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Disclosure to the Guilty Pleading Defendant: Brady v. Maryland and the Brady Trilogy

Lee Sheppard

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COMMENTS

DISCLOSURE TO THE GUILTY PLEADING DEFENDANT: *BRADY v. MARYLAND* AND THE *BRADY* TRILOGY

I. INTRODUCTION

Criminal conviction in this country is achieved largely through plea negotiation, rather than trial. The vast majority of criminal defendants plead guilty in exchange for sentencing concessions.[1] By pleading guilty, a defendant waives a number of constitutional protections, the most important of which is the right to trial.[2] The defendant's act of self-conviction typically consists of two stages. Plea bargaining between the defense and the prosecution is the first and more important stage. These negotiations are informal and totally outside the purview of judges, yet a court will enforce the agreement that the parties have made.[3] Plea bargaining is not a situation in which the parties have equal bargaining power. The defendant pleads guilty based on the extent of his knowledge of the prosecutor's case against him and any tactical, mitigating, or exculpatory information that might exist.[4] In contrast, the second stage is a formal and perfunctory proceeding in which the trial judge accepts the defendant's plea and gives his imprimatur to the informal agreement.[5] Thus the process accorded the guilty

[1] D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966). Newman reports that approximately 90% of all criminal defendants plead guilty. His study is accepted as there are no more recent studies of comparable completeness nor is there any reason to doubt the percentage of defendants pleading guilty has lessened over the years.

[2] Boykin v. Alabama, 395 U.S. 238, 242-44 (1969). Among others are the privilege against self-incrimination, the right to proof of guilt beyond a reasonable doubt, the right to confront one's accusers, and the right to obtain witnesses in one's favor. For other rights and privileges of lesser importance waived by a guilty plea, *see* Bishop, *Waivers in Pleas of Guilty*, 60 F.R.D. 513 (1974).

[3] Bordenkircher v. Hayes, 434 U.S. 357 (1978); Blackledge v. Allison, 431 U.S. 63 (1977); Santobello v. New York, 404 U.S. 257 (1971).

[4] *See* text accompanying notes 29-55 *infra*.

[5] *See* text accompanying notes 56-59 *infra*.

pleading defendant consists primarily of informed plea negotiation with the prosecution and only secondarily of formal plea acceptance proceedings.

The Supreme Court has sanctioned plea bargaining,[6] and, with the exception of recognizing the possibility of coercion during the negotiations,[7] has done so by ignoring the realities of this unsupervised practice. The Court assumes that plea negotiations are conducted fairly. Consequently, the Court enforces plea agreements in a manner reminiscent of the now discredited "freedom of contract" decisions of the late nineteenth century; the defendant is held to his bargain as long as the apparent inequities do not approach unconscionable proportions. Ironically, the "due process revolution" of the Warren Court[8] focused on the relatively small percentage of criminal defendants who stand trial,[9] but for the defendant who pleads guilty those decisions at best have meant that he has more rights with which to negotiate. The Court's principal contribution to due process for the guilty pleading defendant is *Boykin v. Alabama*,[10] a judicial gloss on the formal plea acceptance proceeding.

One of the principal aspects of unfairness in plea bargaining is the defendant's inability to obtain pertinent information known only to the prosecution. While being told which rights are waived by a guilty plea is useful to the defendant, it is of little value to the defendant and his counsel if lack of relevant information prevents them from a reasoned decision whether to plead guilty or to stand trial. The type of information that would aid the defense in this decision includes all items relevant to an assessment of the prosecution's case against the defendant. Ideally, this information would be available to the defense through regular preplea discovery.[11] Most important, the Court's decision in *Brady v. Maryland*[12] should be interpreted to require prosecutorial disclosure of

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6 Bordenkircher v. Hayes, 434 U.S. at 363-64; Blackledge v. Allison, 431 U.S. at 71-72; Santobello v. New York, 404 U.S. 257; Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742, 751-52 (1970).

7 The possibility that a plea might be induced by threats, misrepresentation, or other improper means was recognized in Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *rev'd on other grounds*, 356 U.S. 26 (1958), and by the Supreme Court in Brady v. United States, 397 U.S. at 755. *See* note 139 *infra*.

8 The term "due process revolution" refers to the series of Supreme Court decisions of the Warren era which made the criminal procedural protections of the fifth and sixth amendments binding on the states through the fourteenth amendment. *See* note 135 *infra*.

9 Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 37 (1979).

10 395 U.S. 238. *See* text accompanying notes 56-59 *infra*.

11 *See* text accompanying notes 95-126 *infra*.

12 373 U.S. 83 (1963). The reader should note that two Supreme Court cases with the name "Brady" will be discussed in this article. Brady v. Maryland, 373 U.S. 83, dealing with the prosecution's duty to disclose favorable evidence to the defense, will often be referred to by the words "*Brady* rule," "*Brady* violation," and "*Brady* material." *See* text accompanying

all favorable evidence material to the issue of guilt or punishment, or to the informed decision to waive the right to trial.

Postconviction challenges to guilty pleas that are grounded in nondisclosure in violation of *Brady v. Maryland* are rare, probably because many violations prior to the entry of a plea go undiscovered.[13] The Supreme Court has never resolved the question of whether a *Brady* violation is cognizable by a court in a postconviction proceeding notwithstanding a guilty plea. *United States v. Agurs*,[14] in which the Court set forth the standards of materiality to be used in applying the *Brady* rule, arguably determines the showing of materiality the guilty pleading defendant must make to fit the withheld evidence within the *Brady* rule.[15] However, because none of the Court's decisions concerning the prosecutorial duty to disclose dealt with a guilty plea, this question remains open. An analysis of the small body of law dealing with the validity of guilty pleas preceded by *Brady* violations reveals a judicial attempt to resolve questions presented by the overlap of two areas of the law: the prosecutorial duty to disclose[16] and the waiver of constitutional rights by a guilty plea.[17]

Four different yet interrelated models can be used to analyze the question of whether a *Brady v. Maryland* violation is a valid basis for a court to vacate a guilty plea, and if so, what the standard of materiality of the evidence withheld should be. First, a plea of guilty preceded by the prosecutor's failure to disclose material and favorable evidence is unintelligent because the defendant and his counsel lacked sufficient information to make a reasoned decision whether to plead guilty or stand trial.[18] Second, claims grounded in *Brady v. Maryland* are forfeited by a guilty plea, which cures the due process violation, thereby enabling the state to proceed against the defendant once again.[19] Third, a guilty plea

notes 65-74 *infra*. Brady v. United States, 397 U.S. 742, which addresses the standards for plea bargaining will be referred to by the words "*Brady* trilogy," which also includes Parker v. North Carolina, 397 U.S. 790, and McMann v. Richardson, 397 U.S. 759. *See* text accompanying notes 29-55 & 145-47 *infra*.

13 Nakell, *Criminal Discovery for the Defense and for the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437, 453 (1972).

14 427 U.S. 97 (1976).

15 *See* text accompanying notes 75-95 *infra*.

16 United States v. Agurs, 427 U.S. 97; Brady v. Maryland, 373 U.S. 83. An analysis of the Court's decisions involving the prosecutorial duty to disclose between 1963 and 1976 can be found in Comment, *The Prosecutor's Duty to Disclose: From Brady to Agurs and Beyond*, 69 J. CRIM. L. & C. 197, 199-200 (1978). These decisions will not be discussed here because they do not add anything to the law as espoused in *Brady v. Maryland* and *United States v. Agurs*.

17 Bordenkircher v. Hayes, 434 U.S. 357; Blackledge v. Allison, 431 U.S. 63; Santobello v. New York, 404 U.S. 257; Parker v. North Carolina, 397 U.S. 790; McMann v. Richardson, 397 U.S. 759; Brady v. United States, 397 U.S. 742.

18 *See* text accompanying notes 145-65 *infra*.

19 *See* text accompanying notes 166-84 *infra*.

is an admission of factual guilt which waives all claims of antecedent constitutional violations unrelated to factual guilt.[20] Fourth, the prosecutorial duty under *Brady v. Maryland* can be interpreted as an essential element of due process, which cannot be waived by a guilty plea nor made dependent upon a specific defense request.[21]

In order to provide the necessary background for a discussion of these four models, Part II of this comment will discuss plea negotiation as an institution and will criticize the Court's erroneous assumptions regarding negotiated pleas. Part III will discuss the prosecutorial duty to disclose as defined by *Brady v. Maryland*[22] and *United States v. Agurs*.[23] In addition, criminal defense discovery as a solution to the problem of prosecutorial withholding of material and favorable evidence will be examined. Part IV will use the four models to analyze the application of the *Brady v. Maryland* rule to postconviction attacks on pleas of guilty.

II. PLEA BARGAINING

Guilty pleas obtained through bargains struck between the prosecution and the defense are the predominant means of conviction in state and federal courts.[24] Administrative convenience is the easiest explanation for the high rate of guilty plea convictions; the criminal justice system cannot afford to give every defendant a trial.[25] While the United States Supreme Court[26] and institutions such as the American Bar Association[27] have sanctioned plea bargaining, the academic community has vociferously disapproved of the practice.[28] One critic of plea bargaining contends that the Court has an overly optimistic view of the situation,

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20 *See* text accompanying notes 186-99 *infra*.

21 *See* text accompanying notes 201-38 *infra*.

22 373 U.S. 83. *See* text accompanying notes 65-74 *infra*.

23 427 U.S. 97. *See* text accompanying notes 75-95 *infra*.

24 D. NEWMAN, *supra* note 1, at 3; Alschuler (1979), *supra* note 9, at 33.

25 The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were to be subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Santobello v. New York, 404 U.S. at 260. The Court's statement inspired this rejoinder:

> [T]he view that plea bargaining is an "economic necessity" would gain plausibility if one concluded that this shortcut to conviction had been employed for as long as there had been trials, and even more clearly, the claim of economic necessity would become strained if one concluded that the Anglo-American legal system had survived without plea bargaining during most of its existence.

Alschuler (1979), *supra* note 9, at 2.

26 Bordenkircher v. Hayes, 434 U.S. at 363-64; Blackledge v. Allison, 431 U.S. at 71-72; Santobello v. New York, 404 U.S. at 260-61; Parker v. North Carolina, 397 U.S. 790; McMann v. Richardson, 397 U.S. 759; Brady v. United States, 397 U.S. at 751-52.

27 ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *Standards Relating to Pleas of Guilty* (Tent. draft 1967).

28 Plea bargaining has had an unsavory reputation in academic circles since the 1920s

and has insulated negotiated pleas from later attack by making unrealistic assumptions.[29]

The Court assumes that informal plea negotiations are conducted fairly. It has therefore ignored this decisive stage of the pleading process while devoting its attention to the formal entry of the plea, which is enveloped in procedural protections.[30] The supposed fairness of plea negotiations appears to be rooted in two troublesome assumptions made by the Court. The first assumption is that all defendants who plead guilty would be convicted if they stood trial. The second is that a defendant's plea is voluntary and intelligent if his counsel is present when the plea is entered.[31] The realities of plea bargaining refute both of these assumptions.

The Court's assumption that all guilty pleading defendants would be convicted if they stood trial is implicit in *Santobello v. New York*[32] and *Brady v. United States*.[33] In *Brady*, the Court stated: "We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves."[34] This notion that the guilty pleading defendant would be convicted at trial where he would receive a higher sentence than that which he bargained for is unwarranted because both the prosecutor and the defendant are adverse to taking unnecessary risks. The strength or weakness of the state's case is the prosecutor's main consideration in plea bargaining; therefore, the majority of prosecutors choose to negotiate pleas in cases where victory at trial is less than a certainty.[35] Given the lack of sufficient resources to prosecute and punish all offenders, the prosecutor's initial decision to charge a defendant means that he has made his own judgment that the defendant can be proven guilty of a crime. The pros-

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when the practice, by that time commonplace, first came to public attention. Alschuler (1979), *supra* note 9, at 26-32.

29 A pervasive criticism of the Court's opinions in the *Brady* trilogy can be found in Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975).

30 *See* notes 56-59 & accompanying text *infra*.

31 The discussion of this point in this section will focus on the quality of the assistance of defense counsel. Waiver theory as applied to guilty pleas is extensively discussed in the text accompanying notes 145-65 *infra*.

