inaccurate information and even with exculpatory *Brady* material, the defendant would still only be provided with "part of the picture"; in reality, the court stated, the defendant would need both inculpatory and exculpatory evidence to be able to enter a plea voluntarily and intelligently under this reasoning. *Id.* However, the United States Supreme court has held that such disclosure is not required. United States v. Bagley, 473 U.S. 667, 675 (1985) ("the prosecutor is not required to deliver his entire file to defense counsel. . . .").

c. Voluntary and Intentional Waiver of Rights After Pleading Guilty

Despite the fact that a guilty plea operates as an automatic waiver of the three rights enumerated in *Boykin* and the forfeiture of a wide-range of other constitutional rights, a defendant who enters a guilty plea is not totally without rights.[147] It is not uncommon for the government to bargain for the waiver of these retained rights.[148] When it does so the defendant is being asked to make the type of waiver contemplated by the Court in *Johnson v. Zerbst.*[149] These waivers involve the "intentional relinquishment or abandonment of a known right or privilege" by the defendant.[150] As to these waivers, the United States Supreme Court has consistently held that "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."[151] In addition, unless otherwise proscribed by a showing of congressional intent, a defendant may also waive many statutory protections.[152]

For example, in *United States v. Mezzanatto,*[153] the United States Supreme Court held very broadly in favor of allowing a defendant the ability to waive normally protected rights in exchange for leverage with the prosecutor.[154] In *Mezzanatto*, the defendant approached the prosecution hoping to cooperate after being arrested for possession with intent to distribute

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147 Interview with Robert K. Calhoun, Professor, Golden Gate University School of Law, in San Francisco, Cal. (November 12, 2001). *See also supra* text accompanying note 124.

148 *Id. See also* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L.REV. 2011, 2057 (2000) (stating that "[m]any criminal waivers, particularly but not exclusively those associated with plea bargains, occur during a negotiation with the government.").

149 304 U.S. 458 (1938).

150 *Id.* at 464.

151 United States v. Mezzanatto, 513 U.S. 196, 201 (1995). *See e.g.,* Ricketts v. Adamson, 483 U.S. 1, 10 (1987) (a defendant can waive double jeopardy defense by pretrial agreement); Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (a defendant may knowingly and voluntarily waive there Sixth Amendment right to counsel).

152 *Mezzanatto*, 513 U.S. at 201 (a defendant may waive the protections granted to him under Rule 410 of the Federal Rules of Criminal Procedure which prohibits prosecutors from introducing plea negotiation statements into evidence during trial).

153 513 U.S. 196 (1995).

154 *Id.* at 210.

methamphetamine.[155] The prosecution agreed to speak with the defendant, but only if the defendant agreed to waive his right to have statements made during the course of the plea negotiations excluded from evidence, in the event that the case went to trial.[156] To the defendant's detriment, he agreed to this condition.[157] As the defendant conveyed his story, the Government discovered inconsistencies between the defendant's statements and surveillance evidence they had in their possession and ended the meeting.[158] Subsequently, during the defendant's trial, the Government attempted to introduce the defendant's inconsistent statements into evidence.[159]

The defendant objected, arguing that statements made during the course of plea agreements that do not result in a guilty plea, are inadmissable at trial.[160] The trial court allowed the evidence and the jury returned with a guilty verdict.[161] On appeal, the Ninth Circuit held that the defendant's waiver was invalid because Congress had not expressed otherwise, therefore, the trial judge should not have admitted the statements at trial.[162] The United States Supreme Court reversed the Ninth Circuit's ruling, arguing that "[r]ather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption."[163] The Court went on to assert that "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."[164] Indeed, the Court argued that "[t]he presumption of waivability has found specific application in the context of evidentiary rules" where "evidentiary stipulations are a valuable and integral part of everyday trial practice."[165]

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155 *Id.* at 198.
156 *Id.*
157 *Id.*
158 *Id.* at 199.
159 *Mezzanatto*, 513 U.S. at 199.
160 *Id. See also* FED. R. EVID. 410.
161 *Mezzanatto*, 513 U.S. at 199.
162 *Id.* at 200.
163 *Id.* at 200-01.
164 *Id.* at 201.
165 *Id.* at 202-03

d. Unwaivable Rights

Finally, some rights have been deemed so sacrosanct that a defendant may never waive or lose them as the result of a guilty plea or during plea negotiations.[166] As the Seventh Circuit comically stated, "[even] if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept."[167] On a more serious note, the United States Supreme Court has found that "[t]here may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discredit[ing] the federal courts.'"[168]

One such right that the Court has refused to allow a defendant to waive is the right to conflict-free counsel in a criminal proceeding.[169] The defendant in *Wheat v. United States*[170] attempted such a waiver and challenged his drug conviction on the grounds that the court refused to allow him to waive his right to conflict-free counsel.[171] The defendant argued that all potential problems could have been avoided by a waiver of this right.[172] The United States Supreme Court, however, held that the problem was not that simple. The Court held that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."[173] These interests, the Court feared, would be jeopardized if such waivers were regularly permitted.[174] Thus, the Court held that because it was likely that a conflict of interest would be created by multiple

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166 *Id.* at 204.

167 *Mezzanatto*, 513 U.S. at 204 (citing United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985)).

168 *Mezzanatto*, 513 U.S. at 204 (quoting 21 C. Wright & K. Graham, FEDERAL PRACTICE AND PROCEDURE § 5039 (1977)).

169 Wheat v. United States, 486 U.S. 153, 163-64 (1988).

170 486 U.S. 153 (1988).

171 *Id.* at 157.

