Betting Against the House: Why Prosecutors Have an Ethical Disclosure Obligation Prior to Plea Negotiations

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Introduction

On August 15, 2002, Robert Wilcoxson pleaded guilty to second-degree murder and was sentenced to over ten years in prison for a crime he did not commit.[1] Mr. Wilcoxson was one of six men charged with the murder of Walter Bowman, who was killed in his home by three men wearing gloves and bandanas over their faces on September 18, 2000.[2] During the initial investigation, three bandanas and two pairs of gloves were found near the crime scene and collected as evidence.[3] The evidence was sent for pretrial DNA testing and prosecutors received the results on March 7, 2001.[4] The DNA results *excluded* Mr. Wilcoxson and all five of his codefendants as the source of the genetic material collected from the bandanas and gloves believed to have been used in Mr. Bowman's murder.[5]

Rather than dismissing the charges based on the DNA results, prosecutors offered all six men the same plea deal: plead guilty or go to trial and risk receiving a life sentence or the death penalty.[6] Before he pleaded guilty, the prosecutor told Mr. Wilcoxson the evidence was stacked against him; if he went to trial, the odds were that he would

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1 *See Robert Wilcoxson*, The Innocence Project, https://www.innocenceproject.org/cases/robert-wilcoxson/ (last visited Aug. 1, 2020) [hereinafter Innocence Project: *Robert Wilcoxson*].

2 All but one of the men charged with the murder of Walter Bowman accepted the plea offer and pleaded guilty to a lesser offense despite their innocence. *Id.*

3 Ken Otterbourg, *Robert Wilcoxson*, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3818 (last updated Nov. 12, 2019) [hereinafter Nat'l Registry: *Robert Wilcoxson*].

4 *Id.*

5 The prosecution obtained the DNA results, excluding all six of the men charged in the murder as the source of the genetic material, more than four months before any of the plea offers were made in the case. *See id.*

6 *See* Innocence Project: *Robert Wilcoxson*, *supra* note 1.

lose and receive more time at sentencing.[7] The evidence disclosed to Mr. Wilcoxson's attorney included statements from his four codefendants,[8] three jailhouse informants who claimed to have heard statements implicating him in the crime, and a positive eye witness identification placing him at the scene.[9] On its face, the case against Mr. Wilcoxson seemed strong and had caused four of his codefendants to plead guilty to crimes they did not commit to avoid higher prison sentences.[10] Mr. Wilcoxson's life was turned into a high stakes poker game; and just like in Vegas, the house always wins.

Although prosecutors are not legally required to disclose all of the evidence in their possession during the plea negotiation stage, they have an ethical obligation[11] to disclose any exculpatory evidence[12] in their possession to the defense before a defendant pleads guilty.[13] In Mr. Wilcoxson's case, disclosing the exculpatory DNA evidence could have proved not only his innocence[14] but also the innocence of four other men—Teddy Isbell,[15] Kenneth Kagonyera,[16] Damian Mills,[17]

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7 Carla Javier, *Why This Man Spent Nearly a Decade in Prison for a Murder He Didn't Commit*, SPLINTER (Mar. 10, 2017, 11:36 AM), https://splinternews.com/why-this-man-spent-nearly-a-decade-in-prison-for-a-murd-1793859044.

8 *Robert Wilcoxson Awarded $545,591 for 11 Years Wrongful Imprisonment*, JUSTICE DENIED: THE MAGAZINE FOR THE WRONGLY CONVICTED, no. 54, 2013, 8. http://justicedenied.org/issue/issue_54/robert_wilcoxson_jd54.pdf [hereinafter JUSTICE DENIED].

9 *Id*; NAT'L REGISTRY: Robert Wilcoxson, *supra* note 3.

10 JUSTICE DENIED, *supra* note 8, at 8.

11 MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2019).

12 Exculpatory evidence tends "to establish a criminal defendant's innocence." *Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

13 *See* ABA Criminal Justice Standards for the Prosecution Function § 3-1.2 (b)-(c) (2019), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ (2017) [hereinafter ABA Standards for Criminal Justice].

14 *See* INNOCENCE PROJECT: *Robert Wilcoxson*, *supra* note 1; *see also* NAT'L REGISTRY: Robert Wilcoxson, *supra* note 3.

15 "Teddy Isbell pleaded guilty to accessory after the fact to murder on December 11, 2003 and was sentenced to 3 years" in prison. Ken Otterbourg, *Teddy Isbell*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4765 (last updated Nov. 12, 2019). He was exonerated and declared factually innocent on September 30, 2015, about nine years after being released from prison after serving out his full three-year sentence. *See id.*

16 Kenneth Kagonyera pleaded guilty to second-degree murder on December 13, 2001 and was sentenced to between twelve and fifteen years in prison." *Kenneth Kagonyera*, THE INNOCENCE PROJECT, https://www.innocenceproject.org/cases/kenneth-kagonyera/ (last visited on Aug. 1, 2020). He was exonerated and declared factually innocent on September 22, 2011 after serving ten years of his twelve- to fifteen-year sentence. *Id.*

17 Damian Mills pleaded guilty to second-degree murder, attempted armed robbery, and conspiracy to commit armed robbery for the murder of Walter Bowman on June 26, 2001 and

and Larry Williams, Jr.[18] The prosecutor in Mr. Wilcoxson's case made the conscious choice not to disclose this evidence to the defense because the prosecutor wrongfully believed Mr. Wilcoxson and his codefendants were guilty.[19] The prosecutor's decision was not only unethical but resulted in the conviction of five innocent men and allowed the real perpetrators to escape prosecution.[20] Without any knowledge that evidence existed that could prove his innocence, Robert Wilcoxson made a decision no person should ever have to make and pleaded guilty to a crime he did not commit in the hopes of receiving mercy from the court for his cooperation.[21] The circumstances surrounding Mr. Wilcoxson's guilty plea, unfortunately, are not uncommon and have a significant effect on the criminal justice system: the conviction and incarceration of innocent individuals.[22] The National Registry of Exonerations has 541 reported cases where defendants pleaded guilty to a crime and were later found innocent and exonerated.[23] Two hundred and seven of those 541 cases have official misconduct listed as a contributing factor to the wrongful con-

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was sentenced to twelve years in prison. Ken Otterbourg, *Damian Mills*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Casedetail.aspx?caseid=4763 (last updated Nov. 12, 2019). He was exonerated and declared factually innocent on September 30, 2015, two years after being released from prison after serving out his full twelve-year sentence. *See id.*

18 "Williams pleaded guilty to second-degree murder on February 25, 2002 and was sentenced to 10 years in prison." Ken Otterbourg, *Larry Williams, Jr.*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4764 (last updated Nov. 12, 2019). He was exonerated and declared factually innocent on September 30, 2015, almost four years after being released from prison after serving out his full ten-year sentence. *See id.*

19 *See* JUSTICE DENIED, *supra* note 8, at 9. Robert Wilcoxson spent nine years of his life in prison before a three-judge panel reviewed the evidence in his case and found him actually innocent, calling for his immediate release from prison. *Id.* This tragedy could have been prevented if the prosecution had provided Mr. Wilcoxson with the available exculpatory evidence, which he would have been entitled to if he had gone to trial, before he pleaded guilty. *See id.*

20 *See* INNOCENCE PROJECT: *Robert Wilcoxson*, *supra* note 1; *see also* ABA Standards for Criminal Justice, *supra* note 13.

21 Mr. Wilcoxson was twenty-one years old, had a daughter on the way, and was advised by his attorney that his best option was to plead guilty considering the evidence against him. Javier, *supra* note 7, at 1.

