PLEADING BLINDLY

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INTRODUCTION

The Department of Justice (DOJ), recently caught with discovery violations that reflect prosecutorial misconduct and prosecutorial improprieties,[1] took the bold and perhaps unprecedented step to issue three new policies.[2] A working group

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[1] *See, e.g.,* United States v. Shaygan, 661 F. Supp. 2d 1289, 1318-20 (S.D. Fla. 2009) (finding discovery violations under *Brady, Giglio,* and *Jencks*); Ellen S. Podgor, *DOJ Moves to Dismiss the Ted Stevens Case*, WHITE COLLAR CRIME PROF BLOG, http://lawprofessors.typepad.com/whitecollarcrime_blog/2009/04/doj-moves-to-dismiss-the-ted-stevens-case.html (Apr. 1, 2009) (citing Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice, United States v. Stevens, No. 08-231 (EGS) (D.D.C. Apr. 1, 2009)) (discussing dismissal of case by DOJ following discovery violation); *see also* Letter from Hon. Emmet G. Sullivan, U.S. District Judge for D.C., to Hon. Richard C. Tallman, Chair, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure (Apr. 28, 2009), http://lawprofessors.typepad.com/whitecollarcrime_blog/2009/11/change-the-discovery-rules.html (calling for an amendment to Federal Rule of Criminal Procedure 16 for disclosure of all exculpatory material).

[2] *See* Tracy Russo, *Memos to United States Attorneys: Establishing Guidance for Prosecutors Regarding Criminal Discovery*, JUSTICE BLOG, http://blogs.usdoj.gov/blog/archives/493 (Jan. 4, 2010). It should be noted that the DOJ has never affirmatively stated that the issuance of these three policies was a result of recent findings of discovery violations associated with this office, but they do state that it is "in response to some of the recommendations in the Working Group Report." Memorandum from David W. Ogden, Deputy Att'y Gen., on the Requirement for Office Discovery Policies in Criminal Matters for the Heads of Department Litigating Components Handling Criminal Matters (Jan. 4, 2010), http://www.justice.gov/dag/dag-to-usas-component-heads.pdf.

"made up of senior prosecutors from throughout the Department and from United States' Attorney Offices, law enforcement representatives, and information technology professionals" examined the "policies, practices, and training related to criminal case management and discovery"[3] and provided the impetus for then Deputy Attorney General David Ogden's three memos: 1) *Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group*,[4] 2) *Requirement for Office Discovery Policies in Criminal Matters,*[5] and 3) *Guidance for Prosecutors Regarding Criminal Discovery*.[6] While applause is certainly warranted for the government's affirmative recognition that "[t]he Department of Justice's responsibility is not just to win cases, but to do justice,"[7] the policies fall short in an important area—discovery for defendants prior to entering into plea agreements.[8]

This essay considers the three memos of former Deputy Attorney General David W. Ogden with a focus on how these memos consider, and fail to consider, discovery matters in the context of plea negotiations.[9] It also notes the more recent memo of Attorney General Eric H. Holder, Jr. titled *Depart-*

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[3] Russo, *supra* note 2.

[4] Memorandum from David W. Ogden, Deputy Att'y Gen., on Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group for Department Prosecutors (Jan. 4, 2010), http://www.justice.gov/dag/dag-memo.pdf.

[5] Ogden, *supra* note 2.

[6] Memorandum from David W. Ogden, Deputy Att'y Gen., on Guidance for Prosecutors Regarding Criminal Discovery for Department Prosecutors (Jan. 4, 2010), http://www.justice.gov/dag/discovery-guidance.pdf.

[7] Russo, *supra* note 2.

[8] Although this piece is focused on discovery as related to plea agreements, it should be noted that the Ogden Memos fall short in many other areas such as instructing prosecutors that they should never describe their discovery process as "open file," failing to instruct on when *Jencks* material should be given to defense counsel despite varied practices across the United States, and having the DOJ as opposed to courts making the decisions on when evidence should be withheld to protect witnesses or for reasons of national security. *See* Ellen S. Podgor, *New DOJ Discovery Policies Fall Short,* WHITE COLLAR CRIME PROF BLOG, http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/01/new-doj-discovery-policies.html (Jan. 5, 2010).

