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Incentivized Informants, *Brady*, *Ruiz*, and Wrongful Imprisonment: Requiring Pre-Plea Disclosure of Material Exculpatory Evidence

Markus Surratt

INCENTIVIZED INFORMANTS, *BRADY*, *RUIZ*, AND WRONGFUL IMPRISONMENT: REQUIRING PRE-PLEA DISCLOSURE OF MATERIAL EXCULPATORY EVIDENCE

Markus Surratt*

Abstract: An incentivized informant scandal recently hit Orange County, California where county officials were caught lying, hiding, and not providing information about their informants. Concerned citizens, attorneys, and scholars are beginning to ask more questions as these stories receive increased nationwide attention: what should we do about false incentivized informant testimony? What can we do?

Under *Brady*, *Giglio*, *Ruiz*, and their progeny, in criminal cases the government must turn over any material exculpatory evidence that it possesses, or that is available, when the defendant decides to go to trial. However, if the government does not know—or purports not to know—about material exculpatory information, such as an informant's testimonial history, then there are often inadequate guidelines, rules, or incentives in place for the government to seek out and turn over this type of information. Moreover, because about 95% of state and federal cases end in plea deals, an informant's credibility usually eludes public, judicial, and the accused's scrutiny.

This Comment offers solutions for legislatures, courts, and other government actors to use to help reduce wrongful imprisonment caused by false incentivized informant testimony. First, it outlines the types of information about incentivized informants that the government should seek out. Second, it offers several solutions and, working within *United States v. Ruiz*'s framework, this Comment suggests a legal standard for when the government must provide material information about an informant before a plea deal: when the government's case primarily relies on informant testimony but material exculpatory evidence in its possession shows actual innocence.

INTRODUCTION

Andrew Chambers is a professional snitch. For almost three decades, Chambers has made a living working as an undercover informant for the government by testifying in court on criminal prosecutions.[1] Since 1984,

* J.D. Candidate, University of Washington School of Law, Class of 2018. Thank you to Lara Zarowsky, Director of the University of Washington's Legislative Advocacy Clinic. My experience in her clinic helped shape my topic. And thank you to the *Washington Law Review* team for their editorial work on this Comment.

1. Dennis Wagner, *DEA Reactivates Controversial Fired Informant*, USA TODAY (June 5, 2013, 7:22 AM), http://www.usatoday.com/story/news/nation/2013/06/05/dea-reactivates-controversial-informant/2390989/ [https://perma.cc/P86H-MSPS]; *see also* Michael D. Sorkin & Phyllis Brasch Librach, *Top U.S. Drug Snitch is a Legend and a Liar*, ST. LOUIS DISPATCH (Jan. 16, 2000), http://www.stltoday.com/news/local/crime-and-courts/top-u-s-drug-snitch-is-a-legend-and-

Chambers worked with the Drug Enforcement Agency (DEA) on over 280 cases.[2] Chambers, with a rap sheet exceeding a dozen crimes, reportedly made four million dollars during his first year as an informant.[3] However, Chambers's career was seemingly cut short in 2000 after the Justice Department discovered that he committed perjury in at least sixteen of his cases.[4]

But Chambers resurfaced again in the late 2000s as a DEA informant in a drug case in Phoenix, Arizona.[5] Federal authorities did not explain why they decided to reinstate Chambers as an informant.[6] Yet shortly after the public learned of Chambers's reappearance and involvement in the Phoenix case, federal prosecutors dismissed the drug smuggling charges against the defendants in the case.[7] The U.S. Attorney's Office in Phoenix did not comment on their sudden decision to drop the smuggling charges.[8]

Chambers's story is an outlier, but by no means unique in the incentivized informant world.[9] His story is an extreme example of why

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a/article_aecd2026-0306-5afc-85f6-7ffa066a5bb7.html [https://perma.cc/X8SQ-SEW3] (describing Chambers's long history of informing for the government).

2. Wagner, *supra* note 1.

3. *Id.* Adjusting for inflation in December of 1984, that amount is $9,415,650.52 in January of 2018, as calculated from *Inflation Calculator*, U.S. DEP'T LABOR, https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/39GC-SJPG] (follow "Inflation Calculator" hyperlink; then input "4,000,000" in "December 1984" and buying power as in "January 2018"). Other sources believe this is Chambers's total career snitch earnings. *See* Sorkin & Brasch Librach, *supra* note 1.

4. Wagner, *supra* note 1; *see also* Andrew Murr, *King of the Drugbusters*, NEWSWEEK (July 2, 2000, 8:00 PM), http://www.newsweek.com/king-drugbusters-161927 [https://perma.cc/8U42-QUSP] ("Chambers said he had never been arrested, when in fact he had been—10 times between 1984 and 1998, according to government records . . . ."). Interestingly, Chambers said "ninety-five percent of my cases was done accidentally, just being at the right place at the right time." The Speaker Agency, *Andrew Chambers, The Accidental Narc*, YOUTUBE (Dec. 23, 2013), https://www.youtube.com/watch?v=sGGMpsN_Zl4 [https://perma.cc/W736-YT85]. Chambers was "at the right place at the right time" for over 200 cases. *Id.*; Wagner, *supra* note 1.

5. Wagner, *supra* note 1.

6. *See id.*; Nick Wing, *The DEA Once Turned A 14-Year-Old into a Drug Kingpin. Welcome to the War on Drugs*, HUFFPOST (Oct. 24, 2014, 10:47 AM), http://www.huffingtonpost.com/2014/10/24/dea-war-on-drugs_n_6030920.html [https://perma.cc/S9EY-QYWP].

7. JJ Hensley & Dan Nowicki, *Case Built on Informer Falls Apart*, ARIZ. REPUBLIC (June 5, 2013), http://archive.azcentral.com/news/articles/20130605case-built-informer-falls-apart.html [https://perma.cc/DJ6Z-SUDK] ("[T]he move to dismiss the case has prompted at least one member of the Senate Judiciary Committee, which has jurisdiction over the DEA, to raise the issue of a federal investigation into the decision to use Chambers in the first place.").