22 *See* GUILTY PLEA PROBLEM, https://guiltypleaproblem.org (last visited Aug. 3, 2020) [hereinafter *Guilty Plea Problem*].

23 *See Detailed View*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?SortField=OM&View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&FilterField1=Group&FilterValue1=P&SortDir=Asc (last visited on Aug. 3, 2020) [hereinafter NAT'L REGISTRY Stats].

victions.[24] One-hundred ninety-two individuals pleaded guilty to a crime they did not commit because either the "[p]olice, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to" their guilty plea and subsequent conviction.[25]

The reality is, "criminal justice today is for the most part a system of pleas, not a system of trials."[26] Regardless of whether a defendant exercises their right to a jury trial or decides to plead guilty and waive that right, the same underlying principles of due process should apply.[27] Namely, any exculpatory evidence possessed by the prosecution should be provided to the defense before obtaining a guilty plea.[28] Prosecutors possess an extraordinary amount of discretionary power, a power that only grows larger in the context of plea negotiations.[29] Plea agreements are an essential part of the American judicial system, but because the rules protecting the rights of defendants at trial do not apply with the same force during plea negotiations, it is imperative to have ethical guidelines in place to prevent prosecutorial abuse and protect innocent defendants.[30] Under the current ethical framework governing a prosecutor's disclosure obligations prior to plea negotiations, few safeguards remain in place to adequately protect defendants' rights.[31] Additionally, existing state regulatory protections are sparse and highly varied.[32]

This Comment proposes the implementation of the American Bar Association's (ABA) Model Rule of Professional Conduct 3.8(d)[33] and subsequent adoption of the ABA's Formal Opinion 09-

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[24] *See id.*

[25] *Glossary*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx#OM (last visited Aug. 3, 2020) (defining the National Registry of Exonerations classification of "official misconduct.").

[26] Lafler v. Cooper, 566 U.S. 156, 168-70 (2012).

[27] *See* Brady v. United States, 397 U.S. 742, 757-58 (1970).

[28] *Id.*

[29] *See* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) ("There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries . . . the potential for both individual and institutional abuse.").

[30] *See infra* Sections Background I.B.1, Analysis I.B.1.

[31] *See infra* Sections Background I.C.1, Background I.C.2.

[32] *See infra* Section Background I.C.2; *see also infra* Table 1.

[33] MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2019).

454 governing the scope of Rule 3.8(d).[34] Part I discusses background concepts and information pertinent to the current framework of plea negotiations in the American judicial system, as well as its connection to prosecutors' ethical obligations to disclose exculpatory evidence to the defense prior to plea negotiations. Part II analyzes a prosecutor's pre-plea disclosure obligations by reconciling the obligation established in *Brady v. Maryland*[35] with the ABA Model Rules and proposes stronger regulation by state bar disciplinary boards in cases where violations occur. Finally, the Comment concludes by discussing how to use the current Model Rules in place to regulate plea bargaining in a way that is consistent with a defendant's right to due process.

BACKGROUND

I. PLAYING BY HOUSE RULES: THE CURRENT RULES GOVERNING PLEA NEGOTIATIONS AND PROSECUTORIAL DISCLOSURE OBLIGATIONS

The American criminal justice system is predicated on fundamental fairness and due process of law.[36] William Blackstone[37] famously wrote that it is "[b]etter that ten guilty persons escape than that one innocent suffer."[38] The Supreme Court adopted this same principle in defending the presumption of innocence: It is "better to let the crime of a guilty person go unpunished than to condemn the innocent."[39] The idea that the criminal justice system is willing to protect the inno-

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[34] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009) [hereinafter ABA Op. 09-454] (discussing a prosecutors' duty to disclose favorable information and evidence to the defense prior to obtaining a plea agreement).

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

[36] *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

[37] Sir William Blackstone was an English lawyer in the eighteenth century who wrote the *Commentaries on the Laws of England*, commonly referred to as Blackstone's Commentaries. Blackstone's Commentaries "served as a primary instruction tool in England and America well into the nineteenth century and exerted a pronounced influence on the development of the American legal tradition." Online Library of Liberty, People: Sir William Blackstone, https://oll.libertyfund.org/people/sir-william-blackstone (last visited Aug. 3, 2020).

[38] SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, vol. 2 *358 (Philadelphia, J.B. Lippincott Co. 1893), https://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-2?q=Better™hat™en+guilty+#Blackstone_1387-02_1210 (last visited Jan. 3, 2020).

[39] Coffin v. United States, 156 U.S. 432, 454 (1895) (internal quotation marks and citation omitted).

cent even if it means letting a guilty person go free in the name of fairness is well-rooted in legal commentary and is the predicate for many foundational Supreme Court decisions regarding defendants' rights at trial.[40]

However, in today's world, the criminal justice system can no longer support a society where all criminal cases are tried before a jury of the defendant's peers.[41] Instead, the system relies on plea agreements to relieve some of the pressure overwhelming criminal court dockets,[42] and prosecutors play a crucial role in ensuring that the process is both fair and effective.[43] Pre-plea evidence disclosure is left to the prosecutor's discretion and is not subject to judicial scrutiny.[44] The issue of nondisclosure of exculpatory evidence is as crucial at the plea negotiation stage as it is at trial given the significant role that plea agreements play in today's judicial system.[45] In plea negotiations, however, prosecutorial misconduct is unchecked and impacts not only the accuracy of guilty pleas but the entire criminal justice system.[46]

A. *Going All-In: Taking a Guilty Plea*

The sheer volume of cases that pass through the criminal justice system each year makes it impossible to allow every defendant to effectively exercise their Sixth Amendment right to a jury trial.[47] Instead, the system relies on plea agreements to carry the extra weight.[48] *Brady v. United States* is the landmark case that recognizes

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[40] *See, e.g.* Brady v. United States, 397 U.S. 742 (1970); Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also id.* at 454-56.

[41] *See* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RESEARCH CENTER, Fact Tank News in Numbers, June 11, 2019, https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

[42] *See, e.g. Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT, Aug. 7, 2018, https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/ [hereinafter *Guilty Pleas on the Rise*].

[43] *See* ABA Standards for Criminal Justice, *supra* note 13.

[44] *See* Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1010-11 (1986).

[45] *Id*.

[46] *Id*.

[47] U.S. CONST. amend. VI; *see* Gramlich, *supra* note 41.

[48] *Guilty Pleas on the Rise*, *supra* note 42.

plea agreements as a constitutional mode of criminal adjudication.[49] Robert Brady was charged with kidnapping and originally pleaded not guilty but later changed his plea to guilty to avoid the death penalty at trial.[50] After being sentenced to fifty years in prison, Brady appealed the conviction claiming it was unconstitutional to "influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged."[51]

On appeal, the Supreme Court began its analysis by noting that guilty pleas constitute a valid waiver of an individual's constitutional rights if they are voluntary, "knowing, [and] intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[52] After finding Brady's plea to be both voluntary and intelligent, the Court ultimately held that a guilty plea is valid even if it is "motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged."[53] This decision effectively recognized plea agreements as constitutional by "substantially undercut[ing] any argument that systemic problems such as coercive sentencing schemes or preemptory bargaining tactics were rendering large numbers of guilty pleas invalid."[54] The Court reasoned that plea agreements substantially benefited both parties, and, provided that the guilty plea is a valid waiver of the defendant's rights, it could not hold the agreement unconstitutional.[55] Today, plea agreements are a well-recognized and accepted practice of the criminal justice system, and the rules regulating guilty pleas can be found in the federal, state, and local Rules of Criminal Procedure.[56]

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49 Brady v. United States, 397 U.S. 742, 748 (1970); *see also* Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 UTAH. L. REV. 51, 77-80 (2012).

50 *Brady*, 397 U.S. at 743-44.