[9] *See infra* notes 32-45 and accompanying text.

ment Policy in Charging and Sentencing[10] that recognizes the existence of plea waivers but then fails to offer guidance on improper waiver provisions.[11] The essay then places this discussion in the backdrop of legal scholarship[12] and existing precedent, most importantly the Supreme Court opinion in *United States v. Ruiz*[13] that provides little support for mandating discovery to defendants prior to entering into a plea agreement.[14] Protecting the importance of "a voluntary and knowing"[15] plea agreement cannot be overlooked in assuring an efficient system of justice. Unique concerns are also noted when the government is entering into a deferred prosecution agreement with a corporation or other entity. This essay concludes by stressing the importance of not accepting prosecutorial guidelines as the answer for achieving discovery material as a part of plea negotiations.[16]

PROSECUTORIAL POLICY

The Department of Justice Guidelines are basically policy, usually located in the United States Attorneys' Manual,[17] that guides United States Attorneys across the country on a variety

[10] *See* Memorandum from Eric H. Holder, Jr., Att'y Gen., on Department Policy on Charging and Sentencing to all Federal Prosecutors (May 19, 2010), http://lawprofessors.typepad.com/files/holdermemo.pdf.

[11] *See infra* note 46 and accompanying text.

[12] *See infra* notes 53-62 and accompanying text.

[13] 536 U.S. 622 (2002).

[14] *See infra* notes 63-74 and accompanying text.

[15] Boykin v. Alabama, 395 U.S. 238, 242 (1969). Federal Rules of Criminal Procedure, Rule 11 provides the procedure for acceptance of a plea and requires that the court determine that the plea is voluntary and that there is a factual basis for the plea. It is necessary that the accused understand "waiver of these trial rights if the court accepts a plea of guilty or nolo contendere." *See* Fed. R. of Crim. Proc., Rule 11 (Supp. 2010).

[16] *See infra* notes 79-81 and accompanying text.

[17] It is described as a looseleaf text that "contains general policies and some procedures relevant to the work of the United States Attorneys' offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice." *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 1-1.100 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/ [hereinafter U.S. ATTORNEYS' MANUAL].

of procedural and substantive matters.[18] As prosecutors are afforded enormous discretion, these internal guidelines are especially useful to new Assistant United States Attorneys. The guidelines also serve to provide consistency in decision-making as there are ninety-three United States Attorneys located in the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.[19] Guidelines are offered for many situations such as providing advice on the factors to be considered in deciding whether to charge a corporation.[20] They designate when approvals will be required,[21] such as for international terrorism matters[22] or consenting to a plea of nolo contendere.[23] In some instances, a particular office will need to be consulted before action can be taken, and the guidelines provide the instructions for the approval process. For example, the guidelines tell prosecutors to send every request for an international extradition to the Office of International Affairs for review and approval.[24]

But the guidelines are not mandatory, and as internal guidelines they are unenforceable at law. The guidelines explicitly provide that "[i]t is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."[25] The reality is that DOJ guidelines are sometimes ignored, and there is little recourse when this happens.[26]

Despite the failure of prosecutors to always adhere to DOJ guidelines, it is important to note that these guidelines are not

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[18] *See generally* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1 (1971) (discussing the importance of the DOJ guidelines).

[19] *See* United States Attorneys' Mission Statement, *available at* http://www.justice.gov/usao/about/mission.html.

[20] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-28.300 (2010).

[21] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-2.400 (2010).

[22] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-2.136(D) (2010).

[23] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-16.010 (2010).

[24] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-15.210 (2010).

[25] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 1-1.100 (2010).