32 404 U.S. at 260-61.

33 397 U.S. 742.

34 *Id.* at 758. *See* text accompanying notes 186-89 *infra* for Justice White's explanation of this point.

35 Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58-60 (1968). Alschuler relied on his own informal survey of prosecutors and on a *University of Pennsylvania Law Review* study which found that the strength of the state's case was considered important by 85% of the prosecutors questioned. Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 901 (1964).

ecutor, and often the defense counsel, assumes throughout the plea negotiations that the defendant is guilty of a crime very nearly approximating that charged in the original indictment.[36] The prosecutor simply bargains harder where his case against the defendant is weaker. Professor Alschuler noted this practice of offering more concessions in bargaining where the state's case is weaker and commented that "the greatest pressures to plead guilty are brought to bear on defendants who may be innocent. The universal rule is that the sentence differential between guilty plea and trial defendants increases in direct proportion to the likelihood of acquittal."[37] Prosecutors disagree that innocent people plead guilty, principally because they believe that innocent persons are unlikely to be swayed by any pressure to avoid trial.[38]

The defendant seeks to avoid risk in that his principal objective after arrest is to minimize the uncertainty of what will happen to him.[39] The defendant will therefore be willing to accept the certainty of a low sentence or probation rather than risk a trial where the statutory maximum sentence might be imposed upon conviction.[40] This observation is supported by Michael Finkelstein's empirical study of guilty plea practices in twenty-nine federal district courts, in which he concluded that nearly one-third of defendants who plead guilty would be found innocent if they stood trial.[41] Therefore, while plea negotiation is a viable

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36 M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS 100 (1970). Overcharging with an eye toward reducing the charge to the crime the prosecutor believes the defendant has committed is common in state and federal plea negotiations. "Vertical" overcharging, more common in state courts, is where the defendant is charged with the most serious crime he conceivably could have committed. "Horizontal" overcharging, more often found in federal courts, may be a multiplicitous indictment that comes within statutory bounds. An offer to reduce charges or to dismiss charges against a defendant is a more effective guarantee of sentencing leniency, where there are statutory minimum and maximum sentences, than is the prosecutor's promise to make a sentencing recommendation. Alschuler (1968), *supra* note 35, at 85-105.

37 Alschuler (1969), *supra* note 35, at 60.

38 M. HEUMANN, *supra* note 36, at 122-23.

39 D. NEWMAN, *supra* note 1, at 97; Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COLUM. L. REV. 1059, 1081 n.72 (1976).

40 With regard to sentencing disparities between defendants accused of similar crimes, the more demands a defendant makes upon the resources and time of both judge and prosecutor, the longer his sentence will be upon conviction. Thus a guilty pleading defendant will be sentenced more leniently than one who stands trial before the bench, who will in turn be punished less severely than his unfortunate counterpart who demands a jury trial. *See* Alschuler (1976), *supra* note 39, at 1089-99.

41 Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975). This analysis concerns the defendant's chances of being found innocent at trial, regardless of his actual guilt or innocence. By assuming what he called an "implicit rate of non-conviction" representing the proportion of guilt pleading defendants who would have been acquitted had they stood trial, Finkelstein estimated that one-third of all guilty pleading defendants in districts with high rates of guilty pleas would have been found innocent had they stood trial. *Id.* at 309.

alternative to the risks of trial for both sides, it is not a substitute for trial. A plea of guilty does not mean that a like result would be obtained at trial. The Court's equation of guilty plea with conviction at trial is thus unrealistic.

The Court's second problematic assumption is that a plea is voluntarily and intelligently entered if counsel is present.[42] In the *Brady* trilogy of cases, the Court framed the issue as whether a guilty plea induced by a coerced confession,[43] or by the possible imposition of the death penalty,[44] is voluntary and intelligent if the defendant has received the assistance of counsel. The basic flaw in the Court's position, according to one observer, is the assumption that defense attorneys always have their clients' best interests in mind,[45] an opinion which reflects an unduly optimistic view of "the range of competence demanded of attorneys in criminal cases."[46]

Justice Brennan's dissent in *McMann v. Richardson*[47] articulates a different view that is closer to reality. His dissent implies that the defense attorney finds that his own best interests are usually furthered if he encourages his clients to plead guilty. Since the defense attorney works with the same prosecutors and the same judges on a continuing basis, he finds that cooperation with a prosecutor who wants to deal, or a judge who wants to avoid trial, is more to his continuing advantage than affording an individual defendant the full measure of vigorous advocacy.[48] Perhaps the most appalling feature of this cooperative system is the reluctance of the defense attorney who has a good working relationship with the prosecutor's office and the court to press any constitutional claims that the defendant might have except as bargaining chips to obtain concessions in plea negotiations.[49]

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42 Tollett v. Henderson, 411 U.S. 258, 266-69 (1973); Parker v. North Carolina, 397 U.S. at 794-98; McMann v. Richardson, 397 U.S. at 768-74; Brady v. United States, 397 U.S. at 756-58. *See* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975).

43 Parker v. North Carolina, 397 U.S. at 794; McMann v. Richardson, 397 U.S. at 760.

44 Parker v. North Carolina, 397 U.S. at 794; Brady v. United States, 397 U.S. at 749.

45 Alschuler (COLO. 1975), *supra* note 29, at 22; Alschuler (YALE 1975), *supra* note 42, at 1180.

46 McMann v. Richardson, 397 U.S. at 771.

47 *Id.* at 775-89 (Brennan, J., dissenting).

> [In the two prior cases in the *Brady* trilogy] the Court lays great stress upon the ability of counsel to offset the improper influence injected into the pleading processes by the State's unconstitutional action . . . . [t]he conclusions that the Court draws from the role it assigns to counsel are, in my view, entirely incorrect, for it cannot be blandly assumed, without further discussion, that counsel will be able to render effective assistance to the defendant in freeing him from the burdens of his unconstitutionally extorted confession.

Id. at 781 (Brennan, J., dissenting).

48 Alschuler (1968), *supra* note 35, at 47-91; Alschuler (YALE 1975), *supra* note 42, at 1210. *See* M. HEUMANN, *supra* note 36, at 47-91.

49 Alschuler (1968), *supra* note 35, at 79-81.

Moreover, a defense attorney who knows of a weakness in the prosecutor's case against his client can use this knowledge to obtain concessions in plea bargaining. The prosecutor's power to withhold evidence or deny discovery privileges to the defense becomes crucial where his case is flawed, because he has an incentive to conceal the flaw in order to obtain a guilty plea. On the other hand, a prosecutor with a strong case will find that opening his file to the defense will encourage a guilty plea.

Professor Alschuler noted that opportunities for preplea discovery were conditioned not only upon the strength of the state's case,[50] but also upon defense counsel's rapport with the prosecutor's office,[51] and upon concessions by defense counsel, such as divulging his client's confidences[52] or agreeing that what he discovers will not be used at trial.[53] Other observers agree with this description of informal discovery practices.[54] Alschuler concludes that these circumstances provide a rationale for granting broad defense discovery as a matter of right in order to prevent these questionable practices.[55]

The consequences of the failure of a prosecutor to disclose material and favorable evidence prior to the entry of a guilty plea are magnified because the trial judge is unlikely to discern exculpating circumstances in assessing the validity of the plea. Given his tremendous workload, the trial judge is just as interested in disposing of cases by guilty plea as is the prosecutor. He is, therefore, not especially disposed to giving every guilty plea the "penetrating and comprehensive examination"[56] contemplated by the Court in *Boykin v. Alabama*.[57]

Guilty pleas are usually heard in a very short session in which the

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50 Alschuler (YALE 1975), *supra* note 42, at 1227-28.

51 *Id.* at 1225.

52 *Id.* at 1226.

53 *Id.* at 1227.

54 Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROB. 102 (1977). Professor Uviller termed this bargained exchange "informal discovery," and found that the degree of defense discovery permitted by the prosecutor depended upon the strength of the state's case and the defense attorney's relationship with the prosecutor. *Id.* at 113-14.

55 Although most defense attorneys do seem able to secure relatively broad informal discovery in jurisdictions in which the right for discovery is extremely limited, some defendants suffer because their attorneys are not sufficiently trusted by the prosecutor's office to receive the usual privileges. In addition, the absence of a formal right of discovery seems to impose pressures upon defense attorneys to defend their clients less vigorously than they could.

Alschuler (YALE 1975), *supra* note 42 , at 1229. Professor Alschuler is entirely opposed to plea bargaining but argues for broader defense discovery as a means of mitigating the unfairness of the practice.

56 Alschuler (1976), *supra* note 39, at 1114.

57 395 U.S. 238. *Boykin* is generally regarded as requiring that the defendant be made aware of his rights regarding self-incrimination, jury trial, and confrontation. One interpretation of *Boykin* is that a specific set of admonitions is required. *See, e.g.*, ILL. REV. STAT. ch. 110A, §402 (1979). The other interpretation is that *Boykin* only requires an adequate record

judge asks the defendant a set of ritual questions to which he receives a series of monosyllabic answers. Moreover, the trial judge is unlikely ever to be confronted with any irregularity in the plea because the parties have come to him with a prepared agreement, expecting no more than his stamp of approval. As one commentator put it, "At this late stage in the bargaining process, the interests of the prosecutor and defendant are no longer adverse. Instead, they have a joint commitment to the success of the plea bargain they have shaped. The parties therefore seek to present to the judge a facade of scrupulous regularity."[58] Thus the worst fears of Justice Brennan in his dissent in *McMann v. Richardson*[59] are founded in fact. The trial judge, the prosecutor, and the defense attorney work together in the business of convicting defendants by means of negotiated pleas. The Court misconstrues the defense attorney's role in this cooperative system by presuming that representation by counsel ensures the voluntariness and intelligence of the defendant's plea of guilty.

Due in part to the Court's unrealistic assumption of fairness in plea negotiation, the plea bargaining defendant has little in the way of procedural protection.[60] While the Court made great strides in criminal procedure during the Warren era, its decisions concerning guilty pleas have had the effect of sequestering the negotiated plea from later collateral attack.[61] Permeating the Court's opinions in the *Brady* trilogy[62] are the notions that all defendants who plead guilty surely would be convicted at trial, and that the presence of defense counsel mitigates against unconstitutional pressures to plead guilty.

As the discussion of informal discovery during plea negotiation showed, the extent of informal discovery privileges accorded the defense

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for the plea, rather than specific admonitions. Hansen v. Matthews, 424 F.2d 1205 (7th Cir.), *cert. denied*, 397 U.S. 1057 (1970).

Theoretically, an adequate record of a valid plea indicates that the defendant has knowledge of the charge and its elements, Kennedy v. United States, 249 F.2d 257 (5th Cir. 1957), *aff'd*, 259 F.2d 883 (5th Cir. 1958), *cert. denied*, 359 U.S. 994 (1959), and of his sentence, United States *ex rel.* Hill v. United States, 452 F.2d 664 (5th Cir. 1971); Malignaro v. Smith, 408 F.2d 795 (5th Cir. 1969), and that he has responded affirmatively to the trial judge's inquiries, People v. Kirkpatrick, 22 Cal. App. 3d 420, 99 Cal. Rptr. 207 (1971). Moreover, the defendant's awareness of possible defenses contributes to the invalidity of the plea. Quijada-Gaxiola v. United States, 435 F.2d 264 (9th Cir. 1970); United States *ex rel.* McDonald v. Pennsylvania, 343 F.2d 447 (3rd Cir. 1965); Young v. Brewer, 190 N.W.2d 434 (Iowa 1971).

58 Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 307 n.68 (1972).

59 397 U.S. at 775-89. *See* text accompanying notes 47-49 *supra*.

60 Plea agreements are enforceable. Bordenkircher v. Hayes, 434 U.S. 357; Blackledge v. Allison, 431 U.S. 63; Santobello v. New York, 404 U.S. 257.

61 Alschuler (1979), *supra* note 9, at 37; Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 19-23 (1970).

62 Parker v. North Carolina, 397 U.S. 790; McMann v. Richardson, 397 U.S. 759; Brady v. United States, 397 U.S. 742. *See* text accompanying notes 186-89 *infra*.

depends on a number of factors.[63] Chief among these factors appears to be the strength of the state's case against the defendant. The prosecutor's file is open if it will encourage a guilty plea. The prosecutor's ability to grant and withhold discovery privileges in this manner demonstrates that the level of disclosure to the defense profoundly affects the defendant's decision whether to plead guilty or to stand trial. The next section will examine the protections accorded the guilty pleading defendant by the Court's decisions on prosecutorial disclosure and by the formal discovery rules of state and federal jurisdictions.