172 *Id.* at 160.

173 *Id.*

174 *Id.*

representation, denial of the defendant's waiver was justified.[175]

While it appears that no specific formula has been used to determine which rights cannot be waived, as can be seen from the Court's decision in *Wheat*, when the integrity of the court and its processes are themselves endangered, waivers have not been accepted.[176]

IV. THE NINTH CIRCUIT'S ANALYSIS

In *United States v. Ruiz*,[177] the defendant challenged the "fast track" plea agreement used by the U.S. Attorney's Office for the Southern District of California, which required the defendant to waive certain *Brady* rights on the ground that it violated the defendant's right to due process.[178] The court articulated the issues as: 1) whether the right to *Brady* information could constitutionally be waived in a plea agreement, and 2) whether the benefits of a plea agreement could be conditioned on the defendant's waiver of her right to *Brady* material.[179]

But before addressing the merits of Ruiz's appeal, the Government challenged the jurisdiction of the Ninth Circuit. Specifically, the Government argued that Ruiz's denial of the "fast track" plea agreement and her subsequent unconditional guilty plea extinguished any antecedent constitutional challenges she may have had.[180]

A. JURISDICTIONAL CHALLENGE

The Government first attacked Ruiz's appeal on the grounds that the Government's refusal to recommend, and the

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[175] *Id.* at 164.

[176] *See e.g.* United States v. Willis, 958 F.2d 60, 63 (5th Cir. 1992) (The court refused to allow a defendant to waive his right to a speedy trial under the Speedy Trial Act because the waiver would obviate the societal interest of speedy justice).

[177] 241 F.3d 1157 (9th Cir. 2001).

[178] *Id.* at 1161.

[179] *Id.* The court stated that, "[s]pecifically, Ruiz contends that: (1) the right to receive undisclosed *Brady* evidence is not subject to waiver through plea agreements, (2) prosecutors cannot withhold a 'fast track' recommendation simply because a defendant declines to waive her *Brady* rights, and (3) the Government here withheld the 'fast track' recommendation for this reason." *Id.* at 1163.

[180] *Id.* at 1161-63.

sentencing judge's refusal to grant, Ruiz's request for a downward departure was not reviewable by the Ninth Circuit.[181] Generally, a defendant does not have the right to appeal a district court's discretionary denial of a defendant's request for a downward departure from the applicable sentencing guidelines.[182] The application of this rule, however, is limited to cases in which the sentencing judge actually exercises his discretion not to depart from the sentencing guidelines.[183] The majority, however, did not argue that the sentencing judge refused to exercise *any* discretion.[184] Rather, the majority interpreted 18 U.S.C. § 3742(a)(1)[185] as granting jurisdiction to appellate courts to review constitutional challenges to the sentence imposed.[186] Thus, the majority asserted that the court had jurisdiction over Ruiz's constitutional challenge to the sentencing process itself.[187]

The majority then rejected two arguments proposed by the Government.[188] First, the Government argued that by pleading guilty, Ruiz forfeited her right to challenge the constitutionality of the *Brady* waiver.[189] Citing *United States v. Broce*,[190] the Government took the position that, Ruiz's right to challenge any constitutional defects that preceded the guilty plea was extinguished after she refused to accept the original "fast track" plea agreement and subsequently entered an

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[181] *Id.* at 1161.

[182] *Ruiz*, 241 F.3d at 1161. United States v. Morales, 898 F.2d 99, 102 (9th Cir. 1990). *See generally* 18 U.S.C. § 3742 which reads in pertinent part: "(a) A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence: (1) was imposed in violation of law (2) was imposed as a result of an incorrect application of the sentencing guidelines."

[183] *Ruiz*, 241 F.3d at 1162.

[184] *See id.* at 1162. *See also* United States v. Khoury, 62 F.3d 1138, 1140-42 (9th Cir. 1995), in which the Ninth Circuit held that where the Government impermissibly withholds a recommendation for a downward departure, the district court may still exercise its own discretion to grant the downward departure. Id. at 1141

[185] 18 U.S.C. § 3742(a)(1) states that a sentence is reviewable on appeal if it "was imposed in violation of law."

[186] *Ruiz*, 241 F.3d at 1162. Other circuits have also adopted this reading of 18 U.S.C. § 3742(a)(1) including the Seventh Circuit in United States v. Senn, 102 F.3d 327, 331 (7th Cir. 1996); the Third Circuit in United States v. Graham, 72 F.3d 352, 358 n.8 (3d Cir. 1995); the Fourth Circuit in United States v. Holmes, 60 F.3d 1134, 1137 (4th Cir. 1995); and the First Circuit in United States v. Drown, 942 F.2d 55 (1st Cir. 1991).

[187] *Ruiz*, 241 F.3d at 1162.

[188] *Id.* at 1163.

[189] *Id.*

[190] 488 U.S. 563 (1989).

unconditional guilty plea.[191] Simply put, the court could not review the constitutional defect alleged by Ruiz because it would have occurred prior to her entering the guilty plea.[192] And after pleading guilty her right to raise the claim would have been waived or forfeited.[193]

The majority, however, held that Ruiz's appeal challenged the constitutionality of the Government's actions *after* she pled guilty (i.e. by refusing to recommend a downward departure at the sentencing hearing) and not *before* the guilty plea as the Government contended.[194] Thus, Ruiz had not waived or forfeited the right to raise this constitutional claim.[195]

The second argument proposed by the Government rested on a contractual theory.[196] The Government argued that it was under no obligation to recommend a downward departure because Ruiz had rejected the original "fast track" plea agreement present in the original offer.[197] Thus, the Government argued that there was no agreement for the Ninth Circuit to enforce.[198]

The Ninth Circuit rejected this argument on the grounds that Ruiz was not attempting to enforce the "fast track" plea agreement.[199] To the contrary, the majority announced that Ruiz's claim focused on the constitutionality of the Government's refusal to recommend the downward departure based on her unwillingness to waive her *Brady* rights in return for the recommendation.[200] Accordingly, a majority of the Ninth Circuit found that it had jurisdiction to review Ruiz's constitutional claim and proceeded to decide the case on the merits.[201]

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191 *Ruiz*, 241 F.3d at 1163.