51 *Id.* at 750.

52 *Id.* at 748.

53 *Id.* at 751.

54 Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2020 (2000).

55 *See Brady*, 397 U.S. at 751-52; *see also* Blank, *supra* note 54, at 2020.

56 *See* FED. R. CRIM. P. 11(b)(1)-(3).

1. A System of Pleas: The Current Role of Plea Bargaining

"[C]riminal justice today is for the most part a system of pleas, not a system of trials."[57] The number of criminal cases that are resolved by guilty plea has significantly increased over the past fifty years.[58] Around ninety-seven percent of state and federal criminal cases today are resolved by plea agreements.[59] In other words, less than three percent of defendants choose to exercise their Sixth Amendment right to a fair trial each year.[60] As the number of criminal defendants who go to trial decreases, the rate of guilty pleas increases.[61] Consequently, there has been a steady rise in cases resolved by guilty pleas after the Supreme Court held that plea agreements were constitutional in 1970.[62] Between 1998 and 2018, the number of federal criminal defendants who pleaded guilty instead of going to trial rose a total of eight percent, bringing the total number of defendants pleading guilty in 2018 to 71,550.[63] This steady rise in plea agreements is not surprising because the criminal justice system is overwhelmed with criminal cases, the only way to sustain the flow of justice is for prosecutors to plead out their cases.[64]

Nevertheless, the finality of a guilty plea is no different from a guilty verdict at trial, and treating its finality as such is a grave miscarriage of justice.[65] In *Brady v. United States*, the Court recognized the lack of distinction between the two methods of obtaining a criminal conviction and the importance of maintaining the practice of fairness:

> This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound

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57 Lafler v. Cooper, 566 U.S. 156, 170 (2012).

58 *Guilty Pleas on the Rise, supra* note 42.

59 *Id.*

60 *See id.*

61 Gramlich, *supra* note 41.

62 *See* Gramlich, *supra* note 41; *see also* Brady v. United States, 397 U.S. 742, 756-58 (1970).

63 *See* Gramlich, *supra* note 41.

64 *See* JED S. RAKOFF, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

65 *See Brady*, 397 U.S. at 757-58.

> results, and we should continue to do so, whether conviction is by plea or by trial.[66]

Although there is no distinction between a guilty plea and a guilty verdict, circuit courts remain divided on whether a defendant's constitutional rights at trial extend to plea negotiations. The current debate is whether a prosecutor in possession of exculpatory evidence is ethically obligated to disclose that evidence to the defendant before offering a guilty plea.[67]

The concept of plea negotiations is not the problem with the criminal justice system. Plea agreements, when obtained properly, benefit both parties—they are a fast and effective way for prosecutors to resolve cases and prevent the criminal court system from being overwhelmed; in exchange, defendants typically have their charges reduced or are given shorter sentences.[68] Although plea agreements may be effective, they are the least regulated form of obtaining a conviction and thus carry a large potential for abuse.[69] By design, plea negotiations are completely removed from the trial process.[70] Defendants are dealing only with prosecutors who are making unilateral decisions on what information to disclose, without any regulation by the courts.[71] Although this structure takes some of the burdens off a judge's docket, it affords defendants virtually no constitutional rights during the negotiation phase.[72] The culmination of these consequences creates the perfect storm for wrongful convictions. This is not to say that all prosecutors withhold exculpatory evidence from the defense during the pre-plea process, or that it is commonplace for prosecutor offices to withhold exculpatory evidence. Nevertheless, with the number of convictions that have been overturned because of

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66 *See id*.

67 *See infra* Section I.C.2.

68 *See* RAKOFF, *supra* note 64.

69 *Id.*

70 *See* Michael N. Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3607-08 (2013).

71 *See id.*

72 *See id.*; *see also* James M. Grossman, *Getting* Brady *Right: Why Extending* Brady v. Maryland*'s Trial Right to Plea Negotiations Better Protects a Defendant's Constitutional Rights in the Modern Legal Era*, 2016 B.Y.U. L. REV. 1525, 1529 (2016) ("[M]any of the protections guaranteed under the Constitution for defendants *at trial* are not extended to plea bargaining—the phase where the vast majority of criminal cases are being disposed.").

prosecutorial misconduct, it cannot be denied that there is a guilty plea problem in our criminal justice system.

2. Overcoming Stigma: Innocent Defendants Can and Have Pleaded Guilty

When exculpatory evidence comes to light after a defendant enters a guilty plea, wrongfully incarcerated individuals still face obstacles in getting their convictions overturned. The criminal justice system operates on a presumption that all defendants who plead guilty are, in fact, guilty.[73] In *Brady v. United States*, the Supreme Court rejected the idea that an innocent individual would plead guilty and falsely confess to a crime they did not commit, a sentiment that has been echoed by later cases.[74] The criminal justice system operates under the notion that defendants are presumed innocent until proven guilty, and that presumption is carried with them until a final verdict is rendered.[75] When a defendant pleads guilty, they are waiving that presumption and declaring to a court of law that they are not innocent.[76] However, the reality is not so clear.

"[T]he once-ubiquitous belief that a seemingly voluntary confession amounts to conclusive proof of guilt has increasingly given way to a recognition that false confessions are not only possible, but surprisingly common."[77] Nevertheless, even today, with proof to negate this presumption, it is still a view that most courts cannot overcome.[78] The National Registry of Exonerations lists 506 reported cases where defendants pleaded guilty to a crime and were later exonerated and declared innocent.[79] In other words, 506 individuals pleaded guilty to crimes they did not commit because it was a better alternative than going to trial.[80] The sheer number of cases where convictions obtained by a guilty plea and have been overturned shows that the

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73 *See* Brady v. United States, 397 U.S. 742, 758 (1970).

74 *See id*.; *see also* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("[A]cceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of a bargaining process.").

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

76 *See Guilty Plea Problem*, *supra* note 22.

77 Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 FED. SENTENCING REP. 284, 288 (2019).

78 *See* RAKOFF, *supra* note 64.

79 *See* NAT'L REGISTRY Stats, *supra* note 23.

80 *Id.*

belief that everyone who pleads guilty is, in fact, guilty is a very rudimentary view of the psychology behind why defendants plead guilty in the first place.[81]

We cannot ignore that "innocent people regularly confess to crimes that they did not commit" to avoid losing at trial and receiving a sentence that is "far more severe than they truly deserve."[82] A severe sentence is especially intimidating when the defendant is innocent and they face a significant amount of time behind bars for a crime that they did not commit.[83] Several empirical research studies have simulated the effect of plea bargaining in the current system and have produced alarming results when the "defendant" is innocent of the alleged charges.[84] One psychological study conducted by Vanessa Edkins and Lucian Dervan simulated an innocent defendant's dilemma during plea bargaining.[85]

In the study, a group of college students were given the opportunity to cheat on an exam and divided into two groups based on their decision.[86] The groups consisted of a set of students who had cheated on the exam ("guilty" students) and a set of students who did not cheat ("innocent" students).[87] The study found that "[fifty-six] percent of innocent test subjects opted to admit to their 'guilt' in exchange for a modest fine instead of having their supposed misconduct reported to university authorities."[88] The study suggests that "it takes surprisingly little pressure to induce a false plea, with 'defendants' in experiments giving particular weight to options that allow their lives to return to some semblance of normalcy in the short term."[89] Although these results appear surprising, they mirror the statistics about defendants who have been proven actually innocent after pleading guilty to a crime to receive a lower sentence.[90]

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[81] *See e.g., id.* (reporting that eighteen percent of known exonerees had pleaded guilty to crimes they did not commit).

[82] Neily, *supra* note 77, at 284.

[83] *See* RAKOFF, *supra* note 64.