8. *Id.*

9. *But see* Rich Lord, *Court Files Reveal Million-Dollar Informants*, PITT. POST-GAZ. (Apr. 26, 2014, 11:30 PM), http://www.post-gazette.com/news/nation/2014/04/27/Telling-for-Dollars-Court-files-reveal-DEA-million-dollar-informants/stories/201404270144 [https://perma.cc/H4W9-4RXU]. Andrew Chambers Jr. was only one of several million-dollar informants. Another informant

better rules should regulate using incentivized informants: juries, courts, prosecutors, and defense counsel should be able to accurately assess an informant's credibility.

An incentivized witness is any witness who testifies on behalf of a party for a tangible or expected benefit—from the government or otherwise—in a trial proceeding.[10] This Comment focuses on incentivized witnesses who testify for the government in exchange for a tangible or expected benefit, such as money or reduced criminal punishment. These latter witnesses will be referred to from here on as "incentivized informants." This Comment does not focus on the Good Samaritan or other individuals who only testify in court to reduce and prevent crime in their communities.

There are three major issues with incentivized informant testimony. First, some informants, whose statements go unchecked by government actors, can game the system, remaining free from punishment while duping law enforcement and prosecutors.[11] Second, when these incentives are not disclosed to all participants in a criminal proceeding, the parties lack the information needed to make well-informed assessments of an incentivized informant's credibility.[12] This holds especially true for juries, but it is also important for prosecutors, law enforcement, courts, and defense counsel. Lastly, unchecked incentivized informant testimony can place innocent people in jail or prison.[13] There have been numerous cases where a person was wrongly

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included the "Princess" who was an alleged DEA informant paid one million dollars over four years for drug bust cases. *Id.*

10. *See* E.S.S.B. 5038, 65th Leg., Reg. Sess. (Wash. 2017) ("'Benefit' means any deal, payment, promise, leniency, inducement, or other advantage offered by the state to an informant in exchange for his or her testimony, information, or statement, but excludes a court-issued protection order."). This Comment only focuses on criminal trials with government witnesses, which places exclusive emphasis on witnesses testifying on behalf of the government against a defendant.

11. A poignant example of this behavior was Leslie Vernon White, a snitch who successfully lied dozens of times to prosecutors and law enforcement. White was so good that he could even gather enough information while in prison to manufacture a false confession from another inmate. *See* Ted Rohrlich, *Review of Murder Cases Is Ordered: Jail-House Informant Casts Doubt on Convictions Based on Confessions*, L.A. TIMES (Oct. 29, 1988), http://articles.latimes.com/1988-10-29/news/mn-329_1_murder-case [https://perma.cc/Y793-YG2G].

12. *See, e.g.*, Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996) (describing the dangers of using criminal informants at trial); AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE (3rd ed. 2014), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate.html [https://perma.cc/MTW5-HNRC] (assigning to prosecutor's a duty to seek justice).

13. Indeed, Northwestern University School of Law's 2003 study found that incentivized informants were a leading cause of wrongful convictions in capital cases, involving 45.9% of those cases. NW. UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3

convicted and later exonerated after discovering that an incentivized informant's testimony was false.[14]

Brady v. Maryland[15] in 1963, and *Brady*'s progeny, make clear that defendants and the accused[16] have a right to access evidence held by or available to the government when that evidence is material to guilt or innocence for an upcoming trial.[17] Concerning incentivized informants, this includes any material impeachment evidence.[18] Impeachment evidence is information that challenges a witness's credibility.[19]

To solve the problem of wrongful imprisonment caused by false testimony by incentivized informants, one must identify and define whom these informants are, what incentives play a role in their testimony, and the kind of information that affects their credibility.

This Comment begins by explaining *Brady*'s evolution since 1963, common portraits of incentivized informants, and some of the history of incentivized informants in America. Then this Comment offers several solutions to reduce wrongful imprisonment attributable to incentivized informant testimony. Part I gives an overview of how *Brady*'s requirements—including those emphasized in *United States v. Ruiz*[20]—affect informant testimony and disclosures. It also summarizes the split among circuit courts about pre-plea disclosure of material exculpatory evidence. Part II briefly describes some of America's history of using incentivized informants. Part III proposes solutions that government

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(2004) [hereinafter THE SNITCH SYSTEM], https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf [https://perma.cc/3AMT-6DJY].

14. *See, e.g.*, State v. Gassman, 175 Wash. 2d 208, 208, 283 P.3d 1113, 1113 (2012); State v. Statler, 160 Wash. App. 622, 622, 248 P.3d 165, 165 (2011); State v. Gassman, 160 Wash. App. 600, 600, 248 P.3d 155, 155 (2011); State v. Larson, 160 Wash. App. 577, 577, 249 P.3d 669, 669 (2011). All three men in the above cases were convicted by false informant testimony and later exonerated.

15. 373 U.S. 83 (1963).

16. This Comment refers to both defendants and the accused when discussing individuals affected by incentivized informants. When there is the need to distinguish between the two, this Comment does so. For purposes of this Comment, "defendant" means a person charged with a crime and awaiting a trial or further criminal proceeding(s). The "accused" means someone who is accused of a crime, regardless of whether this person is formally charged or incarcerated for an alleged crime. These terms may also refer to the status of convicted individuals before their charges, conviction, and incarceration.

17. *Id.* at 87.

18. Giglio v. United States, 405 U.S. 150, 153–55 (1972).

19. United States v. Harris, 557 F.3d 938, 942 (8th Cir. 2009) ("But impeachment of a witness involves evidence that calls into question the witness's veracity. It deals with 'matters like the bias or interest of a witness, his or her capacity to observe an event in issue, or a prior statement of the witness inconsistent with his or her current testimony.'" (citations omitted)).