192 *Id.*

193 *Id.* The dissent also argued that the unconstitutional conduct, if any, existed prior to the sentencing during the plea agreement when the Government asked for the *Brady* waiver. *Id.* at 1176 (Tallman, J. dissenting).

194 *Id.*

195 *Id.*

196 *Ruiz*, 241 F.3d at 1163.

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 *See id.*

B. CONSTITUTIONALITY OF THE GOVERNMENT'S REFUSAL TO RECOMMEND THE "FAST TRACK" DEPARTURE

Ruiz argued that the Government unconstitutionally withheld the "fast track" recommendation because she refused to waive her right to receive *Brady* evidence.[202] In framing the issue, the court stated that the heart of Ruiz's argument was that the right to receive *Brady* evidence could not constitutionally be subject to waiver through plea agreements.[203]

1. Unconstitutionality of Brady Waivers

a. Guilty Plea Waivers Generally

In laying the foundation for its opinion, the Ninth Circuit first addressed the validity of a *Brady* waiver by examining the general consequences that a guilty plea has on a defendant's constitutional rights.[204] Generally, the court stated, a guilty plea has one of three effects on a defendant's constitutional rights.[205] First, by pleading guilty, a defendant automatically waives several constitutional rights.[206] Second, the defendant may have the option of expressly waiving those rights not automatically lost by a guilty plea as part of a plea agreement.[207] Finally, the Ninth Circuit recognized a category of constitutional rights that could never be waived as the result of a guilty plea or as part of a plea agreement.[208] Ruiz argued,

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202 *Ruiz*, 241 F.3d at 1163.

203 Id.

204 *Id.*

205 *Id.* at 1163-64.

206 *Id.* at 1163. *See* McCarthy v. United States, 394 U.S. 459, 466 (1969) (holding that the right to a jury trial, the right to confront one's accusers, and the right to invoke the privilege against self-incrimination were among those rights which a defendant automatically waived upon entering a guilty plea). *See also* United States v. Broce, 488 U.S. 563, 573-74 (1989) (stating that an unconditional guilty plea generally results in the automatic waiver of the right to challenge any constitutional defects which preceded the guilty plea).

207 *Ruiz*, 241 F.3d at 1164. *See also supra* text accompanying note 115.

208 *Id. See* United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996) (holding that a plea agreement cannot bar defendants from asserting "claims involving a breach of the plea agreement, racial disparity in sentencing among codefendants or an illegal sentence impose in excess of a maximum statutory penalty."). *See also* United States v. Ullah, 976 F.2d 509, 512 (9th Cir. 1992) (in which the court held the right a unanimous jury verdict can never be waived). *See also* United States v. Lloyd, 125 F.3d 1263, 1268

and a majority of the Ninth Circuit agreed, that the right to receive *Brady* material fell within the third category, as a right which could never be waived as the result or during the course of a plea agreement.[209]

b. Invalidating the Voluntary and Intelligent Guilty Plea

Focusing on the concepts that comprise a valid guilty plea, Ruiz argued that the waiver of the right to receive *Brady* information, as required by the "fast track" plea agreement, was unconstitutional because a defendant could not voluntarily and intelligently waive her right to receive *Brady* evidence.[210] The Ninth Circuit, never having previously addressed defendants' right to receive *Brady* material in the context of plea agreements, analogized Ruiz's case to *Sanchez v. United States*.[211] There the Ninth Circuit had held that defendants could not voluntarily and intelligently enter guilty pleas without *Brady* evidence, nor could they waive or be deemed to have forfeited, upon pleading guilty, the right to raise a *Brady* claim that preceded the guilty plea.[212]

In *Ruiz*, the Ninth Circuit extended *Sanchez* to apply not only to a guilty plea entered by the defendant, but also to plea agreements themselves.[213] The *Ruiz* court held that in light of its earlier decision in *Sanchez*, *Brady* rights are not automatically waived by the entry of a guilty plea.[214] Accordingly, the court had to resolve whether a defendant's right to receive *Brady* evidence could either be expressly

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(9th Cir. 1997) (which provides for an unwaivable right to a speedy trial).

209 *Id.*

210 *Id.* at 1163. *See also supra* note 8 for the "Fast Track" plea agreement *Brady* waiver in *Ruiz*.

211 50 F.3d 1448 (9th Cir. 1995); *Ruiz*, 241 F.3d at 1164. The *Ruiz* court pointed out that no court had ever addressed the issue as to whether *Brady* rights could be waived in a plea agreement. *Id.* In *Sanchez*, the defendant pled guilty to conspiracy and intent to distribute cocaine. *Sanchez*, 50 F.3d at 1450. Sanchez argued that his guilty plea should be revoked because the Government had committed a *Brady* violation by failing to disclose that two "friends" who had visited Sanchez in jail and counseled him to plead guilty were also Government informants. *Id.* at 1451. Apparently the informants (who Sanchez believed to be friends) told Sanchez that if he pled guilty they would be able to secure his release through contacts they had in Washington D.C. and that his wife would not be indicted. *Id.*

212 *See Sanchez*, 50 F.3d at 1453. *See also supra* text accompanying note 139 for a thorough discussion of the forfeiture issue in *Sanchez*.