III. PREPLEA DISCOVERY AND DISCLOSURE

Pretrial disclosure of exculpatory evidence by the prosecution, whether pursuant to the prosecutor's duty under *Brady v. Maryland*[64] or applicable statutes and court rules permitting defense discovery, is an area where due process safeguards are not always enforceable because the discovery process is informal.[65] This section will discuss two questions. First, to what extent does the *Brady-Agurs* standard of materiality afford the guilty pleading defendant the right to preplea prosecutorial disclosure of potentially useful evidence? Second, will the adoption of formal statutory and court rules permitting broad defense discovery of the prosecution's case assure compliance with the *Brady-Agurs* principle?

A. THE PROSECUTORIAL DUTY TO DISCLOSE

In *Brady v. Maryland*,[66] Brady was charged with murder in the commission of a felony. Admitting his participation in the felony, Brady asserted that his companion Boblit did the actual shooting. Therefore, his counsel requested all of Boblit's statements. The prosecutor supplied the defense with all statements except Boblit's confession of the shooting. At trial, Brady was convicted and sentenced to death.

The Supreme Court affirmed the Maryland Court of Appeals' reversal of Brady's conviction.[67] In establishing a new rule governing prosecutorial disclosure, the Court stated: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon

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[63] *See* text accompanying notes 50-55 *supra*.

[64] 373 U.S. 83.

[65] [C]ontrolled by rules of law protecting adversary rights and procedures, the process at other stages is thoroughly unstructured. Beside the carefully guarded fairness of the courtroom is a dark no-man's land of unreviewed bureaucratic and discretionary decision making. *Too often, what the process purports to secure in its formal stages can be subverted or diluted at its more informal stages.*

United States v. Bryant, 439 F.2d 642, 644 (D.C. Cir. 1971) (emphasis added).

[66] 373 U.S. 83.

[67] The Maryland court remanded on the sentencing issue only. Brady v. State, 226 Md. App. 422, 174 A.2d 167 (1961). The Supreme Court concurred with this view. 373 U.S. at 90.

request violates due process where the evidence is material either to the guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[68] On its face, the *Brady* rule seems straightforward. The rule departed from the Court's prior intentional suppression cases[69] by alleviating the need to consider the prosecutor's intent to suppress evidence. Read in accordance with the facts of *Brady*, the rule states that the prosecutor must disclose favorable, material evidence upon receiving a specific request for particular pieces of evidence from the defense.[70] Material evidence is defined as evidence which would create a reasonable doubt of the defendant's guilt.[71] The Court based its decision on the due process clause,[72] reasoning that a criminal defendant cannot have a fair trial if he is prejudiced by the withholding of material evidence in his favor.

Lower courts inconsistently applied *Brady v. Maryland*'s specific request[73] and materiality[74] requirements for thirteen years before the Court attempted to explain *Brady* in *United States v. Agurs*.[75] In *Agurs*, the Court categorized situations demanding the application of the *Brady* rule where the defense made a specific request, a general request, or no request at all.[76] A general request for material and favorable evidence, the Court stated, is the functional equivalent of no request at all.[77]

> If there is a duty to respond to a general request . . . it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if 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 if no request is made.[78]

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68 373 U.S. at 87.

69 *See, e.g.*, Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935).

70 A comprehensive analysis of the historical origins of the prosecutor's duty to disclose can be found in Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 137-42 (1964).

71 *See* text accompanying notes 50-55 *supra*.

72 U.S. CONST. amend. XIV.

73 Some courts construed the prosecutor's duty to disclose liberally so as to override the specific request requirement. *See, e.g.*, Giles v. Maryland, 386 U.S. 66, 96-102 (1967) (Fortas, J., concurring); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964). *See also* note 82 *infra*.

74 Lower courts have determined the materiality of withheld evidence by asking whether it would have changed the trial result. "Lower court opinions often read as if the judge has first made up his mind as to the defendant's guilt and then simply decided the materiality issue accordingly." Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 128 (1972). *See also* Comment, *supra* note 16, at 216.

75 427 U.S. 97.

76 Most challenges to pleas of guilty on the grounds of a *Brady* violation involve situations where a general request or no request was made; hence only the pertinent portions of the *Agurs* opinion will be discussed here.

77 427 U.S. at 106-07.

78 *Id.* at 107.

Thus the Court imposed a high standard of materiality upon a defendant alleging prosecutorial withholding after he has entered a general request for material and favorable evidence or has made no request. In such situations, the standard of materiality is whether the withheld evidence would have created a reasonable doubt of the defendant's guilt.[79] The conviction stands if the defendant fails to make this showing.

No Supreme Court decision addresses the right of the guilty pleading defendant to preplea prosecutorial disclosure of material and favorable evidence. Assuming the usual case of the defendant who, prior to entering a guilty plea, has made a general request for *Brady* material or no request at all, the question becomes whether the standard of materiality demanded by *United States v. Agurs* should be required of the guilty pleading defendant, or whether a lower standard of materiality is more appropriate. *Agurs* can be applied in two ways to this situation of the usual guilty pleading defendant. First, the standard of whether the evidence creates reasonable doubt of guilt can be applied. Second, *Agurs* may be construed to call for a sliding scale of standards for diffferent classes of defendants.

The reasonable doubt standard of materiality has often been applied by lower courts faced with postconviction challenges to guilty pleas based on *Brady* violations.[80] However, this standard is impossible to apply where there has not been a trial. An appellate judge can only decide whether the undisclosed evidence creates a reasonable doubt of guilt if he can consider it in light of all the other evidence. Because there has been no trial, none of the evidence has been adequately developed or tested. In essence, the reviewing court applying the reasonable doubt standard is trying the case for the first time. Thus the defendant's constitutional claims are being determined by an exercise in judicial hindsight.

Moreover, the reasonable doubt standard is too vigorous a standard to be imposed on a defendant who chooses to forego the procedural safe-

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[79] [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.

Id. at 112-13 (footnote omitted).

[80] *See, e.g.*, United States v. Wolczik, No. 76-245 (W.D. Pa. Nov. 27, 1979); Fambo v. Smith, 433 F. Supp. 590 (W.D.N.Y.), *aff'd per curiam* 565 F.2d 233 (2d Cir. 1977); People v. Gott, 43 Ill. App. 3d 137, 356 N.E.2d 1102 (1976); *Ex parte* Lewis, No. 60,645 (Tex. Crim. May 30, 1979), *aff'd without opinion sub nom.* Lewis v. State, 600 S.W.2d 335 (Tex. Crim. 1980). Perhaps a quest for certainty in the application of the prosecutor's duty to disclose has engendered this literal reading of *Agurs*. A desire for certainty in the test for which evidence is material should not, however, blind courts to the rationale underlying the duty to disclose which is fairness to the defendant.

guards of a trial. Indeed, this standard may be too harsh even for a defendant who has had a trial and later asserts a *Brady* violation. Justice Fortas articulated this position in his concurring opinion in *Giles v. Maryland*.[81] Arguing for an expansive interpretation of the materiality requirement, he stated:

> The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses.[82]

Justice Fortas went on to qualify his statement by saying that the nondisclosure of evidence which is merely cumulative or repetitious should not be grounds for setting aside a conviction.[83] Clearly, Justice Fortas' concern was whether the prosecution or the reviewing court might miss some piece of evidence which would be useful to the defense.[84] Hence Justice Fortas would interpret the *Brady v. Maryland* rule in a way that would best prevent prejudice to the defendant, rather than in terms of meeting stringent materiality requirements. The application of the reasonable doubt standard to the guilty pleading defendant asserting a *Brady* violation after entering a general request or no request is so harsh that the purpose of the *Brady* rule, fairness to the defendant, is frustrated.

Under the second approach to materiality determination, *Agurs* can be read as calling for a sliding scale of standards of materiality for different classes of defendants rather than as imposing strict requirements.[85] All convicted criminal defendants who assert that the prosecutor withheld material and favorable evidence can be placed on a continuum of

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81 386 U.S. at 96-102 (Fortas, J., concurring).

82 *Id.* at 98. Justice Fortas also argued against the specific request requirement, an argument best articulated in Barbee v. Warden, 331 F.2d 842: "In gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel." *Id.* at 846.

83 One commentator agrees that the line should be drawn here, stating:

> Fairness requires that the defendant be given favorable evidence of any probative value on the question of guilt or punishment, whether relevant to building a defense or to undermining the prosecutor's case. . . . [W]henever the prosecutor has failed to disclose relevant information to the defense, the courts should not hesitate to find error. This does not necessarily mean that a conviction need be reversed when the prosecutor has innocently overlooked truly insignificant bits of evidence.

Comment, *supra* note 74, at 132.

84 386 U.S. at 99 (Fortas J., concurring).

85 [T]he significance of *Agurs* is that a court or prosecutor can rank-order the defendant's burden of proving unfairness according to the situation in which a particular nondisclosure occurred. That is, the majority opinion can be interpreted as a means of comparing "how much" a defendant must prove in order to establish materiality in accordance with the circumstances under which the nondisclosure occurred.

Note, *Discovery—Prosecutor's Failure to Disclose*, 67 J. CRIM. L. & C. 408, 414 (1976).

required showings of materiality. Those convicted at trial would be held to the high standards of materiality required by *Agurs* in the specific request, general request, and no request categories. Those convicted by pleas of guilty would be ranked among themselves according to the three request categories. No guilty pleading defendant, however, would be held to the standards that *Agurs* requires of defendants who stood trial, because a plea conviction involves a waiver of the right to proof of guilt beyond a reasonable doubt. Thus, the standard of materiality should be lower in all cases where there has been a plea conviction because neither side has had the opportunity to present evidence.

A lower standard of materiality for guilty pleading defendants would encompass evidence that relates to the defendant's decision whether to plead or to stand trial, even though the evidence may not necessarily constitute traditional *Brady* material. Because the *Brady-Agurs* standard of materiality is based on the notion that the withheld evidence would have affected the trial outcome, the standard presumes that the question of whether to go to trial has already been answered. Therefore, "traditional" *Brady* material and favorable evidence is exculpatory evidence. This includes evidence related to an element of the offense,[86] to a legal excuse,[87] or a justification for the crime, or to an illegal search and seizure of evidence.[88] Courts have found *Brady* violations where evidence relating to these examples was not disclosed to defendants who later entered pleas of guilty.[89]

Certain types of evidence, however, are highly pertinent to an informed decision whether to plead guilty or to stand trial, yet would not be cognizable as *Brady* material under the *Agurs* reasonable doubt standard. Evidence of the defendant's incompetence to stand trial[90] would fit into this category. Incompetency is more easily recognized at a trial, which can be suspended for a competency hearing, than at a brief arraignment where a plea is entered. Similarly, evidence, which for trial purposes would be termed "tactical" or "merely cumulative," may be important to the defendant and his counsel when making a choice between a guilty plea and a trial. Since this choice is essentially a strategic decision, the withholding of strategic evidence should be cognizable as a *Brady* violation. Examples of tactical evidence affecting the decision to plead include information that the complaining witness had died,[91] or

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86 Fambo v. Smith, 433 F. Supp. 590.

87 Clements v. Coiner, 299 F. Supp. 752 (S.D. W. Va. 1969); *Ex parte* Lewis, No. 60,645 (Tex. Crim. May 30, 1979).

88 Zacek v. Brewer, 241 N.W.2d 41 (Iowa 1976).

89 *See* notes 86-88 *supra*.

90 Evans v. Kropp, 254 F. Supp. 218 (E.D. Mich. 1966); *Ex parte* Lewis, No. 60,645.

91 People v. Jones, 44 N.Y.2d 76, 375 N.E.2d 41, 404 N.Y.S.2d 85, *cert. denied*, 439 U.S. 846 (1978).

information which would aid the defense in impeaching the credibility of a prosecution witness at trial.[92]

Nonetheless, a standard of materiality that calls for disclosure of all evidence relating to the defendant's decision whether to plead guilty or stand trial is indefinite and difficult to apply. This standard could open the doors to every defendant seeking to set aside his guilty plea on the ground that some trivial piece of information was withheld. Furthermore, this standard could be construed to require the prosecutor to sort through all of the largely neutral and irrelevant information in his files in order to find evidence which would affect a decision to plead.

