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"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation

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"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation

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The proposed amendments to the ABA Criminal Justice Standards for Prosecutors and Defense Lawyers ("Proposed Standards") address a number of problematic issues related to the roles of both prosecutors and defense attorneys. This Symposium Article considers waiver of rights in the context of the Standards, focusing on guilty pleas and the so-called "preconditions" that prosecutors generally require before even entertaining the defendant's proffer, colloquially termed "Queen for a Day" agreements.[1] It reviews the development in the law since 1993; the changes in the practice since that time; and the proposed changes to the Standards. The article focuses on the complex obligations of criminal defense attorneys to investigate their cases and give competent advice to their clients in the shadow of proffers and pleas. It concludes that attorneys in this role face an almost insoluble dilemma and hopes that the Proposed Standards provide an important first step to resolving it. The paper includes an appendix providing an historical breakdown of pleas and trials in federal courts from 1987 to 2009.[2]

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1. For a more detailed explanation of these agreements, see Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiations*, 23 CRIM. JUST. 14 (2008); and Benjamin A. Naftalis, *"Queen For a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea Statement Rules*, 37 COLUM. J.L. & SOC. PROBS. 1 (2004).

2. Most of the discussion focuses on federal law, which provides the minimum floor for constitutional protections. Many of the same concerns, however, are present in plea agreements in state courts as well.

Introduction

During a telephone discussion with a United States District Court Judge in July, 2010, he spoke of the "*hydraulic* pressure to plead" that exists in the criminal justice system: "The system depends on pleas," he said.[3] That the system depends on the cooperation of defendants not to go to trial is nothing new—nearly twenty years ago, two commentators noted that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[4] For decades, the percentage of cases going to trial has been minimal in relation to the overall number of defendants charged with crimes.[5] But what has changed, perhaps, is this "hydraulic" pressure. Due to mandatory minimum sentences and sentencing guidelines, prosecutors have enormous leverage over defendants in the negotiation of plea agreements since defendants who choose not to plead face staggering risks.[6] Indeed, the statistics showing the substantial increase in federal pleas between 1987 and 2009 (from 87% to more than 95% of all cases) is strong proof of the pressure upon defendants to plead. In the last three years, on average, only 3.87% of all federal defendants took their case to trial.[7] State cases likewise depend on plea agreements, with an average of 95% pleading guilty each year for the last five years.[8]

3. Telephone interview between the Honorable William G. Young, Judge, United States District Court, District of Mass., and Jane Moriarty, July 28, 2010. Notes of discussion on file with author. *See also* United States v. Kandirakis, 441 F. Supp. 2d 282, 284, n. 5 (D. Mass. 2006) (discussing, *inter alia*, factors that increase the "hydraulic pressure" to plead guilty).

4. Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1912 (1992).

5. From 1985 to 2009, the percentage of pleas entered in federal district court has risen dramatically, from approximately 87% to over 95%. *See* Appendix I, appended. Equally startling is the actual number of people convicted by plea or trial during that same time period. Fewer than 40,000 people were convicted in federal court in 1985 while more than 85,000 were convicted in 2009. The number of actual convictions rose steadily, along with the number of guilty pleas.

6. "[T]he Department [of Justice] is so addicted to plea bargaining to leverage its law enforcement resources to an overwhelming conviction rate that the focus of our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen." United States v. Green, 346 F. Supp. 2d 259, 265 (D. Mass. 2004), *decision vacated in part on other grounds and remanded*, United States v. Yeje-Cabrera, 430 F.3d 1 (1st Cir. 2005), *vacated and remanded by* United States v. Pacheco, 434 F.3d 106 (1st Cir. 2006).

7. *See* Appendix I, *infra*. In 2007, 2008, and 2009, the percentage of defendants pleading guilty was 95.8%, 96.3%, and 96.3%, respectively.

8. *See id.*

Thus, in 2011, we must look at the concept of "waiver of rights"—particularly the right to trial—as resting upon a new landscape. Since the current Standards were published in 1993, courts have decided many opinions relevant to waiver of rights and several commentators have written thoughtfully about the subject in the last several years.[9] The Proposed Standards differ substantially from the 1993 version and address many of the concerns this article raises. As will be clear from the article, the law of waiver has expanded exponentially in the last few decades, necessitating a change in the current Standards.

I. Waiver of Rights in the Courts

Waiver of rights may be implicated at every step in the process in which a right is involved: The right to remain silent; the right to counsel; the right to trial by jury; the right not to testify; the right to object to admissibility of evidence; the right to allocution; the right to appeal; the right to appeal execution orders, and certain habeas corpus rights.[10]

The United States Supreme Court has held with great regularity that a defendant has the right to waive rights in a variety of contexts, going so far as to find a "presumption of waivability."[11] In the decision to plead guilty, a defendant waives the right to a trial and in so doing, may waive the right to receive certain types of impeachment evidence,[12] as well as the rights against compulsory self-incrimination

9. *See* Taslitz, *supra* note 1; Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Conviction*, 57 CASE W. RES. L. REV. 651 (2007); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223 (2006); Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment, and Alienation*, 68 FORDHAM L. REV. 2011 (2000): Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998). For an earlier article, see Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989).

10. *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2011–14 (2000) (discussing the various rights that criminal defendants waive in the plea bargaining process).

11. United States v. Mezzanatto, 513 U.S. 196, 202 (1995).

12. United States v. Ruiz, 536 U.S. 622, 633 (2002) ("[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement . . .").

and confrontation.[13] According to many federal courts of appeal, defendants may waive the right to appeal any errors that occurred in the sentencing,[14] and the right to collaterally attack the plea or sentence in some circumstances.[15] The defendant may also waive various exclusionary rules of evidence and may stipulate to the admissibility of evidence.[16] If the defendant is determined to be competent, she may also waive the appeals challenging her execution in a death penalty case.[17]

13. Boykin v. Alabama, 395 U.S. 238, 243 (1969). *Accord* Godinez v. Moran, 509 U.S. 389, 398 (1993).

14. "Most courts, including all twelve federal courts of appeals with criminal jurisdiction, uphold appeal waivers, so long as the waiver is made voluntarily and with an understanding of the consequences." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5(c), Waiver or Forfeiture of the Right of Appeal (2009 Supp.).