[26] *See generally* Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167 (2004) (discussing the failure to adhere to DOJ guidelines).

always the minimal standards under law. It is common for DOJ guidelines to advise prosecutors to exceed the requirements of the law. For example, there is no legal requirement that a defendant be advised of his or her rights prior to appearing before a grand jury. The DOJ guidelines, however, instruct prosecutors that it is the Department of Justice policy "to advise a grand jury witness of his or her rights if such witness is a 'target' or 'subject' of a grand jury investigation."[27] Likewise, Supreme Court precedent tells a prosecutor that he or she is not required to present exculpatory evidence to a grand jury.[28] The guidelines, however, inform prosecutors otherwise, in that it states:

> [i]t is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.[29]

The guidelines recognize the Supreme Court's decision in *United States v. Alvarez-Machain*[30] that allowed a prosecution following the kidnapping of a foreign national in Mexico for trial in the United States.[31] But in citing to this precedent, the guidelines recognize the "sensitivity of abducting defendants from a foreign country" and place restrictions on law enforcement engaging in such conduct.[32]

Historically the memos of the Deputy Attorney General (DAG) have become a part of the culture of the office and serve as added guidance that is offered by each individual DAG who

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[27] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-11.151 (2010).

[28] *See* United States v. Williams, 504 U.S. 36 (1992) (holding that it is not within a court's supervisory powers to dismiss an indictment when the government fails to present "substantial exculpatory evidence" to a grand jury).

[29] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-11.233 (2010). The guideline also provides that "[w]hile a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review." *Id.*

[30] 504 U.S. 655 (1992).

[31] *Id.*

[32] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-15.610 (2010).

passes through the office. For example, former Deputy Attorney General Ogden's January 4, 2010, Memorandum for Department Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery*, is included in the Criminal Resource Manual that is referenced in the United States Attorneys' Manual.[33] Some of the memos issued by Deputy Attorney Generals have been controversial and been the subject of court discussions, such as the Thompson memorandum on the *Principles of Federal Prosecution of Business Organizations*.[34]

Despite the fact that plea agreements represent approximately ninety-five percent of the dispositions in the federal criminal justice system,[35] the Ogden memos fail to offer meaningful consideration of the discovery issues that arise in this context. In the memo titled *Guidance for Prosecutors Regarding Criminal Discovery* (*Guidance for Prosecutors Memo*), there is discussion of "where to look" for the evidence, "what to review," how to conduct the review, and "making a record."[36] Prosecutors are told "to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes."[37] The memo warns prosecutors to be aware of cases with national security issues and to study these matters prior to filing charges.[38] The memo has what might be called a "take-credit when you can" statement, in that it advises prosecutors to let the defense know when they are providing "discovery beyond what is required," while also suggesting that the prosecutor acknowledge that this is not a commitment to provide such additional discovery in the future.[39]

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[33] U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 165 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.pdf [hereinafter CRIMINAL RESOURCE MANUAL].

[34] *See* United States v. Stein, 541 F.3d 130, 136 (2008) (discussing the role of the Thompson Memo in a company's failure to pay attorney fees of indicted employees).

[35] U.S. Sentencing Commission, Figure C: Guilty Pleas and Trial Rates, Fiscal Years 2005-2009, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/FigC.pdf (2006 - 95.7%; 2007 - 95.8 %; 2008 - 96.3 %; 2009 - 96.3%).

[36] Ogden, *supra* note 6, at 2, 4, 10.

[37] *See id.* at 3.

[38] *Id.*

[39] *Id.* at 9.

Clearly the *Guidance for Prosecutors Memo* stresses the importance of disclosing exculpatory evidence "reasonably promptly after discovery."[40] But when it comes to disclosures prior to pleas, the memo states "[p]rosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing."[41] Thus, despite the theme of the Ogden *Guidance for Prosecutors Memo* being to provide discovery to insure a "fair and just result in every case,"[42] the bulk of cases proceeding through these government offices may find themselves outside the discussion because they are resolved with a plea agreement and there is no affirmative statement that all discovery, not just exculpatory material, needs to be turned over to the defense prior to entering a plea agreement.

This *Guidance for Prosecutors Memo* does provide that "[d]iscovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed."[43] Here again, the focus of the discovery is trial and not resolution of the matter without the necessity of a trial.

The remaining two memos issued in January 2010 by then Deputy Attorney General Ogden provide equally weak language of discovery guidance prior to entering a negotiated plea. The *Memorandum for Heads of Department Litigating Components Handling Criminal Matters* focuses on having individual U.S. Attorney offices throughout the different districts formulate a written discovery policy for their district. This policy recognizes that "[p]roviding broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of the case."[44] But in the next sentence it

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[40] *Id.* at 10.

[41] *Id.*

[42] *Id.* at 11.