213 *Ruiz*, 241 F.3d at 1164.

214 *Id.*

waived by the defendant in a plea agreement or whether the right to receive *Brady* evidence was a right that could not be waived at all.[215]

Focusing on the voluntary and intelligent requirements of a valid guilty plea, the court stated that "plea agreements, like guilty pleas, must be entered into voluntarily and intelligently to satisfy due process requirements."[216] The pre-plea disclosure of *Brady* evidence, the court continued, plays an important role in the defendant's assessment of the prosecution's case and decision whether to plead guilty.[217] In addition, such disclosure ensures that the prosecution does not deliberately suppress exculpatory information to achieve a conviction.[218] Thus, the court concluded that "plea agreements, and any waiver of *Brady* rights contained therein, 'cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution.'" The court reasoned that, if the need for *Brady* material is crucial during a guilty plea in order to both ensure the defendant is making the proper decision and the prosecutor is not suppressing information as in *Sanchez*, then the need for *Brady* material is as equally important during a plea agreement.[219]

To overcome the Ninth Circuit's reliance on *Sanchez*, the Government attempted to distinguish defendants' waiver of rights during the entry of plea agreements with defendants'

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[215] *Id.*

[216] *Id.* (citing United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996)).

[217] *Ruiz* 241 F.3d at 1164.

[218] *Id.*

[219] *Id.* The Ninth Circuit, in reaching its conclusion in Ruiz, analogized its reasoning with the court's analysis in DeRoo v. United States, 223 F.3d 919 (8th Cir. 2000). In *DeRoo*, the plea agreement included a waiver of ineffective assistance of council claims. *Id.* at 923-24. The challenge to the waiver was that it prevented the defendant from entering a plea agreement voluntarily and intelligently. *Id.* The Eighth Circuit held that a "decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of advice outside the range of competence . . . ." *Id.* Thus, the Eighth Circuit concluded that "'[j]ustice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of [a plea] agreement cannot be barred by the agreement - the very product of the alleged ineffectiveness.'" *Id.* (quoting Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999)). With this holding the Eighth Circuit effectively barred waivers of ineffective assistance of counsel claims associated with the negotiation of plea agreements. *See DeRoo*, 223 F.3d at 923-24. For similar propositions, the *Ruiz* court also pointed to: United States v. Cockerham, 237 F.3d 1179 (10th Cir. 2001); United States v. Henderson, 72 F.3d 463 (5th Cir. 1995); and United States v. Craig, 985 F.2d 175 (4th Cir. 1993).

waiver of rights during the entry of guilty pleas.[220] The Government asserted that the situations were distinct because in a plea agreement a defendant is aware of the rights being waived, while in the entry of a guilty plea a defendant would not be aware.[221] As such, the Government contended that Ruiz's waiver of her right to impeachment evidence during the course of her plea agreement did not violate the voluntary and intelligent requirement.[222]

The Ninth Circuit rejected this argument because in *Sanchez* it was not the Government's failure to disclose the existence of the right to receive *Brady* material that rendered the guilty plea involuntary and unintelligent.[223] Rather, it was the Government's failure to *produce* the actual *Brady* evidence that gave validity to the defendant's claim.[224] Similarly, in Ruiz's case, the court held that "a defendant's abstract awareness of her rights under *Brady* is a pale substitute for the receipt of concrete *Brady* material."[225] The court reasoned, that with the actual *Brady* material, the defendant would be in a much better position to make a voluntary and intelligent choice about entering a guilty plea.[226] Without such information, a guilty plea could not be voluntary and intelligent and therefore valid.[227] In this way, the court concluded that a defendant's right to receive *Brady* evidence could not be constitutionally waived through a plea agreement.[228]

c. Protecting a Defendant's Right to Impeachment Evidence

The Ninth Circuit also addressed the Government's argument that, while the waiver of all *Brady* rights may not be constitutional, the waiver at issue in the "fast track" agreement was not unconstitutional because it required that Ruiz waive only *some Brady* rights, specifically her right to receive

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220 *Ruiz*, 241 F.3d at 1165.
221 *Id.*
222 *Id.*
223 *Id.*
224 *Id.*
225 *Id.*
226 *Ruiz*, 241 F.3d at 1165.
227 *Id.*
228 *Id.*

impeachment evidence of Government witnesses.[229] Because the case would never proceed to trial, as a result of Ruiz guilty plea, the Government argued that impeachment evidence was irrelevant at the pretrial plea bargain stage.[230]

On the contrary, the court could find nothing to suggest that *Sanchez's* holding only required prosecutors to produce exculpatory evidence and not impeachment evidence before the entry of a guilty plea.[231] In fact, the court indicated that the opposite was true, noting that "[t]he *Brady* rule encompasses impeachment evidence as well as exculpatory evidence."[232] The court stated the United States Supreme Court "declined to recognize any meaningful difference between these two types of *Brady* evidence."[233] Rather, the court found that a reasonable interpretation of *Sanchez* was much broader, requiring prosecutors to disclose both impeachment and exculpatory evidence before the defendant entered a guilty plea.[234]

The court reiterated that according to the *Brady* rule, the Government is required to disclose evidence that is "favorable to the defendant if it is 'material.'"[235] In the context of Ruiz's case, the Ninth Circuit found that "evidence is 'material' if 'there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial.'"[236] Thus, the court held that impeachment evidence is 'material' because the disclosure of such evidence could "create a reasonable probability the defendant would reject the plea agreement."[237]

The court also held that prosecutors must disclose *Brady* material at a time when the information will be of value to the accused.[238] In the context of plea agreements, this would be *before* a defendant accepted the plea agreement.[239]

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229 *Id.* at 1165-66. *See also supra* note 8 for the "Fast Track" plea agreement *Brady* waiver in *Ruiz*.