15. *Accord* United States v. Djelevic, 161 F.3d 104, 107 (2d Cir. 1998) ("emphatically reject[ing]" the contention that the defendant's knowing and voluntary waiver of his right to appeal "should not bar consideration of his appeal, because counsel was ineffective not at the time of the plea, but at sentencing"); Davilia v. United States, 258 F.3d 448, 451 (6th Cir. 2001) (joining the majority of other circuits in holding that if a plea agreement is made knowingly, intelligently, and voluntarily, it can waive the right to collateral review, except when the ineffective assistance of counsel claim relates directly to the plea agreement or waiver). *See* United States v. Cockerham, 237 F.3d 1179, 1181 (10th Cir. 2001) (recognizing that a waiver of rights under 28 U.S.C. § 2255 is generally enforceable, except when alleging the counsel who represented defendant during the plea was ineffective in actually negotiating the plea—not just the sentence); United States v. White, 307 F.3d 336, 343 (5th Cir. 2002) ("[W]e will follow [the] wealth of authority and hold that an ineffective assistance of counsel argument survives a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself."). *See also* Mason v. United States, 211 F.3d 1065, 1069 (7th Cir. 2000) (Since defendant's ineffective assistance of counsel claim related only to his attorney's performance at sentencing, and had nothing to do with the attorney's negotiation of the waiver, his claim was barred because he had waived his right to seek post-conviction relief through appeal.).

16. United States v. Mezzanatto, 513 U.S. 196, 202–03 (1995) (defendant may waive objections to the admissibility of evidence and may stipulate to evidence); *Godinez*, 509 U.S. at 398.

17. *See generally*, Gilmore v. Utah, 429 U.S. 1012 (1976) (terminating the stay of execution of Gary Gilmore after finding that the lower courts had found a knowing, intelligent, and competent waiver of rights); Whitmore v. Arkansas, 495 U.S. 149, 154 (1990) (seeming to recognize the right to waive appeals following a death sentence). For a detailed discussion about death-penalty waivers, see John H. Blume, *Killing the Willing: "Volunteers," Suicide, and Competency*, 103 MICH. L. REV. 939, 943–44 (2005) (discussing death penalty waivers and proposing a standard for assessing such waivers that strikes a balance between the desire to prevent death row inmates from using the death penalty as a means of committing state-assisted suicide, yet protecting the right of mentally healthy inmates to forgo further appeals and accept punishment); and Amy Smith, *Not "Waiving" But Drowning: The Anatomy of Death Row Syndrome and Volunteering For Execution*, 17 B.U. PUB. INT. L.J. 237, 238, 252–53 (2008) (discussing the effects of death row on inmates and noting the rise in "volunteering," or waiving, all state and federally mandated rights to

Nonetheless, there are some limitations placed on waivers of rights, particularly as concerns the waiver of *trial* rights. First, the Supreme Court has remarked that while a defendant gives up various constitutional guarantees when entering a guilty plea,[18] the guilty plea be made both knowingly and voluntarily—albeit what constitutes "knowing and voluntarily" is a bare-bones standard.[19] Additionally, "[t]here may be some evidentiary provisions that are so fundamental to the reliability of the fact finding process that they may never be waived without irreparably 'discredit[ing] the federal courts.'"[20] What those evidentiary provisions might be, however, is somewhat uncertain.

A. Preconditional Waivers and Proffers

Rule 410 of the Federal Rules of Evidence and (the former version of) Rule 11 of the Federal Rules of Criminal Procedure both provide, in parallel language, that any statement made in the course of an unsuccessful plea negotiation is not admissible in any proceeding against the defendant.[21] The hortatory goal of these

appeal, and the parallel increase in lengths of time inmates spend on death row, between sentencing and execution).

18. These include the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to confront one's accusers. *Ruiz*, 536 U.S. at 628.

19. *Id.* at 629. The Supreme Court in *Ruiz* determined that the Constitution did not require complete knowledge of all relevant circumstances. Rather, a court may accept a plea "despite various forms of misapprehension under which a defendant might labor." *Id.* at 630. As described by one court of appeals, a defendant's comprehension of the consequences of the waiver need not be perfect. It is the defendant's understanding of the rights being relinquished, not all possible repercussions of relinquishing them, that defines the waiver as knowing. *See* United States v. Krilich, 159 F.3d 1020, 1026 (7th Cir. 1998). Proving the voluntariness of the plea is also a potentially low hurdle. *See, e.g.*, United States v. Mitchell, 2011 WL 322371, *4 (10th Cir.) (even a defendant strongly pressured by prior counsel could not claim the plea was involuntary after he chose to enter the plea and affirmed it on the record). *Accord,* United States v. Carr, 80 F.3d 413, 417 (10th Cir. 1996).

20. *Mezzanatto*, 513 U.S. at 204 (citing 21 Wright & Graham § 5039, at 207–08).

21. FED. R. EVID. 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements, provides: "Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: (1) a plea of guilty which was later withdrawn; (2) a plea of nolo contendere; (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the

provisions was to encourage a free and open discussion among prosecutors, defendants, and defense lawyers to seek agreement and eliminate the need for trial in many cases.[22] Rule 410 reflected both U.S. Supreme Court practice[23] and long-standing policy.[24]

Nonetheless, prosecutors began to encourage defendants to waive the protection of Rule 410 by refusing to engage in plea discussions without preconditional waivers. This prosecutorial power grew as a response to the enactment of mandatory minimums and sentencing guidelines, which collectively shifted much of the power to the prosecutors to rewrite criminal practice.[25] As defense lawyers challenged the practice of preconditional waivers, cases worked their way up to the Supreme Court. In 1995, the U.S. Supreme Court held in *United States v. Mezzanatto* that absent some affirmative indication that an agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules was valid and enforceable.[26]

In *Mezzanatto*, the defendant agreed to enter into plea discussions with the government concerning contraband crimes. The prosecutor warned defendant that if he wanted to cooperate, he had to be completely truthful in his proffer. As a precondition, he would have to agree that any statement made during the discussions could be used to impeach any contradictory testimony he might give at trial if the case proceeded that far. Defendant agreed, then proceeded to mislead the prosecutor, and was confronted with surveillance evidence proving defendant's deception. Plea negotiations were

statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

22. United States v. Young, 2011 WL 96627 (W.D. Ky. Jan. 11, 2011) (discussing the policy goals and legislative history of these rules). *See* FED. R. EVID. 410 advisory committee's note ("[E]xclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise.") (citing MCCORMICK ON EVIDENCE § 251, 543 (Hornbook 2011).

23. Kercheval v. United States, 274 U.S. 220 (1927) (disallowing evidence of a withdrawn plea in a federal prosecution).

24. "Free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it." FED. R. EVID. 410 Advisory Committee's Note.

25. *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1505–06 (1993) (discussing the empowering effect of the sentencing guidelines for prosecutors in the plea bargaining process and the resulting drastic changes to the nature of plea bargaining, and proposing possible solutions).