[84] Neily, *supra* note 77, at 288.

[85] Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 28 (2013).

[86] *Id.* at 29.

[87] *Id.* at 30.

[88] Neily, *supra* note 77, at 288, *see* Dervan, *supra* note 85, at 32.

[89] Neily, *supra* note 77, at 288; *see* Dervan, *supra* note 85, at 37.

[90] The Innocence Project reports that a total of "95% of felony convictions in the United States are obtained through guilty pleas," "18% of known exonerees plead guilty to crimes they

B. *Knowing When to Fold:* Brady v. Maryland *and Its Progeny*

The Court in *Brady v. Maryland* intended to protect the defendant's right to a fair trial under the Due Process Clause.[91] The Supreme Court's holding, now commonly referred to as "the *Brady* doctrine," created a constitutional obligation for prosecutors to disclose any evidence that is material to either guilt or punishment to the defense at trial.[92] The purpose behind the *Brady* doctrine was to prevent the possibility, however remote, of an innocent person being convicted of a crime that they did not commit.[93] However, the application of *Brady* today does not carry the same effect as it did at its inception. *Brady*'s progeny have severely limited the scope of the *Brady* doctrine's practical application.[94]

1. The *Brady* Doctrine: A Trial Right

The Supreme Court in *Brady v. Maryland* held that failure to disclose exculpatory evidence material to guilt or punishment is a violation of a defendant's due process rights under the Fourteenth Amendment.[95] The rule was intended to safeguard a defendant's right to a fair trial and prevent them from being deprived of life, liberty, or property without being presented with all of the exculpatory evidence in the prosecution's possession.[96] Under this standard, due process requires prosecutors to turn over any evidence that is favorable to the defense and relates to the defendant's guilt, innocence, or sentencing.[97]

Since *Brady v. Maryland,* the Court has placed various limitations on the kind of evidence that must be disclosed, the materiality standard, and when claims can be raised.[98] In *Giglio v. United States*, the

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did not commit," and "83% of DNA exoneration plea cases resulted in identification of the alternate perpetrator." *Guilty Plea Problem*, *supra* note 22.

91 Brady v. Maryland, 373 U.S. 83, 87 (1963).

92 *Id.* at 87-88.

93 *Id.*

94 *See* Strickler v. Green, 527 U.S. 263, 280-82 (1999); Kyles v. Whitley, 514 U.S. 419, 435-37 (1995); United States v. Bagley, 473 U.S. 667, 676-678 (1985); United States v. Agurs, 427 U.S. 97, 107-14 (1976).

95 *Brady*, 373 U.S. at 87-88.

96 *See id.* at 87.

97 *See id.*

98 *See Bagley*, 473 U.S. at 676-77; *Agurs*, 427 U.S. at 107-14; Giglio v. United States, 405 U.S. 150, 153-54 (1972).

Supreme Court extended a prosecutor's obligation to disclose material information to impeachment evidence.[99] The Court held that material exculpatory evidence that must be turned over to the defense consisted of evidence that could be used to impeach any of the prosecution's witnesses which relates to the defendant's culpability.[100]

Six years after *Brady*, in *United States v. Agurs*, the Supreme Court expanded the disclosure requirement holding that *Brady* material must be disclosed by the prosecution even in the absence of a specific discovery request.[101] Furthermore, the Court placed a limitation on *Brady*'s materiality standard, finding that under *Brady*, a new trial is required only in cases where the suppressed evidence was material to the case and likely to affect the outcome.[102] In 1985, the Supreme Court in *United States v. Bagley* limited the materiality standard even further, holding that a prosecutor's failure to turn over favorable evidence only requires a new trial if a reasonable probability exists that the outcome would have been different if the evidence in question was turned over.[103]

The reasonable probability test established by *Bagley* still controls in determining if evidence is material under *Brady*.[104] Based on this standard, the test for determining materiality is retroactive and requires that the defendant actually went to trial instead of taking a plea.[105] Consequently, the *Brady* doctrine functions as a recourse for defendants to receive a new trial when evidence material to their guilt or innocence that would have changed the outcome of the *trial* was withheld from the defense.[106] This creates a problem when applied to the context of plea negotiations because there is no trial record to determine if the evidence would have changed the outcome of the case.[107] With no trial record to rely on, an appellate court has no way of knowing what information factored into the defendant's decision to

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99 *Giglio*, 405 U.S at 54-55. *See also* Impeachment evidence is "[e]vidence used to undermine a witness's credibility." *Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

100 *Giglio*, 405 U.S. at 153-54.

101 *Agurs*, 427 U.S. at 110-11.

102 *Id.* at 112-14.

103 *Bagley*, 473 U.S. at 682 (defining reasonable probability as "a probability sufficient to undermine the confidence in the outcome").

104 *Id.*

105 *See* John G. Douglass, *Fatal Attraction: The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY. L.J. 437, 472-74 (2001).

106 *Id.* at 472-74.

107 *Id.* at 477-78, 480.

plead guilty.[108] "Even under an 'objective' standard, it is impossible to evaluate the impact of previously undisclosed '*Brady* material' without knowing what other information the defendant possessed at the time he made that assessment."[109]

2. The Supreme Court Shows Its Hand: No Duty to Disclose Impeachment Evidence Prior to Trial

In 2002, the Supreme Court took up the issue of whether there is a constitutional obligation for prosecutors to disclose exculpatory and impeachment evidence before entering into a plea agreement with a defendant.[110] *United States v. Ruiz* was the first time the Supreme Court granted certiorari in a case attempting to extend the *Brady* doctrine to plea bargaining.[111] However, the Court ruled only on whether impeachment evidence had to be produced prior to a guilty plea and did not take up the issue of exculpatory evidence.[112] The Court held that prosecutors are not constitutionally obligated to disclose impeachment information relating to any of their witnesses prior to entering into a plea agreement.[113] Citing *Brady v. United States*, the Court found that impeachment information is relevant only to maintaining the fairness of a trial and does not extend to plea agreements.[114] Concerned with the possibility of endangering the government's witnesses and informants by revealing their identities, the Court found that impeachment information does not pertain to whether a defendant knowingly and voluntarily agreed to a guilty plea and declared the right to impeachment evidence a trial right.[115]

C. *Rules of the Game: The Model Rules of Professional Conduct and a Prosecutor's Ethical Obligations*

The Model Rules of Professional Conduct, adopted and produced by the American Bar Association, were "intended to serve as a national framework for implementation of standards of professional

108 *Id.* at 480.
109 *Id.*
110 United States v. Ruiz, 536 U.S. 622, 625 (2002).
111 *See Petegorsky*, *supra* note 70, at 3623.
112 *Ruiz*, 536 U.S. at 625.
113 *Id.*
114 *Id.* (citing Brady v. United States, 397 U.S. 742, 748 (1970)).
115 *Id.* at 629; *see also Petegorsky*, *supra* note 70, at 3624-25.

conduct."[116] Standing alone, the Model Rules are just that—models—and have no binding legal effect on individual jurisdictions.[117] However, once a model rule has been adopted, the ethical rule carries the force of law and serves as the disciplinary authority for that jurisdiction.[118] As of 2018, all fifty states and the District of Columbia have adopted Codes of Professional Conduct modeled after the ABA Model Rules.[119] Consequently, the ethical obligations imposed by the Model Rules are binding authority, and attorneys are required to comply with the ethical rules as a condition of their licensing.[120] Professional misconduct resulting from violating an ethical rule is independently regulated by each individual jurisdiction's disciplinary authority.[121] The responsibility of investigating claims of misconduct often falls on state bar disciplinary bodies, because a court's authority in this area is limited.[122]

The nature of a prosecutor's authority and responsibility is substantially different from the role of other lawyers. Unlike other professions in the legal field, a prosecutor's obligation is not to a specific client but to the entire system itself; they represent the people.[123] Furthermore, the criminal justice system relies on prosecutors performing their duties in a manner that is not only effective but also ethical and fair.[124] A prosecutor's unique role in the criminal justice system gives them a broad range of discretionary power; however, this power is not unlimited.[125] ABA Model Rule of Professional Conduct 3.8 is tailored

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116 Ray Taylor, *Defending Lawyers in Disciplinary Proceedings*, 31 AMJUR TRIALS 633, § 3. Rules of Professional Conduct (Originally published in 1984 updated in 2019).

