

Exculpatory Evidence Pre-plea without Extending *Brady*

Brian Sanders[†]

Innocent defendants sometimes plead guilty. This is a problem. Some suggest fixing this problem with a constitutional requirement that prosecutors disclose exculpatory evidence before a defendant pleads guilty. A circuit split has thus developed concerning whether Brady, which requires disclosure of exculpatory evidence, extends to the pre-plea context. The Supreme Court's jurisprudence, however, likely bars a constitutional requirement for pre-plea disclosure of exculpatory evidence. Faced with this exigency, this Comment argues that contract law should form the legal basis for pre-plea disclosure. Specifically, the contract doctrine of constructive fraud provides a suitable remedy. While big boy clauses, which defeat constructive fraud claims, initially appear disastrous to this regime, such clauses are likely the redeeming quality of a constructive fraud solution. To safeguard innocent defendants from using big boy clauses, this Comment suggests open bargaining and modifications to judicial plea colloquies.

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[†] BA 2017, Pepperdine University; JD Candidate 2020, The University of Chicago Law School. I thank Professor Douglas Baird for his critiques, especially in regard to big boy clauses. I thank Brendan Anderson, Tiberius Davis, and Zachary Reynolds for listening to me talk incessantly about exculpatory evidence and for providing indispensable feedback. I thank Charles F. Capps for all his insights and especially for his critique of my formal logic.

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INTRODUCTION

George is eighteen. He's in ninth grade special education. And he's in prison.

One evening, law enforcement officers took George to a detention facility on suspicion of public intoxication and automobile burglary. George tried to make a call at the facility, but the phone was broken. He banged the phone against its receiver and

gestured obscenely toward a security camera. Several officers attempted to put George in a padded cell while he cooled off. But George didn't want to go into a padded cell. A scuffle ensued.

Four surveillance cameras captured the scene. The footage showed that George didn't assault any officers. But no one told George about the footage, and the local district attorney's office charged George with felonious assault on a public servant anyway. Faced with a felony charge and without access to evidence that would prove his innocence, George did what he thought best.

George pleaded guilty.

Now, as George begins his eight-year prison sentence, there's good news and bad news. The good news is that, although he doesn't know it yet, George will eventually get his hands on the footage that proves his innocence. He'll then use that to get out of prison. The bad news is that at eighteen years old, three years away from finishing high school, and in prison, George won't find out about this footage for another four years.¹

* * *

George Alvarez's story epitomizes a significant problem in the US criminal justice system: innocent defendants sometimes plead guilty while prosecutors withhold exculpatory evidence. Courts define exculpatory evidence as evidence that is both "favorable" to a defendant and "material either to guilt or to punishment."² As of 2019, 41 out of the 365 DNA exonerations in the US criminal justice system involved defendants who pleaded guilty

¹ For the entire story put forward by the defendant, see *Alvarez v City of Brownsville*, 904 F3d 382, 385–88 (5th Cir 2018) (en banc). George Alvarez's defense team gave a compelling story, but also a misleading one. In order to get habeas corpus relief, Alvarez's attorneys submitted a video with the thirty seconds leading up to the alleged crime redacted. Id at 394 (Jones concurring). Those thirty seconds show Alvarez quarreling with officers and defying their instructions, such that his claim of actual innocence "is supportable only if one sees no more than the redacted video." Id. Instead of objecting to the video, the DA's office "immediately agreed to a new trial, and apparently offered an agreed set of findings and conclusions." Id. Why did the government lawyers fail to object to the redacted video? While the record does not make it entirely clear, there are some suspicious facts: Alvarez's attorney in his state habeas corpus case, Eduardo Lucio, was an indicted co-conspirator in a bribery prosecution of the district attorney of the county in which Alvarez was prosecuted. Id. Alvarez's former attorney, who was an unindicted co-conspirator in the same bribery prosecution, gave the supporting testimony for Alvarez's appeal. Id. While these facts suggest that the Supreme Court should not use *Alvarez* to decide important issues, the defense version of the story still typifies the problem that this Comment addresses.

² *Brady v Maryland*, 373 US 83, 87 (1963).

to crimes they did not commit.³ The actual number of innocent defendants who have pleaded guilty likely surpasses this statistic, because pleas can be difficult to overturn⁴ and because convicted defendants often discover exculpatory evidence only by some fortuitous occurrence.⁵

Many scholars blame prosecutors for failing to disclose exculpatory evidence pre-plea (“pre-plea disclosure”), contending that such suppression is a significant cause of innocent people pleading guilty.⁶ Nevertheless, federal circuit courts appear to disagree about whether the Constitution requires pre-plea disclosure.⁷ This circuit split presents a fundamental question: Is there any legal basis for requiring prosecutors to disclose exculpatory evidence before a defendant pleads guilty?

Instead of resolving this question from a constitutional perspective, this Comment argues that contract law principles should form the legal basis for pre-plea disclosure. This approach is justifiable given that a persistent problem plagues current constitutional arguments for pre-plea disclosure. While this Comment discusses the constitutional argument in depth below, a brief discussion of the Court’s jurisprudence reveals the obstacle that due process–based arguments for pre-plea disclosure face and that this Comment seeks to avoid. The Supreme Court in *Brady v Maryland*⁸ held that a prosecutor’s “suppression . . . of evidence favorable to an accused . . . violates due process.”⁹ While there is no doubt that *Brady* imposes duties on prosecutors by the time of trial, judges and scholars alike have argued that a prosecutor’s failure to disclose exculpatory evidence pre-plea, long before any trial, also violates a defendant’s due process right.¹⁰

³ *DNA Exonerations in the United States* (The Innocence Project, 2019), archived at <http://perma.cc/5Q6H-EDC4>.

⁴ See Samuel R. Wiseman, *Brady, Trust, and Error*, 13 *Loyola J Pub Interest L* 447, 456 (2012).

⁵ See, for example, *Alvarez*, 904 F3d at 388 (stating that “the videos . . . surfaced during discovery for an unrelated § 1983 case”).

⁶ See, for example, Wiseman, 13 *Loyola J Pub Interest L* at 466 (cited in note 4).

⁷ Compare, for example, *Alvarez*, 904 F3d at 394, with *McCann v Mangialardi*, 337 F3d 782, 788 (7th Cir 2003).

⁸ 373 US 83 (1963).

⁹ *Id.* at 87.

¹⁰ See, for example, *Alvarez*, 904 F3d at 416 (Costa dissenting) (“Due process requires more than we afford the accused today.”). For a summary of scholarship arguing that due process requires pre-plea disclosure, see generally Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist’s Guide to Loss, Abandonment and Alienation*, 68 *Fordham L Rev* 2011 (2000).

There is, however, a problem with inferring that *Brady* extends to the pre-plea context. In *United States v Ruiz*,¹¹ the Court addressed impeachment evidence—which a party can use to undermine a witness’s credibility¹²—holding that “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.”¹³ While due process arguments for pre-plea disclosure of exculpatory evidence often try to distinguish between the impeachment evidence mentioned in *Ruiz* and the exculpatory evidence described in *Brady*,¹⁴ the Court in *United States v Bagley*¹⁵ rejected this distinction.¹⁶

This Comment refers to this problem as the *Bagley/Ruiz* syllogism: if exculpatory and impeachment evidence are constitutionally indistinguishable, and if there is no constitutional requirement for pre-plea disclosure of impeachment evidence, then there is good reason to think the Court might reject the notion that due process requires pre-plea disclosure of exculpatory evidence.

While critics can posit that the premises of the syllogism are false,¹⁷ the plain language of *Bagley* and *Ruiz* strongly supports the conclusion that due process does not require pre-plea disclosure. Moreover, although the Court often reviews writs of certiorari on the pre-plea disclosure issue, the Court has declined to take up this issue for nearly two decades.¹⁸

Despite the Court’s reluctance to address the issue of pre-plea disclosure, litigants and scholars have expended vast resources arguing that due process requires pre-plea disclosure.¹⁹ Regardless, in many jurisdictions, defendants like George Alvarez remain incarcerated. Given the circuit split and the uphill battle

¹¹ 536 US 622 (2002).

¹² *Napue v Illinois*, 360 US 264, 269 (1959).

¹³ *Ruiz*, 536 US at 633.

¹⁴ See, for example, *McCann*, 337 F3d at 787–88.

¹⁵ 473 US 667 (1985).

¹⁶ *Id.* at 676 (“This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.”).

¹⁷ See Part II.

¹⁸ See generally, for example, *Conroy v United States*, 559 US 941 (2010) (denying certiorari on a pre-plea disclosure issue); *Smith v Mills*, 555 US 830 (2008) (denying certiorari); *Ohiri v United States*, 555 US 1143 (2009) (denying certiorari); *Alvarez v City of Brownsville*, 139 S Ct 2690 (2019) (denying certiorari).

¹⁹ For a list of only a fraction of the many cases on which litigants have expended resources arguing for pre-plea disclosure, see Part II. For a list of some of the many articles arguing for pre-plea disclosure, see Blank, 68 *Fordham L Rev* at 2083–84 (cited in note 10).

that due process arguments face, this Comment begins with the following question: If a defendant does not have a due process right to receive exculpatory evidence pre-plea, is there any other legal basis that requires pre-plea disclosure? This Comment argues that in many cases, prosecutors must still disclose exculpatory evidence pre-plea, not on due process grounds, but instead on the basis of contract law. Specifically, this Comment argues that if a prosecutor withholds exculpatory evidence, a defendant may overturn his conviction by rescinding his plea agreement based on the doctrine of constructive fraud.

This Comment proceeds in three parts. Part I describes the Court's exculpatory evidence jurisprudence, beginning with the basic due process right to exculpatory evidence, as expressed in *Brady*, and impeachment evidence, as expressed in *Giglio v United States*.²⁰ *United States v Agurs*²¹ and *Kyles v Whitley*²² provide characteristics of exculpatory evidence that later inform this Comment's discussion of constructive fraud. Next, this Part examines *Bagley*'s discussion of the relationship between exculpatory evidence and impeachment evidence, along with *Ruiz*'s holding that the Constitution does not require pre-plea disclosure of impeachment evidence. Finally, this Part analyzes the syllogism that emerges from *Bagley* and *Ruiz*.

Part II describes the federal circuit courts' various possible responses to the *Bagley/Ruiz* syllogism. The Second, Seventh, Ninth, and Tenth Circuits, on the one hand, all appear to require pre-plea disclosure: they do so by (1) using procedure to circumvent the syllogism, (2) ignoring the syllogism, or (3) attacking one of the syllogism's premises. The First, Fourth, and Fifth Circuits, on the other hand, do not require pre-plea disclosure, characterizing the rights to receive exculpatory evidence and impeachment evidence as trial rights and thereby affirming both premises of the syllogism.

Part III argues that the solution to the circuit split does not rest on due process grounds at all, but instead on principles of contract law. This Part discusses how the elements of constructive fraud—(1) a false representation, (2) reasonable reliance, (3) detriment, and (4) duty—are often present when a prosecutor fails to disclose exculpatory evidence. This Part also proposes that

²⁰ 405 US 150 (1972).

²¹ 427 US 97 (1976).

²² 514 US 419 (1995).

modifications to judicial plea colloquies can curb any abuses created by so-called big boy clauses, which seek to contractually negate the “reasonable reliance” element of constructive fraud.²³

I. BACKGROUND: FROM *BRADY* TO THE *BAGLEY/RUIZ* SYLLOGISM

This Comment makes a contract law argument instead of a due process argument for pre-plea disclosure. The constitutional background, however, remains relevant for two reasons. First, the circuit split on this issue is based on constitutional law. Thus, to understand why this issue has generated divergent approaches, one must comprehend the precedents that produced the split. Second, because all courts that require pre-plea disclosure have relied on due process, this Comment bears the burden of showing why a contract law approach is preferable for both judges and litigants. In short, the due process rationale for pre-plea disclosure is relevant to this Comment because it shows why contract law provides a superior solution.

Thus, Part I.A reviews the Court’s original explication of the basic constitutional rights to receive exculpatory and impeachment evidence in *Brady* and *Giglio*. Part I.B examines several cases in which the Court explicated characteristics of the rights it had created in those cases. Part I.C explains why the *Bagley/Ruiz* syllogism creates an obstacle to those who argue for pre-plea disclosure on due process grounds.

A. The Court’s Creation of the Rights to Receive Exculpatory and Impeachment Evidence

The Fifth Amendment says that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”²⁴ Certain rights that go hand in hand with due process, such as the right to a jury trial²⁵ and the right to confront accusers,²⁶ appear in the constitutional text. The Supreme Court has also found that certain unenumerated rights fall within the ambit of the Due Process Clause.

²³ Big boy clauses negate the “reasonable reliance” element of constructive fraud by asserting that a defendant pleaded guilty without reliance on any exculpatory evidence.

²⁴ US Const Amend V. Similarly, the Fourteenth Amendment prohibits a state from depriving “any person of life, liberty, or property, without due process of law.” US Const Amend XIV.

²⁵ US Const Art III, § 2, cl 3.

²⁶ US Const Amend VI.

In 1963, the Supreme Court in *Brady* announced one of these unenumerated rights, finding that the Due Process Clause includes the right to receive exculpatory evidence.²⁷ John Brady and Donald Boblit had both participated in a murder.²⁸ Before Brady went to trial, his counsel requested that the prosecutor turn over Boblit's statements concerning the murder.²⁹ The prosecutor purported to comply with this request, but in fact failed to turn over a statement in which Boblit confessed to the murder.³⁰ At trial, Brady testified that he had participated in the crime, but had not committed the "actual killing."³¹

The Court concluded that the prosecutor's failure to disclose exculpatory evidence, "where the evidence [was] material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," violated Brady's due process right.³² Concerns about justice animated the Court's holding.³³ The Court also noted that "[s]ociety wins" when "criminal trials are fair," and the criminal justice system "suffers when any accused is treated unfairly."³⁴ Thus, even though the Court's justification comprised a single paragraph, it is clear that concerns about the justice and fairness of a trial bolstered *Brady*.

Brady has some important limitations: in order to meet the *Brady* standard, exculpatory evidence must be both "favorable" to the accused³⁵ and "material."³⁶ While one can glean definitions for each term from the surrounding text, *Brady* explicitly defined neither. Furthermore, *Brady* dealt only with situations in which the "prosecution [] withholds evidence *on demand* of an accused," and not when a defendant fails to request exculpatory evidence.³⁷ Finally, *Brady* did not address whether its holding applied to impeachment evidence.

²⁷ 373 US at 87.

²⁸ *Id.* at 84.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Brady*, 373 US at 84.

³² *Id.* at 87.

³³ *Id.* at 87–88.

³⁴ *Id.* at 87.

³⁵ *Brady*, 373 US at 88 (describing favorable evidence as that which "tend[s] to exculpate him or reduce the penalty").

³⁶ *Id.* (describing materiality by asking "how much good Boblit's undisclosed confession would have done Brady if it had been before the jury" or whether suppression of the evidence was "prejudicial to the defendant").

³⁷ *Id.* (emphasis added).

The relationship between exculpatory and impeachment evidence is crucial to this Comment's conclusion that contract law is a preferable solution. Thus, it is worth pausing to explicate the nature of impeachment evidence before analyzing how the Court handles it. Impeachment evidence is evidence that affects the "truthfulness and reliability of a given witness" at trial, when that witness's credibility "may well be determinative of guilt or innocence."³⁸ Because impeachment evidence could be material and favorable to a defendant, impeachment evidence, at first glance, appears to be one variety of exculpatory evidence under *Brady*. However, it is factually distinct from exculpatory evidence in that its relevance depends on whether the prosecution intends to call the impeached witnesses at trial.³⁹

In 1972, about ten years after *Brady*, the Court addressed the relationship between impeachment evidence and exculpatory evidence in *Giglio*.⁴⁰ John Giglio was convicted of passing forged money orders.⁴¹ At trial, the only witness connecting Giglio to the crime was his co-conspirator Robert Taliento.⁴² Defense counsel later learned, however, that an individual at the US Attorney's Office had promised Taliento that "if he testified before the grand jury and at trial he would not be prosecuted."⁴³

Giglio held that evidence that impeached the credibility of Taliento, namely that he struck a deal with the government, fell within the general rule of *Brady*.⁴⁴ As a consequence, prosecutors must disclose impeachment evidence to a defendant in order to avoid violating a defendant's due process right.⁴⁵ *Giglio* did not explicitly rely on *Brady*'s concern for a fair trial. The Court instead concluded that "rudimentary demands of justice" dictated its holding.⁴⁶ Thus, given the conclusion that impeachment evidence falls within the *Brady* rule, the concerns underlying *Brady* likely illuminated *Giglio*'s reasoning, with a special emphasis on justice.