[43] *Id.* at 10.

[44] Ogden, *supra* note 2, at 1.

notes that "there are times when countervailing considerations counsel against broad and early disclosure."[45]

The final Ogden memo, *Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group,*[46] thanks the Working Group that studied discovery issues in the DOJ. It tells prosecutors that discovery coordinators have now been named and that a "Train the Trainer" conference has been held.[47] This educational approach to resolving problems of the past is an incredible step for improving the discovery issues that have recently plagued DOJ. In this memo, former Deputy Attorney General Ogden acknowledges that "[i]n many cases, broad and early disclosures might lead to a speedy resolution and preserve limited resources for the pursuit of additional cases."[48] But then in the next sentence, this is qualified by a statement that "[i]n other cases, disclosures beyond those required by relevant statutes, rules and policies may risk harm to victims or witnesses, obstruction of justice, or other ramifications contrary to our mission of justice."[49] Throughout the memos one does not find an explicit statement instructing prosecutors to provide discovery prior to entering plea agreements. More importantly, there is no statement prohibiting prosecutors asking for a waiver of discovery in return for the benefit of the bargain being offered by the plea agreement.

The May 19, 2010, *Memorandum to All Federal Prosecutors*[50] issued by Attorney General Eric H. Holder, Jr. recognizes the importance of plea agreements and the effect of waivers, but again, it provides no guidance on the necessity of discovery prior to entry of plea agreements. This memo stresses "individualized assessment" in charging and sentencing decisions.[51] Holder states that "[e]ach office shall promulgate written guid-

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[45] *Id.* at 1-2.
[46] Ogden, *supra* note 4, at 1.
[47] *Id.* at 3.
[48] *Id.* at 2.
[49] *Id.*
[50] *See* Holder, *supra* note 10.
[51] *Id.* at 1.

ance regarding the standard elements required in its plea agreements, including the waivers of a defendant's rights."[52] This is clearly a step forward in recognizing the importance of plea negotiations, but this memo also fails to provide explicit department policy on what will be allowed and what will be prohibited in this important area of law. One does not find language that discovery waivers to secure a plea bargain are unacceptable.

LEGAL SCHOLARS

Many have written about pretrial discovery in cases resolved via a plea negotiation, and most advocate for increased disclosure. Some have commented on the practice of prosecutors to demand waiver of discovery rights as part of a plea negotiation.[53] Questions that can become relevant here are whether the pleas are knowing and voluntary when these rights are waived,[54] and whether the duty to disclose exculpatory evidence to the defendant is a right that can be waived.[55] Clearly there are concerns about the implications to a fair judicial process because of discovery waivers in plea agreements.[56] In addition, ethical concerns arise for the defense, and also for defense counsel, who bears malpractice exposure should unprovided evidence by prosecutors confirm the innocence of the accused. But of the utmost importance, as pointed out by Professor Kevin C. McMunigal, is the fact that non-disclosure of

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[52] *Id.* at 2.

[53] *See, e.g.,* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2013-14 (2000) (discussing how prosecutors include as a requirement in a plea agreement that the defendant waive discovery rights).

[54] *See* Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, 23 CRIM. JUST. 28 (2008) (discussing the ethical obligations of lawyers in the plea bargaining process).

[55] *See* Shane M. Cahill, Note, United States v. Ruiz: *Are Plea Agreements Conditioned on Brady Waivers Unconstitutional?*, 32 GOLDEN GATE U. L. REV. 1 (2002).

[56] *See generally* Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of 'Discovery' Waivers*, 51 STAN. L. REV. 567 (1999) (discussing the policy and ethical implications of waivers).

exculpatory or other discovery material raises concerns of wrongful convictions.[57]

In the existing scholarship one also finds suggested improvements to achieve a more balanced process by the exchange of discovery prior to finalizing a plea agreement. Academics such as Professor Russell Covey note that "the enhancement of pre-plea discovery would help to conform plea bargain outcomes to trial outcomes and is therefore justified under trial shadow theory."[58] Professor Erica Hashimoto calls for an amendment to the Model Rules of Professional Conduct to require "pre-plea disclosure of exculpatory and impeachment information."[59] The scholarship is not limited to a United States focus, as Professor Jenia Iontcheva Turner, in conducting a comparative study of judicial participation in plea negotiations, notes "that a judge's early input into plea negotiations can render the final disposition more accurate and procedurally just."[60]