230 *Ruiz*, 241 F.3d at 1166.

231 *Id.*

232 *Id.* (citing *Bagley*, 473 U.S. at 676).

233 *Ruiz*, 241 F.3d at 1166 (citing *Bagley*, 473 U.S. at 676-77).

234 *Ruiz*, 241 F.3d at 1166.

235 *Id.* (citing *Sanchez*, 50 F.3d at 1453).

236 *Id.* (quoting *Sanchez*, 50 F.3d at 1454).

237 *Id.*

238 *Ruiz*, 241 F.3d at 1166 (citing United States v. Gordon, 844 F.2d 1397, 1403 (9th Cir. 1988)).

239 *Ruiz*, 241 F.3d at 1166-67. The court went on to state that, "[t]his does not mean,

Accordingly, the Ninth Circuit held that the prosecutor's duty to disclose impeachment evidence could not be separated from its duty to disclose exculpatory evidence and such disclosure was required before the accused entered into a plea agreement.[240]

2. Conditioning the "Fast Track" Plea Agreement on an Unconstitutional Brady Waiver

Finally, Ruiz contended that the Government acted with an unconstitutional motive when it opposed her request for the downward departure based simply on the fact that she would not accept what she believed to be an unconstitutional *Brady* waiver.[241] The Government, on the other hand, asserted that it was not improper to condition Ruiz's plea agreement on the waiver of her *Brady* rights because she was never obligated to accept the agreement.[242] Before addressing Ruiz's argument, the court discussed whether it would be permissible for the Government to refuse to recommend a downward departure present in a plea agreement that the defendant rejected because it contained an unconstitutional waiver of that defendant's rights.[243]

In discussing this issue, the court recognized that is not unconstitutional for prosecutors to encourage defendants to forego constitutionally protected rights through incentives.[244] The court pointed out, however, that this rule "is premised on the assumption that the targeted rights may be validly waived."[245] Contrary to the rule, the court had found that the right to receive undisclosed *Brady* material could not be constitutionally waived without violating the Due Process requirement that a defendant's plea be voluntary and intelligent.[246] Accordingly, the court concluded that the

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as the Government contends, that impeachment evidence is only valuable if there is going to be a trial. It simply means that, if there is going to be a trial, impeachment evidence, like exculpatory evidence, must be disclosed while it is still valuable." *Id.*

240 *Id.* at 1167.

241 *Id.*

242 *Id.*

243 *Id.*

244 *Ruiz*, 241 F.3d at 1167 (quoting United States v. Villasenor-Cesar, 114 F.3d 970, 975 (9th Cir. 1997)).

245 *Ruiz*, 241 F.3d at 1167.

246 *Id.* at 1167-68.

Government could not constitutionally withhold a downward departure recommendation based on a defendant's refusal to accept a *Brady* waiver.[247]

As to Ruiz's argument that the Government acted with an unconstitutional motive, the court stated that it would indeed have been impermissible for the Government to oppose the downward departure simply because Ruiz refused to waive her *Brady* rights.[248] To prove such a motive existed, Ruiz had to make a "substantial threshold showing" by producing evidence that the Government acted in such a manner.[249] In finding that Ruiz had satisfied her burden, the court pointed to the fact that Ruiz had consistently represented that she refused to accept the "fast track" plea agreement because she would have had to waive her *Brady* rights.[250] This, coupled with the fact that the Government refused to recommend the downward departure because no plea agreement obligated it to do so, compelled the court to order an evidentiary hearing to determine whether the Government impermissibly withheld the departure because Ruiz refused to accept the unconstitutional *Brady* waiver.[251]

C. JUDGE TALLMAN'S DISSENTING OPINION

In his dissenting opinion, Judge Tallman set forth a lengthy discussion agreeing with the Government's contention that the Ninth Circuit lacked jurisdiction to consider the issues in this case.[252] Upon evaluating the *Brady* issue, Judge Tallman stated that he feared the negative policy implications the majority's holding would have on the processing of criminal cases in an overloaded system.[253] Judge Tallman argued that the obligatory disclosure of impeachment evidence to an accused as early as the plea bargaining stage would be both useless to the defendant so early on and would damage the

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[247] *Id.* at 1168.

[248] *See Id.* at 1167 (citing Wade v. United States, 504 U.S. 181, 185-86 (1992) and United States v. Treleaven, 35 F.3d 458, 461 (9th Cir. 1994)).

[249] *Ruiz*, 241 F.3d at 1168.

[250] *Id.*

[251] *Id.* at 1168-69. The United States Supreme Court has since granted *certiorari* in *Ruiz*. *See* United States v. Ruiz, 122 S.Ct. 803 (2002).

[252] *Ruiz*, 241 F.3d at 1172.