26. *Mezzanatto*, 513 U.S. at 210.

broken off by the prosecutor and the case ultimately went to trial, with Mezzanatto taking the stand. At trial, prosecutor impeached defendant with the statements he'd made during the plea discussion.[27]

Mezzanatto argued that Rule 410's protections were not waivable and should bar the admission of defendant's statements into evidence. A majority of the Supreme Court disagreed with Mezzanatto, finding the defendant's arguments unpersuasive and holding the waiver of rights was permissible.[28] The Court believed that admission of plea statements for impeachment purposes enhances the truth-seeking function of trials. It also determined that the plea-statement Rules expressly contemplate a degree of party control that is consonant with the presumption of waivability. Additionally, the Court disagreed that allowing such waiver would discourage plea bargaining, reasoning that some prosecutors may be "especially reluctant" to negotiate in the absence of a waiver.[29] Finally, the Court was not persuaded that waiver agreements invite prosecutorial overreaching and abuse. "The mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether."[30] Rather, on a case-by-case basis, the courts could consider whether the waiver agreement was the product of "fraud or coercion"[31]—an exceptionally difficult standard to meet.

In concurrence, Justice Ginsburg noted that allowing the use of statements to impeach was compatible with "Congress' intent to promote plea bargaining."[32] Nonetheless, she noted that a waiver to use such statements in the case-in-chief "would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining."[33]

Joined by Justice Stevens, Justices Souter dissented, finding that the majority ruling was "at odds with the intent of Congress and will render the Rules largely dead letters."[34] While the dissenters agreed

27. *Id*. at 199.

28. *Id*. at 200–01.

29. *Id*. at 207.

30. *Id*. at 210.

31. *Id*. It appears that *Mezzanatto* may also leave open the right to challenge the agreement if it were not entered into "knowingly or voluntarily." For a more complete description of what this standard entails (or does not entail), *see supra* notes 16–20.

32. *Id*. at 211 (Ginsburg, J., concurring).

33. *Id*. (Ginsburg, J., concurring).

34. *Id*. (Souter, J., dissenting).

with the "general presumption in favor of recognizing waivers of rights," they believed that the express language of Congress in Rule 410 and Rule 11 of the Federal Rules of Criminal Procedure were controlling.[35] Although the dissent remarked on the limited nature of the decision, it worried that the inevitable result of the reasoning used by the majority would, in time, come to function as a waiver of trial itself.[36]

Post-*Mezzanatto*, the waiver-of-rights precondition to the proffer has become standard in the federal courts and the permissible scope of the waiver has also expanded. As a 2007 National Law Journal article remarked, "[f]ederal prosecutors are now insisting, as part of the plea agreement process, that defendants waive their 'rights' under . . . FRE 410 . . . [and] *Mezzanatto* has served as the foundation for a line of cases that have expanded the breadth of these waivers over time."[37]

In addition to permitting statements to be used for impeachment, a number of Circuits have approved of case-in-chief waivers. In *United States v. Sylvester*, the Fifth Circuit extended the reach of *Mezzanatto* to include such waivers.[38] Sylvester was arrested for murder and the government offered to seek life imprisonment and to forego the death penalty in exchange for a full confession and plea of guilty. As part of the plea, the government required the defendant to sign a waiver, which provided that in the event the plea negotiations failed, the government could use the confession of the defendant in its case in chief. Sylvester agreed, signed, and confessed. After engaging retained counsel (to replace appointed counsel), he sought to withdraw his plea and go to trial.[39] The court, over defense objection, allowed the government to introduce Sylvester's confession, and the defendant was convicted.[40]

35. *Id*. at 211–12.

36. *Id*. at 217.

37. Mark Calloway, et al., *More Defendants are Asked to Waive Plea Deal Rights; Prosecutors Increasingly Insist that Defendants Waive Protections Against Use of Statements at Trial*, NAT'L L.J. S1 (Col. 1), July 23, 2007.

38. *See* 583 F.3d 285 (5th Cir. 2009); *See also* United States v. Stevens, 2010 WL 5343189, *3 (S.D. W.Va. Dec. 21, 2010) (reviewing *Mezzanatto* and the extension in *Sylvester*, and finding that "no policy reasons prohibit the Court from enforcing Defendant's Rule 410 waiver and admitting the stipulation of facts into evidence in the Government's case-in-chief.").

39. 583 F.3d at 287.

40. *Id*. at 288.

The Fifth Circuit saw no meaningful distinction between a voluntary waiver to admit testimony in rebuttal and in the case in chief, noting that both waivers "enhan[ce] the truth-seeking function of trials and will result in more accurate verdicts."[41] The court noted two "salient prosecutorial functions" these waivers serve: They allow the prosecution to use the defendant's plea statements in opening argument and allow the use of such statements even if the defendant limits his defense to credibility impeachment of government witnesses or even if he "declines to wage any defense at all."[42] Several circuits now permit case-in-chief waivers.[43]

Other courts have permitted prosecutors to use statements broadly as a form of rebuttal evidence. In *United States v. Rebbe*, the concept of rebuttal was interpreted to include the defendant's case, not solely the defendant's testimony.[44] Rebbe signed a waiver before plea discussions permitting the government to use statements of the defendant or "evidence obtained directly or indirectly from those statements . . . to rebut any evidence, argument, or representations offered by or on behalf [of the defendant]."[45] After Rebbe made several incriminating statements, the plea discussions fell apart and the case went to trial. At trial, the prosecution put on its case in chief and rested. Defendant's attorney asked for an advisory ruling about the admissibility of the incriminating statements should he put on a defense, which the court declined to grant. Defendant called four witnesses in support of his case (although he did not testify) and the court allowed the Government to introduce the statements as rebuttal evidence.[46] The Ninth Circuit upheld the admissibility of such statements. Since "Rebbe presented a defense that was inconsistent with his proffer statements and the Government did not seek to admit Rebbe's . . . statement in its case-in-chief, we cannot discern any error . . . ."[47]

41. *Id*. at 290 (quoting *Mezzanatto*, 513 U.S. at 204).

42. 583 F.3d at 293.

43. *See* United States v. Burch, 156 F.3d 1315, 1322–23 (D.C. Cir. 1998); United States v. Young, 223 F.3d 905, 911 (8th Cir. 2000); and United States v. Mitchell, 2011 WL 322371, *9 (10th Cir.) (all upholding case-in-chief waivers).

44. United States v. Rebbe, 314 F.3d 402 (9th Cir. 2002).

45. *Id*. at 404.

46. *Id*. at 405.