In short, these two seminal cases established the due process rights to receive exculpatory and impeachment evidence, and

³⁸ *Napue v Illinois*, 360 US 264, 269 (1959).

³⁹ See *Ruiz*, 536 US at 629–30.

⁴⁰ 405 US 150 (1972).

⁴¹ *Id.* at 150.

⁴² *Id.* at 151.

⁴³ *Id.* at 152.

⁴⁴ *Giglio*, 405 US at 154–55.

⁴⁵ *Id.*

⁴⁶ *Id.* at 153.

they signaled some connection between the two. Several aspects of the new rights, however, remained undefined after *Giglio*. First, the Court did not say whether due process requires disclosure of exculpatory evidence even when the defendant fails to request such evidence. Second, it was unclear to what extent a defendant had to prove a prosecutor's knowledge of exculpatory evidence. Third, the Court did not define the precise standard for determining whether exculpatory evidence is material. Fourth, the Court did not precisely define the relationship between impeachment evidence and exculpatory evidence. Finally, it was not clear when the rights to receive *Giglio* and *Brady* information attached. Over the next few decades, several of the Court's cases addressed these ambiguities. The next Section considers some of these cases, as their holdings and underlying rationales are crucial to show that constructive fraud maps onto the typical exculpatory evidence case.

B. The Characteristics of the Rights to Receive Exculpatory and Impeachment Evidence

This Section proceeds in two parts. First, it examines *Agurs* and *Kyles*, two cases that are not directly relevant to due process arguments for pre-plea disclosure, but that instead inform this Comment's discussion of the duty and scienter requirements of constructive fraud. Second, this Section examines *Bagley* and *Ruiz*, two cases that together form the primary obstacle to a due process mandate for pre-plea disclosure.

1. *Agurs*'s use of prosecutorial duty and *Kyles*'s scienter requirement.

In *Agurs*, the Court concluded that a defendant is entitled to receive *Brady* material even when she fails to request it.⁴⁷ Linda Agurs stabbed James Sewell.⁴⁸ Agurs claimed self-defense, but the jury rejected her claim.⁴⁹ Defense counsel failed to request exculpatory evidence, but the defense later discovered that Sewell had a criminal record for assaults and carrying a deadly weapon, both of which would have supported Agurs's self-defense claim.⁵⁰

⁴⁷ *Agurs*, 427 US at 107.

⁴⁸ *Id.* at 98.

⁴⁹ *Id.* at 100.

⁵⁰ *Id.* at 100–01.

The Court held that when exculpatory evidence is “material,”⁵¹ fairness requires that prosecutors turn it over regardless of whether a defendant requests it.⁵²

In addition to fairness, the Court also relied on the concept of prosecutorial duty: the prosecutor has a duty to “prosecute the accused with earnestness and vigor”⁵³ and to see that “justice shall be done.”⁵⁴ This characterization of prosecutorial duties comes from *Berger v United States*,⁵⁵ which describes the “twofold aim” of the prosecutor that “guilt shall not escape or innocence suffer.”⁵⁶ Specifically, *Agurs* noted that “the prosecutor’s duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.”⁵⁷

Next, in *Kyles*, the Court also relied on prosecutorial duties in deciding whether a defendant had to prove a prosecutor’s knowledge of exculpatory evidence under *Brady*. Curtis Kyles allegedly shot a sixty-year-old woman in her left temple.⁵⁸ The prosecution withheld several pieces of evidence, however, that showed that the man who originally blamed Kyles, Joseph Wallace, might have been the perpetrator.⁵⁹ The prosecutor was unaware of this evidence until after trial, even though it was in police custody.⁶⁰ The Court held that the “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”⁶¹

In examining materiality, the Court recognized two sorts of prosecutorial duties: the Court concluded that “the rule [of materiality] in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice.”⁶² In other words, the American Bar Association (ABA) requires disclosure of

⁵¹ *Agurs*, 427 US at 112 (finding that evidence is material “if the omitted evidence creates a reasonable doubt that did not otherwise exist”).

⁵² *Id.* at 107 (“[I]f the 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.”).

⁵³ *Id.* at 110.

⁵⁴ *Id.* at 111 (quotation marks omitted).

⁵⁵ 295 US 78 (1935).

⁵⁶ *Id.* at 88.

⁵⁷ *Agurs*, 427 US at 111.

⁵⁸ *Kyles*, 514 US at 423.

⁵⁹ *Id.* at 428–29.

⁶⁰ *Id.* at 438.

⁶¹ *Id.* at 437.

⁶² *Kyles*, 514 US at 437.

any evidence that tends to exculpate, whereas *Brady* requires disclosure only of *material* evidence.⁶³ In short, *Kyles* did away with any requirement that a defendant prove the individual prosecutor's knowledge of the exculpatory evidence, while also recognizing the difference between constitutionally imposed prosecutorial duties and ABA-imposed prosecutorial duties.

Agurs's and *Kyles*'s discussions of prosecutorial duties inform this Comment's discussion of duty in the constructive fraud context. *Kyles*'s lack of a scienter requirement also shows that a constructive fraud remedy is suitable. To see why a contract law remedy is superior to a constitutional remedy in the first place, however, one must first observe the *Bagley/Ruiz* syllogism.

2. The premises of the *Bagley/Ruiz* syllogism.

To understand the obstacle that due process arguments for pre-plea disclosure face, one must understand the premises of what this Comment refers to as the *Bagley/Ruiz* syllogism. Each case presents a premise. First, this Section explains *Bagley*'s conclusion that exculpatory and impeachment evidence are not constitutionally distinct. Second, this Section describes *Ruiz*'s holding that pre-plea disclosure of impeachment evidence is not constitutionally required.

Bagley considered the relationship between impeachment and exculpatory evidence. The government indicted Hughes Bagley for fifteen firearm and narcotics offenses.⁶⁴ While the law enforcement officers testifying against Bagley at trial said that they had not received any reward for their testimony, Bagley later found evidence that the government had paid each officer \$300.⁶⁵

Before *Bagley* reached the Supreme Court, the Ninth Circuit had "treated impeachment evidence as constitutionally different from exculpatory evidence," finding that withholding impeachment evidence was more egregious.⁶⁶ The Supreme Court held that it had previously "rejected any such distinction between impeachment evidence and exculpatory evidence."⁶⁷ In order to apply the materiality standard of *Agurs* and resolve the dispute in

⁶³ Id.

⁶⁴ *Bagley*, 473 US at 669.

⁶⁵ Id at 670–71.

⁶⁶ Id at 676.

⁶⁷ Id.

Bagley, the Court necessarily had to show that impeachment evidence falls under the rules of *Brady* and its progeny.⁶⁸ Four Justices have described this statement as a “significant development[]” of the Court’s *Brady* jurisprudence.⁶⁹

The Court also crafted a materiality standard, finding that a piece of evidence is material for *Brady* purposes “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”⁷⁰ A reasonable probability is one “sufficient to undermine confidence in the outcome.”⁷¹

In 2002, the Court decided *Ruiz*.⁷² Immigration authorities found marijuana in Angela Ruiz’s luggage, and the US Attorney’s Office offered Ruiz a plea agreement.⁷³ The agreement stated that the government had turned over “any known information establishing the factual innocence of the defendant” and that Ruiz waived her right to receive “impeachment information . . . as well as the right to receive information supporting any affirmative defense.”⁷⁴

Although criminal defendants have wide latitude in waiving constitutional and statutory protections in exchange for favorable plea deals,⁷⁵ the Ninth Circuit had held that “a defendant’s right to receive undisclosed *Brady* material cannot be waived through a plea agreement.”⁷⁶ A defendant’s ignorance of a piece of impeachment evidence in the government’s files, the argument goes, precludes a defendant from making a plea “voluntarily and intelligently to satisfy due process requirements.”⁷⁷ However, a unanimous Supreme Court disagreed, holding that “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.”⁷⁸ The language surrounding this holding, however, furnished the fodder for the circuit split.

⁶⁸ *Bagley*, 473 US at 676–82.

⁶⁹ *Connick v Thompson*, 563 US 51, 99 n 16 (2011) (Ginsburg dissenting), citing *Bagley*, 473 US at 676.

⁷⁰ *Bagley*, 473 US at 682.

⁷¹ *Id.* This materiality standard manifests in this Comment’s discussion of the materiality standard applicable to a constructive fraud claim in Part III.

⁷² 536 US 622.

⁷³ *Id.* at 625.

⁷⁴ *Id.* (quotation marks, alterations, and citations omitted).

⁷⁵ See *United States v Mezzanatto*, 513 US 196, 210 (1995).

⁷⁶ *United States v Ruiz*, 241 F3d 1157, 1165 (9th Cir 2001), *revd.*, 536 US 622 (2002).

⁷⁷ *Id.* at 1164.

⁷⁸ *Ruiz*, 536 US at 633.

Much of the Court's reasoning applied explicitly to both impeachment and exculpatory evidence. Like *Brady*, the Court's underlying rationale was that impeachment evidence "is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*."⁷⁹ The Court concluded that waivers in plea agreements are generally voluntary, so long as a defendant understands "the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it."⁸⁰ Significantly, the Court characterized both rights to exculpatory and impeachment evidence as "trial-related rights."⁸¹ Finally, mirroring *Bagley*, the Court concluded that it was "difficult to distinguish, in terms of importance, (1) a defendant's ignorance of grounds for impeachment of potential witnesses at a possible future trial from (2) the varying forms of ignorance at issue" in other cases in which the defendant "misapprehended the quality of the State's case."⁸²

On the other hand, the Court in a solitary sentence singled out impeachment evidence. The Court found that it was "particularly difficult to characterize impeachment information as critical information" due to "the random way in which such information may, or may not, help a particular defendant."⁸³

Justice Clarence Thomas objected to this supposedly "flawed characterization about the usefulness of certain types of information" in his concurrence.⁸⁴ Justice Thomas also highlighted the majority's conclusion that due process does not require pre-plea disclosure of impeachment evidence or affirmative defense information.⁸⁵ As the majority agreed, *Brady* was concerned with ensuring a fair trial and, according to Justice Thomas, the plea agreement stage does not implicate concerns about a fair trial regardless of the type of evidence withheld.⁸⁶

⁷⁹ Id at 629 (emphases in original).

⁸⁰ Id (emphases in original).

⁸¹ Id at 631.

⁸² *Ruiz*, 536 US at 631.

⁸³ Id at 630.

⁸⁴ Id at 634 (Thomas concurring).

⁸⁵ Id at 633.

⁸⁶ *Ruiz*, 536 US at 634.

C. The Problem Presented by the *Bagley/Ruiz* Syllogism

Given this background, what is the problem facing due process arguments for pre-plea disclosure? The problem is the *Bagley/Ruiz* syllogism: *Bagley* held that there was no constitutional distinction between exculpatory and impeachment evidence. *Ruiz* held that there was no constitutional requirement to disclose impeachment evidence pre-plea. If the Court relies on rudimentary rules of logic,⁸⁷ it necessarily follows that pre-plea disclosure of exculpatory evidence is not constitutionally required.⁸⁸ Several courts have already recognized this syllogism.⁸⁹

The point of this Section is not that due process arguments for pre-plea disclosure are impossible or unsound. Instead, this

⁸⁷ See, for example, *Dura Pharmaceuticals, Inc v Broudo*, 544 US 336, 342 (2005) (“[A]s a matter of pure logic, at the moment the transaction takes place, the plaintiff has suffered no loss.”); *Shapiro v United States*, 335 US 1, 25 (1948) (“[S]urely logic as well as history requires a similar reading of the proviso.”). Justices often critique one another when they believe their colleagues have used flawed logic. See, for example, *New York v Harris*, 495 US 14, 21 (1990) (Marshall dissenting) (“The majority’s conclusion . . . amounts to nothing more than an analytical sleight of hand, resting on errors in logic.”); *Atkins v Parker*, 472 US 115, 136 (1985) (Brennan dissenting) (asking whether an “implication is logically required”).

⁸⁸ Lest the reader overlook the logical necessity of this conclusion, a brief formal logic analysis is warranted: Figure 1 shows the logical necessity of the conclusion that pre-plea disclosure is not constitutionally required. “E” stands for the proposition that pre-plea exculpatory evidence disclosure is constitutionally required. “I” stands for the proposition that pre-plea impeachment evidence disclosure is constitutionally required. The tilde symbol, “~,” negates any premise that it precedes. *Symbolic Logic {Philosophy Index}*, (Philosophy-Index.com, 2019), archived at <http://perma.cc/A88Y-F4RU>. The “≡” symbol expresses a biconditional, also described as “equivalence.” *Id.* This means that each proposition is necessary and sufficient to prove the other. *Id.* The “∴” symbol signals a conclusion. *Id.* The proof is explicated below, but it appears as follows:

FIGURE 1
 I ≡ E
 ~ I
 ∴ ~ E

“~I” expresses *Ruiz*’s holding that pre-plea impeachment evidence disclosure is not constitutionally required. The biconditional, “≡,” expresses that two propositions are equivalent, and this appropriately expresses *Bagley*’s conclusion that there is no constitutional distinction between impeachment and exculpatory evidence (in other words, that they are constitutionally equivalent). *Id.* Thus, given the biconditional’s expression of equivalence, if one proposition in the biconditional is false (~I), then the other proposition must of necessity be false (~E).

Thus, the syllogism of Figure 1 is valid, which means that if the premises are true, the conclusion necessarily follows. Any judge or scholar who believes that Supreme Court precedent means what it says must also affirm that, according to the Supreme Court in *Bagley* (I ≡ E) and *Ruiz* (~I), each premise is true.

⁸⁹ See, for example, *Friedman v Rehal*, 618 F3d 142, 154 (2d Cir 2010); *Clark v Lewis*, 2014 WL 1665224, *8 (ED Cal).

Section shows the obstacle that the *Bagley/Ruiz* syllogism creates in order to best frame the main theoretical responses to the syllogism.

II. THE CIRCUITS' RESPONSES TO THE *BAGLEY/RUIZ* SYLLOGISM

Given the Court's reluctance to extend its holding in *Ruiz* beyond impeachment evidence, lower courts have diverged in their interpretations. On the one hand, some courts hold that *Ruiz* instead created a distinction between impeachment and exculpatory evidence. Under this interpretation, pre-plea disclosure is constitutionally required, because exculpatory evidence, unlike impeachment evidence, is critical information. On the other hand, some courts hold that *Ruiz* was applying the general rule that there is no constitutional right to receive *Brady* evidence pre-plea. Under this interpretation, a criminal defendant only triggers *Brady* obligations by actually proceeding to trial.

A. Some Circuits Appear to Hold That Due Process Requires Pre-plea Exculpatory Evidence Disclosure

There are a few ways for courts to conclude that pre-plea disclosure is constitutionally required, all of which involve denying the truth of the *Bagley* premise. This Section first analyzes how a court can require pre-plea disclosure on largely procedural grounds. With this approach, a court can hint at a distinction between exculpatory and impeachment evidence, letting lower courts draw the inference that the two are in fact distinct. This is the Second Circuit's approach. Second, a court can distinguish exculpatory and impeachment evidence by largely ignoring *Bagley*. This is the Ninth Circuit's approach. Third, a court can explicitly argue that *Ruiz* distinguished between exculpatory and impeachment evidence. This is the Seventh and Tenth Circuits' approach.

1. Courts can distinguish exculpatory evidence from impeachment evidence based on procedural considerations.

If a court relies on procedural technicalities, that court can allow lower courts to conclude that pre-plea disclosure is constitutionally required without immediately or explicitly distinguishing exculpatory and impeachment evidence. Habeas corpus review provides a salient example. Under 28 USC § 2254, the

question a federal court must ask on post-conviction habeas corpus review is whether the state court's determination was an "unreasonable application" of Supreme Court precedent.⁹⁰ Thus, faced with a habeas case, a federal circuit court can simply conclude that a lower court's interpretation of *Ruiz* is not unreasonable but simultaneously provide commentary on *Ruiz*, such that lower courts can later fill in the blanks and conclude that *Ruiz* requires pre-plea disclosure.

The Second Circuit took this tack in *Friedman v Rehal*.⁹¹ A state court had said that due process does not require pre-plea disclosure.⁹² In response to a subsequent petition for a writ of habeas corpus, the Second Circuit asked whether the lower court's conclusion was an unreasonable application of Supreme Court precedent.⁹³ The court noted *Bagley*'s identical treatment of impeachment and exculpatory evidence and concluded that the state court's holding was not an unreasonable interpretation of Supreme Court precedent.⁹⁴ The court noted, however, that *Ruiz* did not overrule past circuit precedent that required pre-plea disclosure of exculpatory evidence.⁹⁵

While this approach did not immediately mandate pre-plea disclosure,⁹⁶ Second Circuit district courts relied on *Friedman* to distinguish between exculpatory and impeachment evidence without using the "unreasonable application" test required in habeas review.⁹⁷ In terms of the *Bagley/Ruiz* syllogism, this is the equivalent of denying *Bagley*'s conclusion that there is no constitutional distinction between exculpatory and impeachment evidence.