Yet a lower standard of materiality mandating disclosure of evidence directly affecting the defendant's decision whether to plead guilty or stand trial is a logical extension of the *Brady* principle. In the context of a trial, the prosecutor must disclose *Brady* material no later than at trial.[93] Most defendants never find out that material and favorable evidence has been withheld.[94] Disclosure of such evidence must precede the defendant's act of self-conviction[95] if his guilty plea is to be the product of an informed choice between self-conviction and trial. It is not sufficient that the defendant entering a plea merely be aware that he is waiving certain rights. Preplea disclosure of evidence directly affecting the decision to plead guilty would ensure that a guilty plea is an intelligent waiver of the defendant's right to trial. The possible difficulties in applying this standard, especially from the standpoint of the prosecutor, raise the question whether broad privileges of defense discovery would not be an easier way to achieve the same result.

B. PREPLEA DISCOVERY

The *Brady* rule is not a rule of discovery, nor does it demand that there be any defense discovery at all.[96] The rule simply states that the prosecutor must disclose material and favorable evidence to the defense

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92 State v. Pitts, 249 So. 2d 47 (Fla. Dist. Ct. App. 1971).

93 The Supreme Court has never decided the optimal time for the disclosure of *Brady* material, but disclosure must be made no later than at trial. Comment, *supra* note 16, at 217.

94 Nakell, *supra* note 13, at 453.

95 At least one court disagrees. United States v. Wolczik, No. 76-245. "The rule of *Brady v. Maryland* is founded on the constitutional requirement of a fair trial . . . . It is not a rule of discovery . . . . Thus, a defendant cannot expect to obtain *Brady* material for use in a pretrial decision to plead guilty."

96 United States v. Agurs, 427 U.S. 92; Brady v. Maryland, 373 U.S. 83. Significantly, Justice Stevens reiterated the Court's position that the defendant has no right to broad discovery of the prosecutor's case, and that the prosecutor need not open his file to the defendant. 427 U.S. at 109. This position was previously espoused in Moore v. Illinois, 408 U.S. 786, 792 (1972).

"Many authorities have announced without analysis that there is no constitutional right to defense discovery. The United States Supreme Court has strongly favored defense discov-

before trial. The question to be discussed in this section is whether the adoption of procedural rules permitting broad defense discovery would ensure compliance with the *Brady* rule.

Generally, criminal discovery for the defense has several perceived advantages. Given the greater investigative resources of the prosecutor, defense discovery equalizes the strategic contest between the prosecution and the defense.[97] In addition, defense discovery may encourage guilty pleas,[98] reduce the number of motions requesting information,[99] and generally impute a measure of fairness to pretrial processes that are determinative of the outcome of the formal proceedings. Arguments that defense counsel will use the discovered evidence to fabricate a defense,[100] and that the defense should not be able to engage in a "fishing expedition,"[101] have been largely discredited.

Since *Brady v. Maryland*, many commentators have advocated a pretrial "open file" policy on the part of the prosecution to ensure that the defendant's right to prosecutorial disclosure of material and favorable evidence is observed.[102] Efforts to increase pretrial defense discovery are directed at the problem of "negligent nondisclosure."[103] Because the good faith or bad faith of the prosecutor in failing to turn over material and favorable evidence to the defense is irrelevant under the *Brady*

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ery, but the Court's development of constitutional procedures to deliver it has been measured." Nakell, *supra* note 13, at 451 (footnotes omitted).

97 Note, *Implementing Brady v. Maryland: An Argument for a Pretrial Open File Policy*, 43 U. CIN. L. REV. 889, 890 (1974); Note, *supra* note 70, at 142-43.

98 Note, *supra* note 97, at 908. "[T]here may be an increase in guilty pleas when there is disclosure of implicating evidence (not within the parameters of *Brady*) as well as favorable evidence." *Id.*

99 *Id.*

100 What may be seen as a last stand for this argument can be found in *In re* DiJoseph, 394 Pa. 19, 28-31, 145 A.2d 187, 190-92 (1958) (Bell, J., dissenting).

> The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one-time refusal of the criminal law to allow the accused to produce any witnesses at all.

6 J. WIGMORE, EVIDENCE § 1863, at 488 (3d ed. 1940).

101 There is no persuasive reason why he [the defendant] should not be allowed to go on a "fishing expedition" for information as long as he does not fish for the prosecution's work product. In many cases the defendant—particularly if he is innocent—may have little or no idea what information the prosecution might have. . . . That is precisely why he needs discovery.

Nakell, *supra* note 13, at 475.

102 *See, e.g.*, Nakell, *supra* note 13; Comment, *supra* note 74; Note, *supra* note 97; Comment, *Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial*, 119 U. PA. L. REV. 527 (1971).

103 Note, *supra* note 97, at 909. The author observed that most *Brady* violations that are appealed are the result of negligence on the part of the prosecution, rather than intentional suppression. For an analysis of some examples of negligent nondisclosure cases, *see* Nakell, *supra* note 13, at 452-60.

rule,[104] the Court was obviously concerned with negligent nondisclosure in formulating the rule. Addressing the negligent nondisclosure problem, one commentator has argued that broad defense discovery is mandated because the prosecutor should not be entrusted with the determination of which evidence must be furnished to the defendant under *Brady v. Maryland*.[105]

The prosecutor should be relieved of responsibility for disclosure by means of liberal defense discovery for several reasons. The prosecutor's integrity has nothing to do with the negligent nondisclosure problem.[106] First, the demands of the prosecutor's workload and his role as an advocate make him unable to search his files for every piece of evidence that conceivably could be material and favorable to the defendant. If the prosecutor only moves to indict defendants that he believes can be proved guilty,[107] then he may decide close questions of materiality and favorableness in favor of nondisclosure.[108] Thus, his posture, heavy caseload, and massive files mean that total compliance with the *Brady* rule is expensive for the prosecutor in terms of time.

Second, the prosecutor cannot, and should not, be expected to prepare the defendant's case for him. He cannot be expected to view the evidence according to its usefulness to the defense because his posture as prosecutor gives him a biased view of the evidence.[109] Moreover, if the prosecutor is unfamiliar with defense counsel's theory of the case, he is unlikely to appreciate the strategic value of seemingly neutral information.[110]

Two practitioners, Zagel and Carr, have argued that the problem of the prosecutor's inability to appreciate the defense value of information in his file can be alleviated by reciprocal discovery.[111] They assert that in instances where the materiality and favorableness of the evidence is in doubt, the prosecutor cannot decide whether to produce the evi-

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104 Brady v. Maryland, 373 U.S. 83. When material and favorable evidence is withheld, the prosecutor is cast "in the role of an architect of a proceeding that does not comport with standards of justice, even though . . . his action is not 'the result of guile' . . . ." *Id.* at 88 (citations omitted).

105 Nakell, *supra* note 13, at 435-60. *See also* Note, *supra* note 97, at 895-900.

106 *See* note 105 *supra*; both authors agree that cases of intentional suppression are rare and easily dealt with on appeal.

107 *See* text accompanying note 37 *supra*.

108 Note, *supra* note 97, at 889 n.57.

109 *Id.* at 896.

110 Nakell, *supra* note 13, at 458. There is disagreement on the merits of the trial judge performing this function. Professor Nakell argues against it on the ground that the trial judge knows even less about the defense counsel's case than does the prosecutor. *Id.* at 460-61.

111 Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557, 562 (1971). At the time they wrote this article, Zagel and Carr were members of the Criminal Justice Division of the Illinois Attorney General's Office.

dence unless he has gained knowledge of the defense theories through discovery against the defense. Zagel and Carr further observe that defense discovery may serve to ensure that an adequate basis exists for a plea of guilty.[112]

Nonetheless, broad defense discovery cannot be regarded as a panacea in implementing the *Brady* rule in the guilty plea context, nor in ensuring that pleas of guilty are intelligently entered. As Zagel and Carr point out:

> A prosecutor acting in good faith, however, will comply with *Brady* even without discovery. If the prosecutor is not acting in good faith, he can hide the evidence even if there is discovery. Compliance with *Brady* cannot be secured by courtroom procedure alone; ultimately compliance will depend on the good faith of law enforcement personnel.[113]

The extent to which procedural rules affording the defense discovery privileges may be undermined during plea negotiations is not known. However, as the discussion of plea bargaining in the previous section showed, a logical inference can be made that some dilution of discovery privileges is taking place during plea negotiation, given the extent of prosecutorial control over informal discovery.[114]

At the time of this writing, California,[115] Illinois,[116] New Jersey,[117] Florida,[118] and to some extent the amended Federal Rules of Criminal Procedure[119] provide the defense with broad privileges to discover items of prosecution evidence such as the statements of the defendant, codefendants, and witnesses,[120] documentary and physical evidence, and experts' reports. Two recent cases that apply the Illinois and federal discovery rules to guilty pleading defendants demonstrate that these rules do not necessarily ensure compliance with the *Brady* rule.

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112 *Id.* at 562.

113 *Id.* "The austere ambivalence that is commanded is beyond the capacity of anyone who is also expected to perform an advocate's role." Nakell, *supra* note 13, at 457.

114 *See* text accompanying notes 50-55 *supra*.

115 California discovery process is not statutory but is the product of judicial decision on a case-by-case basis; discovery is at the trial court's discretion on defense motion. *See* Kane, *Criminal Discovery—The Circuitous Road to a Two-Way Street*, 7 U.S.F.L. REV. 203 (1973); Shatz, *California Criminal Discovery: Eliminating Anachronistic Limitations Imposed on the Defendant*, 9 U.S.F.L. REV. 259 (1974); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964); Note, *The Preliminary Hearing in California: Adaptive Procedures in a Plea Bargain System of Criminal Justice*, 28 STAN. L. REV. 1207 (1976).

116 ILL. REV. STAT. ch. 110A, § 412 (1979). *See* Zagel & Carr, *supra* note 111.

117 N.J. CT. R. 3:13-3. *See* Zagel & Carr, *supra* note 111, at 566-67.

118 FLA. R. CRIM. P. 3.220. *See* Zagel & Carr, *supra* note 111, at 564-66.

119 FED. R. CRIM. P. 16. *See* Comment, *Amendments to the Federal Rules of Criminal Procedure—Expansion of Discovery*, 66 J. CRIM. L. & C. 23 (1975).

120 Disclosure of government witnesses' statements is governed by the complementary provisions of FED. R. CRIM. P. 16 and the Jencks Act, 18 U.S.C. § 3500 (1979).

In *People v. Gott*,[121] the defendant sought to withdraw his plea, alleging that the prosecutor withheld a codefendant's statements prior to his entry of a guilty plea but later presented these statements at the sentencing hearing. The defense had made a general request for discovery under Illinois Supreme Court Rule 412.[122] The court found that while the codefendant's statements were inculpatory and therefore were not *Brady* material, the prosecutor's failure to disclose this evidence violated Illinois Supreme Court Rule 412(a)(ii), which requires the prosecution to disclose all statements of codefendants on written motion.[123] In holding that the nondisclosure was harmless error, the court made no mention of this violation of state discovery rules.[124]

In *United States v. Wolczik*,[125] the defendant sought to vacate his plea, asserting that he had been denied discovery of the written statements of his coconspirators. The Court denied relief because the Jencks Act[126] and Rule 16[127] preclude discovery of the statements of prospective government witnesses until they have testified at trial. The Court further found that the statements were not *Brady* material because the statements identified Wolczik as a coconspirator but did not exonerate him.[128] Nonetheless, the Court stated that if the statements were *Brady* material, preplea disclosure arguably could be required.[129]

Gott and *Wolczik* demonstrate that even the most defense-oriented discovery statutes to date do not necessarily act as enforcement mechanisms for the *Brady* rule. In both cases the courts held that the withheld evidence was not *Brady* material. Only in *Gott* would the application of the relevant discovery statute have required the prosecutor to turn over more evidence to the defense than required under the *Agurs* reasonable doubt standard.[130]

Hence the guilty pleading defendant is not afforded disclosure of evidence directly affecting his choice between a plea and a trial by the

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121 43 Ill. App. 3d 137, 356 N.E.2d 1102 (1976).