47. *Id*. at 407. *Accord*, United States v. Hardwick, 544 F.3d 565, 570-71 (3d Cir. 2008) (approving the admission of defendant's plea statements after the close of government's case, since the terms of the waiver were expansive: "to rebut *any* evidence or arguments. . . .") (emphasis in original).

In *United States v. Krilich*,[48] the defendant signed a conditional waiver allowing the government to use "the substance of the proffer" at trial for impeachment or "in rebuttal testimony," should the defendant "testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer."[49] Judge Easterbrook, writing for the majority, claimed the court would give neither a "stingy reading nor a generous one" to the conditional waiver, but rather "a natural reading, which leaves the parties in control through their choice of language."[50] The court agreed that the prosecutor could introduce evidence that "contradicted the proffer." Once the defense cross-examinated witnesses to elicit evidence that was contrary to the defendant's proffer, the court permitted the introduction of the proffer statements.[51] The court disagreed, however, that once the defendant puts on *any* defense, the statements would be admissible. Rather, the "judge must find genuine inconsistency before allowing use of the statements."[52] Post-*Mezzanatto*, questions remain about whether the defendant essentially waives the right to any real defense once he signs a preconditional waiver that permits the prosecution to proffer evidence "to rebut" his case. At least in some circuits, defendants may be waiving the right to trial for the privilege of making a proffer. If prosecutors consistently require these preconditional waivers, then the dissent in *Mezzanatto* was prescient in its concern that the case would turn section 410 of the Federal Rules of Evidence into a "dead letter"[53] in criminal cases. Moreover, it is particularly troubling that this de facto trial waiver is made *before* the plea discussion—simply for the right to even *discuss* a potentially unsuccessful plea.

B. Remaining Uncertainties about Waivers

In addition to the use of proffer statements in trial, there are other waiver problems inherent in plea agreements. In *United States v. Ruiz*, the defendant refused to accept a plea agreement because it required her to waive the right to obtain impeachment evidence

48. United States v. Krilich, 159 F.3d 1020 (7th Cir. 1998).
49. *Id*. at 1024.
50. *Id*. at 1025.
51. *Id*. at 1025–26.
52. 159 F.3d at 1025.
53. U.S. v. Mezzanatto, 513 U.S. 196, 211 (1995) (Souter, J., dissenting).

under *Brady v. Maryland*.[54] The Court held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."[55] *Ruiz* did not address whether the right to obtain actual exculpatory information—evidence tending to prove the defendant is not guilty of the crime or is guilty of a lesser crime than that which he is charged—may be likewise waived.

To date, there is a split of opinion on whether *Ruiz* imposes an obligation to disclose exculpatory information. In a July, 2010 decision, the United States District Court for the District of Connecticut held that there was a distinction between the obligation to provide exculpatory information and material impeachment evidence, stating "the court declines . . . to hold that *Ruiz* applies to exculpatory as well as impeachment material."[56] As the court in *Danzi* recognized,[57] some courts have held *Ruiz* does apply to exculpatory information[58] while others courts have held that *Ruiz* does not.[59] It also noted that pre-*Ruiz* case law in the Second Circuit

54. United States v. Ruiz, 536 U.S. 622 (2002). *See also* Brady v. Maryland, 373 U.S. 83, 87 (1963).

55. 536 U.S.at 633.

56. United States v. Danzi, 726 F. Supp. 2d 120 (D. Conn. 2010), ruling clarified in United States v. Danzi, 2010 WL 3463272 (D.Conn)

57. 726 F.Supp. 2d at 128.

58. *See* Friedman v. Rehal, 618 F.3d 142, 154 (2d Cir. 2010) (discussing the issue in dicta and stating that "the Supreme Court has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial, and the reasoning underlying Ruiz could support a similar ruling for a prosecutor's obligations prior to a guilty plea"); United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010) (noting in dicta that "the Supreme Court has not addressed the question of whether the *Brady* right to *exculpatory* information, in contrast to *impeachment* information, might be extended to the guilty plea context," but declining to decide the issue because "even if [the Court] were to assume that the prosecution's failure to disclose material exculpatory evidence at the plea stage could result in an unknowing plea in certain narrow circumstances, Moussaoui cannot demonstrate that *his* guilty plea was entered unknowingly for this reason"); United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009), *cert denied*, 130 S. Ct. 1502 (2010) ("Conroy argues that the limitation of the Court's discussion [in *Ruiz*] to impeachment evidence implies that exculpatory evidence is different and must be turned over before entry of a plea. *Ruiz* never makes such a distinction nor can this proposition be implied from its discussion.").

59. *See* United States v. Ohiri, 133 F. App'x 555, 562 (10th Cir. 2005) ("By holding in *Ruiz* that the government committed no due process violation by requiring a defendant to waive her right to impeachment evidence before indictment in order to accept a fast-track plea, the Supreme Court did not imply that the government may avoid the consequences of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government's possession."); McCann v.

required the prosecution to turn over exculpatory evidence prior to a plea agreement.[60]

Thus, the state of the law is unsettled,[61] and there is a conflict among the courts. We believe that there must be a requirement—both as a matter of constitutional law and ethical obligation—for prosecutors to provide exculpatory information before entering into plea agreements.[62] Although courts do not seem to agree, we also believe, as a matter of competent representation obligations, defense counsel should have much greater access to prosecutorial evidence before pleas are entered or preconditional waivers are signed or guilty pleas are entered.

II. The Defense Dilemma

With the consistent and widespread use of plea bargaining, preconditional waivers, and pressures from guidelines and minimum mandatory sentencing, the role of defense counsel has become both cabined and marginalized. Faced with the potential for draconian prison terms for clients who are unsuccessful at trial, criminal defense attorneys possess little bargaining power and shoulder a heavy burden to ascertain what constitutes good advice. In fact, plea

Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) (stating in dicta that "*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence," and that "[g]iven this distinction, it is highly likely the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea").

60. *Danzi*, 726 F. Supp. 2d at 126.

61. *See e.g.*, Garrett v. United States, No. 2:05cv323, 2006 WL 1647314 (E.D. Va. June 13, 2006) (assuming but declining to decide the issue of whether exculpatory evidence must be disclosed at the plea stage); Ferrara v. United States, 384 F. Supp. 2d 384, 409 (D. Mass. 2005) (finding that the government's decision to not disclose material exculpatory information undermined the reliability of a guilty plea, which could therefore be vacated in a § 2255 proceeding and noting that "*Ruiz* . . . confirms rather than contradicts this conclusion."); *In re* Miranda, 182 P.3d 513, 543 n.6 (Cal. 2008) (citing conflicting cases on whether prosecutors must disclose exculpatory information pre-plea and declining to decide the issue).