20. 536 U.S. 622 (2002).

actors, particularly prosecutors, law enforcement, legislatures, and courts can use to reduce wrongful imprisonment caused by using incentivized informants. Finally, Part IV suggests a pre-plea deal legal standard for requiring informant disclosure.

I. BACKGROUND ON *BRADY*'S CONTOURS AND MATERIAL EXCULPATORY EVIDENCE

This Part first offers an overview of how *Brady* has developed since 1963. This includes a summary of *United States v. Ruiz* and the split among the U.S. Courts of Appeals. It then describes the general types of informants in the American criminal justice system.

A. Incentivized Informant Testimony is Loosely Regulated Under Brady*,* Giglio*, and* Ruiz

This section is broken into several sub-sections. The first discusses the constitutional foundation of a defendant's right to material exculpatory evidence. The second examines two types of material exculpatory evidence: witness credibility and impeachment evidence. The third covers the government's investigative duties regarding material exculpatory evidence and situations when this evidence should be suppressed. The final sub-section summarizes recent applications of *Brady* and its progeny.

1. Napue *and* Brady*: Criminal Defendants Have a Right to Evidence Showing Their Innocence*

Since *Napue v. Illinois*[21] and *Brady v. Maryland*,[22] government prosecutors have been required to give materially exculpatory evidence in their possession to a criminal defendant: "suppression by the prosecution of evidence favorable to an accused upon request violates

21. 360 U.S. 264 (1959). *Napue* involved four men who murdered an off-duty police officer during a robbery of a cocktail lounge in Chicago. *Id.* at 265. One of the robbers, Hamer, was caught, convicted, and sentenced to 199 years in prison. *Id.* Hamer, an accomplice in the murder, testified against his fellow accomplice, Napue. *Id.* at 265–66. During his testimony, Hamer said that the prosecution did not promise to consider his testimony when sentencing Hamer, a lie that the prosecutor did not correct during the trial. *Id.* at 267. The Court found that this violated Napue's due process under the Fourteenth Amendment. *Id.* at 270–72.

22. 373 U.S. 83 (1963) (holding that defendant, who was convicted of murder, and whose potential accomplice testified against him at trial, deserved a new trial because the government failed to turn over evidence that this potential accomplice admitted to the murder while talking to law enforcement before trial).

due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[23] This right is rooted in the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[24]

Brady involved a defendant who was convicted of murder.[25] An alleged accomplice, Boblit, confessed to the murder in a government interview.[26] However, the prosecution withheld Boblit's confession from Brady until Brady was convicted of murder and sentenced.[27] The U.S. Supreme Court ruled that any prosecutorial suppression of evidence favorable to the accused violates due process when that evidence is material to guilt or punishment.[28]

2. *Material Exculpatory Evidence Includes a Witness's Promise or Agreement with the Government*

Nine years after *Brady*, the U.S. Supreme Court in *Giglio v. United States*[29] clarified that witnesses' credibility, including their understanding or agreement as to their own future prosecution, is a type of exculpatory evidence that is favorable to a defendant.[30] Such exculpatory impeachment evidence[31] under *Brady* may be material depending on the strength of other evidence in the case.[32] The accused need not have requested this information, or any other exculpatory information, for a *Brady* violation to occur.[33]

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23. *Id.* at 87.

24. U.S. CONST. amend. XIV, § 1; *Brady*, 373 U.S. at 87.

25. *Brady*, 373 U.S. at 84–86.

26. *Id.* at 84.

27. *Id.*

28. *Id.* at 87.

29. 405 U.S. 150 (1972).

30. *Id.* at 154–55.

31. Kyles v. Whitley, 514 U.S. 419, 433 (1995) ("[T]he Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes." (citing United States v. Bagley, 473 U.S. 667, 683 (1985))).

32. *Giglio*, 405 U.S. at 154–55; *see also* Cone v. Bell, 556 U.S. 449, 451 (2009) ("The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure 'that "justice shall be done"' in all criminal prosecutions." (quoting United States v. Agurs, 427 U.S. 97, 111 (1976))).

33. Strickler v. Greene, 527 U.S. 263, 280 ("We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused . . . ." (citing *Agurs*, 427 U.S. at 107)).

When deciding how to define "material," the U.S. Supreme Court in *United States v. Bagley*[34]—a case where the government promised not to prosecute two informants in exchange for their testimony—gave this definition: "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[35] The Court also noted that exculpatory and impeachment evidence, both falling under *Brady*, are not constitutionally different from one another regarding the government's failure to disclose information.[36]

3. *Suppressing Material Exculpatory Evidence Requires Examining All Evidence, Including Evidence Known to Government Actors Involved in the Case*

In 1995, the U.S. Supreme Court further shaped *Brady*'s contours in *Kyles v. Whitley*.[37] In *Kyles*, the Court held that the total impact of all evidence favorable to the defendant must be considered, rather than only examining each piece of evidence separately.[38] The *Kyles* Court stated that the prosecution's knowledge of evidence favorable to the defendant, and unknown to the defense, is not automatically a *Brady* violation.[39] The prosecution has the "consequent responsibility" to assess this cumulative impact and to know when there is a reasonable probability of a *Brady* violation.[40] As a result, the Court assigned to prosecutors a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[41] Consistent with *Brady*, this "duty to learn" holds irrespective of the prosecution's good faith or bad faith.[42]

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34. 473 U.S. 667 (1985).

35. *Id.* at 682.

36. *Id.* at 676–77; *see also* United States v. Ruiz, 536 U.S. 622 (2002).

37. 514 U.S. 419 (1995).

38. *Id.* at 420.

39. *Id.* at 436–37.

40. *Id.* at 437.

41. *Id.* And this duty presumably extends to learn about favorable evidence concerning incentivized informants. *See, e.g.*, *In re* Sealed Case No. 99-3096 (Brady Obligations), 185 F.3d 887, 898 (D.C. Cir. 1999) (noting "[t]he government concedes that it never conducted a full-fledged *Brady* search with respect to any agreements its various components may have had with [the adverse witness for defense,] Jones," and that "[f]or the reasons stated above, that failure constituted a breach of the government's 'duty to search' for *Brady* information" (citations omitted)).