[253] *Id.* at 1176.

prosecution's case in the future.[254] In the event of a trial, Judge Tallman argued that early disclosure could be problematic, "for example, if the government were required to publicly release information on the identity of an informant that it would like to keep confidential as long as possible."[255]

Ultimately, Judge Tallman objected to the rule established by the majority's opinion because it would likely dissolve the "fast track" program that had been operating so successfully.[256] Judge Tallman argued that if mandatory disclosure was required in all cases, even those that did not proceed to trial, an already over-worked system would become even more congested as prosecutors scrambled to disclose evidence that would only be useful at trial not during the plea agreement process.[257]

D. JUDGE TASHIMA'S CONCURRING OPINION

Judge Tashima wrote a concurring opinion primarily to respond to Judge Tallman's argument that jurisdiction was improper.[258] Judge Tashima, also addressed Judge Tallman's concern that the majority's ruling would have negative policy implications.[259] Judge Tashima stated that while the Southern District of California had a heavy caseload, the court's ruling declaring impeachment waivers unconstitutional would not undermine the effectiveness of the "fast track" program.[260] He argued that in simple cases, such as Ruiz's, the Government would be faced with very few, if any, Government witnesses, and thus would have to disclose very little impeachment evidence.[261] Thus, Judge Tashima argued that Judge Tallman had no reason to be concerned that the Government's *Brady* obligations would become overwhelming.[262] Even assuming the court's ruling did create a "caseload crisis," Judge Tashima emphasized that the appropriate solution would be for

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254 *Id.*
255 *Id.*
256 *Id.*
257 *Id.* at 1176-77.
258 *Ruiz*, 241 F.3d at 1169-70.
259 *Id.* at 1170-71.
260 *Id.* at 1170.
261 *Id.*
262 *Id.*

Congress to authorize more judgeships, not for the court to "shortcut the Constitution."[263]

V. CRITIQUE

A. PRESERVING THE TRUTH-SEEKING FUNCTION: THE NEED FOR PRE-TRIAL *BRADY* DISCLOSURES

Possibly the most important aspect of the Ninth Circuit's holding in *Ruiz*, is that it seeks to preserve the truth-seeking function of the courts and the criminal justice system in general. Since its decision in *Brady v. Maryland*, the United States Supreme Court has consistently held that the driving force behind requiring the prosecution to disclose exculpatory and impeachment evidence during plea negotiations is to ensure that "justice is done its citizens in the courts."[264] In the same spirit, the Court has historically recognized that it is the role of the courts and prosecutors to ascertain the truth when a person is accused of a crime, not simply to obtain a conviction.[265]

Nevertheless, the Ninth Circuit's holding seems to conflict with the United States Supreme Court's decision in *Mezzanatto*.[266] In *Mezzanatto*, the Court expressed the view that criminal defendants are presumptively free to waive most of their fundamental rights, especially those granting them protection under the rules of evidence.[267] In this way the *Brady* discovery rule is similar to the rules of evidence because of its focus on trial procedure. Thus, it could be argued under *Mezzanatto* that the *Brady* rule is a right which is

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[263] *Id.* at 1170.

[264] *See Brady*, 373 U.S. at 87. *See also Agurs*, 427 U.S. at 110-11 ("For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done'"); Kyles v. Whitley, 514 U.S. 419, 439 (1995) ("[*Brady*] disclosures will serve to justify trust in the prosecutor 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.'" (citing Berger v. United States, 295 U.S. 78, 88 (1935)).

[265] *See Mezzanatto*, 513 U.S. at 204 (admitting plea statements for impeachment purposes because it *enhances* the truth-seeking function of trials); Brown v. United States, 356 U.S. 148, 156 (1958) (it is the function of the courts of justice to ascertain the truth); *Kyles*, 514 U.S. at 440 (discussing the role of courts and prosecutors in ensuring that the truth is found when a person is accused of a crime).

[266] *See also supra* text accompanying note 153.

[267] *Mezzanatto*, 513 U.S. at 200-03. *See also supra* text accompanying note 153.

presumptively waiveable. In *Mezzanatto*, however, it was relatively simple for the Court to conclude that defendants can constitutionally waive their right to have plea statements excluded during trial, especially since such a waiver would result in the production of *more information* for a jury to use during deliberation.[268]

Contrary to the waiver at issue in *Mezzanatto*, the purpose of the "fast track" waiver in *Ruiz* was not to produce *more* information thereby leading to a more accurate or informed plea by the defendant.[269] Rather, the purpose of the waiver in *Ruiz* was to *exclude* as much information as constitutionally permissible.[270] It was not designed to ensure that the truth was found or that justice was achieved. Instead, as Judge Tallman's dissent points out, the waiver was included in plea agreements to speed cases through the court's docket, thereby unclogging an already overburdened judicial system.[271]

While the idea of creating an efficient criminal justice system is appealing, the manner in which this goal is achieved through the "fast track" agreement is problematic.[272] Requiring *Brady* waivers in plea agreements can ultimately only diminish the truth-seeking function of the criminal justice system by relieving prosecutors of their duty to disclose the most valuable information to an accused at the most valuable point in time. Instead of pushing uninformed criminal defendants through a congested system because it is too costly to provide them with impeachment evidence, the Ninth Circuit properly held in *Ruiz* that it is unconstitutional to deprive defendants of *Brady* information. This is so whether or not they are willing to waive their right to receive this information. To preserve the truth-seeking nature of our criminal justice

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[268] *Id.* at 204. *See also supra* text accompanying note 153.

[269] *Ruiz*, 241 F.3d at 1165-66.

[270] *See id.* The Government, in order to win over a majority of the Ninth Circuit, argued that they weren't trying to deprive Ruiz of *all* her *Brady* rights, just *some* of them. *Id.*

[271] *Id.* at 1176-77 (Tallman, J. dissenting). Judge Tallman noted that "[t]hrough the fast track program the [Southern] District [of California] has been able to dramatically expedite the processing of its heavy workload." *Id.*

[272] *See Id.* at 1170-71 (Tashima, J. concurring). Judge Tashima states that "[i]ncreased prosecutorial efficiency is a commendable goal, but it surely should not be advanced at the cost of requiring the accused to give up an unwaivable constitutional right. The appropriate solution . . . is for Congress to authorize more judgeships, not to shortcut the Constitution." *Ruiz*, 241 F.3d at 1170-71 (Tashima, J. concurring).

system as a whole, and not just at trials, it is important that *Brady* evidence be strictly guarded.