62. A full exposition of the foundation for that opinion is outside the scope of this paper, but both *Brady v. Maryland*, 373 U.S. 83 (1963), and MODEL RULES OF PROF'L CONDUCT R. 3.8 clearly require *timely* prosecutorial disclosure of exculpatory evidence. *Brady* and its progeny require defense counsel to request such evidence; MODEL RULE. 3.8(d) places the burden entirely on the prosecutor. For further discussion of this issue, *see* Fred C. Zacharius & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 5–11 (2009); and Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982).

bargaining seems to be an outmoded term to describe this process, since the defense has very little, if any, bargaining power. Perhaps a more honest descriptive phrase would be "capitulation to the government's best offer."

Counsel is faced with a complex series of decisions about whether to make a proffer, enter a plea, or go to trial. Exercising the right to be tried by a jury has become a dicey and often unwise proposition, but knowing whether and when to plead may be equally fraught with peril. Many cases with multiple defendants (e.g., drug cases) often have little hard evidence but a parade of cooperating co-defendants by the time the case goes to trial.[63] While a reasonable jury might question the motives of a single co-defendant receiving the benefit of a substantially reduced sentence, that concern likely will fall away upon hearing several such witnesses tell coordinated stories Moreover, the defendant faces substantial prison time if he elects to go to trial and loses.

Additionally, some prosecutors may place stringent time limits on the availability of a preconditional or regular plea agreement, creating a hurried atmosphere in which defendants are rightly fearful of losing a potentially good deal but may not know enough about the prosecution's case to properly evaluate the offer.[64] Moreover, some prosecutors may be unwilling to share information with defense counsel unless the case is going to trial[65] as the Supreme Court does not require pre-plea disclosure of either inculpatory or impeachment evidence.[66] Finally, even if prosecutors disclose exculpatory information, they are subject to the well-recognized bias problems

63. By far the single largest category of federal prosecution is felony drug trafficking. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, DEFENDANTS IN CRIMINAL CASES COMMENCED, BY OFFENSE, OCTOBER 1, 2007-SEPTEMBER 30, 2008 (2010), http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st401.pdf. These cases frequently have multiple defendants who cooperate and testify.

64. Interviews with Defense Attorney #1, November 28, 2010 and Defense Attorney #2, Janaury 14, 2011 (notes on file with author).

65. *See* discussion about *Ruiz*, *supra*, notes 52–60. Anecdotally, some defense attorneys claim that some federal prosecutors refuse to disclose any evidence, stating "ask your client what he did if you want to know." Interviews with Defense Attorney #1, November 28th, 2010, and Defense Attorney #2, (Janaury 14, 2011.). However, a government prosecutor disagreed that such refusal to disclose was commonplace and was usually limited to cases in which there were safety concerns for witnesses. (Interview with Prosecutor #1, April 7, 2011) (notes on file with author).

66. *See* United States v. Agurs, 427 U.S. 97, 109 (1976) (noting the Constitution does not require a prosecutor to open his files to the defendant in discovery); *see* discussion concerning United States v. Ruiz, 536 U.S. 622 (2002), at nn. 53-60.

that would affect *any* prosecutor: deciding unilaterally what evidence is exculpatory.[67]

The other side of the dilemma are the legal and ethical obligations imposed on defense counsel. A criminal defense attorney must apprise the defendant of any potential plea offers and in appropriate circumstances, may even have a duty to seek out plea negotiations with the prosecution.[68] Deciding what advice to give a client concerning plea negotiations is difficult, yet critically important. The Seventh Circuit stated in *Johnson v. Duckworth*, "[a]part from merely being informed about the proffered agreement, we also believe that a defendant must be involved in the decision-making process regarding the agreement's ultimate acceptance or rejection."[69] The defense attorney must ensure that the defendant understands fully the plea agreement and provide advice on whether to accept or reject it. As explicitly stated by the Second Circuit in *Boria v. Keane*, "[t]he decision whether to plead guilty or contest criminal charges is ordinarily the most important single decision in a criminal case . . . [and] counsel may and *must* give the client the benefit of counsel's professional advice on this crucial decision."[70] With the lack of

67. For further discussion of the bias problems that would affect prosecutorial decision-making in this context, *see* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–22; Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201, 1211 n.33 (2005); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 494–96 (2009).

68. *See* Nunes v. Mueller, 350 F.3d 1045, 1052–53 (9th Cir. 2003) ("The right lost . . . was not the right to a plea bargain as such, but rather the right to counsel's assistance in making an informed decision once a plea had been put on the table. It has long and clearly been held that defendants are entitled to effective assistance of counsel during all critical stages of the criminal process . . . . Here, the right that Nunes claims he lost was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law."); Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir. 1986) ("After examining cases and professional standards, we fully agree with Johnson that in the ordinary case criminal defense attorneys have a duty to inform their clients of plea agreements proffered by the prosecution, and that failure to do so constitutes ineffective assistance of counsel under the sixth and fourteenth amendments."); Hawkman v. Parratt, 661 F.2d 1161, 1171 (8th Cir. 1981) ("We agree that under the facts of this case, counsel's failure to initiate plea negotiations concerning the duplicitous felony counts constituted ineffective assistance of counsel . . . . However, we do not hold that defense counsel always has a duty to initiate plea bargaining negotiations. The legal inquiry into whether counsel rendered ineffective assistance necessarily encompasses consideration of many relevant factors.").

69. *Johnson*, 793 F.2d at 902.

70. Boria v. Keane, 99 F.3d 492, 496–97 (2d Cir. 1996) (emphasis added), decision clarified on rehearing, 99 F.3d 36 (2d Cir. 1996) (quoting ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (1988)); *see also* David P. Leonard, *Waiver of Protections Against the Use of Plea Bargains and Plea Bargaining*

discovery and the pressure to waive rights, knowing how to counsel a client is problematic at best. Moreover, given the minimal level of comprehension required of a defendant to waive rights, it is debatable whether many defendants properly understand the gravity of the choice they make when they agree to a preconditional waivers or even standard pleas.[71]

The U.S. Supreme Court recently held in *Padilla v. Kentucky* that the defense attorney provided ineffective assistance of counsel by failing to inform the defendant of deportation consequences of his guilty plea.[72] The Court stated that "[b]efore deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel."[73] The Court overruled the Kentucky Supreme Court, which held that defense counsel was not ineffective for neglecting to advise the defendant of possible deportation consequences of a guilty plea, reasoning that deportation was merely a "collateral consequence" of a guilty plea.[74] The Court, however,

Statements After Mezzanatto, 23 CRIM. JUST. 8, 13 (2008) (discussing the importance of the role of the defense attorney in ensuring the defendant understands any plea offers and enters any plea agreements knowingly, noting that "a criminal defendant will rely heavily on the advice of the defense attorney.").