42. *Kyles*, 514 U.S. at 437–38; Brady v. Maryland, 373 U.S. 83, 87 (1963).

Additionally, the Court in *Kyles* held that prosecutors must turn over information that an informant made inconsistent statements when this information is material.[43] Materiality hinges on whether there is a "reasonable probability" that, had the evidence been disclosed to the defense, the proceeding's outcome would have been different.[44] Evidence that is merely helpful to the defense is not enough.[45] However, the defense does not need to show that the government's disclosure of material exculpatory evidence would have resulted in the defendant's acquittal.[46]

To be a "true *Brady* violation," the evidence at issue must favor the accused by being exculpatory or impeaching, be suppressed by the government willfully or inadvertently, and prejudice the accused.[47] Prejudice depends on whether there is a reasonable probability that the trial's result would have been different if the suppressed information was given to the defense.[48]

4. Perceived Limits and Applications of Brady *Since the Millennium*

The new millennium began with further constrictions to the general *Brady* rule: the government seemingly only has to produce exculpatory impeachment material if the defendant decides to go to trial, but not during plea negotiations and the entry of a guilty plea.[49] In *Ruiz*, decided in 2002, the U.S. Supreme Court, when considering the availability of informant impeachment information, stated that "[t]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."[50] The

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43. *See Kyles*, 514 U.S. at 453 ("[T]he question is . . . whether we can be confident that the jury's verdict would have been the same.").

44. *Id.* at 440–41.

45. *Id.* at 436–37.

46. *Id.* at 434.

47. Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (holding that defendant's *Brady* violation claim was not satisfied because defendant failed to meet the "reasonable probability" required of the prejudice element). *Compare id.* at 293 ("[Witness] Stoltzfus' vivid description of the events at the mall was not the only evidence that the jury had before it."), *with* Banks v. Dretke, 540 U.S. 668, 700–01 (2004) ("Regarding 'prejudice,' the contrast between *Strickler* and Banks's case is marked . . . . [Witness] Farr's testimony was the *centerpiece* of Banks's prosecution's penalty-phase case." (emphasis added)).

48. *Strickler*, 527 U.S. at 289.

49. United States v. Ruiz, 536 U.S. 622, 623 (2002).

50. *Id.* at 623. This constriction on *Brady* is particularly troubling given that 90 to 95% of all defendants plead guilty. ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 78 (2009); *see also* U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2010), https://www.ussc.gov/sites/default

Court reasoned that defendants who enter a guilty plea voluntarily waive their *Brady* rights knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences, and satisfy constitutional requirements.[51]

And four years later in 2006 in *Youngblood v. West Virginia*,[52] the U.S. Supreme Court continued emphasizing *Brady*'s progeny: "*Brady* suppression occurs when the government fails to turn over evidence that is 'known only to police investigators and not to the prosecutor.'"[53] In *Youngblood*, the defendant was accused and convicted of sexual assault, but appealed his conviction after evidence surfaced that an investigating state trooper found and failed to produce a written note supporting Youngblood's consensual-sex defense.[54] The Court found that Youngblood presented a viable *Brady* violation claim because of the state trooper's failure to disclose the written note, and remanded the case for further consideration.[55] Six years after *Youngblood*, the Court reaffirmed that, to prevail on a *Brady* claim, defendants need not show that they would have "more likely than not" been acquitted had the new evidence been admitted.[56] Instead, only a reasonable probability that the trial's outcome could be different is needed.[57]

Lastly, in *Wearry v. Cain*,[58] the U.S. Supreme Court ruled that Louisiana's failure to disclose information about a key informant-witness gave rise to a viable *Brady* claim.[59] The Court held that "[b]eyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction. The State's trial evidence resembles a house of cards, built on the jury crediting [prisoner-informant] Scott's account rather than Wearry's alibi."[60] The government failed to disclose

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/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Stats_Nat_0.pdf [https://perma.cc/4SMR-3ZLL] (as of 2010, the total percentage of federal cases ending in guilty pleas was 96.8% versus 3.2% going to trial, out of 83,941 cases).

51. *Ruiz*, 536 U.S. at 623.

52. 547 U.S. 867 (2006).

53. *Id.* at 869–70 (quoting Kyles v. Whitley, 514 U.S. 419, 438 (1995)).

54. *Id.* at 868.

55. *Id.* at 870.

56. Smith v. Cain, 565 U.S. 73, 75 (2012) (holding that evidence of inconsistent statements—witness telling police that he could not identity defendant as perpetrator but then identifying defendant at trial as the perpetrator—impeaching sole eyewitness testifying against the defendant, who was convicted of murder, was grounds for a valid *Brady* violation claim when not disclosed).

57. *Id.* at 75–76 (citing *Kyles*, 514 U.S. at 440–41).

58. __ U.S. __, 136 S. Ct. 1002 (2016).

59. *Id.* at 1006.

60. *Id.*

that the already-imprisoned informant Scott unsuccessfully attempted to obtain a deal with prosecutors before testifying, may have had a personal vendetta against the defendant, and coached another inmate to lie about the defendant's involvement in a murder.[61] The jury had convicted Wearry of capital murder based in large part on incentivized informant testimony.[62]

From *Napue* and *Brady* to *Ruiz* and *Wearry*, the U.S. Supreme Court has placed a firm obligation on the government to safeguard a defendant's constitutional rights.[63] This requires the government to turn over material exculpatory impeachment evidence bearing on an informant's credibility.[64] Such impeachment evidence includes: prior inconsistent statements or false statements made by a witness or informant,[65] any material exculpatory evidence favorable to the defendant that is known by others acting on the government's behalf,[66] the prosecutor's knowing use of perjured testimony,[67] charges the witness or informant is facing—if the charges are associated with a deal or bargain with the government,[68] benefits the government promises to the witness or informant,[69] and prior criminal convictions.[70] But again,

61. *Id.* at 1006–07.