Thus, the Ninth Circuit's decision in *Ruiz* has placed the right to receive *Brady* evidence among those "rare constitutional rights that cannot be waived . . .".[273] In doing so, the court has protected an accused's right to receive exculpatory and impeachment evidence that the Government has in its possession at a time when the disclosure of such evidence would be of "value" - here, *before* the acceptance of a plea agreement.[274]

As several courts have noted, a defendant's decision whether to plead guilty rests heavily on his assessment of the prosecution's case.[275] After the Ninth Circuit's holding in *Ruiz*, those accused of a crime are now in a much better position to evaluate the weight of material evidence in their favor and then make a decision as to how they will proceed.[276] Without the disclosure of *Brady* information at plea bargaining stage of criminal proceedings, the inducement of guilty pleas from those who have possibly been falsely or mistakenly accused could become a common reality.[277] Further, if a guilty plea did result in waiver or forfeiture of the right to raise a *Brady* claim, such a rule would apply across the board. As one commentator noted, regardless of whether a prosecutor wrongfully suppresses *Brady* evidence to induce a guilty plea, fails to disclose evidence it should have reasonably been aware of before the guilty plea was entered, or did not discover the evidence until after the guilty plea was entered, the result is the same - the defendant would be barred from raising a *Brady* claim.[278] In short, a defendant who pled guilty would be

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[273] *Id.* at 1172.

[274] *Id.* at 1166-67.

[275] *See e.g., Ruiz*, 241 F.3d at 1164; *Sanchez*, 50 F.3d at 1453; *Miller*, 848 F.2d at 1320; *Brady*, 397 U.S. at 756.

[276] It should be noted that the Fifth Circuit's position in *Matthew* regarding this idea was over broad. The Ninth Circuit's ruling in *Ruiz* does nothing to change the rule that prosecutors are only required to disclose exculpatory and impeachment evidence and not incriminating evidence. Thus, under the *Ruiz* line of reasoning, prosecutors are not required to turn over their entire case file to an accused, but only material evidence regarding the accused's *innocence*.

[277] *See*, Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 968-84 (1989). For an argument that such fears are unwarranted, *see*, John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 499-501 (2001).

[278] Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide*

helpless to challenge his plea if exculpatory evidence was later discovered, regardless of whether the evidence was wrongfully suppressed or innocently overlooked by the prosecution.

Not all courts agree with the Ninth Circuit's opinion in *Ruiz*. There is a a sharp divide between those circuits who would follow the Ninth Circuits opinion and those who would oppose it.[279] The Fifth Circuit's opinion in *Matthew v. Johnson* is an example.[280] Up to now, however, the debate has focused less on the truth-seeking aspect of pre-trial *Brady* disclosures and more on the technical applicability of *Brady* in the pre-trial context.[281] In focusing on *Brady's* application to the pre-trial stages of the criminal process, the value of *Ruiz* is best illustrated when compared with the Fifth Circuit's decision in *Matthew*.

B. DEFENDING *RUIZ* AGAINST *MATTHEW*

As mentioned, the *Ruiz* court found the reasoning underlying the *Brady* rule to be applicable at the plea bargaining stage of criminal proceedings. In contrast, the Fifth Circuit in *Matthew* argued that the *Brady* rule was meant only to apply to trials, thus implying that an accused is not entitled to be treated fairly during any other stage of the criminal process.[282] The *Matthew* court went so far as to state that *Brady* evidence is not necessary to protect the due process rights of those who plead guilty.[283]

The Fifth Circuit's position is in dirct conflict with the Court's reasoning in *Brady* that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our

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to Loss, Abandonment and Alienation, 68 FORDHAM L.REV. 2011, 2060 (2000).

279 *See e.g.*, Miller v. Angliker, 848 F.2d 1312, 1319-20 (2d Cir. 1988) (guilty plea not knowing and intelligent if entered without knowledge of exculpatory *Brady* material); United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (same); Campbell v. Marshall, 769 F.2d 314, 321 (6th Cir. 1985) (same); White v. United States, 858 F.2d 416, 422 (8th Cir. 1988) (same). *But cf.* Smith v. United States, 876 F.2d 655, 657 (8th Cir. 1989) (in pleading guilty defendant waives all challenges to the prosecution); Matthew v. Johnson, 201 F.3d 353, 361, 364-69 (5th Cir. 2000) (in the absence of a trial no *Brady* violation can occur and plea not involuntary or unintelligent without *Brady* evidence). For this reason it is likely that the United States Supreme Court has granted *certiorari* to *Ruiz*. *See* United States v. Ruiz, 122 S.Ct 803 (2002).

280 201 F.3d 353 (5th Cir. 2000).

281 *See also supra* note 78.

282 *See also supra* note 146.