117 Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 715 (1987).

118 *Id.*

119 *See* ABA Model Rules of Prof'l Conduct: *Alphabetical List of Jurisdictions Adopting Model Rules*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last updated on Mar. 28, 2018); *see also* Michael E. McCabe, *Seeking National Uniformity, California (Finally) Adopts New Ethics Rules*, MCCABE LAW IP ETHICS (May, 11, 2018) https://www.ipethicslaw.com/seeking-national-uniformity-california-finally-adopts-new-ethics-rules/ (last visited on Dec. 26, 2019).

120 *See* Rosen, *supra* note 117, at 715-17.

121 *See id.* at 715-17.

122 *See id.*

123 *See* ABA Criminal Justice Standards for the Prosecution Function, *supra* note 13 (A prosecutor functions as "an administrator of justice, an advocate, and an officer of the court . . . [and] it is their duty 'to seek justice, not merely to convict.'").

124 *See id*.

125 *See id.*; *see also* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2019).

specifically towards the special responsibilities of prosecutors and places limitations on their discretionary powers.[126]

1. A Proper Bluff: Rule 3.8(d) and the Duty to Disclose

Model Rule 3.8 (d) governs a prosecutor's disclosure obligations and requires prosecutors to:

> 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.[127]

Although most jurisdictions have modified or made minor edits to the language of Rule 3.8(d), the overall substance of the rule has remained the same: Prosecutors have an ethical duty to disclose exculpatory material to the defense.[128] Thirty-nine states[129] have adopted the ABA's language governing Rule 3.8(d) verbatim; ten states[130] adopted the ABA rule but made minor edits, and two jurisdictions[131] added an intent requirement to the rule's language.[132] Additionally

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126 MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2019).

127 *Id.*

128 *See* Hans P. Sinha, *Prosecutorial Ethics: The Duty to Disclose Exculpatory Material*, Prosecutor, Jan.-Mar. 2008, at 20, 21.

129 Thirty-nine states—Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming—adopted the ABA's language verbatim. *See* ABA Model Rules of Prof'l Conduct: *Jurisdictional Rules Comparison Charts: Model Rule 3.8*, at 2-13, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8.pdf (last updated on Dec. 11, 2018) [hereinafter ABA *Model Rule 3.8 Comparison Chart*].

130 California, Georgia, Maine, New Jersey, New York, North Dakota, Ohio, Virginia, and Washington adopted ABA rule and only making minor edits to the language, or adding some qualifications to the rule; however, the overall substance and structure of the ABA rule has remained unchanged. *See infra* Table 1.

131 Alabama and the District of Columbia added intent requirements to the language of their rules. *See infra* Table 1.

132 *See infra* Table 1.

nine have states altered the rule designation in the state rules of professional conduct.[133]

The bottom line is, prosecutors are obligated under Rule 3.8(d) to disclose exculpatory evidence to criminal defendants.[134] Whether a prosecutor is obligated to disclose exculpatory evidence prior to entering into a plea agreement is up for debate among federal circuit courts.[135] So far, the Supreme Court has remained silent; however, the ABA Committee on Ethics and Professional Responsibility ("ABA Committee") answered the question in a Formal Opinion issued in July 2009.[136] The Formal Opinion was drafted specifically to clear up any confusion between a prosecutor's constitutional and ethical obligation to timely disclose evidence favorable to the defense.[137]

2. Tipping One's Hand: Defining A Prosecutor's Ethical Disclosure Obligations

The ABA further defined the terms of the Model Rule 3.8(d) in its Formal Opinion 09-454.[138] The ABA's Formal Opinion took effect on January 1, 2010, effectively clarifying a point that had been debated in courts for years.[139]

The ethical duty imposed by Rule 3.8(d) is "separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders."[140] The ABA Committee made a point to note that the ethical obligations imposed by the rule extended further than the constitutional case law of *Brady v. Maryland*.[141] Rule 3.8(d) was adopted "against the background of the Supreme Court's 1963 decision in *Brady v. Maryland*," but it imposes a more demanding disclosure obligation on prosecutors.[142] The ABA Committee

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133 *See infra* Table 1.

134 MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2019); *see also infra* Table 1.

135 ABA Op. 09-454, *supra* note 34.

136 *Id.*

137 *Id.*

138 *Id.*

139 Theresa A. Newman & James E. Coleman, Jr., *The Prosecutor's Duty of Disclosure Under ABA Model Rule 3.8(d)*, CHAMPION, Mar. 2010, at 20, 20.

140 *Whether Rule of Professional Conduct Governing Prosecutor's Disclosure Obligations Is Coextensive with* Brady *Standard for Disclosure of Exculpatory Evidence and Factual Applications*, 44 A.L.R. 7TH ART. 4, § 2 (2019); *see also* ABA Op. 09-454, *supra* note 34.

141 ABA Op. 09-454, *supra* note 34.

142 *Id.*

explained Rule 3.8(d) requires prosecutors to "steer clear of the constitutional line, erring on the side of caution."[143] The ABA Committee based its rationale on the history of the rule's enactment found in the comments of Rule 3.8(d).[144] A prosecutor's disclosure obligation is "expanded in the ethics field due to the prosecutor's role and responsibility in establishing justice 'and [to make sure] that special precautions are taken to prevent and to rectify the conviction of innocent persons.'"[145] This rationale is echoed in dicta by the Supreme Court regarding a prosecutor's duty to disclose.[146] In *United States v. Agurs*, the Supreme Court acknowledged that a prosecutor's constitutional duty to disclose is an imprecise standard and reasoned that a "prudent prosecutor" would resolve doubts in favor of disclosure.[147]

The most important section of Rule 3.8(d) in regard to pre-plea disclosure of exculpatory evidence is the section on "timely disclosure."[148] Rule 3.8(d) provides that disclosure of evidence must "be made early enough [that it] can be used effectively."[149] This is especially important in the context of pre-plea disclosure, a point noted by the ABA Committee in its formal opinion.[150] A defendant's decision to accept a plea agreement and plead guilty is "strongly influenced by [the] defense counsel's evaluation of the strength of the prosecution's case," and the disclosure of exculpatory evidence prior to a defendant pleading guilty could greatly impact their decision."[151] Rule 3.8(d)'s timely disclosure requirement mirrors the due process rights that a defendant would be afforded if they were to go to trial.[152] It allows defendants to make a fully informed decision to plead guilty and is the first step toward preventing innocent defendants from pleading guilty out of a feeling of necessity.

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143 *Id.*

144 *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2019); *see also* Daniel Conte, *Swept Under the Rug: The* Brady *Disclosure Obligation in a Pre-Plea Context*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 74, 81 (2012).

145 Conte, *supra* note 144, at 81 (quoting MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009)).

146 *See* United States v. Agurs, 427 U.S. 97, 108 (1976).

147 *Id.*

148 *See* MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2019).