62. *Id.* at 1003–04.

63. *See id.* at 1006 ("But Louisiana instead charged Wearry with capital murder, and the only evidence directly tying him to that crime was [prisoner] Scott's dubious testimony, corroborated by the similarly suspect testimony of [prisoner] Brown."); Brady v. Maryland, 373 U.S. 83, 87–88 (1963) ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant."); Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

64. Giglio v. United States, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general [*Brady*] rule." (citations omitted)).

65. *See* Kyles v. Whitley, 514 U.S. 419, 453–54 (1995); *Giglio*, 405 U.S. at 153.

66. *Kyles*, 514 U.S. at 437.

67. United States v. Agurs, 427 U.S. 97, 103 (1976).

68. United States v. Bagley, 473 U.S. 667, 676–77 (1985). Prosecutors may also be required to disclose their witness's application for sentence commutation. *See, e.g.*, Reutter v. Solem, 888 F.2d 578, 581 (8th Cir. 1989) ("Here, the prosecution failed to inform the defense that the state's key witness, Trygstad, had applied for sentence commutation and that when he gave his testimony at petitioner's trial he already had been scheduled to appear before the parole board a few days later.").

69. *Bagley*, 473 U.S. at 684.

70. *See Agurs*, 427 U.S. at 112–13 (holding that the prosecutor's failure to disclose the victim-witness's criminal record, though relevant under *Brady*, nonetheless did not require disclosure because it was not material to the case); WASH. SUPER. CT. CRIM. R. 4.7(a)(vi) (2007) ("[T]he

this evidence need only be disclosed if it is material, even for a prosecutor's knowing use of perjured testimony.[71] Furthermore, there are even fewer informant disclosure requirements if the case is not yet set for trial.[72]

B. Ruiz *and Plea Deals: The* Ruiz *Court's Analysis Leaves Open Required Pre-Plea Deal Informant Disclosures for Exculpatory Evidence*

In *Ruiz*, the defendant, Angela Ruiz, refused to accept the government's "fast track" plea bargain for illegally smuggling drugs.[73] Ruiz travelled from Mexico to the United States.[74] Immigration agents in the United States found thirty kilograms—about sixty-five pounds—of marijuana in Ruiz's luggage.[75] Ruiz refused to accept the plea bargain that federal prosecutors offered her because they required her to waive her right to impeachment evidence about informants or other witnesses.[76] Because Ruiz would not agree to this waiver, the government withdrew its offer.[77]

Even without this agreement, Ruiz eventually pled guilty.[78] The court, on the government's recommendation, sentenced Ruiz to a harsher sentence than recommended for the plea deal sentence.[79] Ruiz appealed her sentence.[80] On appeal, she argued that she was entitled to this impeachment evidence before negotiating or accepting a plea.[81]

The *Ruiz* Court ruled against her, saying that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."[82] But the

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prosecuting attorney shall disclose to the defendant . . . any record of prior criminal convictions known to the prosecuting attorney.").

71. *Bagley*, 473 U.S. at 678–80 ("[T]he knowing use of perjured testimony . . . is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.").

72. United States v. Ruiz, 536 U.S. 622, 623 (2002).

73. *Id.* at 625.

74. United States v. Ruiz, 241 F.3d 1157, 1160 (9th Cir. 2001), *rev'd*, 536 U.S. 622 (2002).

75. *Ruiz*, 536 U.S. at 625.

76. *Id.*

77. *Id.* at 622.

78. *Id.* at 626.

79. *Id.*

80. *Id.*

81. *See id.* Ruiz's appeal was under 18 U.S.C. § 3742, Review of a Sentence, which states in part that a "defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence . . . was imposed in violation of law." 18 U.S.C. § 3742(a)(1) (2012).

82. *Ruiz*, 536 U.S. at 623.

Court's conclusion depended on whether Ruiz voluntarily, knowingly, intelligently, and with sufficient awareness waived her constitutional rights.[83] It also depended on the difficulty in determining when this information is helpful to the accused and disrupting and severely burdening the government's investigation.[84]

Therefore, the *Ruiz* Court first held that impeachment information is special in relation to the fairness of trial and not with respect to plea deals if a plea is voluntary.[85] The Court continued: "the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in *general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it."[86]

Second, the Court stated that it is difficult to characterize impeachment information as critical information that the accused must know before a plea deal because it is unknown if the information will or will not help the accused.[87] The degree of help, the Court went on, depends on the accused's independent knowledge of the prosecutor's potential case.[88]

Third, the *Ruiz* Court stated that the Constitution, with respect to the defendant's awareness of the relevant circumstances, does not require complete knowledge.[89] "It is difficult to distinguish, in terms of importance, (1) a defendant's ignorance of grounds for impeachment of potential witnesses at a possible future trial from (2) the varying forms of ignorance at issue in these cases."[90]

Fourth, the Court said that due process considerations, which include the nature of the private interests at stake, the value of the additional safeguard, and the adverse impact of the requirement on the government's interests, argue against a right to information in Ruiz's case.[91]

The Court stated that the added value of this safeguard was minimal because the value depends on the accused's independent knowledge of

83. *Id.* at 633.

84. *Id.* at 630–32.

85. *Id.* at 629.

86. *Id.* (emphasis in original).

87. *Id.* at 630.

88. *Id.*

89. *Id.*

90. *Id.* at 631.

91. *Id.* (citing Ake v. Oklahoma, 470 U.S. 68, 77 (1985)).

the government's case.[92] It also reasoned that "the Government will provide 'any information establishing the factual innocence of the defendant regardless.'"[93] And other additional safeguards, the Court said, such as Federal Rule of Criminal Procedure 11, would protect the defendant's constitutional rights.[94] The Court then said that the government's interest in the efficient administration of justice, protecting witnesses, and not disrupting ongoing investigations weighed against a constitutional obligation to provide impeachment information before plea negotiations.[95]

The *Ruiz* Court ruled that pre-plea impeachment evidence need not be disclosed. But there remains a split within the U.S. Courts of Appeals as to whether the government must turn over material *exculpatory* evidence before a guilty plea. The first section summarizes the Seventh Circuit's position requiring such disclosure. The second section summarizes the Fifth Circuit's opposing position.