122 ILL. REV. STAT. ch. 110A, § 412 (1979).

123 ILL. REV. STAT. ch. 110A, § 412(a)(ii). This section provides in pertinent part: "[T]he State shall, upon written motion of defense counsel, disclose to defense counsel . . . . any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant . . . ."

124 43 Ill. App. 3d at 142-43, 356 N.E.2d at 1106. *See* text accompanying notes 190-91 *infra*.

125 No. 76-245. Wolczik entered a guilty plea after agreeing to a plea bargain identical to that offered his coconspirators.

126 18 U.S.C. § 3500.

127 FED. R. CRIM. P. 16(2).

128 *See* text accompanying notes 149-55 *infra*. United States v. Wolczik, No. 76-245. Wolczik's motion to vacate his plea was denied.

129 *Id.*

130 The Illinois Supreme Court applied the reasonable doubt standard in this case. People v. Gott, 43 Ill. App. 3d at 142, 356 N.E. 2d at 1106. *See* text accompanying notes 190-91 *infra*.

most liberal defense discovery provisions any more than he is afforded such disclosure under the standards delineated in *Agurs*. Insofar as the trial defendant is concerned, these defense discovery provisions probably have served their purpose of alleviating the prosecutor's burden of compliance with the *Brady* rule. The guilty pleading defendant, however, is not greatly aided by these provisions where they do not encompass evidence beyond that required to be disclosed under the reasonable doubt standard.

In the majority of jurisdictions, defense discovery privileges are subject to judicial discretion,[131] and the defense is required to make some showing of "need,"[132] "materiality," "reasonableness,"[133] "good cause,"[134] or some combination of these. State and federal discovery procedures, as presently administered, are neither intended nor enforced to aid the defendant in making an informed decision whether to plead guilty or stand trial.

IV. APPLICATION OF *BRADY V. MARYLAND* TO PLEA CONVICTIONS

A guilty plea operates as a waiver of the defendant's right to trial and its attendant constitutional safeguards.[135] Therefore, a plea must satisfy the constitutional standards for waiver, which the Court in *Johnson v. Zerbst*[136] defined as "ordinarily an intentional relinquishment of a known right or privilege."[137] Four models can be used to explain when a guilty plea should be set aside for a violation of *Brady v. Maryland* rights.[138] First, under the traditional concept of waiver, prosecutorial withholding of *Brady* material renders a guilty plea unintelligent.[139]

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131 *E.g.*, DEL. SUPER. CT. CRIM. R. 16; ME. R. CRIM. P. 16(a); PA. R. CRIM. P. 310; TEX. CODE CRIM. PRO. ANN. art. 39.14; VT. R. CRIM. P. 16.

132 *E.g.*, State v. Eads, 166 N.W.2d 766 (Iowa 1969) (defendant must show a particularized need for witness statements).

133 *E.g.*, KAN. STAT. ANN. § 22-3212(2) (1974) (defendant must show materiality and reasonableness of request to discover physical evidence); MD. R. CRIM. P. 728 (defendant must show materiality and reasonableness of request to discover own statements).

134 *E.g.*, MONT. REV. CODE ANN. § 95-1801(d) (1969) (defendant must show good cause to discover witness statements).

135 Among these rights are the right to jury trial, Duncan v. Louisiana, 391 U.S. 145 (1968), the privilege against self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964), the right to confront one's accusers, Pointer v. Texas, 380 U.S. 400 (1965), the right to proof of guilt beyond a reasonable doubt, *In re* Winship, 397 U.S. 358 (1970), and the right to obtain witnesses in one's favor, Washington v. Texas, 388 U.S. 14 (1967). For other rights and privileges of lesser importance waived by a guilty plea, *see* Bishop, *supra* note 2.

136 304 U.S. 458 (1938).

137 304 U.S. at 464. "Almost without exception the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973).

138 373 U.S. 83.

139 The issue of the *voluntariness* of the plea is not relevant here because (a) the concept of

Second, a guilty plea constitutes a forfeiture of *Brady v. Maryland* rights because of the state's interest in the finality of plea convictions.[140] Third, because plea acceptance procedures generally require the judge to satisfy himself that there is a factual basis for the plea,[141] the prosecutor's withholding of certain types of exculpatory evidence could erode the factual basis for the plea. Fourth, the due process right conferred by *Brady v. Maryland* can be equated with several rights[142] that are neither waived nor forfeited by a plea of guilty.

A. REQUIREMENT OF AN INTELLIGENT PLEA

The first model states that prosecutorial withholding of material and favorable evidence renders a subsequent plea of guilty unintelligent. This concept conflicts with a trend exemplified by the *Brady* trilogy[143] and *Tollett v. Henderson*,[144] which one commentator has characterized as an erosion of the concept of voluntary and intelligent waiver.[145] With the undue emphasis placed on the presence of counsel during plea negotiation in the *Brady* trilogy and *Tollett*,[146] an intelligent plea apparently need involve little more than knowledge on the part of the defendant of the charge and the sentence and an awareness that he is foregoing a trial.

These four decisions make a counseled plea virtually immune from collateral attack on traditional waiver grounds. The standard of knowing and intelligent waiver adopted by the Court is sufficiently low as to

"involuntary" seems to be clearly defined as that which is induced by threats, misrepresentation or other improper means, as espoused in Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *rev'd on other grounds*, 356 U.S. 26 (1958), and later accepted by the Court in Brady v. United States, 397 U.S. at 755, and (b) a *Brady v. Maryland* violation affects the defendant's ability to make an informed decision whether to plead guilty, hence it relates to the *intelligence* of making the plea, rather than the defendant's willingness to enter a plea.

140 Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977). For a criticism of Professor Westen's arguments, *see* Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978). Westen replies to Saltzburg in *Forfeiture by Guilty Plea—A Reply*, 76 MICH. L. REV. 1308 (1978).

141 *E.g.*, FED. R. CRIM. P. 11(e).

142 These include: the right to speedy trial, Westen, *supra* note 141, at 1226 n.6; the protection against double jeopardy, Menna v. New York, 423 U.S. 61 (1975); the right to challenge the constitutionality of a substantive criminal law, Ellis v. Dyson, 421 U.S. 426 (1975); Haynes v. United States, 390 U.S. 85 (1968); and the due process right asserted in Blackledge v. Perry, 417 U.S. 21.

143 Parker v. North Carolina, 397 U.S. at 797-98; McMann v. Richardson, 397 U.S. at 770; Brady v. United States, 397 U.S. at 757.

144 In *Tollett*, the Court stated, "A guilty plea voluntarily and intelligently entered may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge . . . ." 411 U.S. at 264.

145 Alschuler (COLO. 1975), *supra* note 29, at 37-42.

146 *See* note 57 *supra*.

validate a "plea in the dark,"[147] as evinced by the Court in *Brady v. United States*:

> The rule that a plea must be intelligently made does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the state's case or the likely penalties attached to alternative courses of action.[148]

Thus the standard of waiver adopted by the *Brady* trilogy and *Tollett*, that a counseled plea is an intelligent plea, is a lower standard than the traditional requirement of voluntary and intelligent waiver of *Johnson v. Zerbst*. The *Brady* trilogy's lowered standard for waiver of constitutional rights by guilty pleading defendants has harsh effects on those asserting a *Brady v. Maryland* violation after a plea conviction. These effects are demonstrated by *United States v. Wolczik*.[149] In that case, Wolczik pleaded guilty to one count of conspiracy in exchange for the dismissal of three counts of receiving and possessing stolen bonds. He sought to vacate his plea because the government had withheld the statements of his coconspirators, who were to testify against him at trial.[150] Quoting at length the language of *Brady v. United States* and *Tollett v. Henderson*,[151] the district court held that considerations which might have influenced the defendant's decision to plead guilty did not negate the voluntary and intelligent nature of the plea[152] unless he could show that it was not competently counseled.[153] Although the court held that the statements withheld were not *Brady v. Maryland* material,[154] given the court's use of such a low standard of knowing and intelligent waiver a finding that these statements were *Brady* material would not have changed the result.[155] Because of its focus on the presence of counsel, the *Brady* trilogy standard of waiver, as applied in *Wolczik*,

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147 Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 183 (1964).

148 Brady v. United States, 397 U.S. at 757.

149 No. 76-245. *See* text accompanying notes 125-29 *supra*.

150 These statements could not be discovered by the defense until the witnesses had testified under the Jencks Act, 18 U.S.C. § 3500, but could be discovered if they were *Brady* material. *See* text accompanying note 129 *supra*.

151 The language quoted by the court was essentially the same as that quoted in the text accompanying notes 144-48 *supra*. United States v. Wolczik, No. 76-245.

152 *Id.*

153 *Id.*

154 Coconspirator Adams' statement identified Wolczik as a conconspirator. One of coconspirator Martin's statements identified Wolczik as a coconspirator by his first name only; Martin's other statement mentioned Wolczik but did not inculpate him. Although the court held that the statements were simply "not exculpatory," there does seem to be a question as to whether Martin's inconsistent statements constitute *Brady* material. *Id.*

155 The court held that a defendant has no right to *Brady* material prior to entering a plea of guilty. *Id.* *See* note 95 *supra*.

seems to ignore the extent of actual knowledge of facts and circumstances relevant to a defendant's decision to plead guilty. The rule of *Brady v. Maryland* and the standard of waiver adopted in the *Brady* trilogy thus are irreconcilable as applied to the guilty pleading defendant. If the withholding of material and favorable evidence by the prosecutor renders a subsequent plea of guilty unintelligent, the standard of voluntary and intelligent waiver used to gauge the validity of the plea must be the traditional concept of *Johnson v. Zerbst*.

Two state courts, however, have attempted to reconcile the prosecutorial duty to disclose and the *Brady* trilogy concept of waiver by holding that prosecutorial withholding of material and favorable evidence renders a guilty plea unintelligent because it detrimentally affects defense counsel's ability to provide competent advice. In *Lee v. State*,[156] the trial court denied the defendant's motion to vacate his sentence,[157] after he pleaded guilty to assault with intent to kill. Lee contended that his plea was not knowingly and intelligently entered because the prosecutor failed to disclose evidence that the victim misidentified another man at a lineup prior to the preliminary hearing at which she identified Lee. Relying on a statement by the assistant prosecutor at the hearing on Lee's motion to vacate that constituted a virtual confession of the prosecution's mistake,[158] the Missouri Court of Appeals allowed the defendant to withdraw his guilty plea, despite the state's reliance on the *Brady* trilogy and *Tollett* for the proposition that a guilty plea waives unknown rights and defenses.[159] The court granted that the plea would be valid if defense counsel knew of the *Brady* violation prior to the entry of the plea and had nonetheless effectively represented the defendant.[160] Nevertheless, the court observed, the combination of the prosecutor's

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156 573 S.W.2d 131 (Mo. 1978).

157 MO. ANN. STAT. § 27.26 (Vernon 1953). This section allows a prisoner to move to vacate his sentence on the ground that it violates the Constitution (or the state constitution or laws), that the court lacked jurisdiction, or that the sentence exceeds the statutory maximum.

158 At the defendant's rule 27.26 hearing, the assistant prosecutor testified:

> I did feel that the facts of the misidentification should have been communicated to the defense attorney because I do feel very strongly that the defense cannot recommend a plea of guilty or discuss a plea of guilty with a defendant unless they are aware of factors which might mitigate the case against their clients.

573 S.W.2d at 132.

159 An argument that "unknowable" rights cannot be waived by a guilty plea under the traditional concept of waiver can be found in Note, *The Guilty Plea as a Waiver of "Present But Unknowable" Rights: The Aftermath of the Brady Trilogy*, 74 COLUM. L. REV. 1435 (1974).

160 There can be no question but that a guilty plea is effective despite a prior violation of the defendant's constitutional rights, provided the defendant and his counsel *knew* that the violations had occurred and the violations had ceased to have any coercive effect at the time the quality [sic] plea was entered. Also, it cannot be questioned that a guilty plea is binding even though the defendant and his counsel were lacking in some information bearing upon the case, so long as that lack of information was not the result of ineffective legal representation.