71. The U.S. Supreme Court has held that a defendant may waive an uncertain right, as long as he does so knowingly and voluntarily. *See* Newton v. Rumery, 480 U.S. 386, 393–94 (1987) (upholding a release-dismissal agreement, and analogizing it to a plea agreement, that required a defendant to waive his right to file a § 1983 claim in exchange for the prosecution's dismissal of pending criminal charges). Similarly, in *United States v. Navarro-Botello*, the Ninth Circuit upheld a plea agreement that waived the right to challenge sentencing issues on appeal over the defendant's objection that the waiver was unknowing and involuntary because he could not have known what sentencing issues might come up until after sentencing occurred. 912 F.2d 318, 320 (9th Cir. 1990). The court reasoned that "[w]hatever appellate issues might have been available to [the defendant] were speculative," but that "[h]e knew he was giving up possible appeals, even if he did not know exactly what the nature of those appeals might be." *Id*. at 320; *see also* United States v. Rutan, 956 F.2d 827, 830 (8th Cir. 1992) (reasoning that because plea bargains are upheld when they include a waiver of the right to a jury trial even though defendants cannot know how well the State will make its case, plea bargains that include a waiver of the right to appeal should be upheld even though defendants might not know all the potential issues on appeal). As described in footnote 19, what constitutes a "knowing and voluntary waiver" is truly a minimal level of understanding.

72. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010). "This is not a hard case to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory and his counsel's advice was incorrect." *Id.* at 1483.

73. *Id.* at 1480–81, (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)); McMann v. Richardson, 397 U.S. 759, 771 (1970)).

74. *Padilla*, 130 S. Ct. at 1480–81; *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) ("In spite of the importance of counsel, one of the most widely

neglected to decide the issue of whether it was proper for courts to apply "a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance required under *Strickland*," because the case did not require such a decision, due to deportation's "close connection to the criminal process," rendering it difficult to classify as either a direct or collateral consequence.[75] The Court left murky both the distinction between direct and collateral consequences as well as the attendant obligations of counsel.[76] Post-*Padilla*, it is unclear precisely which consequences a defense attorney has the duty to inform his client about that might affect the collateral litigation rights over the conviction.[77] Most subsequent cases have declined to expand the limited holding of *Padilla*,[78] but some cases have applied the same

accepted principles of American criminal procedure is that defense lawyers' constitutional duty to advise clients is limited . . . while lawyers must advise clients of the direct consequences of a guilty plea—such as the period of incarceration and the fine that will be imposed at sentencing—eleven federal circuits, more than thirty states, and the District of Columbia have held that lawyers need not explain collateral consequences, which, although they might follow by operation of law, are not part of the penalty imposed by the particular statute the defendant is accused of violating.").

75. *Padilla*, 130 S. Ct. at 1481–82.

76. "There is some disagreement among the courts over how to distinguish between direct and collateral consequences." *Id.* at 1481 n.8.

77. The concurring justices in *Padilla* argued that the collateral-consequences rule should be maintained as "it is unrealistic to expect [criminal defense attorneys] to provide expert advice on matters that lie outside their area of training and expertise." *Id.* at 1487–88 (Alito, J., & Roberts, C.J., concurring in the judgment). The concurrence continued, arguing that the removal in *Padilla* was serious:

[C]riminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are serious, but this Court has never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters.

Id. at 1488 (citing Chin & Holmes, *supra* note 77).

78. *See e.g.*, United States v. Mercado, No. 3:96-165-02, 2010 WL 3360414, at *2 (S.D.W. Va. Aug. 20, 2010) ("The error complained of by Mr. Mercado—the inaccurate calculation of criminal history—simply does not involve 'collateral consequences' within the meaning of *Padilla*."); United States v. Lopez-Nieves, 2010 WL 2404334, C-06-506(1), at *1 n.2 (S.D. Tex. June 11, 2010) ("[Defendant] claims that, if counsel had investigated his first immigration offense and deportation, then the facts of that prior removal would have resulted in a lesser amount of incarceration in light of *Padilla*. The holding in *Padilla*, however, was merely that counsel is constitutionally deficient if he fails to inform his client about whether a plea carries a risk of deportation."); Brown v. Goodwin, No. 09-211, 2010 WL 1930574, at *13 (D.N.J. May 11, 2010) (declining to find defense attorney's

reasoning in other contexts, expanding the duty of the defense attorney to make his client aware of the consequences of a guilty plea.[79] Therefore, a prudent defense attorney should also discuss possible collateral consequences of a guilty plea to ensure the defendant makes an informed decision. Equally true, counsel should discuss the likely effects of a preconditional waiver if the plea colloquy is unsuccessful, as well as the attendant waivers if it is successful.

The defense attorney's role in plea bargaining is crucial and the defendant must rely on counsel's judgment in accepting or rejecting the plea offer from the government, as defendants are inexperienced and incapable of evaluating plea offers.[80] It is important that a defense attorney be able to provide an opinion that is not coercive

failure to inform defendant of civil commitment consequences of a guilty plea to be ineffective assistance of counsel, and stating that "while *Padilla*'s implications for cases involving removal are clear, the holding of *Padilla* seems not importable—either entirely or, at the very least, not readily importable—into scenarios involving collateral consequences other than deportation"); People v. Cristache, 907 N.Y.S.2d 833, 843 (N.Y. Crim. Ct. 2010) ("Under these circumstances, where the removal consequences of defendant's pleas were unclear or uncertain, plea counsel was constitutionally obliged to do no more than advise defendant that pending criminal charges may carry a risk of adverse immigration consequences.").

79. *See e.g.*, Taylor v. State, 698 S.E.2d 384, 385, 388 (Ga. Ct. App. 2010) ("[I]n light of the United States Supreme Court's recent decision in *Padilla v. Kentucky*, we agree with Taylor that it is constitutionally deficient for counsel not to advise his client that pleading guilty will make him subject to the sex offender registration requirements," "even if registration as a sex offender is a collateral consequence of a guilty plea, the failure to advice a client that his guilty plea will require registration is constitutionally deficient performance."); Pridham v. Commonwealth, No. 2008-CA-002190-MR, 2010 WL 4668961, at *1–2 (Ky. Ct. App. Nov. 19, 2010) (holding that "[i]n light of the decision in *Padilla* . . . gross misadvice concerning parole eligibility may amount to ineffective assistance of counsel worthy of post-conviction relief" and reasoning that "the factors relied upon in the deportation context apply with equal vigor to the circumstances of gross misadvice about parole eligibility."); People v. Garcia, 907 N.Y.S.2d 398, 405 (N.Y. Crim. Ct. 2010) ("[M]erely advising a client to seek outside immigration advice, without more, now fails to meet the affirmative duty set forth in *Padilla*, at least where the immigration implications of the plea were fairly straightforward . . . and where the 'specialist's' advice was wrong.").