⁹⁰ 28 USC § 2254(d)(1).

⁹¹ 618 F3d 142 (2d Cir 2010).

⁹² *Id* at 154.

⁹³ *Id* at 152–53.

⁹⁴ *Id* at 154 ("It is enough to say that the holding of the Nassau County Court . . . does not constitute an 'unreasonable application' of Supreme Court precedent as 28 U.S.C. § 2254(d)(1) requires.")

⁹⁵ *Friedman*, 618 F3d at 154 ("Petitioner is correct that *Ruiz* did not expressly abrogate this holding as applied to all *Brady* material.")

⁹⁶ The Fifth Circuit has even characterized the Second Circuit as "seem[ing] to have doubts about a defendant's constitutional entitlement to exculpatory *Brady* material before entering a guilty plea." *Alvarez*, 904 F3d at 392.

⁹⁷ See, for example, *Davis v United States*, 2015 WL 1277011, *5 (D Conn) ("[T]he *Brady* rule applies in the plea-bargaining context only to exculpatory evidence, but not to impeachment evidence.")

2. Courts can ignore *Bagley*.

While the habeas approach allows a circuit court to address the *Bagley/Ruiz* syllogism, the second approach is for the court to simply ignore the syllogism. With this approach, courts need not grapple with the tough question of whether there is a distinction between exculpatory and impeachment evidence. Courts imply such a distinction by allowing a litigant to bring a claim based on an assumed constitutional right to receive exculpatory evidence pre-plea.

The Ninth Circuit uses this approach. Before *Ruiz*, the Ninth Circuit in *Sanchez v United States*⁹⁸ held that pre-plea disclosure of exculpatory evidence is constitutionally required because waiver of *Brady* rights can never be intelligent or voluntary.⁹⁹ After *Ruiz*, the Ninth Circuit again addressed the issue in *Smith v Baldwin*.¹⁰⁰ The court held that a pre-plea disclosure claim failed on *Sanchez*'s materiality standard.¹⁰¹ This citation to *Sanchez* and the analysis of a pre-plea *Brady* violation suggest that *Ruiz* did not overrule or abrogate *Sanchez*'s holding that the Constitution requires pre-plea disclosure.¹⁰² *Bagley*'s conclusion that there is no constitutional distinction between exculpatory and impeachment evidence made no appearance in the opinion.¹⁰³ Ninth Circuit district courts explicitly note that *Ruiz* limited its holding to impeachment evidence.¹⁰⁴ Thus, the Ninth Circuit considers pre-plea disclosure claims without explicitly distinguishing impeachment and exculpatory evidence. In short, the Ninth Circuit essentially ignores the *Bagley/Ruiz* syllogism altogether.

⁹⁸ 50 F3d 1448 (9th Cir 1995).

⁹⁹ See *id.* at 1453 (“We therefore hold that a defendant challenging the voluntariness of a guilty plea may assert a *Brady* claim.”).

¹⁰⁰ 510 F3d 1127 (9th Cir 2007) (en banc).

¹⁰¹ *Id.* at 1148 (citing *Sanchez* to define materiality as “whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead”).

¹⁰² *Id.* at 1147–48.

¹⁰³ See *id.* at 1148 (citing only *Sanchez*).

¹⁰⁴ See, for example, *Wright v Director of Corrections (CA)*, 2013 WL 6388380, *9 (CD Cal). But see *Clark*, 2014 WL 1665224 at *8 (finding that exculpatory evidence is treated the same as impeachment evidence under *Ruiz*, per *Bagley*, and thus pre-plea disclosure is not constitutionally required).

3. Courts can explicitly distinguish exculpatory and impeachment evidence.

While the first two options skirted the *Bagley/Ruiz* syllogism, a court could reject the conclusion of the *Bagley/Ruiz* syllogism by explicitly distinguishing exculpatory and impeachment evidence. First, courts can assert that *Bagley* used crude language to connect exculpatory and impeachment evidence. In another part of *Bagley*, however, the Court said impeachment evidence “falls within th[e] general rule [of *Brady*].”¹⁰⁵ Thus, if a piece of evidence is impeachment evidence, then all rules applicable to *Brady* evidence govern it. It does not follow, however, that if something is *Brady* evidence, then all rules applicable to impeachment evidence govern it.¹⁰⁶ As of this writing, no court has decided to pick and choose *Bagley*’s language in this way. Second, those seeking to make such an argument can further posit that *Ruiz*’s conclusion—that it is “particularly difficult to characterize impeachment information as critical information”¹⁰⁷—implies that it is not as difficult to characterize exculpatory evidence as critical information. A court could conclude that exculpatory evidence is indeed critical information.

For instance, in *McCann v Mangialardi*,¹⁰⁸ the Seventh Circuit interpreted *Ruiz* as creating a “significant distinction between impeachment information and exculpatory evidence.”¹⁰⁹ Thus, because the Court hinted in *Ruiz* that impeachment evidence is particularly irrelevant pre-plea, the Seventh Circuit concluded that it was “highly likely that the Supreme Court would find a violation of the Due Process Clause” if prosecutors suppressed exculpatory evidence pre-plea.¹¹⁰ Significantly, however, none of the courts in the Seventh Circuit after *McCann* acknowledged *Bagley* when distinguishing exculpatory and impeachment evidence.

¹⁰⁵ *Bagley*, 473 US at 677, quoting *Giglio*, 405 US at 154.

¹⁰⁶ As a matter of formal logic, this interpretation of *Bagley* posits a conditional (if/then statement), and to describe *Brady* as being governed by all rules applicable to impeachment evidence is to fallaciously affirm the consequent. *Affirming the Consequent Fallacy {Philosophy Index}*, (Philosophy–Index.com, 2019), archived at <http://perma.cc/FWC7-TYA5>. To be clear, this argument breaks down if *Bagley* posits a biconditional, as indicated in Part I, as opposed to only a single conditional.

¹⁰⁷ *Ruiz*, 536 US at 630.

¹⁰⁸ 337 F3d 782 (7th Cir 2003).

¹⁰⁹ *Id.* at 788.

¹¹⁰ *Id.*

In the same way, the Tenth Circuit claimed in *United States v Ohiri*¹¹¹ that *Ruiz* indicated that “impeachment evidence differs from exculpatory evidence” because it is not critical information of which a defendant must be aware before he pleads guilty.¹¹² Both the Seventh and Tenth Circuits assumed that exculpatory evidence was critical information without further explanation.¹¹³ In terms of the *Bagley/Ruiz* syllogism, both courts can be understood as holding that *Ruiz* clarifies or overrules *Bagley*.

In sum, the Second Circuit required pre-plea disclosure by addressing the issue on a habeas corpus case and allowing lower courts to fill in the gaps. The Ninth Circuit meanwhile provides an example of a court ignoring *Bagley*’s distinction between impeachment evidence and exculpatory evidence. Finally, the Seventh and Tenth Circuits focus on *Ruiz*’s statement that it is “particularly difficult to characterize impeachment information as critical information,”¹¹⁴ arguing that exculpatory evidence is distinguishable from impeachment evidence in that exculpatory evidence is in fact critical information.

B. Some Courts Hold That Due Process Does Not Require Pre-plea Disclosure

While courts that require pre-plea disclosure zero in on *Ruiz*’s “particularly difficult”¹¹⁵ language, courts that do not require pre-plea disclosure focus on other language in *Ruiz*. These courts focus on *Ruiz*’s characterization of the rights to both exculpatory and impeachment evidence as “trial-related rights.”¹¹⁶ Given these circuits’ consistent reasoning, this Comment examines each circuit briefly, pausing on the Fifth Circuit, which provides the most recent decision and most fleshed out arguments concerning pre-plea disclosure.

¹¹¹ 133 Fed Appx 555 (10th Cir 2005).

¹¹² *Id.* at 562.

¹¹³ *Id.*, quoting *Ruiz*, 536 US at 629 (“[Ruiz] explained that impeachment evidence differs from exculpatory evidence in that it is not ‘critical information.’”); *McCann*, 337 F3d at 787–88, quoting *Ruiz*, 536 US at 630 (arguing that because “*Ruiz* reasoned that it was ‘particularly difficult to characterize impeachment information as *critical information*,’ . . . *Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence”) (emphasis in original).

¹¹⁴ *Ruiz*, 536 US at 630.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 631.

In *United States v Mathur*,¹¹⁷ the First Circuit classified *Brady* as a trial right, concluding that, under *Ruiz*, there is no constitutional obligation for a prosecutor “to share all useful information with the defendant.”¹¹⁸ Similarly in *United States v Moussaoui*,¹¹⁹ the Fourth Circuit held that *Brady* preserves the fairness of a trial, and in a plea bargain, *Brady* “concerns are almost completely eliminated because [] guilt is admitted.”¹²⁰

In September of 2018, the Fifth Circuit decided *Alvarez v City of Brownsville*,¹²¹ which involved the story of George Alvarez discussed in the Introduction. Sitting en banc, the court refused to extend *Brady* to the pre-plea context.¹²² In justifying its conclusion, the Fifth Circuit noted that *Brady* sought to preserve the fairness of the trial.¹²³ The court, however, fractured into several concurrences and dissents. These present some of the best arguments on every side of the issue, making them worthy of review.

Judge James C. Ho’s concurrence vigorously defended the court’s holding. Judge Ho catalogued the Court’s cases that characterized *Brady* as a trial right, citing Justice Thomas’s assertion in *Ruiz* that the plea stage never implicates this right.¹²⁴ Judge Ho characterized other courts that have extended *Brady* to the pre-plea context as “flirting with . . . a novel alteration of the constitutional doctrine.”¹²⁵ Furthermore, a defendant may waive various rights,¹²⁶ and, the argument goes, there is no principled distinction between these rights and *Brady* rights.¹²⁷ Finally, extending *Brady* diminishes its value to defendants, thereby “imprison[ing] a man in his privileges and call[ing] it the Constitution.”¹²⁸ In other words, a defendant’s ability to waive his right to

¹¹⁷ 624 F3d 498 (1st Cir 2010).

¹¹⁸ *Id.* at 507, quoting *Ruiz*, 536 US at 629.

¹¹⁹ 591 F3d 263 (4th Cir 2010).

¹²⁰ *Id.* at 285. See also *United States v Brown*, 576 Fed Appx 145, 148 (4th Cir 2014) (concluding that a defendant could not assert a *Brady* violation because no trial had occurred).

¹²¹ 904 F3d 382 (5th Cir 2018).

¹²² *Id.* at 394.

¹²³ *Id.* at 392–93.

¹²⁴ *Id.* at 399 (Ho concurring), citing *Ruiz*, 536 US at 628 (Thomas concurring).

¹²⁵ *Alvarez*, 904 F3d at 397.

¹²⁶ *Id.* at 399–400 (describing the right to a trial, the right to a bench trial, the right to confront accusers, and the right to compulsory process for favorable witnesses).

¹²⁷ *Id.*

¹²⁸ *Id.* at 401 (emphasis omitted), quoting *Adams v United States*, 317 US 269, 280 (1942).

exculpatory evidence is a “significant bargaining chip in plea negotiations” and removing that right decreases a defendant’s leverage in getting the prosecutor to reduce his sentence.¹²⁹

Judge Gregg Costa dissented, arguing that *Brady* concerned justice in general, more than fairness at trial.¹³⁰ Moreover, a prosecutor providing a factual basis for a guilty plea in open court, who does not explain the presence of exculpatory evidence, violates a prosecutor’s duty to tell the truth.¹³¹ Judge Costa was also perplexed by the Department of Justice’s (DOJ) opposition to extension of *Brady*, as the DOJ’s own policy requires that prosecutors turn over exculpatory evidence “reasonably promptly after it is discovered.”¹³²

C. This Comment’s Rejection of Due Process Arguments for Pre-plea Disclosure Is Justified

This Comment argues that proponents of pre-plea disclosure should use contract law arguments in lieu of constitutional arguments. Why should proponents of pre-plea disclosure jettison due process arguments for pre-plea disclosure when they have prevailed in about half the circuits that have addressed the issue? Here is why: Due process arguments that actually grapple with the syllogism typically contend that *Ruiz* acknowledges a constitutional distinction between exculpatory and impeachment evidence. This implies, however, that *Ruiz* overruled *Bagley*’s presumably precedential holding that there is no distinction between exculpatory and impeachment evidence. This implication is problematic for several reasons.

First, that interpretation is tenuous because while *Ruiz* did indicate that it is “particularly difficult” to characterize impeachment evidence as critical information, that language does not intimate that exculpatory evidence *should* be characterized as

¹²⁹ *Alvarez*, 904 F3d at 401. Here, Judge Ho’s illustration is useful. According to legend, King Siam gave political rivals “sacred white elephants.” *Id.* One could not sell or work these elephants (because they were sacred, of course). *Id.* Eventually the elephants would drive their owners into bankruptcy, given their appetite. *Id.* Similarly, to give a defendant a non-waivable right to receive exculpatory evidence is to remove the utility of that right from a defendant, namely his ability to waive that right in exchange for a reduced sentence. *Id.* Thus, removing a defendant’s ability to waive his right decreases a prosecutor’s incentive to reduce a defendant’s sentence through bargaining. *Id.*

¹³⁰ *Id.* at 407 (Costa dissenting).

¹³¹ *Id.*

¹³² *Id.* at 410, quoting United States Attorney’s Manual § 9-5.001(D)(1), archived at <http://perma.cc/S9EY-BKDF>.

critical information. Even if one concedes that the Supreme Court distinguished exculpatory and impeachment evidence, nothing in the text of *Ruiz* suggests that this is a *constitutionally relevant* distinction that could overrule *Bagley*. Moreover, the “particularly difficult” language comprised a single sentence in *Ruiz*, whereas the Court spent the surrounding paragraphs describing the rights to exculpatory and impeachment evidence as “trial-related rights” and finding that “impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*.”¹³³ If rights that affect the fairness of a trial do not affect the voluntariness of a plea, then a defendant by pleading guilty has forgone a fair trial’s “accompanying constitutional guarantees,” including other “trial-related” rights like the right to receive exculpatory evidence.¹³⁴

Second, the trouble with using the Court’s “particularly difficult” language to show a constitutionally relevant distinction between exculpatory and impeachment evidence is further demonstrated by the fact that both circuits that described exculpatory evidence as critical information provided no reasoning for that designation.¹³⁵ While these courts claim that exculpatory evidence is critical information, which is so important that a defendant must be aware of it before pleading guilty, *Ruiz* concluded that a defendant’s ignorance from a lack of impeachment evidence was “difficult to distinguish, in terms of importance” from the ignorance he experiences when he “misapprehend[s] the quality of the State’s case.”¹³⁶ Exculpatory evidence, if it is important at the plea stage, is important because it helps the defendant evaluate the quality of the government’s case.¹³⁷ Thus, if anything, *Ruiz* supports the conclusion that exculpatory evidence, like impeachment evidence, is not critical information.

Finally, if *Ruiz* had overruled *Bagley*, one would expect the justices who overruled *Bagley* to cease treating *Bagley* with the importance it had before they overruled it. The opposite is true. Nine years after *Ruiz*, Justice Ruth Bader Ginsburg (who joined *Ruiz*), Justice Stephen Breyer (who wrote *Ruiz*), Justice Sonia

¹³³ *Ruiz*, 536 US at 629 (emphases in original).

¹³⁴ *Id.* at 628–29, 631.

¹³⁵ See *Ohiri*, 133 Fed Appx at 562; *McCann*, 337 F3d at 787–88.

¹³⁶ *Ruiz*, 536 US at 630–31, quoting *Brady v United States*, 397 US 742, 757 (1970).

¹³⁷ Robert E. Scott and William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L J 1909, 1937 (1992) (“Based on the different packages of information each side has, both must generate an estimate of the likelihood that [the defendant] will be convicted if the case goes to trial.”).

Sotomayor, and Justice Elena Kagan characterized *Bagley*'s holding that there is no constitutional distinction between impeachment and exculpatory evidence as a "significant development[]" in the Court's *Brady* jurisprudence.¹³⁸ It is hard to believe that *Ruiz*, without explicitly mentioning it, somehow overruled *Bagley*. It is even harder to believe that, after this surreptitious nullification of *Bagley*, the very justices who supposedly crafted this nullification would then venerate *Bagley* as a "significant development[]" in *Brady* jurisprudence.¹³⁹

This is not to say that due process arguments for pre-plea disclosure are indubitably unsound; the simple point of this analysis is to show that arguments refuting the *Bagley/Ruiz* syllogism face an uphill battle. Thus, those wishing to provide defendants with a way to receive exculpatory evidence pre-plea, who do not wish to rely on a strained interpretation of Supreme Court precedent, should seek a new framework to resolve the circuit split. This Comment proposes that contract law principles and constructive fraud provide that framework.