1. The Seventh Circuit's Analysis Supports Pre-Plea Informant Disclosures that Align with Ruiz *and Constitutional Due Process*

The Seventh Circuit, in 2003 in *McCann v. Mangialardi*[96] addressed, in dicta, pre-plea informant disclosures in *Ruiz* and concluded the following: "[t]he Supreme Court's decision in *Ruiz* strongly suggests that a *Brady*-type disclosure might be required under the circumstances of this particular case."[97]

Mangialardi involved a deputy chief police officer—Sam Mangialardi—participating in cocaine trafficking.[98] One of Mangialardi's traffickers suspected a person, former defendant and now plaintiff, Demetrius McCann, of being an informant.[99] This trafficker planted drugs in McCann's car.[100] Mangialardi then ordered police to

92. *Id.*

93. *Id.* The Court omitted the citation for their quotation.

94. *Id.*; *see also* FED. R. CRIM. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a *factual basis* for the plea." (emphasis added)); McCarthy v. United States, 394 U.S. 459, 467 (1969) (holding that under Federal Rule of Criminal Procedure 11, the judge must personally address the defendant and determine whether the defendant's plea was voluntarily made with sufficient understanding).

95. *Ruiz*, 536 U.S. at 631–32.

96. 337 F.3d 782 (7th Cir. 2003).

97. *Id.* at 787.

98. *Id.* at 783.

99. *Id.*

100. *Id.*

search McCann's car, where they found the drugs and arrested McCann.[101] McCann later pled guilty to drug charges.[102]

Regarding the importance of an informant's testimony in the government's case, the Seventh Circuit stated:

> Thus, *Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that 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.[103]

The *Mangialardi* Court did not consider the pre-plea disclosure issue.[104] This was because former defendant McCann failed to show that police deputy Mangialardi knew about the McCann's factual innocence before McCann pled guilty.[105]

Once more, in 2016 in *Cairel v. Alderden*,[106] the Seventh Circuit reemphasized, again in dicta, potential pre-plea disclosure requirements: the failure to disclose exculpatory evidence, even in the context of plea deals, may be an unconstitutional deprivation of liberty violating *Brady*.[107]

However, since the former defendant in *Cairel* had access to the exculpatory information before pleading guilty, the Seventh Circuit did not consider pre-plea disclosures under *Ruiz*.[108] There were two defendants in *Cairel*, one of whom, Jeremy Cairel, appeared to have a learning disability.[109] After initially denying involvement, Cariel admitted to the robbery, and implicated his co-defendant, Marvin Johnson.[110] Both men were eventually found innocent and released when

101. *Id.*
102. *Id.*
103. *Id.* at 788.
104. *Id.*
105. *Id.*
106. 821 F.3d 823 (7th Cir. 2016).
107. *Id.* at 833.
108. *Id.* at 833 n.3.
109. *Id.* at 828–29.
110. *Id.* at 828.

detectives found information supporting their innocence.[111] Johnson said he pled guilty, despite his innocence, to avoid jail time.[112]

2. *The Fifth Circuit's Reasoning Restricts* Ruiz *and Declines to Distinguish Between Impeachment Evidence and Exculpatory Evidence*

The Seventh Circuit's analysis contrasts with the Fifth Circuit's.[113] In 2009, in *United States v. Conroy*,[114] the Fifth Circuit rejected the Seventh Circuit's analysis, namely that the *Ruiz* Court's limited discussion to impeachment evidence suggests that exculpatory evidence should be treated differently.[115] The Fifth Circuit in *Conroy* ruled that "*Ruiz* never ma[de] such a distinction nor can this proposition be implied from its discussion."[116]

Then in 2017 in *Alvarez v. City of Brownsville*,[117] a three judge panel on the Fifth Circuit affirmed *Conroy*.[118] In *Alvarez*, the defendant was arrested for burglary and intoxication.[119] At the jail, the detention officer accused the defendant Alvarez of assault.[120] Alvarez pled guilty.[121] Several years later, video evidence surfaced showing Alvarez's innocence.[122] The panel of judges in *Alvarez* denied Alvarez's *Brady* claim for damages: Alvarez did not have a constitutional right to this exculpatory evidence when he pleaded guilty.[123] Additionally, the panel distinguished *Alvarez* as a case involving a *Brady* claim for civil damages, rather than a collateral attack on a guilty plea.[124]

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111. *Id.* at 830.

112. *Id.*

113. *See generally* United States v. Conroy, 567 F.3d 174 (5th Cir. 2009) (per curiam).

114. 567 F.3d 174 (5th Cir. 2009) (per curiam).

115. *Id.* at 179.

116. *Id.*

117. 860 F.3d 799 (5th Cir. 2017).

118. *Id.* at 802–03.

119. *Id.* at 800.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 803.

124. *Id.* Indeed, Alvarez's conviction was overturned after the exculpatory video evidence surfaced. *Id.*

A few months later, in November 2017, the Fifth Circuit granted rehearing en banc.[125] Their en banc decision is pending as of this Comment's writing.

The reasoning and analysis above lays the foundation for supporting a legal standard that sometimes requires the government to turn over exculpatory information relating to informants before plea negotiations. However, first, it is necessary to know whom these informants are, and what motives they have to lie.

C. Brady *Only Requires the Government Turn Over Limited Information About Incentivized Informants to the Accused*

There are several general types of incentivized informants in the American criminal justice system, each of which interacts differently with *Brady*'s progeny. These incentivized informants can loosely be categorized as: the jailhouse snitch, the professional snitch, the accomplice, the calumniator—one who falsely accuses others—and the confidential informant.