Lee v. State, 573 S.W.2d at 134 (emphasis added).

knowing suppression of exculpatory evidence and the fact that knowledge of that evidence at the time of the plea "reasonably would have led the defendant not to so plead" called for the withdrawal of the plea.[161] The court based its decision on the defense attorney's need for an item of material and favorable evidence that would have enabled him to provide the defendant with informed advice in the decision whether to plead guilty.

Similarly, in *Zacek v. Brewer*,[162] petitioner Zacek sought postconviction relief on the ground that his plea to second-degree murder was unintelligent. He argued that the state "artificially restricted" his choice between a plea and trial because the police had willfully suppressed evidence of an illegal search of his home and seizure of shell casings that matched the murder weapon.[163] Zacek's attorneys had advised him to plead guilty because they thought that he would be convicted of first-degree murder if tried. At the postconviction hearing, however, one of the attorneys testified that he never would have recommended a guilty plea had he known that the evidence was illegally seized and thus inadmissible at trial. The Supreme Court of Iowa found that, under *Tollett* and *McMann*, Zacek could not obtain relief for a preplea deprivation of a constitutional right unless he could show that his counsel's advice was not within the standards enunciated in those two cases.[164] The court found that the state's suppression of exculpatory evidence prevented defense counsel from becoming informed of the illegality of the search and therefore prevented counsel from rendering effective assistance to the defendant.[165]

The evidence withheld in *Zacek* and *Lee* was obviously exculpatory. The courts need not have concerned themselves with the defense attorneys' inability to render advice to reach the results obtained. A simple application of the *Brady v. Maryland* rule to the facts of each case, even with the *Agurs* reasonable doubt standard, would have brought about the same result. The courts should not have taken the circuitous steps that they took to relate plain violations of due process to the effectiveness of counsel. Although these steps were necessary to reconcile the *Brady* trilogy standard of waiver with the prosecutorial duty to disclose, they were inexpedient because the focus of the latter rule is on fairness to the defendant and not on the presence of counsel in bargaining. When the prosecutor unfairly withholds material and favorable evidence from the defense, the ripple effects that this action may have on

161 *Id.* at 134-35.
162 241 N.W.2d 41.
163 *Id.* at 45.
164 *Id.* at 50.
165 *Id.* at 51-52. The case was remanded for an order to set aside the plea.

defense counsel's efficacy are a foregone conclusion. Only if the courts accept the proposition that a guilty plea waives all antecedent constitutional defects need the effect of such defects on defense counsel's advice be considered. This argument, which will be discussed in the next section, is that the *Brady* trilogy was not based on the traditional concept of waiver, and espouses a different concept of how the defendant relinquishes his rights by a plea of guilty.

B. FORFEITURE BY PLEA

The second model states that the *Brady* trilogy does not represent the traditional concept of waiver, but abandons the voluntary and intelligent waiver concept.[166] Justice White, who wrote the trilogy opinions, originated this argument. In his dissent in *Lefkowitz v. Newsome*,[167] Justice White stated that the trilogy was not grounded in the *Johnson v. Zerbst* theory of waiver, but rather in the idea that the defendant cannot vacate his plea regardless of the constitutional violations that preceded it, because a plea is a determination of factual guilt.[168] Justice White's somewhat unorthodox view of the absolute finality of guilty pleas[169] is the root of the second model, which states that a guilty plea may be seen as a *forfeiture* of *Brady v. Maryland* rights.[170]

Based on Justice White's theory that a guilty plea cures all antecedent constitutional violations, Professor Westen has developed a model for determining which rights are forfeited by a guilty plea.[171] This model differentiates forfeiture from waiver. Forfeiture, in the sense of involuntary relinquishment, is necessary where the state's interest in the finality of the guilty plea outweighs the defendant's assertion of the claimed right. Waiver, the traditional concept of a voluntary and intelligent decision to forego a right, applies where this balance tips in favor of the defendant's assertion of the claimed right.[172]

The starting point for Westen's model is the *Brady* trilogy[173] and *Tollett v. Henderson*.[174] Professor Westen argues that the constitutional

166 Alschuler (COLO. 1975), *supra* note 29, at 30-37; Westen, *supra* note 140; Note, *supra* note 159, at 1439-45.

167 420 U.S. 283 (1975). *See* Alschuler (COLO. 1975), *supra* note 29, at 30-37; Westen, *supra* note 140, at 1232.

168 420 U.S. at 299 (White, J., dissenting).

169 *Contra*, Lefkowitz v. Newsome, 420 U.S. at 283 (majority opinion); Blackledge v. Perry, 417 U.S. 21.

170 The third argument, which is an extension of the second, holds that if a plea is to function as a determination of factual guilt, then the nondisclosure of *Brady* material which exculpates the defendant is grounds for setting the plea aside.

171 Westen, *supra* note 140.

172 *Id.* at 1254-55.

173 *Id.* at 1227 n.29.

174 A grand jury whose members included no one of the defendant's race could have been

violations at issue in these cases were "curable" and therefore forfeited by a guilty plea. Westen states his model as follows:

> A defendant who has been convicted on a plea of guilty may challenge his conviction on any constitutional ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect. In other words, a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be "cured."[175]

Applying this model, Westen attempts to explain the Court's holdings in *Blackledge v. Perry*[176] and *Menna v. New York*[177] by arguing that the constitutional rights at issue in those cases were not forfeitable because they were not curable. In *Blackledge v. Perry*, the defendant had been convicted at trial of a misdemeanor and exercised his statutory right to trial *de novo*. In retaliation, the prosecutor filed a felony charge against Perry for an included offense based on the same conduct. Perry pleaded guilty to the felony charge and then sought postconviction relief for the prosecutor's retaliatory move, asserting that he had been deprived of due process. In *Menna v. New York*, the defendant pleaded guilty to contempt charges for refusing to testify before a grand jury. Menna was later indicted for refusing to answer questions before the same grand jury, and filed a double jeopardy claim. Professor Westen argues that the incurability of the violation of the due process right to a statutory trial *de novo*, and of the protection against double jeopardy, stems from the fact that a violation of these rights prevents the state from ever obtaining a valid conviction.[178] He relies on a statement in *Blackledge v. Perry* that the claimed right goes "to the very power of the State to bring the defendant into court to answer the charge brought against him."[179]

Where does the right to prosecutorial disclosure of material and favorable evidence, which is rooted in due process, fit into Westen's scheme of differentiating those rights which are forfeited from those rights which may be asserted after a guilty plea? The remedy for a failure to disclose *Brady* material no later than at trial is a new trial; thus the state has the opportunity to obtain a conviction on the original charge after providing the defendant with the evidence previously with-

"cured" by the state's obtaining a proper indictment from a racially balanced grand jury. *Id.* at 1226.

175 *Id.*

176 417 U.S. 21.

177 423 U.S. 61.

178 Professor Westen's differentiation between curable and incurable constitutional violations may not hold up. Professor Saltzburg argues that the defect in *Blackledge* was curable in that the prosecutor could have filed a charge that did *not include* Perry's misdemeanor, and that the defect in *Menna* could have been cured by denominating the plea a *civil* contempt. Saltzburg, *supra* note 140, at 1284-85 nn.89-91.

179 417 U.S. at 30.

held. The state's chances of obtaining a conviction upon retrial will be diminished by this evidence, but the power of the state to bring the defendant into court on the original charge is in no way impaired. Therefore, if Westen's model is applied to *Brady v. Maryland*,[180] the defendant's right to prosecutorial disclosure of material and favorable evidence is forfeited by a guilty plea because a claim based on this right does not "forever preclude the state from obtaining a valid conviction."[181]

Such an argument, however logical, is purely academic. Surely no judge would refuse to allow a defendant to withdraw his plea in the face of a clear violation of the prosecutor's duty under *Brady v. Maryland*. There are no cases where, given these facts, a judge has refused to set aside a plea by invoking Westen's argument that a *Brady* violation is an antecedent constitutional violation of no consequence once the defendant has admitted his guilt.

A Florida intermediate appellate court, however, agreed with Westen's view until ordered to reverse itself by the highest court of the state. In *State v. Pitts*,[182] decided before Westen's article was written, the court held that a guilty plea does not cure a *Brady* defect, reversing its own prior decision that evidence tending to impeach the credibility of witnesses need not be disclosed prior to the entry of the defendants' guilty pleas. The court's prior decision relied on the *Brady* trilogy for the notion that a guilty plea waives all antecedent nonjurisdictional defects.[183]

The theory that a defendant's right to collaterally assert a *Brady* violation is forfeited by a guilty plea is logically appealing, but to deny a defendant relief in this situation is patently unfair. The forfeiture theory would make the *Brady v. Maryland* rule a nullity for the majority of all convicted criminals because most convictions are obtained through plea negotiations rather than trials.[184] The harshness of Justice White's

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180 *See* text accompanying note 175 *supra*. Neither Westen nor Saltzburg discusses *Brady v. Maryland*.

181 Westen, *supra* note 140, at 1226.

182 249 So. 2d at 49. The Florida Supreme Court remanded the case to the district court for remand to the trial court with instructions to vacate the judgment, sentence, and guilty plea. The Florida Supreme Court did not make any determination of the questions of law, relying on the motion in confession of error by the Florida attorney general. 247 So. 2d at 54.

183 249 So. 2d at 48-49. In an unusual opinion, the court reversed itself on equal protection grounds:

> Under the requirement of the equal protection provisions of the state and federal constitutions, the benefits of the same rule of law must be accorded all prisoners whose convictions rest on a guilty plea. Accordingly we recede from so much of our opinion as stands for the proposition that a *Brady* violation is inapplicable where the charges are disposed of by a guilty plea rather than a trial. Conversely stated, we are required to hold by the position taken by the Attorney General that a guilty plea does not cure a *Brady* defect.

Id. at 49.

184 *See* notes 24-25 & accompanying text *supra*.

view that a guilty plea is a final determination of factual guilt can be mitigated by reading the *Brady* rule to hold that the nondisclosure of evidence which factually exculpates the defendant is ground for setting the plea aside.

C. FACTUAL BASIS

The third model is a logical corollary of Justice White's theory of the guilty plea as an admission of guilt. This model states that the plea should be invalidated if the prosecution fails to disclose exculpatory evidence in its possession at the time of the plea. In short, the prosecution's withholding of evidence which refutes the defendant's admission of guilt vitiates that admission. Therefore, a plea of guilty must have a sound basis in fact.

Many guilty plea acceptance procedures require the trial judge to satisfy himself that there is a factual basis for the plea.[185] *Menna v. New York*,[186] a *per curiam* opinion, contains a footnote articulating Justice White's view that an admission of factual guilt should end all inquiries into the validity of the plea except those which directly bear on the question of the defendant's guilt or innocence. Discussing the *Brady* trilogy and *Tollett v. Henderson*, the Court stated:

> The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.[187]

Thus if a plea of guilty is to function as a final determination of factual guilt, the defendant should be allowed to challenge the validity of his plea by showing that evidence which the prosecution did not disclose

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[185] Because of the importance of protecting the innocent and of insuring that guilty pleas are the product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.

North Carolina v. Alford, 400 U.S. 25, 38 n.10 (1970) (citations omitted).

[186] 423 U.S. 61.

[187] *Id.* at 62 n.2 (emphasis in original). Professor Alschuler rephrased Justice White's statement thus:

> These defendants have solemnly admitted their guilt, and that being so, we do not care what may have happened to them in the past. The whole purpose of criminal proceedings is to determine whether a defendant is guilty, and once that question is satisfactorily answered in the affirmative, the state's consequent right to incarcerate the defendant is established absolutely.