III. CONTRACT LAW, CONSTRUCTIVE FRAUD, BIG BOY CLAUSES, AND COLLOQUIES: A FRAMEWORK FOR PRE-PLEA DISCLOSURE

Scholars have expended vast amounts of resources arguing that pre-plea disclosure is a due process right.¹⁴⁰ Several circuits, however, consistently reject due process arguments, and given the *Bagley/Ruiz* syllogism, there is a significant possibility that the Supreme Court might reject them too. Even if the Court continues to deny certiorari on pre-plea disclosure cases, more criminal defendants who seek relief from guilty pleas that occurred without pre-plea disclosures stand to benefit from alternative arguments in those jurisdictions that reject due process arguments. This Comment provides one of these alternative arguments that is free from the risk of "flirting with . . . a novel alteration of the constitutional doctrine."¹⁴¹ Defendants can use contract law principles and the doctrine of constructive fraud.

¹³⁸ *Connick*, 563 US at 99 n 16 (2011) (Ginsburg dissenting).

¹³⁹ *Id.*

¹⁴⁰ See, for example, *Blank*, 68 Fordham L Rev at 2083 (cited in note 10).

¹⁴¹ *Alvarez*, 904 F3d at 397 (Ho concurring).

A. Contract Law, with Important Limitations, Is an Appropriate Remedy

Beyond the strained interpretation of *Ruiz*, this Section examines reasons that litigants should prefer to use contract law arguments over due process arguments for pre-plea disclosure. First, if the issue of pre-plea disclosure makes it to the Supreme Court, there is reason to think that contract law arguments would have a higher likelihood of prevailing. Second, contract law is better tailored to the pre-plea exculpatory evidence context than the due process clause.

1. Judges who reject due process arguments might be more disposed to rule for defendants on contract law grounds.

Even if judges agree that pre-plea disclosure is a good idea, they may balk at the notion of creating a new constitutional right. Many judges hesitate to create constitutional rights that they cannot find in the text of the Constitution or in precedent. Thus, judges often shy away from policy outcomes they desire based on trepidation about inventing new rights.¹⁴² Several Supreme Court justices, including Justice Neil Gorsuch,¹⁴³ Justice Brett Kavanaugh,¹⁴⁴ and Chief Justice John Roberts¹⁴⁵ seem to agree

¹⁴² See, for example, Robert H. Bork, *The Judge's Role in Law and Culture*, 1 Ave Maria L Rev 19, 21–22 (2003) (arguing that even if “*Lochner* expressed desirable . . . social policy” it was still “an abomination” because “[t]he Court invented a right to make contracts, a right found nowhere in the Constitution”).

¹⁴³ Justice Gorsuch expressed his belief that “[i]t is the job of the judge to apply it, not amend the law . . . even when he might well prefer a very different outcome.” Bruce Schreiner, *Supreme Court's Gorsuch Touts Conservative Role for Judges* (Associated Press, Sept 21, 2017) (ellipsis in original), archived at <http://perma.cc/27J8-GJLN>.

¹⁴⁴ Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 Cath U L Rev 683, 687 (2016) (“[T]o be a good judge . . . you have to understand your proper role in the game: to apply the rules and not to re-make the rules based on your own policy views.”).

¹⁴⁵ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*, Senate Committee on the Judiciary, 109 Cong. 1st Sess 55 (2005) (explaining that his mentor, Justice William Rehnquist, taught him that “[j]udges have to have the humility to recognize that they operate within a system of precedent,” which means that “a certain humility should characterize the judicial role. Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them.”). See also *Obergefell v Hodges*, 135 S Ct 2584, 2616 (2015) (Roberts dissenting):

[T]he majority’s approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*. . . . If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority’s position indefensible as a matter of constitutional law.

with this interpretative philosophy. Because lower court judges who deny any due process right to pre-plea disclosure are concerned that creating such a right would constitute “a novel alteration of the constitutional doctrine,”¹⁴⁶ the notion of extending *Brady* might also give many Supreme Court justices pause.

The justices might be sympathetic to the problem of innocents pleading guilty, and the Court in *Ruiz* even acknowledged that concern.¹⁴⁷ There is good reason, however, to believe that the Court will be disposed to deal with this concern on contract law grounds instead of directly on due process grounds. For instance, Justice Thomas, who would most certainly find no right to pre-plea disclosure,¹⁴⁸ wrote that the solution to any problems created by criminal defendants giving up rights in plea agreements was not constitutional extensions prohibiting waiver of rights.¹⁴⁹ Instead the “appropriate response” is to “permit case-by-case inquiries into whether waiver agreements are the product of fraud or coercion.”¹⁵⁰

2. Contract law is better tailored to the pre-plea exculpatory evidence context.

Beyond the problems created by a strained interpretation of precedent, the Constitution simply does not fit the situation of pre-plea disclosure. The Constitution requires that a “defendant enter a guilty plea that is ‘voluntary’ and make related waivers ‘knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.’”¹⁵¹ However, the Court has interpreted the “relevant circumstances” language to mean that a defendant must understand only “the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.”¹⁵² Thus, the Due Process Clauses do not require a defendant to be aware of the specific consequences of waiving a right. A defendant’s prospective knowledge about a specific piece of exculpatory evidence sounds

¹⁴⁶ *Alvarez*, 904 F3d at 397 (Ho concurring).

¹⁴⁷ *Ruiz*, 536 US at 631 (“That fact, along with other guilty-plea safeguards . . . diminishes the force of *Ruiz*’s concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty.”).

¹⁴⁸ See *id.* at 634 (Thomas concurring).

¹⁴⁹ *United States v Mezzanatto*, 513 US 196, 210 (1995).

¹⁵⁰ *Id.*

¹⁵¹ *Ruiz*, 536 US at 629, quoting *Boykin v Alabama*, 395 US 238, 242 (1969).

¹⁵² *Ruiz*, 536 US at 629 (emphasis in original).

like a “specific detailed consequence” as opposed to a general understanding of the “nature of the right.” In other words, the square peg of constitutionally mandated pre-plea disclosure does not fit the round hole of the Due Process Clause.

Contract law, on the other hand, is well-suited to the exculpatory evidence context. The exigency of this Comment is innocent people pleading guilty. To help these defendants get out of prison or avoid prison in the first place, the ideal remedy is rescission of the plea agreement and reversal of the guilty plea. A contract law doctrine that makes the plea agreement unenforceable and rescindable would be apt and would avoid the *Bagley/Ruiz* syllogism.¹⁵³ Thus, because “plea bargains are essentially contracts,”¹⁵⁴ it is fitting to first seek to resolve any perceived injustice in the plea-bargaining process by sifting through the vast body of contract doctrines to find the doctrine best tailored to the pre-plea, exculpatory evidence context.

3. Limitations on any plausible contract law doctrine.

Contract law is generally more suitable to the pre-plea disclosure context than are the Due Process Clauses. However, it is imperative to find the right sort of contract doctrine. For example, some contract law arguments for pre-plea exculpatory evidence disclosure already face resistance from the Supreme Court. *Ruiz* overruled the Ninth Circuit’s holding, which had directly relied on commentators who concluded that contract principles like “adhesion, duress, mistake, [and] unconscionability” required pre-plea disclosure.¹⁵⁵ The fact that the Court did not adopt these contract doctrines suggests that a defendant must carefully separate out those contract law doctrines that are doomed from the get-go from those that a court could plausibly utilize in this context. Thus, this Section describes three qualities of a plausible contract doctrine that could require pre-plea disclosure. First, the contract law doctrine should not blend with constitutional law precedent. Second, the contract law doctrine should not provide a remedy

¹⁵³ Contract law also avoids prosecutorial immunity issues that arise in tort claims, as contract law does not require the defendant to file an entirely new tort action. For a discussion of prosecutorial immunity with respect to tort law, see Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L Rev 53, 54.

¹⁵⁴ *Puckett v United States*, 556 US 129, 137 (2009).

¹⁵⁵ Blank, 68 Fordham L Rev at 2074 (cited in note 10). See *Ruiz*, 241 F3d at 1164 n 3, citing Blank, 68 Fordham L Rev at 2085 (cited in note 10); and Erica G. Franklin, Comment, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of “Discovery” Waivers*, 51 Stan L Rev 567, 581 (1999).

that is coextensive with a constitutional law remedy. Third, the contract law doctrine must fit the typical pre-plea exculpatory evidence situation.

a) *An apt contract doctrine should not blend completely with Brady.* One primary reason to shift to contract law arguments is to avoid the limitations of the *Bagley/Ruiz* syllogism. Nevertheless, some commentators blend contract doctrines and due process in their arguments.¹⁵⁶ For instance, Daniel Blank provides an example of the sort of flawed contract law argument that this Comment seeks to avoid. Blank argues that contract doctrines like adhesion, duress, and unconscionability “suggest that, even if the practice of plea bargaining as a whole can pass constitutional muster under contract analysis, waivers of the right to disclosure of *Brady* material cannot.”¹⁵⁷ Blank’s arguments use contract doctrines to suggest a constitutional conclusion that *Brady* applies pre-plea. If a court doubts that there is a constitutional requirement for pre-plea disclosure, it is also unlikely to buy into an argument that uses contract law as a means of suggesting precisely the same constitutional conclusion.

b) *An apt contract doctrine should not provide a remedy that is coextensive with a constitutional law remedy.* A coextensive solution is one that requires “essentially the same practical consequences as a holding that [pre-plea disclosure] is constitutionally required.”¹⁵⁸ For instance, Blank proposed that under various contract doctrines, waivers of *Brady* rights could *never* be enforceable.¹⁵⁹ A rule that is not coextensive, in this context, would mean that *some* waivers of *Brady* rights are enforceable.

There are ample reasons to think that the coextensive characteristic could act as a bane for contract arguments that are used in lieu of due process arguments. *Martinez v Ryan*¹⁶⁰ provides an example. In that case, every justice shied away from implementing an equitable remedy that was coextensive with a constitutional remedy. The Court confronted “a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings,” but claimed that “[t]his is not the case,

¹⁵⁶ Blank, 68 Fordham L Rev at 2074 (cited in note 10).

¹⁵⁷ *Id.*

¹⁵⁸ *Martinez v Ryan*, 566 US 1, 20 (2012) (Scalia dissenting).

¹⁵⁹ Blank, 68 Fordham L Rev at 2085 (cited in note 10). Blank also argues that “under a contract-based approach, a defendant may not waive his *Brady* rights as part of a plea bargain.” *Id.* at 2074.

¹⁶⁰ 566 US 1 (2012).

however, to resolve . . . a constitutional matter.”¹⁶¹ Thus, the Court instead implemented an equitable remedy.¹⁶² The charge of Justice Antonin Scalia’s dissent was that, by claiming to avoid a constitutional rule but instead implementing a coextensive equitable regime, the Court committed intellectual dishonesty.¹⁶³ Instead of being forthcoming in divulging the “radical step” in its constitutional jurisprudence, the Court, according to Justice Scalia, disguised its dubious constitutional interpretation behind the veneer of an equitable remedy.¹⁶⁴ Lest the reader dismiss Justice Scalia’s criticism as the opinions of a single justice, the majority did not fight the charge that a coextensive remedy in lieu of a tenuous constitutional conclusion would be suspect. Instead, the majority argued that there were “differences between a constitutional ruling and the equitable ruling of this case.”¹⁶⁵

Thus, under *Martinez*, coextensive rules are not inherently suspect.¹⁶⁶ They become suspect only when the proposed constitutional rule, to which the alternative remedy is coextensive, relies on a strained interpretation of the Constitution or precedent.¹⁶⁷ The concern is that use of the coextensive rule is “a sham,” when it is not an honest application of precedent, but instead a guise under which to create new constitutional rights.¹⁶⁸ *Martinez*’s coextensive concern is relevant to this Comment in two ways. First, because this Comment seeks to replace a tenuous due process conclusion with a contract doctrine, this Comment must be careful to show real differences between the effects of the two arguments. A coextensive rule with precisely the same effect as a due process rule would likely not hoodwink judges who are concerned that a constitutional rule “imprison[s] a man in his privileges and call[s] it the Constitution.”¹⁶⁹ Second, Part III.D rejects another strained interpretation of circuit court precedent concerning big boy

¹⁶¹ *Id.* at 8, 9.

¹⁶² *Id.* at 16.

¹⁶³ *Id.* at 21 (Scalia dissenting).

¹⁶⁴ *Martinez*, 566 US at 19.

¹⁶⁵ *Id.* at 16 (majority).

¹⁶⁶ For instance, duress likely provides an unproblematic coextensive remedy. If a prosecutor puts a gun to a defendant’s head and forces him to sign a plea agreement, duress would make the plea agreement unenforceable in every instance of gun-to-head waiver. Likewise, as a constitutional matter, gun-to-head waiver would likely not be considered voluntary.

¹⁶⁷ *Martinez*, 566 US at 19 (Scalia dissenting).

¹⁶⁸ *Id.* at 21.

¹⁶⁹ *Alvarez*, 904 F3d at 401 (Ho concurring) (emphasis omitted), quoting *Adams v United States*, 317 US 269, 280 (1942).

clauses on the grounds that it would create a coextensive alternative to a due process right to pre-plea disclosure.

In short, a coextensive solution would risk transmogrifying this Comment into a shell game, arguing that it is an uphill battle to say that pre-plea disclosure is constitutionally required but then proposing a solution that provides the exact same outcome as a due process rule. Thus, a litigant seeking to utilize a plausible contract law doctrine in the pre-plea disclosure context should likely be able to point to relevant situations in which the contract law remedy would not apply.

c) An apt contract doctrine must fit the typical pre-plea exculpatory evidence situation. The extremes of this principle are clear. The infancy doctrine, for instance, which often voids contracts entered into by minors, would not be a suitable doctrine because many cases of pre-plea disclosure do not involve minors.¹⁷⁰ A closer call are those contract doctrines that Blank presents, such as “adhesion, duress, mistake, [and] unconscionability.”¹⁷¹ While no court has adopted any of these contract arguments, which may be indicative of their inapplicability, it is beyond the scope of this Comment to refute the viability of each contract doctrine contender.

Regardless, a suitable contract law doctrine must rely on factors that will be present in every case of pre-plea disclosure. A good place to find these factors is in the progeny of *Brady*.¹⁷² Using the Court’s previous explications of *Brady* rights, the next Section suggests the use of a contract doctrine that maps well onto the pre-plea disclosure context. That doctrine is constructive fraud.

B. Constructive Fraud Is a Suitable Remedy

Constructive fraud is “a fraud that arises by the operation of law from conduct, which if sanctioned by law, would secure an unconscionable advantage, irrespective of the actual intent to defraud.”¹⁷³ Because constructive fraud usually emerges from state law, there is little agreement about the precise contours of each element and no Restatement provision that cleanly summarizes

¹⁷⁰ See, for example, *Douglass v Pflueger Hawaii, Inc*, 135 P3d 129, 134 (Hawaii 2006) (noting agreement with the common law rule that “contracts entered into by minors are voidable”).

¹⁷¹ Blank, 68 Fordham L Rev at 2074 (cited in note 10).

¹⁷² See Part I.

¹⁷³ John Glenn and Karl Oakes, *Fraud*, 37 *Corpus Juris Secundum* § 5 (West 2019).

the elements. Courts, however, generally agree on several principles that one can group into four elements: (1) the defendant made a material, false representation; (2) the plaintiff reasonably relied on the defendant's statement; (3) the plaintiff suffered some detriment as a result of this reliance; and (4) the defendant had a duty, arising out of a special relationship with the plaintiff, to give correct information.¹⁷⁴

Before showing that the typical pre-plea disclosure situation would satisfy the elements of constructive fraud, this Section begins by outlining the three features of constructive fraud that make it a suitable contract law remedy. Next, this Section explains the mechanics of a constructive fraud claim, to show that, on a practical level, defendants could avail themselves of constructive fraud in the pre-plea disclosure context.

1. Qualities of constructive fraud that make it suitable to the pre-plea disclosure situation.

Constructive fraud has three distinctive qualities that make it particularly appealing in the pre-plea disclosure context. First, constructive fraud does not require a showing of intent. Second, constructive fraud requires a violation of a duty. Third, big boy clauses can defeat constructive fraud claims. While the presence of big boy clauses initially appears to threaten the efficacy of a constructive fraud solution, this Section argues that big boy clauses are the very things that make this Comment's constructive fraud regime more plausible than other contract doctrines that scholars have put forth.