The problem of allowing pleas to be entered without the defense having received discovery is magnified when discovery later surfaces and the defendant not only waived rights to receive discovery, but also waived the ability to file post-conviction relief. Prosecutors are offered guidance in the sentencing appeal context of how to word plea agreements to assure that a defendant is unsuccessful with arguments for post-

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[57] *See* Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651 (2007) (discussing the failure to disclosure *Brady* material and wrongful convictions); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989) (discussing how the disclosure of *Brady* material advances the accuracy of pleas).

[58] Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 91 (2009). *But see* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 442 (2001) (discussing "the marriage of *Brady* and plea bargaining" would not achieve "fully informed pleas").

[59] Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 949 (2008) (discussing why an amendment to Rule 3.8(d) of the Model Rules of Professional Conduct is needed to assist with pre-plea disclosures).

[60] Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 199 (2006) (providing a comparison of judicial involvement in pleas between Germany, Florida, and Connecticut).

conviction relief.[61] Attorneys Alan Ellis and Todd Bussert note that waivers of a defendant's appellate and post-conviction rights raise ethical concerns of possible ineffective assistance of counsel claims for the defense counsel and concerns of prosecutorial misconduct for the prosecution.[62]

COURTS

Although the Supreme Court in *United States v. Ruiz*[63] is forceful in stating that defendants have no Fifth and Sixth Amendment right to have federal prosecutors provide "impeachment information relating to any informants or other witnesses,"[64] there is less clarity on the requirements of *Brady*[65] material when a plea negotiation resolves a case. In this regard, courts are split on whether prosecutors can include a waiver of a defendant's discovery rights as part of a plea agreement when the material being withheld is exculpatory as opposed to impeachment evidence.[66]

In *Ruiz*, the Court examined a California "fast track" plea bargain that required defendants "to waive indictment, trial and an appeal" in return for a sentencing recommendation for a downward departure under the federal sentencing guidelines.[67] The proposed plea provided that "information establishing the defendant's factual innocence" had been, and would continue to be, provided to the defendant, but the defendant would be required to "'waive the right' to receive 'impeachment information relating to any informants or other witnesses' as well as the right to receive information supporting any affirmative de-

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[61] CRIMINAL RESOURCE MANUAL, *supra* note 33, § 626 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00626.

[62] Alan Ellis & Todd Bussert, *Stemming the Tide of Postconviction Waivers*, 25 CRIM. JUSTICE 28 (2010).

[63] 536 U.S. 622 (2002).

[64] *Id.* at 625.

[65] *See* Brady v. Maryland, 373 U.S. 83 (1963) (holding it a due process violation when prosecutors fail to disclose requested material exculpatory evidence).

[66] *See* United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (failing to extend *Ruiz* to exculpatory evidence), *cert denied*, 130 S. Ct. 1502 (Feb. 22, 2010); McCann v. Mangialardi, 337 F.3d 782, 787-88 (7th Cir. 2003) (extending *Ruiz* to *Brady* disclosures that provide factual innocence).

[67] 536 U.S. at 625.

fense the defendant raises if the case goes to trial."[68] This latter provision, the waiver of the right to impeachment evidence, resulted in a breakdown in the plea negotiation, and when the defendant pleaded guilty without a negotiated agreement, the government did not advocate for a downward sentencing departure.

The *Ruiz* Court noted that "the Constitution does not require the prosecutor to share all useful information with the defendant."[69] The Court found the release of this information "more closely related to the fairness of a trial than to the voluntariness of the plea."[70] With concerns about the "administration of the plea bargaining process," the Court found that it could not say "that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit."[71]

But strong arguments can be made that this decision is limited to impeachment evidence and does not extend to discovery of exculpatory evidence. The Court explicitly noted that the proposed plea in the *Ruiz* case stated that the government would provide and continue to provide evidence of factual innocence. The Court found that this provision along with "other guilty-plea safeguards diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty."[72] In this regard, one cannot cite *Ruiz* as supportive of a plea agreement that requires waiver of *Brady* type material.