Alschuler (COLO. 1975), *supra* note 29, at 32-33.

would negate his admission of factual guilt. A requirement of a showing that the nondisclosed evidence would negate factual guilt is equivalent to the *Agurs* reasonable doubt standard,[188] which is the standard of materiality in the usual guilty plea case. This model requires the defendant to affirmatively disprove his guilt in order to establish a *Brady v. Maryland* violation. Although it places an onerous burden of proof on the defendant, the factual basis model is less harsh than the forfeiture model, which simply does not allow any *Brady v. Maryland* claim following a guilty plea.[189]

People v. Gott[190] exemplifies the operation of the reasonable doubt standard. Because the defense had entered a general request for evidence, the court relied on *Agurs* for the standard of materiality. Finding that the evidence at issue, the statements of a codefendant, was completely inculpatory, the court held that the nondisclosure was harmless beyond a reasonable doubt. Disclosure of the statements at the time of the plea, the court observed, would not have induced the defendant to go to trial.[191]

The reasonable doubt standard does not encompass the entire inquiry a reviewing court must make in assessing the validity of a guilty plea according to the factual basis model. If a guilty plea is to function as an admission of the defendant's guilt, then the nature of the evidence withheld is determinative of the *Brady v. Maryland* question. The withheld evidence must erode the factual basis for the plea. The insanity defense illustrates this inquiry. In a case of first-degree murder, for instance, evidence of the defendant's insanity at the time of the crime may serve to negate the element of intent. Hence nondisclosure of this evidence would be ground for setting aside a guilty plea to that charge because this evidence destroys the factual accuracy of the plea.

More often, however, an insanity defense is an excuse rather than a complete defense. The defendant admits the requisite act and intent, but claims that his insanity renders him not guilty in that the state cannot punish him. A justification for the crime, such as self-defense, has the same effect as an excuse; both are affirmative defenses. An affirmative defense is complete in the sense that it will prevent the state from obtaining a valid conviction, even if the state can show that the defendant was factually guilty of the crime.

Therefore, the model which states that a guilty plea cuts off all

188 427 U.S. at 112-13. *See* text accompanying notes 75-95 *supra*.

189 *See* text accompanying notes 171-89 *supra*.

190 43 Ill. App. 3d 137, 356 N.E.2d 1102. *See* text accompanying notes 121-24 *supra*.

191 43 Ill. App. 3d at 142, 356 N.E.2d at 1106. The court vacated the defendant's sentence and remanded because the prosecutor reneged on his promise not to make a sentencing recommendation.

claims unrelated to factual guilt would have to allow for *Brady v. Maryland* claims that the evidence suppressed by the prosecution would have aided the defendant in the establishment of a legal excuse or a justification for the crime. A guilty plea does not waive rights that would give the defendant a complete defense to the charge, regardless of whether the defendant was aware of these rights at the entry of his plea.[192]

Two federal cases illustrate that a complete defense cannot be waived. In *Clements v. Coiner*,[193] the defendant pleaded guilty to a murder charge. The prosecution withheld the results of a polygraph test and a letter from a psychiatrist, both of which corroborated a theory of the defendant's insanity at the time of the crime (which occurred in 1956). Both of the defendant's lawyers testified at a 1968 evidentiary hearing that the evidence would have materially aided the defense. The district court held that due process demanded that the plea be invalidated, stating:

> The possibility of mental defects and the resultant limitations of criminal responsibility raised thereby amply support a determination of materiality . . . . A further examination into the petitioner's condition might well have altered the entire course of events, for the prosecution obviously accepted the petitioner's guilty plea knowing that there was a serious question as to petitioner's mental capacity at the time of the alleged crime.[194]

In the second case, *Fambo v. Smith*,[195] the evidence withheld by the prosecution clearly proved the impossibility of the defendant's perpetration of the second count of the crime. Fambo was charged with two identical counts of possession of dynamite with intent to use it unlawfully. In exchange for Fambo's plea of guilty, the prosecution dropped the first of these charges. The first count charged the defendant with possession of dynamite with intent to use it unlawfully on November 29, 1970; the second count charged him with the same crime committed on December 1, 1970. Sometime between these two dates, the police found and destroyed the dynamite, replacing the contents of the tubes with sawdust. Thus, Fambo's commission of the second count was impossible. Despite the fact that the assistant district attorney and law enforcement officers were aware of the replacement, no information regarding it was imparted to the defendant and his counsel during plea negotiations. Defense counsel made no request for this evidence. Despite the erosion of the factual basis for the second count, the court denied habeas corpus relief on a finding that Fambo had gotten the benefit of his bar-

192 Note, *supra* note 159, at 1446.
193 299 F. Supp. 752.
194 *Id.* at 754.
195 433 F. Supp. 590.

gain.[196]

The model, which states that a plea of guilty is an admission of factual guilt that cuts off all claims unrelated to factual guilt, poses some problems in application. The standard of materiality required by this model is the equivalent of the reasonable doubt standard, which effectively requires the reviewing court to try the case for the first time.[197] Essentially, the *Fambo* and *Clements* courts did just that. However, since the trial judge, in accepting a guilty plea, generally does not conduct a penetrating inquiry into the strength of the state's unpresented case when accepting a guilty plea,[198] he cannot know whether the defendant would be able to present evidence sufficient to establish a complete defense but for the *Brady* violation. Yet the standard of materiality contemplated by the factual basis model and by *United States v. Agurs* requires the reviewing court to divine the relative strengths of the evidence on either side in assessing the defendant's claim of a *Brady* violation.

The difficulty of characterizing evidence as representative of a complete or incomplete defense creates a related problem. An incomplete defense may be complete in the sense that it absolutely prevents conviction. For example, a defendant's claim of illegal search and seizure might prevent the state from introducing its principal piece of evidence against him at trial. The state simply would not pursue the prosecution any further. Thus, the defendant constructively has an absolute defense stemming from a procedural claim.

Defenses and procedural rights cannot be neatly catalogued. The question arises whether this differentiation should be attempted for the purpose of deciding which rights are forfeited and which are preserved by a guilty plea. Every piece of evidence, even inculpatory evidence, could be useful to the defense in some way. The variety of possible defenses available to even an obviously guilty defendant and his creative counsel, coupled with the fact that most of the information in the prosecutor's file is not easily pigeonholed, make categorization of evidence for purposes of the factual basis model nearly impossible. Moreover, no differentiation should be attempted because *Brady v. Maryland* holds that all nondisclosed evidence favorable to the defendant and material to the issue of guilt or punishment is functionally equivalent.[199]

196 *Id.* at 600.
197 *See* note 188 *supra*.
198 *See* text accompanying notes 56-58 *supra*.
199 373 U.S. at 87.

D. DUE PROCESS

Three models were discussed that treat *Brady* material withheld in the context of plea negotiations differently from the same suppression of evidence before a trial. First, a plea of guilty coupled with a *Brady* violation can be considered unintelligent because defense counsel lacked sufficient information to effectively assist the defendant in making an informed decision how to plead. Second, a claim of preplea suppression of *Brady* material is forfeited by a guilty plea because a *Brady* violation is curable in that the state is not barred from obtaining a conviction. Third, Justice White's theory that a guilty plea is an admission of factual guilt which waives all antecedent constitutional violations unrelated to the issue of factual guilt was considered. All of these arguments fail to provide an adequate safeguard of the guilty pleading defendant's right to disclosure because their logically appealing distinctions break down when applied to real cases.

The small percentage of criminal defendants who stand trial are assured, through judicial supervision, the full protection of the procedural rights guaranteed by the fourth, fifth, and sixth amendments. The majority of defendants, because they are convicted on the basis of their own pleas outside the purview of judges, are denied an adequate safeguard of their right to due process. Only after the defendant is committed to a plea bargain is a formal and largely perfunctory[200] effort made to assess the validity of the plea.

Brady v. Maryland was predicated on the due process clause.[201] Its language is nebulous; hence its underlying due process rationale can better be seen in Justice Fortas' concurring opinion in *Giles v. Maryland*.[202] This concurring opinion is important because it is a persuasive, albeit liberal, interpretation of what the Court left unsaid in *Brady v. Maryland*. Justice Fortas argued that the state's responsibility to ensure the defendant a fair trial under the due process clause calls for broad disclosure of evidence to the defense.[203] If the reason for the prosecutorial duty to disclose is to assure the criminal defendant a fair procedure, then full disclosure of material and favorable information to the defense should not be hindered by an overly technical interpretation of the *Brady* rule.

Examples of technical impediments would include the Court's own strict reading of the rule in *United States v. Agurs*,[204] the needless step of determining materiality on the basis of traditional notions of waiver,[205]

200 *See* text accompanying notes 56-58 *supra*.
201 373 U.S. at 87. *See* text accompanying notes 65-74 *supra*.
202 386 U.S. at 96-102 (Fortas, J., concurring). *See* text accompanying notes 81-84 *supra*.
203 386 U.S. at 98.
204 427 U.S. 97. *See* text accompanying notes 75-95 *supra*.
205 *See* text accompanying notes 145-65 *supra*.

and a requirement that the withheld evidence negate an admission of guilt.[206] These obstacles in the path of prosecutorial disclosure of material and favorable evidence are as inconsistent with due process as burdens on the exercise of any other constitutional right. Several courts faced with a *Brady* violation preceding a guilty plea have used a due process rationale to afford relief where no request for *Brady* material was made.

In *Evans v. Kropp*,[207] the defendant pleaded guilty to second-degree murder. Evidence of his postarrest suicide attempt and his psychiatrist's testimony[208] was not brought to the attention of the trial judge who accepted the plea.[209] The court granted the defendant a writ of habeas corpus, stating: "[T]he controlling factor in a procedure where material information in the possession of any state agency is not disclosed to the court is not whether defense counsel knew or should have known about it, but rather whether the procedure as a whole comported with the requirements of due process."[210]

What appears to be the most comprehensive statement to date[211] on the application of *Brady v. Maryland* in the guilty plea context is *Fambo v. Smith*.[212] Distinguishing the *Brady* trilogy by saying that the pleas at issue in the trilogy were valid when entered,[213] the court reasoned that Fambo would have been denied due process of law had he gone to trial according to *Brady v. Maryland* and *United States v. Agurs*.[214] Writing for the court, Chief Judge Curtin maintained that the prosecutor should have disclosed the evidence in question in order for defense counsel to be able to advise the defendant whether to plead or stand trial. Otherwise, the plea could not have been voluntary, intelligent, and completely counselled.[215]

Thus the court took the additional step of trying to conform the *Brady v. Maryland* rule with the traditional concept of waiver espoused in

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206 *See* text accompanying notes 186-99 *supra*.

207 254 F. Supp. 218.

208 The psychiatrist had testified at a prior sanity hearing that the defendant was schizophrenic and therefore incompetent to stand trial. *Id.*

209 The psychiatrist's findings evidently were communicated to the police guard and to defense counsel but not to the prosecutor. *Id.* at 220-22.

210 *Id.* at 222. The court found that the defense counsel's personal view that informing the court of the defendant's incompetency would not help the defendant and his consequent nondisclosure of that information violated the defendant's right to effective assistance of counsel.

211 *But see* United States v. Wolczik, No. 76-245.

212 433 F. Supp. 590. *See* text accompanying notes 195-96 *supra*.

213 433 F. Supp. at 594. Thus the court agreed with Justice White's view that the *Brady* trilogy decisions were not grounded in the traditional concept of waiver.

214 *Id.* at 597. The court cited *Agurs* for the proposition that no defense request is necessary where the evidence withheld is so obviously exculpatory.

215 *Id.* at 598-99.

Johnson v. Zerbst. Chief Judge Curtin bridged this gap by relying on the assumptions made by the Supreme Court in its opinions approving the practice of plea negotiation,[216] and concluded that Fambo's plea was voluntary and intelligent.[217] However, Fambo was denied due process in the negotiations preceding his plea, even though he was not harmed by the nondisclosure insofar as his sentence was concerned. The prosecution did not negotiate honestly, inviting error by deliberately withholding material and favorable evidence from the defense and the trial judge. The court relied on *Santobello v. New York*[218] for the proposition that judicial tolerance of plea bargaining "presuppose[s] fairness in securing agreement between an accused and a prosecutor."[219]

In *Ex parte Lewis*,[220] the Texas Court of Criminal Appeals held that due process demands that *Brady v. Maryland* be equally applied to guilty pleading and trial defendants. Lewis alleged that a psychiatrist's letter, to the effect that he was insane at the time of the crime and was incompetent to stand trial, was not disclosed to his counsel.[221] As the letter was obviously material and favorable, under *Agurs* it should have been disclosed even in the absence of a request. After finding that his newly appointed defense counsel would not have allowed Lewis to plead guilty if he had known of the letter, the court set aside[222] Lewis' guilty plea.[223]

The compelling nature of the evidence withheld in each of these cases may have dictated the courts' decisions to apply *Brady v. Maryland*. In contrast, the courts in *United States ex rel. Suggs v. La Vallee*[224] and *People v. Heral*[225] frankly disbelieved the claims of the guilty pleading defendants that evidence tending to show their incompetence at the time of their pleas was withheld, and affirmed their convictions. A unifying factor among the cases discussed which were decided after 1976, namely

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216 *See* notes 218-19 *infra*.