First, constructive fraud does not require a showing of intent.¹⁷⁵ Removal of the intent element reduces the burden on criminal defendants, especially those with limited resources, who will likely have trouble proving that a prosecutor knew of or purposefully withheld exculpatory evidence.¹⁷⁶ Without the burden of an intent element, a constructive fraud claim is comparatively easier

¹⁷⁴ See, for example, *Specialty Beverages, LLC v Pabst Brewing Co*, 537 F3d 1165, 1180–81 (10th Cir 2008); *Hydro Investors, Inc v Trafalgar Power Inc*, 227 F3d 8, 20 (2d Cir 2000) (considering a claim for “negligent misrepresentation” instead of “constructive fraud,” though the doctrinal contours are identical); *Doe v Boy Scouts of America*, 329 F Supp 3d 1168, 1179 (D Idaho 2018).

¹⁷⁵ Fraud, *Black's Law Dictionary* 775 (West 10th ed 2014) (defining constructive fraud as “[u]nintentional deception”).

¹⁷⁶ See Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 Case W Res L Rev 651, 651 (2007) (noting that “prosecutors and police often have sole access to files containing *Brady* material”).

to bring than some civil causes of action, such as malicious prosecution.¹⁷⁷

Without a required showing of intent, constructive fraud maps nicely onto *Kyles*, which held that prosecutors have a duty to discover and disclose all exculpatory evidence in law enforcement files.¹⁷⁸ This duty means that a prosecutor is in “constructive” possession of all exculpatory evidence in law enforcement files, even if he had no actual knowledge of that evidence.¹⁷⁹ In a word, when claiming a *Brady* violation, a defendant need not prove knowledge or any other sort of scienter with regard to a specific prosecutor.¹⁸⁰ In the same way, constructive fraud also eliminates any scienter requirement. This similarity is important. *Kyles* implicitly recognizes the difficulty defendants with otherwise meritorious *Brady* claims would have in proving scienter and obtaining relief.¹⁸¹ Thus, a contract law doctrine that does not parallel *Kyles* would place a heavy burden on defendants.

Second, constructive fraud requires a violation of a duty.¹⁸² Because prosecutorial duties animated *Kyles*¹⁸³ and *Agurs*,¹⁸⁴ a constructive fraud claim is better tailored to pre-plea disclosure than other contract law arguments, which neglect to focus on the duties that animate *Brady*’s progeny. Moreover, as detailed below, constructive fraud can involve a breach of an equitable as opposed to a legal duty.¹⁸⁵ Thus, courts can find an *equitable* duty for prosecutors to disclose exculpatory evidence pre-plea more easily than they can find an equivalent, constitutionally imposed *legal* duty.¹⁸⁶

Third, big boy clauses defeat constructive fraud claims. In contract law, big boy clauses are “no-reliance clauses . . . (as in ‘we’re big boys and can look after ourselves’).”¹⁸⁷ These clauses

¹⁷⁷ Michael Avery, *Paying for Silence: The Liability of Police Officers under Section 1983 for Suppressing Exculpatory Evidence*, 13 Temple Polit & CR L Rev 1, 47 (2003) (“[A] malicious prosecution claim generally requires . . . proof of malice.”) (citations omitted).

¹⁷⁸ *Kyles*, 514 US at 437.

¹⁷⁹ *Dennis v Secretary, Pennsylvania Department of Corrections*, 834 F3d 263, 288–89 (3d Cir 2016).

¹⁸⁰ *Kyles*, 514 US at 437.

¹⁸¹ *Id.* (“[T]he prosecution . . . alone can know what is undisclosed.”).

¹⁸² *Hydro Investors*, 227 F3d at 20.

¹⁸³ *Kyles*, 514 US at 437.

¹⁸⁴ *Agurs*, 427 US at 111.

¹⁸⁵ See Part III.C.4.

¹⁸⁶ See *Kyles*, 514 US at 437.

¹⁸⁷ *Extra Equipamentos e Exportação Ltda v Case Corp*, 541 F3d 719, 724 (7th Cir 2008). See also, for example, *In re National Century Financial Enterprises, Inc. Investment Litigation*, 905 F Supp 2d 814, 824 (SD Ohio 2012) (“The parties referred to the Letter

typically indicate that one party is “not relying on representations or statements made by the other party.”¹⁸⁸ In the pre-plea disclosure context, this clause would assert that the defendant decided to plead guilty of his own free will without reliance on the exculpatory evidence or lack thereof in the prosecutor’s possession. For reasons developed below, these clauses would likely be enforceable and would likely defeat any constructive fraud claim.¹⁸⁹

The presence of these clauses might initially seem devastating to a constructive fraud regime because prosecutors could overuse them. Regardless, big boy clauses are likely beneficial. The discussion of big boy clauses below shows that big boy clauses create a practical distinction between a *Brady*-based due process rule and a constructive fraud regime, and that this distinction might assuage some concerns courts have with adopting coextensive rules.

2. Mechanics of a constructive fraud claim.

Before showing that the typical pre-plea disclosure situation can satisfy the elements of constructive fraud, it is worth explaining how a defendant would bring such a claim.¹⁹⁰ Per *Puckett v United States*,¹⁹¹ courts can analyze plea agreements as contracts, subject to at least some ordinary contract principles.¹⁹² If the government commits fraud in a plea agreement, a court can declare the agreement unenforceable.¹⁹³ If a plea agreement is unenforceable, one contractual remedy is rescission.¹⁹⁴ Rescission allows the defendant to withdraw his consideration, namely his guilty

Agreement as a ‘big boy’ agreement because [one of the parties] in essence said that it knew what it was doing and could take care of itself.”)

¹⁸⁸ *Extra Equipamentos*, 541 F3d at 730.

¹⁸⁹ See Part III.D.

¹⁹⁰ This procedure is merely illustrative and somewhat oversimplified. While this Comment focuses on the theoretical plausibility of constructive fraud, a comprehensive explication of mechanics is further warranted.

¹⁹¹ 556 US 129 (2009).

¹⁹² See *id.* at 136–38. The contract law analogy fails in other respects due to constitutional limitations. For instance, prosecutors cannot request specific performance, as “it is unconstitutional to compel a criminal defendant to plead guilty.” Julie A. Lumpkin, *The Standard of Proof Necessary to Establish That a Defendant Has Materially Breached a Plea Agreement*, 55 Fordham L Rev 1059, 1069 (1987).

¹⁹³ See *Puckett*, 556 US at 137. It will not do to argue that if constructive fraud invalidates a plea, it makes the plea involuntary in a constitutional sense. Even if this is so, this due process violation is a different sort of due process violation than one that would come from extending *Brady*. This difference is evident from the likely enforceability of big boy clauses. See Part III.D.

¹⁹⁴ *Puckett*, 556 US at 137.

plea.¹⁹⁵ Both fraud and constructive fraud can be the basis for rescinding a contract.¹⁹⁶ This procedure for withdrawing a plea is not novel, and the Supreme Court endorsed it in *Puckett*.¹⁹⁷ Lest the reader dismiss *Puckett* as an academic exercise with little practical bite, the Court has explicitly allowed a lower court to consider rescinding a plea agreement when a prosecutor breached that agreement.¹⁹⁸ In short, the Court is willing to rescind plea agreements that are obtained by fraud.

In order to rescind a plea agreement, the defendant should promptly file a motion to withdraw his plea in the trial court after he discovers the exculpatory evidence.¹⁹⁹ To be clear, if at all possible a defendant should not bring this claim for the first time on appeal, as he would face even more obstacles.²⁰⁰ The defendant should also avoid bringing this claim for the first time when seeking state post-conviction relief or habeas corpus review, as these collateral proceedings could skew the outcome, depending on procedural posture.²⁰¹ The role of the trial court is to determine “whether the Government’s conduct comports with the parties’ reasonable understanding of the agreement.”²⁰² When a defendant brings a motion to withdraw, the defendant has the burden of proving constructive fraud by a preponderance of the evidence.²⁰³

Finally, the text of the plea agreement would determine the success of a constructive fraud claim. Constructive fraud claims by definition seek to rescind an agreement that the claimant believes to be fraudulent.²⁰⁴ The text of the actual agreement, however, will determine the respective rights and expectations of the

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* See *Curtis Lumber Co, Inc v Louisiana Pacific Corp*, 618 F3d 762, 774 n 4 (8th Cir 2010) (“Constructive fraud can exist in cases of rescission of contracts.”).

¹⁹⁷ *Puckett*, 556 US at 137.

¹⁹⁸ See *Santobello v New York*, 404 US 257, 262–63 (1971).

¹⁹⁹ See, for example, *United States v Price*, 95 F3d 364, 369 (5th Cir 1996) (explaining that the defendant was unable to appeal a court’s decision regarding his plea because he failed to withdraw that plea).

²⁰⁰ If the defendant did not raise this issue until an appeal, the defendant would have to show a plain error in the district court’s ruling, which would put a heavier burden on the defendant. See *Puckett*, 556 US at 135.

²⁰¹ See *Friedman*, 618 F3d at 154 (“It is enough to say that the holding of the Nassau County Court . . . does not constitute an ‘unreasonable application’ of Supreme Court precedent as 28 U.S.C. § 2254(d)(1) requires.”).

²⁰² See *Price*, 95 F3d at 367.

²⁰³ *Id.*

²⁰⁴ See Glenn and Oakes, *Fraud*, 37 *Corpus Juris Secundum* § 5 (cited in note 173).

parties, and hence their abilities to bring claims against one another.²⁰⁵ One can imagine numerous ways in which a plea agreement could deal with exculpatory evidence. This Comment focuses on three that appear especially salient.

Thus, while the next Section analyzes each of the four elements of constructive fraud in turn, its discussion of each pertinent element weaves in discussions of two possible plea agreement permutations: First, the prosecutor could agree to turn over all exculpatory evidence. This permutation is worth considering because some prosecutors already use this language.²⁰⁶ Second, the agreement could omit any statement about exculpatory evidence. This permutation is worth addressing, because it appears to be the DOJ's dominant approach.²⁰⁷ Finally, in Part III.D, this Comment analyzes a third permutation: the agreement could include a big boy clause. This permutation is worth considering because it presents a theoretical challenge to a constructive fraud regime.

C. Application of the Typical Pre-plea Exculpatory Evidence Situation to the Elements of Constructive Fraud

As noted above, courts generally agree on several principles of constructive fraud that can be grouped as four elements: (1) the defendant made a material, false representation; (2) the plaintiff reasonably relied on the defendant's statement; (3) the plaintiff suffered some detriment as a result of this reliance; and (4) the defendant had a duty, arising out of a special relationship with the plaintiff, to give correct information.²⁰⁸ Because a successful constructive fraud claim in the pre-plea disclosure context must prove each of these elements, this Section considers each in turn.

²⁰⁵ See, for example, *Extra Equipamentos*, 541 F3d at 724 (“The purpose of such a clause is to head off a suit for fraud.”).

²⁰⁶ This form mirrors the agreement in *Ruiz*. *Ruiz*, 536 US at 625 (“[The plea agreement] specifies that any known information establishing the factual innocence of the defendant has been turned over to the defendant.”) (quotation marks and citation omitted).

²⁰⁷ See generally, for example, *Model Annotated Individual Plea Agreement* (Department of Justice), archived at <http://perma.cc/8NMY-8MN2>; *Plea Agreement for United States v. Rabobank, National, Association* (Department of Justice), archived at <http://perma.cc/964C-KRPT>; *Plea Agreement: United States v. Lindh*, (Department of Justice, Mar 8, 2017), archived at <http://perma.cc/L9SG-P2RR>.

²⁰⁸ See note 174.

1. The prosecutor made a material, false representation.

The three components of this element are representation, materiality, and scienter.²⁰⁹ The first part of this element is that the prosecutor must have made a false representation. In one permutation of a plea agreement, the prosecutor might affirmatively state that he has disclosed all exculpatory evidence known to the government. This affirmative statement could theoretically come from an oral promise, but it would more likely come from the written plea agreement itself.²¹⁰ Thus, if a prosecutor makes a representation that the government possesses no exculpatory evidence—even though the government did in fact possess exculpatory evidence—then a defendant can satisfy the representation element.

A plea agreement that omits any statement concerning exculpatory evidence at first appears to commit no fraud, as fraud usually requires a false statement. Thus, a defendant would have to overcome the hurdle of proving that an omission counts as a misrepresentation in this context. There is ample reason to accept this conclusion. The DOJ's own policy requires that prosecutors turn over exculpatory evidence reasonably promptly after its discovery.²¹¹ The Model Rules of Professional Conduct also require that prosecutors timely disclose exculpatory evidence.²¹²

Taken alone, these professional and ethical rules provide little consolation to defendants seeking a means of rescission. In the constructive fraud context, however, they have more bite. For instance, Indiana's and Colorado's versions of constructive fraud allow an omission to qualify as a representation when the omitting party has a duty to reveal some fact.²¹³ The Restatement (Second) of Contracts § 161 also concludes that a nondisclosure can be equivalent to an assertion in several situations, including one in which “the other person is entitled to know the fact because of a

²⁰⁹ While scienter is not an independent element of constructive fraud, states take divergent approaches with regard to whether there is a scienter requirement for specific elements of constructive fraud. For the sake of thoroughness, this Comment analyzes scienter as if it is a hard and fast part of this element.

²¹⁰ See, for example, *Ruiz*, 536 US at 625.

²¹¹ United States Attorney's Manual § 9-5.001(D)(1), archived at <http://perma.cc/S9EY-BKDF>.

²¹² Model Rules of Professional Conduct (“Model Rules”) Rule 3.8(d) (ABA 2018).

²¹³ See, for example, *Trytko v Hubbell, Inc.*, 28 F3d 715, 728 (7th Cir 1994) (applying Indiana law); *Specialty Beverages*, 537 F3d at 1180 (applying Colorado law).

relation of trust and confidence between them.”²¹⁴ While the relationship that the Restatement contemplates initially seems to be that of a defense lawyer and her client, prosecutors have duties to defendants that likely fit this description.²¹⁵ Thus, even if a plea agreement is silent regarding exculpatory evidence, a defendant can argue that an omission is the equivalent of a representation for constructive fraud purposes, because, if exculpatory evidence were in the government’s possession, the prosecutor would have had ethical and professional duties to disclose it.²¹⁶

The second part of this element is materiality. Both constitutional and contract law provide useful definitions. Exculpatory evidence is material under *Bagley* “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”²¹⁷ This “reasonable probability” is present when the evidence creates “a probability sufficient to undermine confidence in the outcome” of a trial.²¹⁸ There are a few problems with using *Bagley*’s definition of materiality. First, the *Bagley* definition is designed for the trial context, as evidenced by the “proceeding” language. It is unclear how one would translate the “undermine confidence in the outcome” standard to the guilty plea context.²¹⁹ Second, while *Bagley*’s standard applies to the materiality of the *evidence*, constructive fraud is concerned with the materiality of the *misrepresentation*. Third, this Comment seeks to avoid coextensive solutions. Any regime that imports a due process definition into a contract law regime likely raises the specter of a coextensive solution. Thus, a contract law definition of materiality is likely more apt.

The Restatement (Second) of Contracts views materiality from the perspective of the individual who makes the misrepresentation.²²⁰ The Restatement concludes that a statement is material if “the maker knows that for some special reason it is likely

²¹⁴ Restatement (Second) of Contracts § 161(d) (1979).

²¹⁵ See Part III.C.4.

²¹⁶ The presence of professional and ethical duties does not render the proposed constructive fraud regime nugatory. Even if prosecutors received discipline for every violation, knowledge that a prosecutor got fired is little consolation to the incarcerated, innocent defendant.

²¹⁷ *Bagley*, 473 US at 682.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Restatement (Second) of Contracts § 162, cmt c (1979).

to induce the particular recipient to manifest his assent.”²²¹ This definition translates to the exculpatory evidence context because the “special reason” is that a defendant, in pleading guilty, must attempt to ascertain the strength of the prosecutor’s case. Knowledge of whether the government possesses exculpatory evidence helps the defendant evaluate the prosecutor’s case, and prosecutors are likely well aware that defendants desire information about the strength of the prosecution’s case.²²² Thus, a prosecutor would know that his representation that he has no exculpatory evidence will likely induce defendants to accept plea agreements.