149 ABA Op. 09-454, *supra* note 34.

150 The Formal Opinion explains that one of the most significant purposes for timely disclosure is to allow the defense counsel to advise their clients on whether or not to plead guilty. *Id.*

151 *Id.*

152 *Id.*

ANALYSIS

II. GETTING RID OF THE HOUSE'S EDGE: IMPLEMENTING RULE 3.8(D) AND ENFORCING SANCTIONS

Given the unique role of prosecutors in the criminal justice system, they have a responsibility to exercise their authority to protect the rights of both the innocent and the guilty.[153] Although the Supreme Court has remained silent regarding pre-plea disclosure of exculpatory evidence,[154] the ABA Committee has clearly defined Rule 3.8(d) in that regard.[155]

The question is no longer whether the *Brady* doctrine can be applied to the context of plea negotiations, but how to balance the need for a well-defined plea system with protecting a defendant's constitutional rights under the Due Process Clause. The *Brady* doctrine is a constitutional right afforded to defendants under the Due Process Clause, and Model Rule 3.8(d) is an ethical obligation imposed on prosecutors. Although Rule 3.8(d) requires further disclosure than the constitutional case law requires, it does not expand *Brady*. The Model Rules of Professional Conduct simply regulate prosecutorial conduct and outline the parameters of a prosecutor's ethical obligations. Thus, state enforcement of the Model Rules, put in place to govern lawyers' conduct, would employ the disclosure principles behind *Brady* without having to address its constitutional implications.

A. *All or Nothing: Reconciling* Brady *With the Model Rules of Professional Conduct*

The *Brady* doctrine is a well-developed standard that serves a specific purpose but does not have the same effect outside the context of a trial.[156] The *Brady* doctrine, in effect, is a trial right, and attempting to extend the right to plea negotiations distorts the requirements

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153 *See* ABA Standards for Criminal Justice, *supra* note 13; *see also* MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2019).

154 The Supreme Court only ruled on whether impeachment evidence had to be produced prior to a guilty plea and did not take up the issue of exculpatory evidence. United States v. Ruiz, 536 U.S. 622, 625 (2002).

155 ABA Op. 09-454, *supra* note 34.

156 Douglass, *supra* note 105, at 484-86.

established by *Brady*'s progeny. The *Brady* doctrine's fatal flaw is its retroactive function: *Brady* and its progeny do not provide enough guidance to help a prosecutor decide what evidence or information should be disclosed before trial or even during a trial because it is reviewed retroactively.[157] Forcing the *Brady* doctrine to apply in a pre-plea context would require an appellate court to determine why defendants plead guilty and then analyze the materiality of the new evidence in the context of that decision.[158] This simply is not attainable in our criminal justice system.

On the other hand, Model Rule 3.8(d) requires "the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on the trial's outcome," which circumvents the materiality requirements established by *Brady*'s progeny.[159] Rule 3.8(d) requires prosecutors to disclose "evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome.'"[160] Requiring prosecutors to adhere to the disclosure requirements laid out in Rule 3.8(d) gives "the defense the opportunity to decide whether the evidence can be put to effective use" at trial and assist their client in making an informed decision when pleading guilty.[161] Today, ninety-seven percent of criminal cases are resolved by plea bargaining, leaving only three percent of cases protected under the *Brady* doctrine.[162] However, this does not mean that defendants should not be provided exculpatory evidence prior to pleading guilty, or that disclosure of exculpatory evidence should not be regulated. The question is no longer whether the *Brady* doctrine can be applied to the context of plea negotiations, but how to balance the need for a well-defined plea system with protecting a defendant's constitutional rights under the Due Process Clause. This can be

157 *See* Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1556-57 (2010).

158 *See id.*; *see also* Douglass, *supra* note 34, at 484-86.

159 ABA Op. 09-454, *supra* note 34.

160 Newman & Coleman, *supra* note 137, at 21 (quoting ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009)).

161 *Id.*

162 *See Guilty Pleas on the Rise*, *supra* note 41; *see also* Grossman, *supra* note 71, at 1528-29.

achieved by relying on a prosecutor's ethical obligation to disclose exculpatory evidence to the defense under Rule 3.8(d).[163]

In its Formal Opinion, the ABA Committee "officially clarified that the ethical duty of disclosure under Rule 3.8(d) of the Model Rules of Professional Conduct is broader than the constitutional obligation established by *Brady v. Maryland* and its progeny."[164] However, just because the ethical rules have a broader disclosure requirement does not mean they cannot coexist with the requirement set forth by the Supreme Court in *Brady*.[165] The ABA adopted Rule 3.8(d) after the Supreme Court's decision in *Brady* and intended for the rule to impose a "more demanding disclosure obligation" on prosecutors, rather than "simply codify existing constitutional law."[166] A prosecutor's ethical obligations under the Model Rules of Professional Conduct are entirely separate from the constitutional requirements established in *Brady*.[167] Thus, the counterargument that prosecutors would not know which "rule" to follow does not apply.[168]

This is not an either-or standard because prosecutors do not have to choose between following *Brady* or Rule 3.8(d): they are ethically obligated to follow both standards. Rule 3.8(d) does not circumvent *Brady*; it merely imposes broader obligations on the disclosure requirement.[169] This is demonstrated by the application of the rule in conjunction with the Supreme Court's ruling in *United States v. Ruiz*.[170] In *United States v. Ruiz*, the Court held that prosecutors are not constitutionally obligated to disclose impeachment information relating to any of their witnesses prior to entering into a plea agreement.[171] On its face, this determination conflicts with Rule 3.8(d) and the Formal Opinion issued by the ABA Committee on Ethics and Professional Responsibility.[172] However, Rule 3.8(d)'s implementation is

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163 *See* Newman & Coleman, *supra* note 139, at 21-22 (The disclosure obligation laid out in Rule 3.8(d) is "better designed to help level the playing field for criminal defendants and prevent[ing] wrongful convictions.").

164 *Id.* at 20.

165 *See* ABA Op. 09-454, *supra* note 34.

166 *Id.*

167 *See id.*; *see also* Newman & Coleman, *supra* note 139, at 20.

168 *See* Steven Koppell, *An Argument Against Increasing Prosecutors' Disclosure Requirements Beyond Brady*, 27 GEO. J. LEGAL ETHICS 643, 648-49 (2014).

169 *See* ABA Op. 09-454, *supra* note 34.

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

171 *Id.* at 633.

172 Rule 3.8(d) states: "a 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

not precluded because it does not differentiate between exculpatory and impeachment evidence.[173] The Supreme Court's holding in *Ruiz* only explicitly applies to the disclosure of impeachment evidence; thus, under Rule 3.8(d), prosecutors are still ethically obligated to disclose exculpatory evidence in their possession before accepting a guilty plea.[174]

B. *Unstacking the Deck: A Check on Prosecutorial Misconduct*

The criminal justice system is imperfect: it is overburdened and relies on plea agreements to remain afloat, but this does not mean that defendants are any less entitled to due process, whether it be a fair trial or a fair plea negotiation. Requiring pre-plea disclosure of exculpatory evidence in the prosecutor's possession at the time of a plea agreement will restore the balance of due process in guilty plea convictions. Pre-plea disclosure of exculpatory evidence not only allows for a proper bargained-for exchange,[175] but also works to prevent innocent defendants from pleading guilty when evidence of their innocence exists.

Not all prosecutors withhold exculpatory evidence from the defense during the pre-plea process. However, with the number of overturned convictions due to prosecutorial misconduct, it cannot be denied that there is a guilty plea problem in our criminal justice system. The lack of a constitutional requirement in place does not mean that an ethical requirement is not needed. The deterrent effect of imposing sanctions for violating an ethical obligation to disclose evidence is the first step toward fixing this problem.