The *Ruiz* decision can be characterized as promoting efficiency, in that the Court was concerned about a system that would impair quick processing of the "90% or more—of federal criminal cases" that are resolved through a negotiated agreement.[73] The Court noted that it would necessitate "substantial-

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[68] *Id.*

[69] *Id.* at 629.

[70] *Id.* at 633 (emphasis omitted).

[71] *Id.* at 632-33.

[72] *Id.* at 631 (citation omitted).

[73] *Id.* at 632.

ly more resources" if the government needed to advance discovery materials to the defense prior to entering into a plea bargain.[74]

Although the use of this form of an economic analysis is disturbing when the context relates to issues of liberty, there are additional factors that support a reconsideration of the *Ruiz* decision. Since the Court's *Ruiz* decision in 2002, government transparency and defense and media exposure of discovery violations have provided some insight into discovery problems existing across the country.

DEFERRED PROSECUTION AGREEMENTS

The pressure to plead is not unique to individuals[75] but is also felt in the corporate world. Following the demise of Arthur Andersen, LLP,[76] deferred prosecution agreements have become a norm in the corporate sector. The resolution of a case may not be a function of the guilt or innocence of a party. Rather, decisions may be more dependent upon the risks and collateral consequences of certain actions.[77] Corporations pay huge fines, agree to cooperate with the government, allow for monitors to participate in company activity, and assure the government that the compliance program at the company is now effective against criminal conduct in order to obtain a deferred or non-prosecution agreement with the government.[78]

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[74] *Id.*

[75] *See generally* Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995) (discussing the pressures to plea bargain).

[76] The indictment and later conviction of accounting firm Arthur Andersen, LLP, caused the demise of the company. The later Supreme Court decision that reversed this conviction was inconsequential to the company as it had suffered the collateral consequences of being unable to continue its business because of the prosecution. *See* Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005).

[77] *See* Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77 (2010) (discussing how innocence or guilt may not be the determining factors for resolving a criminal matter).

[78] *See generally* Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1 (2007-08) (discussing violations of contract rights as a result of prosecutorial power in reaching deferred prosecution agreements).

Providing pre-deferred prosecution discovery is equally important in this corporate context to equalize the playing field between the government and corporation entity. What is perhaps unique about deferred prosecutions is that the corporation is often anxious to provide reciprocal discovery to the government in order to save the entity. In deferred prosecution agreements, the government will often request the company provide evidence that can be used against individuals within the company who violated the law. Providing the material to the government can serve as the corporation's ticket to remain a viable entity that is not subject to debarment or other collateral consequences that could destroy its business.

CONCLUSION

On April 28, 2009, Hon. Emmet G. Sullivan, the judge who sat on the case of *United States v. Stevens*, wrote a letter to the Hon. Richard C. Tallman, the chair of the Judicial Conference Advisory Committee on the Rules of Criminal Procedure, calling for modifications to Rule 16 to require "disclosure of all exculpatory information to the defense."[79] He noted how the DOJ "strongly opposed the amendment" back in September of 2006 saying that a modification to the United States Attorneys' Manual "would obviate the need for an amendment to the federal rule."[80] A modification was made to the Manual, but as noted by Judge Sullivan, problems continued. With the new *Brady* issues that have arisen in cases such as *United States v. Stevens*,[81] we see the DOJ again trying to placate parties by issuing three new discovery memos and a new memo on charging and sentencing. These memos offer a huge step in correcting injustices that have arisen, but they also fail to appropriately respond to concerns regarding pre-plea discovery.

What the Ogden memos fail to emphasize is that achieving justice takes time and resources. Resting on the laurels of the *Ruiz* decision will not correct the problems inherent in a sys-

[79] Sullivan, *supra* note 1 (calling for an amendment to Federal Rule of Criminal Procedure 16 for disclosure of all exculpatory material).

[80] *Id.*

[81] *See* Podgor, *supra* note 1.

tem that fails to consider the importance of discovery for all defendants within the system, and not just those proceeding to trial. Efficiency may be appropriate when dealing with strict liability offenses that carry minimal consequences. But with ninety-five percent of cases proceeding through a plea agreement, it is important to assure fairness for all defendants, and not just for those contemplating a trial.