The third part of this element is whether a prosecutor must have scienter with regard to the falsity and materiality of the statement. Intent to deceive is not an element of constructive fraud.²²³ This still does not rule out the possibility, however, that courts would require scienter with regard to other elements of constructive fraud. For instance, some courts require that the promisor “made a false representation that he or she *should have known* was incorrect.”²²⁴ While constructive fraud claims may or may not require knowledge, such a requirement is likely irrelevant for pre-plea disclosure claims. *Kyles* held that prosecutors have a duty to discover exculpatory evidence known to other agents of the government.²²⁵ Thus, when a governmental entity working with the prosecution possesses exculpatory evidence, courts impute that entity’s knowledge of its possession to the prosecutor.²²⁶ Courts would likely have little problem imputing governmental knowledge of exculpatory evidence to the prosecutor in the constructive fraud context. In short, constructive fraud requires a defendant to show that the government possessed exculpatory evidence at the time of the plea agreement, and this requirement is no more demanding than the requirements of a due process claim under *Kyles*.

²²¹ *Id.*

²²² Scott and Stuntz, 101 Yale L J at 1937 (cited in note 137) (“Based on the different packages of information each side has, both must generate an estimate of the likelihood that [the defendant] will be convicted if the case goes to trial.”).

²²³ See note 175.

²²⁴ *Hydro Investors*, 227 F3d at 20 (emphasis added).

²²⁵ 514 US at 437.

²²⁶ See, for example, *Dennis*, 834 F3d at 288–89. See also *United States v Barcelo*, 628 Fed Appx 36, 38 (2d Cir 2015) (“A prosecutor is deemed to have constructive knowledge of information known to persons who are a part of the prosecution team.”) (quotation marks omitted).

2. The criminal defendant reasonably relied on the false representation.

Unlike materiality, the Restatement (Second) of Contracts views reliance from the perspective of the defrauded party.²²⁷ When a prosecutor makes an affirmative representation or omits to say anything about exculpatory evidence, there are good reasons to think that a defendant is reasonable in relying on that statement or omission. First, a defendant is reasonable in believing that prosecutors will tell the truth because prosecutors have a duty to tell the truth.²²⁸ Furthermore, the DOJ and ABA require that prosecutors disclose exculpatory evidence reasonably promptly after its discovery.²²⁹ It is reasonable to rely on prosecutors to follow ABA rules and DOJ policy along with, in the case of affirmative misrepresentations, a prosecutor's duty to tell the truth.²³⁰

3. The criminal defendant suffered some detriment as a result of this reliance.

Detriment can manifest in several ways. A defendant who signs a plea agreement gives up legal rights, such as the right to a trial and the right to cross-examine witnesses, as consideration.²³¹ He gives up these rights at least partly in reliance on the prosecutor's omission or representation that she possesses no exculpatory evidence. Forgone legal rights constitute legal detriment under contract law.²³² In addition to forgone legal rights, a criminal defendant also suffers a detriment by being convicted and potentially serving a sentence, when he would have been acquitted had he possessed exculpatory evidence. Finally, a

²²⁷ Restatement (Second) of Contracts § 162, cmt c (1979).

²²⁸ See *Davis v Zant*, 36 F3d 1538, 1548 n 15 (11th Cir 1994) (noting that "prosecutors have a special duty of integrity in their arguments"); *United States v Kojayan*, 8 F3d 1315, 1323 (9th Cir 1993) (noting that "lawyers representing the government in criminal cases serve truth and justice first").

²²⁹ See notes 211–12.

²³⁰ It will not do to say that a defendant can hire a private investigator to unearth exculpatory evidence. The accused cares less about what evidence is out there in the world, and more about what evidence a prosecutor has, because that is the evidence that a jury will likely see. Thus, it is only the prosecutor's representations concerning that evidence upon which a defendant can rely.

²³¹ *Alvarez*, 904 F3d at 399–400 (Ho concurring).

²³² *Waters v Churchill*, 511 US 661, 691 (1994) (Scalia concurring).

defendant who would still have pleaded guilty but, with exculpatory evidence in hand, could have negotiated a better plea deal, would suffer a detriment by having to serve a longer sentence.

4. Prosecutors have a duty, arising out of a special relationship with criminal defendants, to provide defendants with correct information.

This element is likely the least intuitive in the pre-plea disclosure context and thus deserves the most rigorous analysis. First, this Section evaluates case law to define the contours of the duty that courts require to establish constructive fraud. Second, this Section argues that prosecutors have a duty to disclose exculpatory evidence that fits within these contours.

a) The duty required to show constructive fraud. Constructive fraud is “a breach of legal or equitable duty.”²³³ The *Corpus Juris Secundum* characterizes constructive fraud as a “breach of duty which, irrespective of moral guilt, the law declares to be fraudulent because of its tendency to deceive, to violate confidence, or to injure public interests.”²³⁴ While a fiduciary duty is the prototypical example of constructive fraud’s predicate duty, a fiduciary duty is not always necessary to establish a constructive fraud claim.²³⁵ A breach of an equitable duty is also sufficient to satisfy this element of constructive fraud.²³⁶ As scholars have not applied this equitable duty to the pre-plea disclosure context, it is helpful to analogize to similar situations in which courts have found the predicate duty for constructive fraud.

To determine whether an equitable duty exists, courts look to the relative positions of each party. The Seventh Circuit, applying Illinois law, noted a breach of equitable duty may exist “where there is great inequality between the parties.”²³⁷ The Supreme Court of Arkansas likewise looks to “the relative position of the parties [] and their means of information such[] that the one

²³³ Glenn and Oakes, *Fraud*, 37 *Corpus Juris Secundum* § 5 (cited in note 173) (emphasis added).

²³⁴ *Id.*

²³⁵ *Id.* at § 7 (“[A]lthough there is authority to the contrary, it has been held that constructive fraud does not require the existence of a fiduciary or confidential relationship.”).

²³⁶ See, for example, *Abrams v Ciba Specialty Chemicals Corp.*, 663 F Supp 2d 1220, 1227 (SD Ala 2009) (noting that under Alabama law, constructive fraud involves a “breach of a legal or equitable duty”); *ADCS Inc v Kimbrough, Jr.*, 30 Fed Appx 225, 229 (4th Cir 2002) (“Under Maryland law a key element of constructive fraud is the breach of a legal or equitable duty.”).

²³⁷ *Houben v Telular Corp.*, 231 F3d 1066, 1075 (7th Cir 2000).

must necessarily be presumed to contract upon the faith reposed in the statements of the other,” and rescinds a contract when “only the party making the contractual commitments [] was in a position to know whether or not its commitments would be honored.”²³⁸ For example, the Boy Scouts of America (BSA) promised a “safe, wholesome and protected environment for children.”²³⁹ A court held that it was reasonable to conclude that the requisite relationship existed between individual scouts and the BSA to establish the BSA’s equitable duty to protect children, by excluding child predators from the organization.²⁴⁰

On the other hand, in the business context, courts do not find equitable duties in “arm’s length transactions between parties seeking to further their own objectives.”²⁴¹ Thus, there is no equitable duty between two contracting multinational corporations.²⁴² Moreover, an ordinary employment contract cannot establish an equitable duty.²⁴³ At the extreme, when the party bringing the constructive fraud claim has superior knowledge, all things being equal, an equitable duty does not attach.²⁴⁴

b) Prosecutorial duties. The next task is to examine the duties of the prosecutor. To satisfy a constructive fraud claim, two aspects of the duty must be present. First, a prosecutor must have an equitable duty to disclose exculpatory evidence pre-plea. Second, this duty to disclose exculpatory evidence pre-plea must be the sort of equitable duty contemplated by constructive fraud regimes.

Prosecutors have an equitable duty to disclose exculpatory evidence pre-plea. The Model Rules of Professional Conduct require that prosecutors “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to

²³⁸ *Cardiac Thoracic and Vascular Surgery, P.A. Profit Sharing Trust v Bond*, 840 SW2d 188, 192–93 (Ark 1992). See also *Saint Annes Development Co, LLC v Trabich*, 737 F Supp 2d 517, 531 (D Md 2010) (finding the requisite duty when “one party gains influence and superiority as a result of the confidence placed in him by the other party”).

²³⁹ *Boy Scouts*, 329 F Supp 3d at 1172.

²⁴⁰ *Id* at 1184 (“[T]he Court must determine whether there is sufficient evidence in the record from which a jury could reasonably find that BSA occupied a superior position of influence and authority over [the plaintiffs]. . . . The Court finds that there is.”).

²⁴¹ *Saint Annes*, 737 F Supp 2d at 531.

²⁴² *Bridgestone America’s, Inc v International Business Machines Corp*, 172 F Supp 3d 1007, 1015 (MD Tenn 2016).

²⁴³ *Houben*, 231 F3d at 1075. See also *Razdan v General Motors Corp*, 979 F Supp 755, 758 (ND Ill 1997).

²⁴⁴ *Garbutt v Southern Clays, Inc*, 894 F Supp 456, 461–62 (MD Ga 1995).

negate the guilt of the accused or mitigates the offense” regardless of the stage in the criminal process.²⁴⁵ When a prosecutor believes that new evidence creates a reasonable likelihood that a convicted defendant did not commit an offense, the prosecutor must disclose the evidence to the court,²⁴⁶ disclose the evidence to the defendant,²⁴⁷ and undertake further investigation.²⁴⁸ Once the evidence reaches the level of clear and convincing, a prosecutor must also seek to remedy the conviction.²⁴⁹ In short, the Model Rules provide several safeguards vis-à-vis exculpatory evidence, the minimum of which is timely disclosure to the accused.

Prosecutors also have an ethical duty to tell the truth. Under Model Rule of Professional Conduct § 3.3(a)(1), no lawyer may knowingly make false statements to a tribunal.²⁵⁰ Prosecutors also have a constitutional duty to tell the truth.²⁵¹ A prosecutor breaches his duty to tell the truth when he makes an affirmative misrepresentation about exculpatory evidence. Concerning omissions, there must be a factual basis for any guilty plea, and often prosecutors orally provide such a basis in open court, in order to satisfy the court that “the conduct which the defendant admits constitutes the offense charged in the indictment . . . to which the defendant has pleaded guilty.”²⁵² Thus, some judges have already recognized that a prosecutor providing a factual basis for a guilty plea in open court, who does not explain the presence of exculpatory evidence, violates a prosecutor’s duty to tell the truth.²⁵³

Finally, a prosecutor has fiduciary duties.²⁵⁴ A prosecutor’s fiduciary duty to the government is different than his duty to defendants because this duty “transcend[s] personal ownership” of

²⁴⁵ Model Rules, Rule 3.8(d).

²⁴⁶ Model Rules, Rule 3.8(g)(1).

²⁴⁷ Model Rules, Rule 3.8(g)(2)(i).

²⁴⁸ Model Rules, Rule 3.8(g)(2)(ii).

²⁴⁹ Model Rules, Rule 3.8(h).

²⁵⁰ Model Rules, Rule 3.3(a)(1).

²⁵¹ See Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 *Georgetown J Legal Ethics* 309, 314 (2001) (“The duty to truth also derives from the prosecutor’s constitutional obligation not to use false evidence.”).

²⁵² FRCrP 11(b)(3), Advisory Committee Notes to the 1966 Amendment.

²⁵³ See *Alvarez*, 904 F3d at 407 (Costa dissenting).

²⁵⁴ This fiduciary duty maps well onto constructive fraud, as constructive fraud may be found by showing “[t]he failure of the fiduciary to disclose a material fact to the principal that might affect the fiduciary’s motives or the principal’s decision, which is known (or should be known) to the fiduciary.” James L. Rigelhaupt, *Trustee’s Representation That It Possessed Expert Knowledge or Skill*, 19 *Am Juris Proof of Facts* 2d 45 § 1.

a right by the defendant and is instead “meant to serve the interest of the federal judicial system.”²⁵⁵ Thus, a prosecutor’s fiduciary duty means that he must “act in accordance with the client’s interests and objectives.”²⁵⁶ The government’s objectives include, first, avoiding punishment of innocents, and second, “affording the accused . . . a lawful, fair process.”²⁵⁷

Each of these objectives requires pre-plea disclosure. First, the objective of avoiding punishment of innocents requires safeguards. At trial, one of these safeguards is disclosure of exculpatory evidence.²⁵⁸ As the government’s objective of avoiding punishment of innocents does not dissipate in the plea context, the fiduciary duty to act in accordance with that objective remains. Second, the objective of affording a criminal defendant a fair process also requires disclosure of exculpatory evidence at trial.²⁵⁹ As the government’s fiduciary duty to give the defendant a fair process does not dissipate in the plea context, the fiduciary duty to act in accordance with that objective remains. Finally, DOJ policy is at least one manifestation of the government’s objectives. As DOJ policy requires disclosure of exculpatory evidence reasonably promptly regardless of the stage of a case,²⁶⁰ a prosecutor must disclose exculpatory evidence pre-plea as part of his fiduciary duties to the government. All of these duties are similar to what Professor Bruce A. Green describes as, “ethical obligation[s], independent of similar obligations imposed by the Due Process Clause, criminal procedure rules and statutes.”²⁶¹

Recall that constructive fraud is a “breach of duty which . . . the law declares to be fraudulent because of its *tendency to deceive, to violate confidence, or to injure public interests.*”²⁶² When a prosecutor acts in contravention of his ethical duties, that action

²⁵⁵ Blank, 68 Fordham L Rev at 2048 (cited in note 10), quoting *Mezzanatto*, 513 US at 214 (Souter dissenting).

²⁵⁶ Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 Fordham Urban L J 607, 634 (1999).

²⁵⁷ *Id.*

²⁵⁸ *Brady*, 373 US at 87.

²⁵⁹ *Id.*

²⁶⁰ See note 211.

²⁶¹ Green, 26 Fordham Urban L J at 616 (cited in note 256). Unlike the duties of ordinary attorneys, this duty creates a quasi-judicial function for a prosecutor. *Id.* at 635. Pennsylvania Chief Justice George Sharswood, in an 1852 essay that the ABA used as the foundation for its first code of ethics, considers the duty of an attorney general to be that of a public trust, describing an attorney general as being as impartial as a judge. *Id.* at 612.

²⁶² Glenn and Oakes, *Fraud*, 37 *Corpus Juris Secundum* § 5 (cited in note 173) (emphasis added).

likely violates public confidence in the criminal justice system. When a prosecutor violates his duty to tell the truth, that action tends to deceive. Finally, when a prosecutor violates his fiduciary duties by failing to act in accordance with the government's objectives, that injures the public interest of having an executive that fulfills the government's objectives. In short, it is clear that a prosecutor has an equitable duty to turn over exculpatory evidence pre-plea.

Next, this prosecutorial duty to disclose exculpatory evidence pre-plea is the sort of equitable duty contemplated by constructive fraud regimes. It is true that arms-length relationships, such as business transactions and employment contracts, do not present the requisite equitable duty.²⁶³ The situation of a person advocating that another be deprived of his liberty, however, does not resemble the typical arms-length transaction. For instance, "an arms-length transaction is characterized by three elements: it is voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest."²⁶⁴ A criminal defendant is compelled to engage in the criminal process; he cannot simply walk away. While plea agreements are no doubt voluntary in a constitutional sense,²⁶⁵ the element of compulsion militates against characterizing a plea agreement as an arms-length transaction. Further, plea negotiations can be characterized as a market,²⁶⁶ but not as an *open* market: a defendant may not abstain from the criminal process or find a different prosecutor with whom to bargain.

Furthermore, plea bargains often involve a great deal of inequality between the two parties, a characteristic that typifies constructive fraud's predicate duty.²⁶⁷ While prosecutors have some professional, resource, and docket constraints, prosecutors are

²⁶³ See *Saint Annes*, 737 F Supp 2d at 531; *Houben*, 231 F3d at 1075. One counterargument is that a defendant knows whether he committed the crime, and superior knowledge often disproves any equitable duty. *Garbutt*, 894 F Supp at 461–62. While it is true that a defendant's knowledge of whether he committed the crime might be a proxy for the kind of evidence that the prosecutor has or will have, Scott and Stuntz, 101 Yale L J at 1941 (cited in note 137), there is little guarantee that this is an accurate proxy. See John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 Emory L J 437, 450 (2001). In fact, the cases that provide the exigency for this Comment are those in which a defendant, despite believing his innocence, believes that his knowledge has failed to translate into evidence that comports with reality.

²⁶⁴ *Bison Township v Perkins County*, 607 NW2d 589, 593 (SD 2000).

²⁶⁵ See *Ruiz*, 536 US at 629.

²⁶⁶ See Part III.D.

²⁶⁷ See *Houben*, 231 F3d at 1075.

generally free to bring any charges they see fit,²⁶⁸ so long as these charges comport with the prosecutor's duty to do justice.²⁶⁹ There is no obligation for prosecutors to plea bargain.²⁷⁰ Moreover, prosecutorial immunity denies "civil remedies to innocent people who have been wrongly convicted of crimes as a result of prosecutorial misconduct."²⁷¹ A prosecutor mainly faces professional repercussions for his actions.²⁷² Thus, a prosecutor has little to lose and much to gain from plea bargaining. The defendant, on the other hand, faces a bleaker situation. With regard to charging and sentencing recommendations, he is largely at the prosecutor's mercy. He does not have the resources of the government's investigatory power at his disposal. Even though the representation of counsel improves the defendant's bargaining position, the very structure of the criminal system puts the prosecutor in a position of power.