283 *Matthew*, 201 F.3d at 362 n.13.

system of the administration of justice suffers when any accused is treated unfairly."[284] It is abundantly clear from this statement that the Court was not limiting an accused's right to be treated fairly to trials alone, as the Fifth Circuit would suggest. Rather, the Court's statement in *Brady* indicates that *any time* an accused is treated unfairly, justice suffers. Withholding exculpatory information from an accused as he struggles to decide whether to take an attractive deal and spend time in prison, or go to trial and take his chance based on the limited evidence he is aware of, is not justice. Such a rule would more likely lead to a number of wrongful convictions. As the United States Supreme Court has acutely pointed out, "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'"[285] In *Ruiz*, the Ninth Circuit properly recognized and applied these principles.[286]

Based on the *Matthew* court's holding, a prosecutor could constitutionally and *purposefully* withhold exculpatory information fully knowing that an individual who was likely innocent was prepared to plead guilty. This is precisely what the Ninth Circuit in *Sanchez,* as echoed in *Ruiz*, feared would result if defendants were barred from raising post-plea *Brady* claims.[287] As the court in *Ruiz* pointed out, reason demands that a prosecutor's duty to disclose *Brady* evidence becomes effective *before* an accused decides to plead guilty. It makes little sense to wait until after the accused has pled guilty to

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

[285] *Schlup v. Delo*, 513 U.S. 298, 325 (1995) (citing In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). *See* also T. Starkie, EVIDENCE 756 (1824) ("The maxim of the law is . . . that it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned."). *See generally* Newman, Beyond "Reasonable Doubt," 68 N. Y. U. L. REV. 979 980-81 (1993)).

[286] *Ruiz*, 241 F.3d at 1164. As the court noted, "if a defendant may not raise a *Brady* claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas . . . . Moreover, the same prosecutorial incentive to withhold *Brady* information that would arise if guilty pleas extinguished *Brady* rights would arise if plea agreements could extinguish those rights." *Id.*

[287] *Sanchez*, 50 F.3d at 1453 ("if a defendant may not raise a *Brady* claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas.")

then provide him with exculpatory evidence. No valid reason exists to allow a prosecutor to withhold evidence, once it is obtained, which indicates that a defendant who is about to plead guilty is in fact innocent. Many courts and commentators have argued extensively about the semantics of the *Brady* rule itself, specifically whether the materiality standard can be broadened to cover the plea bargaining stage.[288] However, the reality that prosecutors *could* take this type of action under the approach suggested in *Matthew* should lay the debate to rest.

Of course, one can argue that a defendant could force prosecutors to make *Brady* disclosures simply by electing to go to trial and professing their innocence. Such an approach ignores the enormous pressure that current sentencing laws place on even innocent defendants to accept a plea bargain when the evidence known to the defendant makes prevailing at trial uncertain.[289] There appears to be something inherently wrong with the notion that we should allow prosecutors to sit on exculpatory evidence when possibly innocent defendant's need this information to make a fully informed decision about whether to plead or not. Such a rule seems to wrongly place the initial burden of proving innocence on the defendant, the party least capable of doing so.[290]

Any fears that such a rule will lead to defendants systematically asserting that they would have pled differently in light of undisclosed *Brady* evidence in order to have guilty pleas routinely overturned can be quelled by the objective standard applied by the Ninth Circuit in *Ruiz*.[291] Under this standard, for a defendant to have a guilty plea reversed based on an alleged *Brady* violation, the court would have to be satisfied that persuasiveness of the evidence would have provided a plausible enough defense that the defendant would

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[288] *See also supra* text note 78.

[289] Interview with Robert K. Calhoun, Professor, Golden Gate University School of Law, in San Francisco, Cal. (February 5, 2002).

[290] *See* Lisa M. Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L.REV. 1205, 1209 (2000) ("prosecutors have the benefit of a police force that investigates their cases and gathers evidence for them. This broad access puts defendants at a great disadvantage in preparing their cases. In the adversary system in which the prosecutor operates, the availability of these powers leads to great inequity between the prosecution and the defense in a criminal trial.")

[291] *Sanchez*, 50 F.3d at 1454.

have chosen to go to trial rather than plead guilty.[292] In cases in which a court found that such objective evidence did exist and was withheld by the prosecution during the entry of a guilty plea, the court's hands should not be tied by virtue of the fact that the defendant pled guilty. At the very least, an accused should be granted a new hearing in which the court could decide whether or not to accept the guilty plea in light of the new evidence.

Even though applying the *Brady* rule to post-plea situations is a potentially difficult task for courts,[293] it nonetheless should be done. The risks of not doing so is too great. If a defendant pleads guilty based on a set of facts that are later refuted by evidence that the Government knowingly and purposefully suppressed, the court should not then be forced to deny the defendant the opportunity to plead anew or withdraw his plea and proceed to trial because the defendant forfeited his right to make a *Brady* claim by not choosing to go to trial. Rather, the court should be able to find that its acceptance of the guilty plea violated due process and the prosecutor's conduct violated the *Brady* rule. This is what the Ninth Circuit decided in *Ruiz*.

V. CONCLUSION

The Ninth Circuit's decision in *Ruiz* properly placed *Brady* rights among those constitutional rights so sacred that they can never be lost, and for good reason. Not only do *Brady* waivers violate the principle that guilty pleas must be knowing for them to be valid, it inhibits the courts and its custodians from finding the truth. A rule that allows prosecutors to withhold exculpatory information from an accused during a plea bargain violates the most fundamental concept of fairness. As such, *Brady* waivers impinge on the most deeply rooted principles underlying the criminal justice system. It is likely that the United States Supreme Court has granted *certiorari* to *Ruiz* due to the dramatic inconsistency among the circuit courts in applying *Brady*.[294] Given the principles upon which

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[292] *Id.*

[293] *See* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 472-87 (2001).

[294] *See* United States v. Ruiz, 122 S.Ct. 803 (2002).

Ruiz was decided, the Supreme Court should affirm the Ninth Circuit's decision.

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