1. The Jailhouse Snitch

The jailhouse snitch[126] is the prototypical incentivized informant.[127] Jailhouse snitches are in jail or prison. But, if they help law enforcement and prosecutors with a case, then they may receive a reduced sentence, money on the books, a better cell, cigarettes, clothes, or other services or privileges.[128] And, if they are lucky, then they may even be released.[129]

The jailhouse snitch is the most commonly recognized snitch, whose credibility is often at issue in many wrongful imprisonment cases involving incentivized informants.[130] Jailhouse snitches will typically

125. Alvarez v. City of Brownsville, 874 F.3d 898 (5th Cir. 2017) (en banc).

126. Jack Call, *Legal Notes*, 22 JUST. SYS. J. 73, 73 (2001) ("A jailhouse informant is an inmate who is either asked by the government to report any incriminating evidence shared with the inmate by another inmate or who comes forward on his or her own with such information. The government then agrees to give the informant some benefit in return for testifying against the targeted defendant.").

127. Once again, Leslie Vernon White in the 1980s stands out as an extreme example of a jailhouse snitch. He would call local police and prosecutors' departments impersonating a state actor to gather information about a case and then use that information to create a false confession of a new incarcerated person awaiting trial. *See* Ted Rohrlich, *Jail Informant Owns Up to Perjury in a Dozen Cases*, L.A. TIMES (Jan. 4, 1990), http://articles.latimes.com/1990-01-04/news/mn-300_1_murder-case [https://perma.cc/9NJQ-RT7A]; Rohrlich, *supra* note 11.

128. NATAPOFF, *supra* note 50, at 28.

129. *Id.* at 38.

130. *Id.*

"overhear" detailed confessions or conversations from the accused, or claim the accused confessed to them while both were incarcerated.[131]

Additionally, jailers and law enforcement sometimes recruit well-known and helpful jailhouse snitches.[132] Jailers may actively place jailhouse snitches in the same cell as, or adjacent to, a recently incarcerated individual who has not yet been convicted, or even charged.[133] The snitch then claims to get guilt-probative information about the new prisoner, and provides this information to the jailers, law enforcement, or prosecutors.[134]

Because of the usefulness of these statements, it is difficult for law enforcement and prosecutors to stop using this information altogether.[135] But it is important to learn more about jailhouse snitches. This includes learning about their criminal and testimonial history and their reasons and benefits for testifying. Such information would, if shared with prosecutors, the court, the defense, and jurors, give our adversarial system more rigor. It would also cause prosecutors to strongly

131. *See* C. Blaine Elliott, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1, 1 (2003) (discussing a case where a jailhouse informant testified against a defendant and later recanted and admitted to lying after the defendant was executed); Kevin D. Williamson, *When District Attorneys Attack*, NAT'L REV. (May 31, 2015, 4:00 AM), http://www.nationalreview.com/article/419110/criminal-justice-mess-orange-county-kevin-d-williamson [https://perma.cc/YR5Z-Y5WN] ("The database tracking inmates' movements around the jail and the reason for those movements is significant, because Orange County law enforcement and prosecutors were in the habit of placing targeted suspects in proximity to criminal informants . . . .").

132. *See, e.g.*, REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 37, 52–53 (1990) [hereinafter L.A. GRAND JURY REPORT], http://grandjury.co.la.ca.us/pdf/Jailhouse%20Informant.pdf [https://perma.cc/SS23-CHET] (describing how some high-profile suspects are placed in classified groups of jailhouse informants). Afterwards, the L.A. County District Attorney's Office severely restricted the use of jailhouse informant testimony. Jailhouse testimony now requires "strong corroboration," payments over $50 are prohibited, prosecutors must check an informant index, and prosecutors must obtain permission from a committee to use the informant. NATAPOFF, *supra* note 50, at 189–90.

133. L.A. GRAND JURY REPORT, *supra* note 132, at 37. For a current look at the L.A. County District Attorney's Office policies on *Brady*, see L.A. CTY. DIST. ATTORNEY'S OFFICE, POLICIES, http://da.lacounty.gov/about/policies [https://perma.cc/DX4S-XYWP].

134. Call, *supra* note 126, at 83 ("Because jailhouse informants are already incarcerated, they are likely to feel that they have nothing to lose and much to gain by providing information to the government.").

135. For example, Rule 35 of the Federal Rules of Criminal Procedure, in potentially reducing a defendant-informant's sentence, while trying to prevent lying, reads in part: "information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing . . . ." FED. R. CRIM. P. 35(b)(2)(C).

reexamine the reliability of a jailhouse informant.[136] Under *Brady*, this information must be turned over if it is material, but sometimes even material information does not reach the jury.[137] Often times this is because defendants strike a plea deal.[138]

2. The Professional Snitch

The professional snitch makes a career out of selling information.[139] And the government is often the buyer. As mentioned in the introduction, Andrews Chambers Jr. is an extreme example of a professional snitch.[140] Chambers was a repeat player in the incentivized informant system.[141] He gained the trust of his government handlers and profited immensely for his efforts.[142] In sum, the professional snitch, like Chambers, has a constant presence in the incentivized informant system, and gains rewards for giving the government information about crimes

136. *See, e.g.*, Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 656 (2007) ("Failure to disclose exculpatory information at trial means jurors will render a decision without that information and thus be more likely to render an inaccurate verdict. But there is no jury at a guilty plea hearing.").

137. *See* Brady v. Maryland, 373 U.S. 83, 83–85 (1963). A great problem arises when, unlike in *Brady*, there is a failure to appeal, or a plea deal. Then this information never reaches the jury or the court. Regarding the plea deal, see NATAPOFF, *supra* note 50, at 78 (discussing briefly the psychology of why innocent people may agree to a plea deal).

138. Allana Durkin Richer & Curt Anderson, *Trial or Deal? Some Driven to Plead Guilty, Later Exonerated*, ASSOCIATED PRESS (Nov. 15, 2016), https://apnews.com/24cfa961d3444be49901496fdcaa3fda [https://perma.cc/9V6L-PKKH] ("Last year, more than 97 percent of criminal defendants sentenced in federal court pleaded guilty compared with about 85 percent more than 30 years ago, according to data collected by the Administrative Office of the U.S. Courts. The increase in guilty pleas has been a gradual rise over the last three decades.").