Precedent also shows that the Court might be willing to find an equitable duty to disclose exculpatory evidence pre-plea of the sort contemplated by constructive fraud regimes. In *Agurs*, the Court concluded explicitly that a prosecutor's duty "illuminates" the standard of materiality in the exculpatory evidence disclosure context.²⁷³ A prosecutor also has a duty to do justice, and *Agurs* thus found that materiality is present when there is concern with the "justice of the finding of guilt."²⁷⁴ Thus, prosecutorial duties informed the Court in requiring exculpatory evidence disclosure in the past.

The Court's distinction between constitutional and nonconstitutional duties also shows that an equitable duty to disclose exculpatory evidence pre-plea is plausible. The Court uses broad language to characterize nonconstitutional duties. Perhaps the

²⁶⁸ See Frank H. Easterbrook, *Criminal Procedure As a Market System*, 12 J Legal Stud 289, 299 (1983).

²⁶⁹ See *Agurs*, 427 US at 111.

²⁷⁰ See Easterbrook, 12 J Legal Stud at 299 (cited in note 268).

²⁷¹ Johns, 2005 BYU L Rev at 54 (cited in note 153). Recall that the absence of civil remedies does not affect a constructive fraud appeal. This is because a constructive fraud appeal is a criminal proceeding, based on the limited contract appeals proceeding allowed in *Puckett*. See note 192 and accompanying text.

²⁷² Johns, 2005 BYU L Rev at 58–59 & n 41 (cited in note 153) (noting that courts believe civil liability to be unnecessary because other mechanisms, including "state codes of professional responsibility," are sufficient to deter wrongdoing). But see *id* at 65 ("[O]ther corrective measures including professional discipline . . . are almost never pursued.").

²⁷³ *Agurs*, 427 US at 111.

²⁷⁴ *Id* at 111–12.

most compelling description of a prosecutor's nonconstitutional duty comes from *Berger v United States*.

Speaking for the Court, Justice Oliver Wendell Holmes Jr concluded that prosecutors do not have a duty to win, but instead a duty to see that justice is done.²⁷⁵ This duty to seek justice entails a duty to avoid improper methods and to make sure that innocent people do not suffer criminal convictions.²⁷⁶ Justice Holmes best summarized this duty with his oft-repeated statement that "while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones."²⁷⁷ The Court did not couch these descriptions in constitutional language. By contrast, in *Ruiz*, the Court used constitutional language when it found no constitutional duty to disclose impeachment evidence pre-plea.²⁷⁸ Thus, a prosecutor's equitable duty is broader than his constitutional duty.²⁷⁹ Lest the distinction be dismissed as different rhetorical styles employed by judges decades apart, the Court explicitly recognizes the distinction between ethical and constitutional duties when it comes to exculpatory evidence disclosure.²⁸⁰ The hesitation of courts to extend the purview of a prosecutor's constitutional duty, therefore, does not apply to the prosecutor's equitable duty. As a result, the distinction between equitable and constitutional duties is the key distinction that would allow a claim of constructive fraud while prohibiting a due process claim.

One counterargument is that the duties of a prosecutor to disclose exculpatory evidence only entail a relational duty between the prosecutor and the DOJ or ABA. For a defendant to bring a constructive fraud claim, the argument goes, these duties must also entail a relational duty between the prosecutor and the defendant. There are a few alternative responses.

Many of the aforementioned duties do in fact entail a relational duty to defendants. While it is true that some attorneys never owe a duty of care to adverse parties in litigation,²⁸¹ this

²⁷⁵ See *Berger*, 295 US at 88.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ See *Ruiz*, 536 US at 633 (noting that "the Constitution does not require . . .").

²⁷⁹ See Gershman, 14 Georgetown J Legal Ethics at 328 (cited in note 251) ("The prosecutor's constitutional duty has been interpreted by the courts more narrowly than its ethical counterpart.")

²⁸⁰ See *Kyles*, 514 US at 437 ("*Bagley* (and, hence, [] *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice.")

²⁸¹ See Matthew T. Byers, *Professional Responsibility—Attorneys Are Not Liable to Their Clients' Adversaries: Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 20 NM L

limitation does not extend to prosecutors.²⁸² Prosecutors have duties to adverse parties. For instance, a prosecutor has a constitutional duty of fairness to the accused, requiring the prosecutor to comply “with the requirements of due process throughout the trial,” one of which is *Brady*.²⁸³ Besides the constitutional duty, the prosecutor’s “duty to the accused . . . is likewise recognized in the Code of Professional Responsibility,” which was promulgated by the ABA.²⁸⁴ Thus, there is little reason to think that the institution promulgating a rule that imposes a duty must necessarily be the exclusive recipient of that duty.

Even if a court relied on a prosecutor’s fiduciary duty to the government to disclose exculpatory evidence pre-plea, constructive fraud likely does not require a duty *to the defendant*. Instead, constructive fraud requires a general *duty to disclose exculpatory evidence*, the consequences of which flow to the defendant. Recall that constructive fraud is “a breach of legal or equitable duty, trust, or confidence that results in damage to another”²⁸⁵ or a “breach of duty which . . . the law declares to be fraudulent because of its tendency to deceive, to violate confidence, or to injure public interests.”²⁸⁶ Each definition focuses on injury to “another” or to “public interests,” but neither requires that the duty be owed to the claimant. While some states have held otherwise, many states do not require that the duty run to the claimant.²⁸⁷

Finally, if any court decides both that constructive fraud’s predicate duty must run to defendants and that prosecutors’ duty to disclose exculpatory evidence pre-plea does not run to defendants, courts could apply the policy rationale underlying the third-party beneficiary doctrine, namely that “[a] nonparty becomes legally entitled to a benefit promised in a contract . . . only if the contracting parties so intend.”²⁸⁸ It is true that legitimacy of the system is likely one intended benefit of, for example, ethical rules.

Rev 737, 741 (1990) (“No jurisdiction has held that an attorney owes a duty of care to an adverse party in litigation.”).

²⁸² See, for example, *State v Britton*, 203 SE2d 462, 466 (W Va 1974).

²⁸³ *State v Graves*, 668 NW2d 860, 870 (Iowa 2003) (quotation marks omitted). See also *Britton*, 203 SE2d at 466 (“[A] prosecutor’s duty to the accused is fairness.”).

²⁸⁴ *Britton*, 203 SE2d at 466.

²⁸⁵ Rigelhaupt, 19 Am Juris Proof of Facts 2d 45 at § 1 (cited in note 254).

²⁸⁶ Glenn and Oakes, Fraud, 37 *Corpus Juris Secundum* § 5 (cited in note 173).

²⁸⁷ Compare *Hermann v Yater*, 631 NE2d 511, 514 (Ind App 1994) (requiring a duty owed to the claimant), with *Hydro Investors*, 227 F3d at 20 (requiring a duty that is not necessarily owed to the claimant under New York law).

²⁸⁸ *Astra USA, Inc v Santa Clara County, California*, 563 US 110, 117 (2011).

One would be missing the elephant in the room, however, to ignore that another intended beneficiary of pre-plea disclosure is the person for whom the exculpatory evidence could prevent incarceration. In fact, *Brady's* concern about giving defendants a fair trial confirms that defendants are the intended beneficiary of exculpatory evidence disclosure.²⁸⁹

D. Big Boy Clauses

If courts increase the rate of rescinded plea agreements based on constructive fraud appeals, the possibility arises that prosecutors will simply include boilerplate “big boy” clauses in every plea agreement. In contract law, big boy clauses are “no-reliance clauses . . . (as in ‘we’re big boys and can look after ourselves’).”²⁹⁰ Big boy clauses are meant to “head off” a suit for fraud.²⁹¹ In the constructive fraud context, they do so by negating the “reasonable reliance” element. This clause, in a basic form, would assert that the defendant decided to plead guilty of his own free will without reliance on the exculpatory evidence or lack thereof in the prosecutor’s possession. If these big boy clauses gain traction, the argument goes, then constructive fraud claims are dead on arrival.

While big boy clauses are enforceable in many states,²⁹² there are valid arguments that big boy clauses would not be enforceable in the pre-plea disclosure context. To see why, one must discern what sort of person or entity counts as a “big boy.” Often, big boys are sophisticated parties.²⁹³ For instance, courts consider large companies and presidents of large companies, who are represented by lawyers, to be big boys.²⁹⁴ Unrepresented lay persons, on the other hand, may not always be big boys.²⁹⁵

Thus, the argument goes, this is not the commercial context, and if anyone should *not* be considered a big boy, it is criminal

²⁸⁹ See *Brady*, 373 US at 87–88.

²⁹⁰ *Extra Equipamentos*, 541 F3d at 724. See also *National Century Financial Enterprises Investment Litigation*, 905 F Supp 2d at 824 (“The parties referred to the Letter Agreement as a ‘big boy’ agreement because [one of the parties] in essence said that it knew what it was doing and could take care of itself.”).

²⁹¹ *Extra Equipamentos*, 541 F3d at 724.

²⁹² See, for example, *id* (citation omitted) (“They are . . . enforceable in Illinois, as elsewhere.”).

²⁹³ See Manuel Farach, *An Eloquent Argument for Enforcing Nonreliance Clauses: Billington v. Ginn-La Pine Island, Ltd., LLLP*, 91 Fla Bar J 48, 48 (2017) (noting that big boy clauses “appear to have originated in the securities industry”).

²⁹⁴ See, for example, *Extra Equipamentos*, 541 F3d at 724, 725.

²⁹⁵ *Id* at 724.

defendants who have the most to lose from big boy clauses and who are the least likely to understand the implications of such clauses. In short, it is conceivable that some courts may not enforce big boy clauses in the pre-plea disclosure context. Alternatively, some courts might allow only white-collar defendants, such as company executives, to employ big boy clauses. Presumably, these defendants have the requisite sophistication, based on both their knowledge and access to resources.²⁹⁶

While this argument has some appeal, courts might resist it. Many criminal defendants are constitutionally entitled to a lawyer, and generally, if a party is represented by a lawyer who explains the implications of a big boy clause, courts enforce the clause.²⁹⁷ Judge Richard Posner, for instance, noted that big boy clauses are enforceable so long as “the signatory knew what he was doing,” and a court will likely deem that a defendant represented by counsel knew what he was doing.²⁹⁸ Finally, parties can bring constructive fraud claims outside the commercial context,²⁹⁹ so there is little reason to think that courts would allow a criminal defendant to bring a constructive fraud claim, without also allowing a clause that negates such a claim.

²⁹⁶ This alternative is fairly problematic. Parsing defendants based on sophistication might force courts to hear procedural unconscionability arguments, like those that did not gain traction in *Ruiz*. See *Wisconsin Auto Title Loans, Inc v Jones*, 714 NW2d 155, 166 (Wis 2006) (finding that procedural unconscionability requires consideration of “age, education, intelligence, business acumen and experience, [and] relative bargaining power”). This route might also raise equal protection concerns. In the criminal context, the Court has found that “the State could not in effect make [a procedure] available only to the wealthy. Such a disposition violated equal protection principles because it distinguished between poor and rich with respect to such a vital right.” *Evitts v Lucey*, 469 US 387, 404 (1985). One could imagine a poor defendant claiming an equal protection violation based on his exclusion from the use of big boy clauses.

²⁹⁷ See, for example, *Extra Equipamentos*, 541 F3d at 725. One concern is that not all defendants utilize counsel at the plea stage and that unrepresented defendants will be bamboozled into signing big boy clauses. The Court has found that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel,” and defendants are entitled to counsel at any critical phase. *Padilla v Kentucky*, 559 US 356, 373 (2010). Defendants, however, may waive this right and plead guilty pro se; in one prominent exoneration study, five out of nine of the innocent defendants who pleaded guilty were not represented by counsel. Emily Hughes, *Innocence Unmodified*, 89 NC L Rev 1083, 1096 (2011). Courts would likely not enforce big boy clauses against these unrepresented defendants.

²⁹⁸ *Nightingale Home Healthcare, Inc v Anodyne Therapy, LLC*, 589 F3d 881, 885 (7th Cir 2009) (citations omitted).

²⁹⁹ *Doe v Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints*, 2012 WL 3782454, *7 (D Idaho) (“[A]ctions for constructive fraud may arise outside the commercial context.”).

Moreover, defendants are generally entitled to waive even their constitutional rights in plea agreements.³⁰⁰ Defendants may also waive their statutory rights under the Federal Rules of Evidence in plea agreements, so there is reason to think the Court would do the same for rights created by contract law.³⁰¹ Thus, while there is a valid argument that some courts will not enforce big boy clauses, it is worth considering how courts might deal with them if they are enforced.

The criminal justice system can deal with big boy clauses in three main ways: (1) prohibit all big boy clauses in plea agreements, (2) allow only defendants to offer big boy clauses as part of a plea agreement, or (3) allow largely uninhibited bargaining.³⁰² This Comment proposes that the third solution, that of open bargaining, best safeguards innocent defendants. First, this Comment explains the problems with each limitation on the use of big boy clauses, along with the benefits of open bargaining. Second, this Comment proposes that any regulation should come in the form of modifications to judicial plea colloquies.

1. Open bargaining best safeguards innocent defendants.

The first solution, prohibiting all big boy clauses, has intuitive appeal. If prosecutors can circumvent constitutional obligations at trial and constructive fraud obligations in a plea agreement by simply copying and pasting boilerplate language, a constructive fraud regime seems to be an unsatisfying safeguard. The concern is that a prosecutor could essentially hold a defendant's feet to the fire by refusing to sign a plea agreement until the defendant disclaimed reliance. Banning big boy clauses would solve this problem.

Banning big boy clauses, however, might mean that pre-plea disclosure is still required by constructive fraud *in every situation*. Recall that constructive fraud requires pre-plea disclosure, and that, barring some other doctrine that categorically defeats an element of a constructive fraud claim, big boy clauses appear to be the only way to preemptively defeat constructive fraud arguments.³⁰³ Banning big boy clauses, therefore, raises the specter of

³⁰⁰ See *Alvarez*, 904 F3d at 399–400 (Ho concurring).

³⁰¹ See *Mezzanatto*, 513 US at 210.

³⁰² To be sure, there are other alternatives, such as allowing only prosecutors to offer big boy clauses or regulating their use somewhat.

³⁰³ See notes 290–91 and accompanying text.

contract law arguments that are coextensive with constitutional arguments, which raises two problems.

First, the Court might as a theoretical matter be skeptical about signing off on a constructive fraud regime that ensures largely the same outcomes as a constitutional right.³⁰⁴ It is also possible that the Court would share Judge Ho's concern that if the defendant has no way to waive his right to receive exculpatory evidence, then we have "imprison[ed] a man in his privileges."³⁰⁵ Second, while coextensive regimes are not inherently suspect, there is special reason for courts to be suspicious of a coextensive regime that disallows all big boy clauses made under the supervision of counsel: such a regime requires a strained interpretation of precedent. After all, courts often enforce big boy clauses so long as "the signatory knew what he was doing,"³⁰⁶ and the Court has treated statutory rights as waivable in plea agreements.³⁰⁷ In other words, courts should allow big boy clauses in at least some plea agreements, in order to avoid coextensive problems. Thus, perhaps the most optimal, realistic world is one in which defendants may include big boy clauses in order to receive a more optimal sentence.

The second solution—allowing only defendants to offer big boy clauses—resolves the coextensive concerns with banning big boy clauses altogether from plea agreements. Big boy clauses would act as a "significant bargaining chip."³⁰⁸ A defendant who knows he is guilty³⁰⁹ and is prepared to plead might offer the prosecutor a big boy clause in exchange for a more favorable sentence. On the other hand, a prosecutor would be unable to insist that every plea agreement have a big boy clause.

One must still query: What sort of defendant would this regime help? This regime would help those guilty defendants who

³⁰⁴ See *Martinez*, 566 US at 19 (Scalia dissenting).

³⁰⁵ *Alvarez*, 904 F3d at 401 (Ho concurring) (emphasis omitted), quoting *Adams*, 317 US at 280. Judge Ho, after all, included his bargaining chip concern shortly after citing Justice Thomas's opinion in *Ruiz* that *Brady's* unfair trial concerns are never implicated at the plea stage. *Alvarez*, 904 F3d at 399. One interpretation is that Judge Ho is explaining Justice Thomas's underlying concern.