80. For a discussion on reasons defendants accept plea agreements even when they are innocent and prosecutorial misconduct in plea bargaining that leads to wrongful convictions, *see* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 8–14 (2009) (examining the potential enforcement of the general competence standard from ABA Model Rules of Professional Conduct Rule 1.1 against prosecutors who fail to exercise reasonable care to prevent false convictions).

but instead, allows the client to make an informed decision.[81] Further, the Supreme Court has specified that a defense attorney has a duty to investigate what evidence the prosecution will use against the defendant.[82] In *Rompilla v. Beard*, the Court remarked "[t]he notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense," but is a legal obligation.[83] *Rompilla* cites the ABA Standards for Criminal Justice as "guides to determining what is reasonable."[84] *Padilla* likewise echoed the use of ABA Standards in this way. While the guides are not "inexorable commands," the Court stated, they "may be valuable measures of the prevailing professional norms of effective representation . . . ."[85] Yet these legal and ethical obligations are difficult to meet in the current climate of limited disclosure and preconditional waivers.

The defense dilemma is thus: The attorney has little time or ability to investigate or discover what evidence the prosecution has against his client, is entitled to little discovery, knows the client risks decades of prison time if she loses at trial (which, statistically, is overwhelmingly likely to happen), and yet must advise the client on the best strategy, often without a sound, fact-based foundation. The dilemma posed has both constitutional and ethical implications related to competence.[86] The Proposed Standards provide a needed

81. *See* Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 909 (1998) ("The attorney will be required to invest herself, to offer an opinion and try to persuade, but not to usurp the decision from the client. Ultimately, it is and must be, the client's choice. The attorney, however, should assume the responsibility and take on the burden of advising her client, with compassion and empathy, as to whether to accept or reject a plea offer. By supplying the bases for her opinion, she should try to persuade the client to accept her recommendation. The result will be fully counseled decisionmaking based on truly effective assistance of counsel.").

82. *See* Rompilla v. Beard, 545 U.S. 374, 387 (2005) (Citing the ABA Standards for Criminal Justice, the Court remarked "[t]he notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense." Rather the Standards are "guides to determining what is reasonable.").

83. *Id.* The court further comments that this duty to investigate applies even when the defendant wishes to plead guilty. *Id.*

84. *Id.*

85. Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010).

86. Failure to provide minimally competent representation can constitute a violation of defendant's Sixth Amendment rights, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). That same failure can constitute an ethical violation for the lawyer, subjecting her to sanctions. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the

sea-change in defining what constitutes good practice while providing guidance for courts[87] in determining the substance of ineffectiveness under *Strickland v. Washington*.[88]

Without solid knowledge of the case the government has against the defendant, the defense attorney cannot know whether a plea offer would really benefit the defendant, whether she has grounds to bargain for a better plea offer, or whether she should simply go to trial. Moreover, requiring defendants to waive virtually all rights before even discussing a plea needs to be reconsidered. The current climate of plea bargaining is at odds with those ethical and constitutional requirements, adversely affecting the lives of defendants and the workings of the justice system as a whole. Change is necessary and the Proposed Standards, if enacted, provide an excellent start. By addressing specifically the issues of investigation, waivers, and prosecutorial disclosure of evidence pre-plea, the Proposed Standards address the very concerns raised in this article.

representation.") [hereinafter "MODEL RULES"]; *id.*, R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). The United States Supreme Court has recently granted certiorari on an issue related to the effective assistance of counsel in plea bargain negotiations, addressing what remedy should be available to a criminal defendant who was provided ineffective assistance during plea negotiations but who was later convicted pursuant to constitutional procedures. *See* Cooper v. Lafler, 376 Fed. Appx. 563, 574–75 (6th Cir. 2010) (affirming the district court's grant of habeas relief where ineffective assistance of counsel, in providing incorrect legal advice, caused the defendant to reject a favorable plea deal and proceed to trial, where he was convicted), *cert. granted*, 131 S.Ct. 856 (U.S. Jan. 7, 2011); Frye v. Missouri, 311 S.W.3d 350, 353, 361 (Mo. Ct. App. 2010) (reversing the judgment entered on the guilty plea and deeming it withdrawn, finding ineffective assistance of counsel where defense counsel failed to communicate an offer to plead to an amended misdemeanor charge to the defendant), *cert. granted*, 131 S.Ct. 856 (U.S. Jan. 7, 2011).

87. *See Rompilla*, 545 U.S. at 387 (2005) (noting that the ABA CRIMINAL JUSTICE STANDARDS provide "guides to determining what is reasonable").

88. Strickland v. Washington, 466 U.S. 668 (1984). Another change that may assist in the government's willingness to disclose more is the new ABA STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY Formal Opinion 09-454, which explains that disclosure under MODEL RULE 3.8(d) includes "favorable evidence so that the defense can decide on its utility" and must be sufficient "to enable defense counsel to advise the defendant regarding whether to plead guilty." This Formal Opinion also finds the prosecutor's obligation goes further than *Ruiz* may require, and does not permit the prosecutor to "seek, accept, or rely on defendant's consent." ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 454, at 7 n.33 (2009). While the Department of Justice has developed a series of new initiatives regarding disclosure, the new policies still fall short of what the ABA requires. For more discussion of this issue, *see* Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Laywers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2161–70 (2010).

III. Summary and Discussion of the Proposed Standards Changes

The ABA formed a Task Force to consider revisions to the Prosecution and Defense Function Standards in 2006.[89] In 2010, Proposed Changes were circulated to the Academic Participants in the revision process (including the author), with requests to address specific provisions. Below is a description of those Proposed Changes as they related to Prosecution and Defense Function waiver of rights, along with two sets of proposed drafts from both the Standards Committee and the Task Force.