217 433 F. Supp. at 600.

218 404 U.S. 257.

219 *Id.* at 261.

220 No. 60,645.

221 *Id.* The letter was written to the defendant's original counsel. A new attorney was appointed to represent Lewis after a change of venue, and this attorney was not furnished with a copy of the letter, although the prosecutor had a copy. *Id.*

222 The overriding concern is whether a defendant has been deprived of due process and due course of law. . . . If anything the denial of due process and due course of law would be greater than in a contested case if an incompetent defendant were permitted (as the applicant was) to waive such constitutional and statutory rights . . . .

Id.

223 One judge dissented on the ground that the evidence showed that the prosecutor's file was open to the defense, and that Lewis himself was aware of the letter and should have informed his attorney of it. *Id.*

224 422 F. Supp. 1042. The evidence as to the defendant's competence was equivocal.

225 54 Ill. App. 3d 527, 369 N.E.2d 922. The defendant's suicidal tendency, standing alone, did not establish a mental disorder.

People v. Gott,[226] *United States v. Wolczik*,[227] *Fambo v. Smith*, and *Ex parte Lewis*, is the courts' adherence to the *Agurs* reasonable doubt standard despite their differing views on the applicability of *Brady v. Maryland* in the guilty plea context. This adherence raises the question whether the concept of due process in plea negotiations[228] would prompt a court to apply a more lenient standard of materiality.

The decisions of two state courts that have considered the issue of the prosecutor's duty to disclose tactical evidence during plea negotiations are illustrative. In *State v. Pitts*,[229] the two defendants pleaded guilty to first-degree murder, were tried on the issue of punishment, and received death sentences. Among other grounds urged in a motion to vacate their pleas was the claim that the state suppressed favorable evidence in the form of witnesses' unsigned statements that proclaimed the defendant's innocence and were later repudiated.[230] Confessing error, the Florida attorney general stated that this was a *Brady* violation because defense counsel might have chosen to go to trial to submit the issue of the witnesses' credibility to a jury had he been aware of their prior statements. Basing its decision on the equal protection clause, the court held that the withholding of evidence which would aid the defense in impeaching the credibility of witnesses violated *Brady v. Maryland* notwithstanding a guilty plea.[231]

The court in *People v. Jones*[232] decided the same issue oppositely. The district attorney failed to disclose that the complaining witness had died during plea negotiations, and the defendant pleaded guilty to third-degree robbery. The Court of Appeals of New York decided that the evidence of the complaining witness's death was "highly material to the practical, tactical considerations which attend a determination to plead guilty, but not to the legal issue of guilt itself."[233] Thus the court phrased the issue as whether this nondisclosure was so serious as to be a

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226 43 Ill. App. 3d 137, 356 N.E.2d 1102.

227 No. 76-245. *See* text accompanying notes 149-55 *supra*.

228 Alschuler (YALE 1975), *supra* note 42, at 1229; Uviller, *supra* note 54, at 113-14; Comment, *supra* note 119.

229 249 So. 2d 47. *See* text accompanying notes 182-83 *supra*.

230 The defendants succeeded in this claim before the trial court and the state appealed. The District Court of Appeal (the same panel that decided 249 So. 2d 47) reversed in a decision reported at 241 So. 2d 399 (1971), stating that "the evidence appellees [defendants] claim was suppressed was not only believed by the State to be untrue, the same having been repudiated . . . but it could have been useful to the defense only with reference to credibility, had Pitts and Lee pleaded not guilty." 241 So. 2d at 412. This decision was remanded by the Florida Supreme Court in 247 So. 2d 53 (Fla. 1971).

231 249 So. 2d at 50.

232 44 N.Y.2d 76, 375 N.E.2d 41, 404 N.Y.S.2d 85.

233 *Id.* at 80, 375 N.E.2d at 43, 404 N.Y.S.2d at 87.

denial of due process,[234] given that the prosecutor's concern should be the pursuit of justice and not solely the pursuit of conviction. The court added, however, that it was not a fundamental concern of criminal justice "that a possibly guilty actor shall escape conviction because the People are not able to establish his guilt."[235] Thus the court held that the prosecutor did not have an affirmative duty to disclose tactical information. In support of its decision, the court noted that the prosecutor need not share the weaknesses of his case with the defendant and quoted *Brady v. United States* for the proposition that "a defendant is not entitled to withdraw his plea merely because he discovers . . . that his calculus misapprehended the quality of the state's case."[236] Nevertheless, the court implied that the plea might be set aside in a situation where the same evidence was withheld from a defendant who, unlike Jones, insisted upon his innocence and decided to negotiate a plea because he felt that the prosecution's case was strong enough to assure him a more severe sentence if he chose to go to trial.[237]

As the court in *People v. Jones* recognized, the Constitution assures a criminal defendant his procedural rights, but it does not require that successive and futile efforts be made to acquit him on appeal. The argument for a lowered standard of materiality required of a guilty pleading defendant asserting a *Brady v. Maryland* violation is not, however, an argument for acquittal at all costs, but rather an argument for due process of law. Although it is the predominant means of conviction, plea bargaining continues to be an informal and unsupervised process. Constitutional safeguards are more honored in the breach in plea negotiation. Professor Alschuler has even suggested that recent increases in the percentage of convictions by negotiated plea are due to the cumbersomeness of trial procedures mandated by the Court's due process revolution.[238] Indeed, the fact that the Court has so burdened the trial with procedural protections while assuming that plea negotiations are conducted fairly is ironic.

In *Giles v. Maryland*, Justice Fortas in his concurring opinion pointed out the further irony that the Court, after setting up a new rule of procedural fairness in *Brady v. Maryland*, burdened that rule with a specific request requirement.[239] Justice Fortas argued that due process required broad disclosure of material and favorable evidence by the

234 *Id.*

235 *Id.* at 82, 375 N.E.2d at 44. 404 N.Y.S.2d at 88.

236 *Id.* (quoting Brady v. United States, 397 U.S. at 757).

237 *Id.*

238 Alschuler (1968), *supra* note 35, at 50-51.

239 Giles v. Maryland, 386 U.S. at 96-106 (Fortas, J., concurring). *See* text accompanying notes 81-84 & 202-03 *supra*.

prosecution.[240] The argument for a lower standard of materiality for a defendant asserting a *Brady v. Maryland* claim after a plea conviction is essentially a fairness argument. As the *Evans v. Kropp* court recognized, the question is not so much the importance of the evidence withheld as it is whether the plea negotiations "as a whole comported with the requirements of due process."[241] The *Lewis* court called due process of law "the overriding concern" in determining whether the *Brady* rule was violated in plea negotiations.[242]

Moreover, the focus of a *Brady* inquiry following a plea conviction should be on whether the defendant and his counsel could make an informed choice between a negotiated plea and a trial. In *Fambo*, the court directed its attention to the choice between a plea and a trial, finding that the defendant's counsel must be able to competently advise him as to the choice.[243] Although it based its holding on the equal protection clause, the court in *Pitts* found that fairness to the guilty pleading defendant demanded disclosure under *Brady v. Maryland* of even tactical evidence because of its impact on the defendant's decision whether to stand trial.[244] The *Pitts* court alone appears to have adopted a lower standard of materiality for defendants convicted on their pleas, yet the courts deciding the other cases discussed have considered the defendant's decision to plead. The argument for a separate standard of materiality for guilty pleading defendants is grounded generally in the concept of fairness in plea negotiation, and specifically in the defendant's right to an informed choice between a guilty plea and a trial.

V. CONCLUSION

Fairness in plea bargaining clearly cannot be presupposed, as the Court does in *Santobello v. New York*.[245] Plea bargaining, which emerged in the late nineteenth century as a derivative of urban caretaker politics,[246] continues to be an unstructured, unsupervised yet well-established practice. The guilty pleading defendant's constitutional protections are treated as bargaining chips in negotiation if they are recognized at all.[247] Fairness in plea bargaining can, however, be fostered by a rule that a guilty plea does not cure an antecedent violation of the

240 386 U.S. at 98.

241 254 F. Supp. at 222.

242 *Ex parte* Lewis, No. 60,645. *See* note 222 *supra*.

243 Fambo v. Smith, 433 F. Supp. at 594-600. *See* text accompanying notes 195-96 & 212-17 *supra*. *See also* Lee v. State, 573 S.W.2d at 134-35; Zacek v. Brewer, 241 N.W.2d at 50-52; text accompanying notes 156-65 *supra*.

244 State v. Pitts, 249 So. 2d at 50. *See* text accompanying notes 182-83 & 229-31 *supra*.

245 404 U.S. at 261.

246 Alschuler (1979), *supra* note 9, at 24-26.

247 *See* text accompanying note 49 *supra*.

prosecutorial duty to disclose, and by a more lenient standard of materiality for the defendant who challenges his guilty plea on the basis of such a violation. Thus the interpretation of the *Brady v. United States* trilogy[248] that a plea constitutes a waiver of all unknown rights and defenses cannot be maintained because it denies the criminal defendant due process in the conduct of plea negotiation.

In *United States v. Agurs*,[249] the Court held that the standard of materiality to be met by the defendant who has made no request or a general request for material and favorable evidence is whether the nondisclosed evidence would create a reasonable doubt of guilt. The judiciary and commentators have argued cogently that the prosecutor's duty to disclose should not depend on a specific request, which is a needless technical impediment to a rule predicated on fairness to the defendant.[250] Similarly, the reasonable doubt standard is an overly technical requirement that frustrates the purpose of the *Brady v. Maryland* rule in the guilty plea context. The demands of due process would be better served if a more lenient standard of materiality replaced the reasonable doubt standard for the guilty pleading defendant who has made no request or only a general request for *Brady* material.[251] The defendant's assertion that material and favorable evidence was withheld prior to the entry of his plea should trigger a lower standard of materiality which would encompass those types of evidence bearing directly upon the defendant's decision whether to plead guilty or to stand trial. This standard reaches beyond the material and favorable evidence that is traditional *Brady* material, as the latter standard is premised on a trial. Thus the lower standard must necessarily include some evidence which for trial purposes would be denominated tactical or merely cumulative. *Brady v. Maryland*, therefore, should be interpreted to demand prosecutorial disclosure of favorable evidence material either to the issue of guilt or punishment, or to the informed decision to waive the right to trial.

However, the broadened duty to disclose should not impose the burden of sorting through every file on the prosecutor in order to produce evidence which only defense counsel is capable of finding. The demands of the prosecutor's caseload and his adversary posture make the imposition of a new burden inappropriate. Moreover, the *Brady* rule does not and should not require the prosecutor to prepare the defendant's case for him. Broad, enforceable provisions for criminal defense

248 Parker v. North Carolina, 397 U.S. 790; McMann v. Richardson, 397 U.S. 759; Brady v. United States, 397 U.S. 742.

249 427 U.S. at 112-13.

250 *See* note 82 *supra*.

251 *See* text accompanying notes 96-126 *supra*.

discovery, preplea, and pretrial, are the solution to this disclosure problem. The easiest way to ensure preplea compliance with *Brady v. Maryland* is to allow defense counsel to read the prosecutor's file while retaining the sanction of vacating of the plea and allowing the defendant to replead if *Brady* material, liberally conceived, is negligently or intentionally withheld from the file.

The economic realities of the criminal justice system and the growing criminal population dictate that plea bargaining cannot be altogether abolished, as many in the academic community would prefer.[252] The majority of criminal defendants are convicted by their pleas of guilty. These defendants waive their right to trial and its attendant rights, but they do not waive the right to due process of law entirely. They remain entitled to procedural fairness in the conduct of plea negotiations. The practice of plea bargaining can be a fair and legitimate alternative to trial if the rudiments of due process, among which is the *Brady v. Maryland* rule, were incorporated in the ground rules.

LEE SHEPPARD

252 *See* note 25 *supra*.