³⁰⁶ *Nightingale Home Healthcare*, 589 F3d at 885 (citations omitted).

³⁰⁷ See *Mezzanatto*, 513 US at 210.

³⁰⁸ *Alvarez*, 904 F3d at 401 (Ho concurring).

³⁰⁹ See Scott and Stuntz, 101 *Yale L J* at 1941 (cited in note 137) ("The defendant's knowledge of . . . whether he is guilty or not—is a good predictor of future evidentiary discoveries."). See also Douglass, 50 *Emory L J* at 450 (cited in note 263) ("The defendant, of course, typically possesses at least one piece of information that the prosecutor does not. He knows whether he committed the crime.").

have superior information about their guilt and would thus be more willing to relinquish their *Brady* rights. Perhaps this does not present a problem. While the exigency of this Comment is innocents pleading guilty, pre-plea disclosure serves other functions, such as promoting the legitimacy of the criminal justice system and giving all defendants a fair shake.³¹⁰ Guilty defendants' favorable use of big boy clauses might be a necessary collateral consequence of a constructive fraud regime that better protects innocents who plead guilty.³¹¹ Even so, as a practical matter, this solution is still not ideal. Setting aside practical enforcement issues, a defendant's offering a big boy clause reveals that he has little faith in his case, putting him in a weaker bargaining position.

Thus, this Comment proposes that the third solution, that of open bargaining, is more desirable. A big boy clause would be most valuable to an innocent defendant *when a prosecutor offers it*. This is the flipside of the problem with the second solution: A prosecutor's offer of a big boy clause tends to show that the prosecutor has some exculpatory evidence or that he is concerned that the defendant might get ahold of such evidence that the prosecutor does not know about, but that is located in government files. This is valuable information to a defendant. For an innocent defendant and for an attorney of a client who maintains his innocence, an offer of a big boy clause should ring alarm bells.

The major objection against open bargaining is the underlying concern that, with free rein, prosecutors might begin to use boilerplate big boy clauses regardless of their assessment of guilt. Such a policy would attempt to mask any weakness in an individual case behind the veneer of a new DOJ or interoffice policy of including such clauses. Perhaps such a policy does not present a problem *ex ante*. After all, when it has weighed in on similar issues, the Court has concluded that "[t]he mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether."³¹²

³¹⁰ See Green, 26 *Fordham Urban L J* at 634 (cited in note 256).

³¹¹ The law does not shy away from such arrangements. For example, while the vast majority of writs of habeas corpus are denied, courts put up with many meritless claims to preserve the few meritorious ones. See *Brown v Allen*, 344 US 443, 498 (1953) (Frankfurter) ("The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by indiscriminating generalities.").

³¹² *Mezzanatto*, 513 US at 210.

This objection to the overuse of big boy clauses is also a microcosm of the debate in law and economics scholarship regarding the necessity of regulation on market failures.³¹³ For example, the potential to use big boy clauses can be viewed as part of an efficient market in which “[t]he defendant, who buys the plea, pays by surrendering his right to impose costs on the prosecutor by demanding trial and by surrendering his chance of acquittal at trial.”³¹⁴ A constructive fraud appeal imposes a cost on the prosecutor, and a big boy clause is a way of insuring against that cost. In a sense, the option of a constructive fraud appeal increases the defendant’s bargaining power by giving him a “significant bargaining chip.”³¹⁵

From the government’s perspective, a prosecutor will “accept a plea that exceeds the punishment his office could obtain by investing an equal amount of prosecutorial resources on other cases.”³¹⁶ The prosecutor would indeed value big boy clauses: They would spare him the costs associated with having law enforcement agents search all their files for exculpatory evidence to hand over to the defendant. Moreover, big boy clauses would reduce work for the prosecutor’s appellate colleagues, who could easily defeat any constructive fraud appeal with an attack on the reliance element. If a defendant gives up his right to bring a constructive fraud appeal, then that will increase the resources a prosecutor’s office can use on other cases. These cost savings will, on the margins, incentivize prosecutors to make bargains that help defendants. The fact that prosecutors value waiver of the right to litigate exculpatory evidence claims is evidenced by the fact that the prosecutor in *Ruiz* offered a six-month sentence reduction at least partly in exchange for waiver of the *Giglio* right.³¹⁷

By this line of reasoning, big boy clauses are beneficial to prosecutors and defendants, and the only overuse of a big boy clause occurs when an innocent person uses one. There are two

³¹³ Some law and economics analyses would suggest that a regime that allows open bargaining will provide more optimal outcomes than one which is regulated, even in the plea-bargaining context. See, for example, Easterbrook, 12 J Legal Stud at 290 (cited in note 268) (“Regulatory failure’ plagues regulation more often than market failure disables markets.”). But see Richard P. Adelstein, *The Negotiated Guilty Plea: A Framework for Analysis*, 53 NYU L Rev 783, 786 (1978) (arguing that market failures might result in defendants who are overcharged, which presents moral transaction costs).

³¹⁴ Easterbrook, 12 J Legal Stud at 309 (cited in note 268).

³¹⁵ *Alvarez*, 904 F3d at 401 (Ho concurring).

³¹⁶ Easterbrook, 12 J Legal Stud at 308–09 (cited in note 268).

³¹⁷ See *Ruiz*, 536 US at 625.

reasons to think an innocent person would not use a big boy clause. First, many innocent defendants who plead guilty are not represented by counsel.³¹⁸ This could occur when a defendant decides to plead guilty pro se or when a defendant is not entitled to the assistance of counsel.³¹⁹ A big boy clause agreed to by a defendant without counsel is likely unenforceable.³²⁰ Second, it is incumbent on an innocent defendant's counsel to refuse a big boy clause. A defendant is essentially using a potentially longer sentence as insurance against the possibility of exculpatory evidence being found in the government's files.³²¹

It is true that, regardless of these safeguards, some innocent defendants might lie to their counsel about their guilt, in order to receive what they believe to be a lesser sentence. In this situation, one could argue that a market failure is present because use of big boy clauses has allowed "[p]rosecutors [to] take advantage of ignorant defendants," and thus it is appropriate to "subject[] the prosecutor's decisions to regulation."³²² This is the market failure of coercion.³²³ Judge Frank Easterbrook's response to this argument is to look at the sentencing differential, in which a defendant receives "one sentence if there is a plea, and a higher sentence if the defendant stands trial and is convicted."³²⁴ Judge Easterbrook asks "whether the size of the [sentencing] differential may be understood as a logical consequence of the bargaining process."³²⁵ If not, it is coercive.³²⁶ Take an extreme example: if a defendant believes he will receive a sixty-year sentence at trial or

³¹⁸ See Hughes, 89 NC L Rev at 1096 (cited in note 297).

³¹⁹ See *Scott v Illinois*, 440 US 367, 373–74 (1979) ("We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.").

³²⁰ See *Extra Equipamentos*, 541 F3d at 724.

³²¹ One counterargument is that if innocent defendants do not accept big boy clauses, and that becomes common knowledge among prosecutors, that will disincentivize guilty defendants from using big boy clauses to bargain at all, because doing so signals that he is guilty. This misunderstands that argument. This Comment does not argue that a defendant's signaling his guilt is a bad thing. After all, agreeing to a guilty plea is the ultimate signal of guilt. Instead, this Comment argues that a defendant's offering a big boy clause shows that he has little faith in his case. Prosecutors already require defendants to waive many rights in a guilty plea, and prosecutors do not see this waiver as an invitation to bring further charges. When a defendant offers a clause that further curtails his own rights, however, that would likely catch a prosecutor's attention.

³²² Easterbrook, 12 J Legal Stud at 300, 309 (cited in note 268).

³²³ *Id.* at 311.

³²⁴ *Id.*

³²⁵ *Id.* at 312.

³²⁶ Easterbrook, 12 J Legal Stud at 312 (cited in note 268).

a six-day sentence through plea bargaining, then “even the innocent will plead guilty.”³²⁷

The question here, however, is more specific than the one Judge Easterbrook asks. The question is whether an innocent defendant’s unwillingness to include a big boy clause would cause him to experience a coercive sentencing differential, which he would not otherwise face if he agreed to include a big boy clause. This is largely an empirical question that can only be determined ex post on a case-by-case basis, but we do have some evidence. In *Ruiz*, the plea agreement reduced the defendant’s sentence six months, from an eighteen-to-twenty-four month sentence to a twelve-to-eighteen month sentence, in exchange for her waiver of several rights, including her right to receive impeachment evidence.³²⁸ Thus, the prosecutor reduced Ruiz’s recommended prison time to somewhere between two-thirds or three-quarters of the time she would face should she be convicted at trial. Can this be understood as a “logical consequence of the bargaining process”?³²⁹ While the time period of six months is certainly significant for an incarcerated defendant, the sentencing differential (two-thirds to three-quarters of the potential prison time) does not seem illogical.

Thus, it is likely that this differential was a logical consequence of the bargaining process and did not coerce an innocent into pleading guilty. Of course, it is still possible that some big boy clauses could create a coercive sentencing differential. The point is only that the empirical evidence available to us does not indicate ex ante that the concern about coercion will manifest.

Even supposing the above law and economics analysis is wrong, coercive use of big boy clauses would still likely not become widespread, because prosecutors have ample incentives not to insist on such clauses. While not directly violating DOJ policy or ABA ethics rules about reasonably prompt disclosure, prosecutors who insist on using a big boy clause create a suspicious atmosphere in any disciplinary proceeding. Moreover, if cases do not plea out, prosecutors will see increased workloads on the margins and thus adapt their policies accordingly.³³⁰

³²⁷ Id at 311.

³²⁸ *Ruiz*, 536 US at 625.

³²⁹ Easterbrook, 12 J Legal Stud at 312 (cited in note 268).

³³⁰ See id at 299 (“As the availability of cases and the returns per case change, so may the prosecution policies. This selection method is presumptively efficient for the same reasons a competitive market is likely to be efficient.”).

While theoretically it is true that prosecutors could pressure defendants to employ any clause in a plea agreement, this is not a problem unique to big boy clauses. For instance, Assistant US Attorneys often used to require that any company facing an indictment and seeking cooperation credit agree to cease paying the legal fees of its employees.³³¹ After being excoriated for this practice in *United States v Stein*³³² and fearing immediate congressional action,³³³ the DOJ promulgated the Filip Memorandum, ending the DOJ's practice of requiring cooperating corporations to cease paying employee legal fees.³³⁴ Similarly, in response to concerns that the DOJ was overusing corporate criminal liability, the Yates Memorandum restricted the instances in which prosecutors could bring corporate criminal prosecutions.³³⁵ Thus, even supposing that constructive fraud causes the criminal justice system to contract an epidemic of big boy clauses, an important shift has nonetheless occurred. The debate is no longer about tenuous procedural due process arguments and instead about DOJ policy. This shift allows for democratic accountability, as demonstrated by the DOJ's sensitivity to external pressures in the Filip and Yates memoranda. Given the already mammoth support for pre-plea disclosure from the DOJ,³³⁶ the ABA,³³⁷ and academia,³³⁸ practically, it might be more effective to debate disclosure of exculpatory evidence as a policy matter rather than as a constitutional matter.

2. Adding a statement to colloquies safeguards against coercive use of big boy clauses.

If concerns about prosecutors overusing big boy clauses persist, there is a simple solution: add a question to the colloquy judges read before signing a plea agreement. The rationale for

³³¹ Mark Filip, *Principles of Federal Prosecution of Business Organizations* *1, 13 (Department of Justice, Aug 28, 2008), archived at <http://perma.cc/E4HH-HG9D>.

³³² 435 F Supp 2d 330 (SDNY 2006), affd 541 F3d 130 (2d Cir 2008).

³³³ Charles Wm. McIntyre, Howard C. Vick, and Michael J. Elston, *McNulty Memo Out, Filip Memo In: DOJ Makes Revisions to Corporate Charging Guidelines* (Martindale, Sept 14, 2008), archived at <http://perma.cc/7CPQ-RJLK>.

³³⁴ See Filip, *Principles of Federal Prosecution* at *1 (cited in note 331).

³³⁵ See generally Sally Q. Yates, *Individual Accountability for Corporate Wrongdoing* (Department of Justice, Sept 9, 2015), archived at <http://perma.cc/MP6K-G6YV>.

³³⁶ *Alvarez*, 904 F3d at 410 (Costa dissenting).

³³⁷ Model Rules, Rule 3.8(d).

³³⁸ See Blank, 68 Fordham L Rev at 2083 (cited in note 10).

colloquies is that “well-placed reminders” reduce the chance of violating a defendant’s rights.³³⁹ Colloquies in federal court must list several constitutional rights of which a defendant could avail himself by taking a case to trial,³⁴⁰ followed by a question to the effect of: “Do you understand the rights I have just explained?”³⁴¹ Adding the *Brady* right could take myriad forms, but a basic version might read as follows: “You give up the right to receive any exculpatory evidence in the government’s possession.” A bracketed section of this statement could say, “[IF PLEADING WITH A NO-RELIANCE CLAUSE]: You are pleading guilty of your own free will without reliance on the exculpatory evidence or lack thereof in the government’s possession.”³⁴²

Adding a single statement to the colloquy is a minor revision. Practically, *Brady* could find its way into colloquies in two ways. First, Rule 11(b)(1) of the Federal Rules of Criminal Procedure lists the various rights that “the court must inform the defendant of, and determine that the defendant understands.”³⁴³ An amendment to this list could include the *Brady* right. Second, without any amendment, individual judges are free to “inform a defendant about specific consequences that might follow from a plea of guilty if the judge ‘feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant.’”³⁴⁴ Such judicial oversight of big boy clauses is already commonplace. For instance, if a person is not a “big boy” and lacks counsel, courts become skeptical about enforcing big boy clauses.³⁴⁵ Courts, therefore, examine the circumstances to determine if “the signatory knew what he was doing.”³⁴⁶

In short, big boy clauses are the redeeming quality of this Comment’s constructive fraud regime, saving the regime from the

³³⁹ Jason Kreag, *The Brady Colloquy*, 67 *Stan L Rev Online* 47, 50 (2014) (arguing that judges should recite a separate *Brady* colloquy to prosecutors).

³⁴⁰ FRCrP 11(b)(1).

³⁴¹ See, for example, *Questions for Taking Guilty Plea* *3 (US District Court – ED Mich), archived at <http://perma.cc/RYG6A-S65M>. See also Association of Justices of the Supreme Court of the State of New York, *Bench Book for Trial Judges-New York*, § 10:2 (Lawyers Cooperative 2015). While this Comment only addresses federal cases, the same regime could easily be translated to state cases.

³⁴² For an example of a district court’s sample colloquy using a similar form, see *Questions for Taking Guilty Plea* at *3 (cited in note 341).

³⁴³ FRCrP 11(b)(1).

³⁴⁴ *Libretti v United States*, 516 US 29, 50 (1995), citing FRCrP 11, Advisory Committee Notes to the 1974 Amendment.

³⁴⁵ See *Extra Equipamentos*, 541 F3d at 724.

³⁴⁶ *Nightingale Home Healthcare*, 589 F3d at 885 (citation omitted).

quagmire of coextensive solutions. Law and economics shows that prosecutors would be unlikely to abuse big boy clauses, and a modification to colloquies can ensure judicial oversight and quell the remaining concerns.

CONCLUSION

George Alvarez, a special education high school student, spent four years in prison because he pleaded guilty to a crime that, according to the state court, he did not commit. Alvarez remained incarcerated because prosecutors failed to disclose exculpatory evidence that would have proven Alvarez's innocence. The problem for defendants like Alvarez is that even with exculpatory evidence in hand, the *Bagley/Ruiz* syllogism precludes them from getting relief under *Brady*.

Thus, this Comment suggests that those concerned about innocent defendants who plead guilty, like Alvarez, should rely less on due process and more on contract law arguments. This Comment proposes a constructive fraud solution, which better maps onto the plea-bargaining context, along with modifications to plea colloquies.

This solution is superior not only to due process arguments, but also to other contract law arguments for pre-plea disclosure. It avoids reliance on a strained interpretation of Supreme Court precedent. In addition, it avoids the coextensive shell game by showing that big boy clauses create a practical difference between a constructive fraud regime and a due process right to pre-plea disclosure. Finally, as a matter of policy, prosecutors are unlikely to use big boy clauses in a coercive fashion, and big boy clauses give defendants more leverage in asking for a sentencing reduction. Thus, constructive fraud is a suitable solution because it is logically cogent and, unlike arguments extending *Brady* pre-plea, a constructive fraud solution declines to "imprison a man in his privileges and call it the Constitution."³⁴⁷

³⁴⁷ *Alvarez*, 904 F3d at 401 (Ho concurring) (emphasis omitted), quoting *Adams*, 317 US at 280.