A. Description of the Changes to the Prosecution Standards

There are several important changes to the Prosecution Standards made by the Committee and by the Task Force. There are new Standards suggested and substantial revisions to existing standards. In essence, the Proposed Standards require specific proof of knowledge of guilt before accepting pleas; full disclosure of exculpatory information before entering plea discussions; and admonitions against routine waivers of rights and the use of coercive tactics (such as unreasonably short deadlines).[90] The standards specifically counsel against making false representations[91] and urge prosecutors to remember the importance of actual innocence in their handling of cases;[92] and they command prosecutors not to engage in discussions with defendants without either counsel present or counsel's approval to proceed.[93]

New standards indicated that prosecutors should not condition acceptance of pleas on waiver of all rights, particularly those that

89. E-mail from Rory Little, Professor of Law, Univ. of Cal., Hastings Coll. of the Law, to Academic Participants (July 8, 2010, 2:15 p.m.) (on file with author).

90. Proposed Standards, Prosecution Function 3-5.7 (c); Rory K. Little, *The ABA's Project to Revise the Prosecution and Defense Function Standards*, 62 HASTINGS L.J. 1113 (Appendix: ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Prosecution Function) (2011) [hereinafter Little, App.: Proposed Prosecution Standards].

91. Proposed Standards, Prosecution Function, at (d); Little, App.: Proposed Prosecution Standards, *supra* note 89.

92. Proposed Standards, Prosecution Function, at (f); Little, App.: Proposed Prosecution Standards, *supra* note 89.

93. Proposed Standards, Prosecution Function, at (a); Little, App.: Proposed Prosecution Standards, *supra* note 89.

would cause a manifest injustice (actual innocence, newly discovered evidence, appeal, habeas corpus, and ineffective assistance).[94]

B. Description of Changes to the Defense Standards

The changes to the defense standards in this area include a greater definition of defense obligations to protect the accused[95] and two new proposed rules on plea agreements[96] and opposing routine waivers.[97] Among the specific obligations for defense lawyers are the need to obtain evidentiary discovery material, to create an investigative and defense strategy and to take steps to protect the client's interest, include preservation of evidence, seeking pretrial release, hiring investigators and experts, and so forth.[98]

The first new proposed standard provides a comprehensive look at plea agreements and spells out in great detail what the defense should know and consider before urging a client to enter into plea discussions.[99] The second standard requires counsel to oppose routine waivers of important rights in plea agreements.[100]

In conducting plea bargaining, the Standards ask the defense attorney not to accept plea deals that contain waivers of constitutional rights[101] (such as the right to appeal) and to challenge the inclusion of such a waiver even where the client is agreeable to the plea offer.[102] However, defense attorneys are currently left without much bargaining room, as the prosecution has the upper

94. Proposed Standards, Prosecution Function, at 3-5(9); Little, App.: Proposed Prosecution Standards, *supra* note 89.

95. Proposed Standards, Defense Function 4-3-6(b)-(d); Rory K. Little, *The Role of Reporter for a Law Project*, 38 HASTINGS CONST. L.Q. 747 (Appendix: ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Defense Function) (2011) [hereinafter Little, App.: Proposed Defense Standards].

96. Proposed Standards, Defense Function, at 4-6.3; Little, App.: Proposed Defense Standards, *supra* note 94.

97. Proposed Standards, Defense Function, at 4-6.4; Little, App.: Proposed Defense Standards, *supra* note 94.

98. Proposed Standards, Defense Function, at 4-3.6; Little, App.: Proposed Defense Standards, *supra* note 94.

99. Proposed Standards, Defense Function, at 4-6.3; Little, App.: Proposed Defense Standards, *supra* note 94.

100. Proposed Standards, Defense Function, at 4-6.4; Little, App.: Proposed Defense Standards, *supra* note 94.

101. Proposed Standards, Defense Function, at 4-6.4; Little, App.: Proposed Defense Standards, *supra* note 94.

102. Proposed Standards, Defense Function, at 4-6.4; Little, App.: Proposed Defense Standards, *supra* note 94.

hand with mandatory minimum sentences. Further, in a realm of repeat players, a defense attorney who has consistently been accepting such plea offers on behalf of her clients might have difficulty suddenly objecting to its inclusion. Can she now make a genuine threat to go to trial when prosecutors are aware of her history of accepting similar plea deals with similar clients?

Ultimately, the Standards are helpful. The Standards do advise defense attorneys to undertake a necessary investigation to provide defendants with better counseling before accepting or rejecting a plea. The Standards also suggest defense attorneys should not accept plea deals that include waivers of "important defense rights" and prosecutors should not "routinely" require such plea waivers. The importance of the new proposals cannot be underestimated, given the Supreme Court's stated reliance upon them.[103] They provide a "collective" view of appropriate behavior that should become the prevailing norm and provide individual attorneys with support for refusing to waive clients' rights and enter plea agreements without a sufficient foundational knowledge to provide competent advice.

103. Rompilla v. Beard, 545 U.S. 374, 387 (2005); Padilla v. Kentucky, 130 S.Ct. 1473, 1482 (2010).

Appendix I

Plea Statistics for U.S. District Courts:

	Plea of guilty or plea of nolo contendere	Total number of defendants convicted
1985	87.8% (33,823)	38,530
1986	87% (35,448)	40,740
1987	87.5% (38,440)	43,942
1988	87.4% (37,514)	42,902
1989	86.9% (38,681)	44,524
1990	86.6% (40,452)	46,725
1991	88.1% (41,213)	46,768
1992	88.8% (44,632)	50,260
1993	89.98% (46,541)	51,723
1994	91.4% (45,429)	49,717
1995	92.2% (43,103)	46,773
1996	92.2% (48,196)	52,270
1997	93.3% (51,918)	55,648
1998	93.9% (56,256)	59,885
1999	95.1% (61,626)	64,815
2000	95.3% (63,863)	67,036
2001	95.1% (64,402)	67,731
2002	96.2 % (68,188)	70,882
2003	96.3% (72,110)	74,850
2004	96.5% (71,028)	73,616
2005	95.7% (74,024)	77,339
2006	96.1% (76,610)	79,725
2007	96.3% (75,949)	78,861
2008	96.8% (79,842)	82,451
2009	96.979% (83,707)	86,314

	Guilty plea	Trial
2002	97.1% (62,084)	2.9% (1,851)
2003	95.7% (69,584)	4.3% (2,993)
2004	95.5% (49,341)	4.5% (2,316)
2005	94.5% (50,649)	5.5% (2,975)
2006	95.7% (69,399)	4.3% (3,107)
2007	95.8% (69,687)	4.2% (3.072)
2008	96.3% (73,616)	3.7% (2,810)
2009	96.3% (78,398)	3.7% (2,972)

Sourcebook of Criminal Justice Statistics, found at http://www.albany.edu/sourcebook

Pleas Statistics for State Courts:

2000 95% (879,200)5% (45,700)

2002 95%5%

2004 95% 5%

Sourcebook of Criminal Justice Statistics, found at http://www.albany.edu/sourcebook