1. Evening Out the Odds: Enforcing Ethical Disclosure Requirements and Imposing Sanctions

Even though there is a rule in place to regulate prosecutorial ethical disclosure obligations, the rule is rarely implemented by courts.[176] The ABA Committee in its Formal Opinion acknowledged that even though "courts sometimes sanction prosecutors for violating disclo-

guilt of the accused or mitigates the offense. . . ." MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2019); *see* ABA Op. 09-454, *supra* note 34.

173 *Id.*

174 *Id.*

175 *See* Brady v. United States, 397 U.S. 742, 750 (1970).

176 *See* ABA Op. 09-454, *supra* note 34.

sure obligations, disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance."[177] Formal opinions issued by the ABA are not mandatory authority; they are just advisory until the Formal Opinion is intentionally adopted by a state court.[178] However, a bar disciplinary authority could still charge a prosecutor for violating the ethical requirement of one of the Model Rules and motion to have a state court implement sanctions.[179] Consequently, under the current guidelines in place, prosecutors could be sanctioned for violating Model Rule 3.8(d) by failing to disclose exculpatory evidence to the defense prior to a plea agreement in all fifty states and the District of Columbia.

The bottom line is that bar disciplinary authorities and the state courts reviewing their decisions need to start imposing sanctions for prosecutorial misconduct that violates prosecutors' disclosure obligations. Based on the Model Rules already in place, state and professional bar disciplinary bodies can impose sanctions and regulate prosecutorial conduct that violates Model Rule 3.8(d).[180] The problem is these disciplinary bodies rarely exercise this kind of review or take the necessary steps to sanction improper conduct, letting it go unchecked.[181] State courts need to go one step further and adopt the ABA's Formal Opinion.

2. A Winning Hand: State Adoption and Implementation of the ABA Formal Opinion 09-454

Implementing Rule 3.8(d) and initiating sanctions for violating the standard will have a deterrent effect on prosecutorial misconduct. It would essentially take the Court's reasoning behind the original *Brady* standard and apply the same rationale to plea negotiations without having to expand the parameters of the *Brady* doctrine. To achieve this, sanctions would have to be enforced and withholding exculpatory evidence from a defendant before a plea agreement would become grounds for a conduct hearing before the state bar disciplinary committee.

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177 *Id.*

178 Koppell, *supra* note 168, at 648.

179 *Id.*

180 Miriam H. Bear, *Timing Brady*, 115 COLUM. L. REV. 1, 27 (2015).

181 *Id.*

Forcing state disciplinary committees to take action against prosecutors who violate their ethical mandates will resolve the current tension between courts and afford defendants the protection they deserve in the plea-bargaining process. A plea negotiation or bargain should be just that: a bargained-for exchange between the defendant and the prosecutor. A defendant not exercising his Sixth Amendment right to go to trial should not remove all protections put in place to prevent innocent defendants from being convicted of crimes they did not commit. Contrarily, the opposite should occur, and our criminal justice system should be more cautious in ensuring that innocent defendants are not taken advantage of during the plea-bargaining process, a process in which they are nothing but disadvantaged.

C. *Breaking Even: The Overall Effect on Plea Bargaining*

In the modern era of our criminal justice system, where the vast majority of criminal convictions are obtained by a guilty plea, it should follow that the same constitutional rights afforded to a defendant at trial to prevent wrongful convictions should extend to the plea negotiation process. However, this problem could, in large, be resolved by protecting the constitutional rights of defendants and holding prosecutors accountable to their ethical obligations.

1. Preventing Blind Bets: Using Rule 3.8(d) to Protect Innocent Defendants

The criminal justice system's refusal to acknowledge that an innocent defendant can confess or plead guilty to a crime that they did not commit is one that can be easily fixed simply by acknowledging that it exists.[182] The reality of wrongful convictions in our justice system cannot be ignored. Although the plea agreement process is commonly referred to as "plea bargaining"—even by this Comment—a plea agreement is not a bargain. A plea agreement should be a negotiation between two parties where a defendant voluntarily chooses to take a plea and admit their guilt in exchange for a reduced sentence because

[182] *See* RAKOFF, *supra* note 64.

they are guilty, not because they are afraid of being punished during sentencing for trying to prove their actual innocence.[183]

Requiring a mandatory pre-plea disclosure of exculpatory evidence would increase the accuracy of plea bargaining and provide defendants with information that they did not previously have access to.[184] Obtaining this information during the plea-bargaining process would have a substantial effect on a defendant's decision of whether or not to plead guilty, especially if the defendant is innocent.[185] The finality of a guilty plea is no different from a guilty verdict at trial, and treating it differently is a grave miscarriage of justice. Thus, the same due process rights should apply. Providing defendants with exculpatory information prior to a guilty plea will be a large step forward in preventing innocent defendants from succumbing to prosecutorial pressure and pleading guilty to crimes that they did not commit.

2. Gambler's Fallacy: The Plea Framework Remains Intact and Largely Unchanged

Employing a stricter application of the Model Rules of Professional Conduct would not have any effect on plea bargaining. This application would apply only when a prosecutor violated the rules of ethics and would be handled outside of the case by the state bar.[186] A basic principle of the criminal justice system is fundamental fairness. It should follow that the checks in place to ensure that a defendant is not wrongfully convicted should extend not only to the trial, but also to the plea negotiation process because that is where most criminal cases are being resolved. This is where Rule 3.8(d) comes into play.

Rule 3.8(d) is no different from any other ethical obligation imposed by the Model Rules of Professional Conduct and should be treated and disciplined as such. There would be no question that if a

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183 *See* F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 197 (2002).

184 Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 1026, 1028-29 (1989).

185 *Id.* at 996.

186 Disciplinary actions in misconduct cases pertaining to federal prosecutors are handled and reviewed by the bar authorities and disciplinary committees in the state where the misconduct occurred. See Justice Manual, *1-4.320 – Adjudicating Findings of Attorney Professional Misconduct – The Professional Misconduct Review Unit*, THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/jm/jm-1-4000-standards-conduct#1-4.300 (last updated Sept. 7, 2020).

lawyer violated attorney-client privilege that they would be reported, investigated, afforded a hearing, and sanctioned by the state bar upon a finding of guilt.[187] A prosecutor violating Rule 3.8(d) by failing to provide a defendant with exculpatory evidence before a guilty plea should be no different. Enforcing sanctions upon prosecutors who violate Rule 3.8(d) would not have an adverse effect on plea bargaining or any negative impact on the *Brady* doctrine or other constitutional precedent. All it would be doing is enforcing the rules that are already in place governing prosecutorial misconduct.

CONCLUSION

Courts should adopt the American Bar Associations Formal Opinion 09-454[188] and its guidelines for a prosecutor's duty to disclose evidence and information favorable to the defense laid out in Rule 3.8(d) of the Model Rules of Professional Conduct.[189] ABA Rule 3.8(d) of the Model Rules of Professional Conduct requires earlier disclosure of exculpatory evidence than *Brady v. Maryland* and protects a defendant's right to due process by requiring disclosure even when the *Brady* disclosure obligation has not yet been triggered.[190] This rule serves as an additional check on plea-bargaining and would be a step in the right direction to properly inform defendants of the evidence against them before they plead guilty and to prevent innocent defendants from pleading guilty to crimes they did not commit. The necessary rule is already in place to require disclosure of exculpatory evidence in the prosecutor's possession before a defendant pleads guilty; states just need to adopt the proper interpretation of the rule and enforce lack of compliance.

187 *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2019).
188 ABA Op. 09-454, *supra* note 34.
189 MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2019).
190 *Id.*

REFERENCE TABLE: RULE 3.8(D) MODIFICATIONS BY JURISDICTION[191]

ABA Model Rule of Professional Conduct 3.8(d) states a prosecutor in a criminal case shall:

> 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.[192]

Thirty-nine states have adopted the ABA's language governing Rule 3.8(d) verbatim; ten states adopted the ABA rule but made minor edits; and two jurisdictions added an intent requirement to the rules language. Additionally, nine have states altered the rule designation in the state rules of professional conduct.[193]

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191 *See* ABA *Model Rule 3.8 Comparison Chart*, *supra* note 129, at 2-13.

192 MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009).

193 Connecticut (3.8(4)), Rules of Professional Conduct, at 45-46, https://www.jud.ct.gov/Publications/PracticeBook/PB.pdf (last visited on Dec. 26, 2019); Florida (4-3.8(c)), https://www-media.floridabar.org/uploads/2019/09/Ch-4-from-2020_03-SEP-RRTFB-9-19-19-3.pdf; Hawaii (3.8(b)), Rules of Professional Conduct, *Rule 3.8 Performing the Duty of Public Prosecutor or Other Government Lawyer*, at 102, https://www.courts.state.hi.us/docs/court_rules/pdf/2013/2013_hrpc_ada.pdf (last visited on Dec. 26, 2019); Kentucky (SCR 3.130(3.8)(c)), https://cdn.ymaws.com/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_(3.8).pdf; Maine (3.8(b)), https://mebaroverseers.org/regulation/bar_rules.html?id=88228; New Mexico (16-308(D)), *see* ABA *Model Rule 3.8 Comparison Chart*, *supra* note 129, at 9; Oregon (3.8(b)), Rules of Professional Conduct, *Rule 3.8: Special Responsibilities of a Prosecutor,* at 24, http://www.osbar.org/_docs/rulesregs/orpc.pdf (last visited on Dec. 26, 2019); Texas (3.9(d)), https://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct/III—ADVOCATE/3-09-Special-Responsibilities-of-a-Prosecutor; Wisconsin (3.8(f)(1)), Rules of Professional Conduct, *SCR 20:3.8 Special Responsibilities of a Prosecutor,* https://www.wicourts.gov/courts/offices/docs/olrscr20annotated.pdf (last visited on Dec. 26, 2019).

Jurisdiction	**Modifications/ Changes Made to Rule 3.8(d)**[194]
Alabama	Added an intent requirement. "*Not willfully fail to* 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."[195]
California	Removed the ABA's language on sentencing from the rule. "make timely disclosure to the defense of all evidence or information known to the prosecutor *that the prosecutor knows or reasonably should know* tends to negate the guilt of the accused, mitigate the offense, *or mitigate the sentence,* except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."[196]
District of Columbia	Added an intent requirement. "The prosecutor in a criminal case shall *not*: *Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any* evidence or information *that the prosecutor knows or reasonably should know* tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, *intentionally fail to* disclose to the defense *upon request any* unprivileged mitigating information known to the prosecutor *and not reasonably available to the defense,* except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."[197]

194 This chart denotes the changes or slight alternations that individual states have made when adopting the language of Rule 3.8 from the ABA Model Rules of Professional Conduct. Any added language has been italicized and language that was removed from the rule has been crossed out.

195 Alabama Dakota Rules of Professional Conduct, *Rule 3.8: Special Responsibilities of a Prosecutor* (emphasis added), http://judicial.alabama.gov/docs/library/rules/cond3_8.pdf (last visited on Dec. 26, 2019).

196 California Rules of Professional Conduct, *Rule 3.8: Special Responsibilities of a Prosecutor* (emphasis added), http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_3.8-Exec_Summary-Redline.pdf (last visited on Dec. 26, 2019).

197 District of Columbia Rules of Professional Conduct, *Rule 3.8: Special Responsibilities of a Prosecutor* (emphasis added), https://www.dcbar.org/For-Lawyers/Legal-Ethics/Rules-of-Professional-Conduct/Advocate/Special-Responsibilities-of-a-Prosecutor (last visited on Aug. 15, 2020).

Georgia	Removed the ABA's language on sentencing from the rule. "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."[198]
Maine	Removed the ABA's language on sentencing from the rule. "make timely disclosure *in a criminal or juvenile case to counsel for the defendant, or to a defendant without counsel, of the existence of* evidence or information known to the prosecutor *after diligent inquiry and within the prosecutor's possession or control,* that tends to negate the guilt of the accused, mitigate the degree of the offense, *or reduce the punishment*."[199]
New Jersey	Removes "or information" from the rule's language. "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."[200]
New York	"A prosecutor *or other government lawyer in criminal litigation* shall make timely disclosure *to counsel for the defendant or to a defendant who has no counsel of the existence of* evidence or information known to the prosecutor *or other government lawyer* that tends to negate the guilt of the accused, mitigate *the degree of* the offense, *or reduce the sentence*, except when relieved of this responsibility by a protective order of a tribunal."[201]
North Dakota	"*disclose to the defense at the earliest practical time* all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and,

[198] Georgia Rules of Professional Conduct, *Rule 3.8: Special Responsibilities of a Prosecutor*, https://www.gabar.org/Handbook/index.cfm#handbook/rule83 (last visited on Dec. 26, 2019).

[199] Maine Rules of Professional Conduct, *Rule 3.8: Special Responsibilities of a Prosecutor* (emphasis added), https://mebaroverseers.org/regulation/bar_rules.html?id=88228 (last visited on Dec. 26, 2019).

[200] New Jersey Rules of Professional Conduct, *RPC 3.8 Special Responsibilities of a Prosecutor*, at 29, https://www.njcourts.gov/attorneys/assets/rules/rpc.pdf (last visited on Dec. 26, 2019).

[201] New York Rules of Professional Conduct, *Rule 3.8 Special Responsibilities of Prosecutors and Other Government Lawyers*, at 129 (emphasis added), https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671 (last visited on Dec. 26, 2019).

	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."[202]
Ohio	Removes "to the tribunal" from the requirement of disclosing information related to sentencing. "The prosecutor in a criminal case shall *not do any of the following*: *fail to* 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, *fail to* disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by an order of the tribunal."[203]
Virginia	A lawyer engaged in a prosecutorial function shall: "make timely disclosure *to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows* tends to negate the guilt of the accused, mitigate the degree of the offense, *or reduce the punishment*, except when *disclosure is precluded or modified by order of a court*."[204]
Washington	Removes "unprivileged" from the rule's language. "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."[205]

[202] North Dakota Rules of Professional Conduct, *Rule 3.8: Special Responsibilities of a Prosecutor* (emphasis added), https://www.ndcourts.gov/legal-resources/rules/ndrprofconduct/3-8 (last visited on Dec. 26, 2019).

[203] Ohio Rules of Professional Conduct, *Rule 3.8: Special Responsibilities of a Prosecutor,* at 128-130 (emphasis added), http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf (last visited on Dec. 26, 2019).

[204] Virginia Rules of Professional Conduct, *Rule 3.8: Special Responsibilities of a Prosecutor* (emphasis added), http://www.vsb.org/pro-guidelines/index.php//main/print_view (last visited on Dec. 26, 2019).

[205] Washington Rules of Professional Conduct, *RPC 3.8 Special Responsibilities of a Prosecutor*, http://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_03_08_00.pdf (last visited on Dec. 26, 2019).

Wisconsin	The substance of the rule remained unchanged; however, the preceding paragraph was modified to say: "[a] prosecutor, other than a municipal prosecutor, in a criminal case or a proceeding that could result in deprivation of liberty shall:"[206]

[206] Wisconsin Rules of Professional Conduct, *SCR 20:3.8 Special Responsibilities of a Prosecutor,* https://www.wicourts.gov/courts/offices/docs/olrscr20annotated.pdf (last visited on Dec. 26, 2019).