139. *See* Joe Davidson, *Want to Make a Million? Become a DEA Informant*, WASH. POST (Sept. 30, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/09/30/want-to-make-a-million-become-a-dea-informant/?utm_term=.07e9630eacf1 [https://perma.cc/K8BZ-YYYB]; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S MANAGEMENT AND OVERSIGHT OF ITS CONFIDENTIAL SOURCE PROGRAM iv (2016) [hereinafter AUDIT OF CONFIDENTIAL SOURCE PROGRAM], https://oig.justice.gov/reports/2016/a1633.pdf#page=1 [https://perma.cc/AT5A-HL9F] ("Additionally, we identified one source who was paid over $30 million during a 30-year period, some of it in cash payments of more than $400,000.").

140. Sorkin & Brasch Librach, *supra* note 2.

141. *Id.*

142. *Id.*; *see also* Freedom of Information Act, 5 U.S.C. § 552 (2012) (stating that requests by third parties of informant records need not be disclosed unless the informant's status as an informant has been officially confirmed); Bennett v. Drug Enf't Admin., 55 F. Supp. 2d 36 (D.D.C. 1999) (involving FOIA request to the DEA for records pertaining to the informant Andrew Chambers).

and criminals.[143] Snitches like Chambers are rewarded even if their information turns out to be false.[144]

Under *Brady*'s progeny, an informant's paid status is material for *Brady* purposes and must be disclosed.[145] Yet Chambers is an example of what may happen despite *Brady*'s protections; the government gathers enough information from a professional snitch to convict a defendant only to find out later that this information was false.[146] This type of snitch provokes the oft-asked question: how many of these informants provide testimony that no one discovers is fabricated?[147]

3. The Accomplice

The accomplice informant is a person who is the alleged accomplice of the defendant or the accused.[148] Generally, the accomplice is someone who allegedly worked in concert with others to commit a crime.[149] The accomplice takes loosely two forms.[150] First, the accomplice could in fact be an accomplice, but inform on individuals who had nothing to do with the crime.[151] Second, these accomplices may have been involved in

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143. Lord, *supra* note 9.

144. *See, e.g.*, AUDIT OF CONFIDENTIAL SOURCE PROGRAM, *supra* note 139, at i ("In one case, the DEA reactivated a confidential source who previously provided false testimony in trials and depositions. During the approximate 5-year period of reactivation, this source was used by 13 DEA field offices and paid $469,158. More than $61,000 of the $469,158 was paid after this source was once again deactivated for making false statements to a prosecutor.").

145. Banks v. Dretke, 540 U.S. 668, 691 (2004). *Banks* involved a paid informant who told police that the defendant was involved in a murder and knew where the murder weapon was, and the court reversed the defendant's conviction because the prosecution violated *Brady* by not turning over information that the informant was being paid by the government. *Id.* at 668, 691.

146. Hensley & Nowicki, *supra* note 7.

147. Davidson, *supra* note 139 ("The report by the Justice Department's Office of Inspector General (IG) found serious deficiencies with the DEA's confidential-source program, including poor oversight that 'exposes the DEA to an unacceptably increased potential for waste, fraud, and abuse,' IG Michael Horowitz said.").

148. Two classic examples of the accomplice informant are *Napue v. Illinois*, 360 U.S. 264 (1959), and *Brady v. Maryland*, 373 U.S. 83 (1963).

149. *See* R. Michael Cassidy, *"Soft Words of Hope:"* Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1134 (2004) (describing an accomplice as a "joint venturer in a crime").

150. While a person could theoretically pose as an accomplice when she was not involved in the crime at all, to lie and minimize others' liability, she would subject herself to liability. So, this Comment disregards this option since no information could be found about how prevalent these informants are. *But see* People v. Gray, 408 N.E.2d 1150 (Ill. App. Ct. 1980) (convicting innocent woman of murder who lied in her testimony about several others' involvement in the murder hoping for a reduced sentence).

151. *See, e.g.*, State v. Statler, 160 Wash. App. 622, 629–30, 248 P.3d 165, 169 (2011) (finding three later-exonerated men guilty based on informant testimony); State v. Gassman, 160 Wash. App.

the crime, but, for reasons of self-interest, inform on their fellow accomplices. These accomplices may also downplay their role in the crime while exaggerating the role of other participants.[152]

The accomplice is a common type of informant used regularly by law enforcement and prosecutors.[153] In a prisoners' dilemma, these informants want to be as useful as possible to get the best deal for themselves.[154] So, their incentives to provide good testimony—and lie while doing it—are strong.[155] Thus, an accomplice's background and reliability are important in assessing that accomplice's testimony.[156] *Brady* covers an accomplice's actual or expected benefits from the government, but this information does not always come to light.[157] Nor does it cover accomplices' self-preservation interests.[158]

4. The Calumniator

The calumniator passes blame to someone else. The calumniator is typically an informant who feigns innocence or downplays their involvement in a crime.[159] The target of this blame could be a co-

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600, 606–08, 248 P.3d 155, 157–58 (2011) (same); State v. Larson, 160 Wash. App. 577, 583–85, 249 P.3d 669, 672–73 (2011) (same).

152. *See, e.g.*, *Napue*, 360 U.S. at 264 (involving a murder suspect accomplice who downplayed his role by stating that he was a reluctant participant in the robbery that led to the victim's murder).

153. Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1528–29 (2008) (stating that accomplices often become a key witness against their other accomplices).

154. For example, when the Sentencing Reform Act of 1984 went into effect, it changed the incentives for defendants in federal prosecutions. Parole was eliminated and mandatory minimums were put in place. ETHAN BROWN, SNITCH: INFORMANTS, COOPERATORS & THE CORRUPTION OF JUSTICE 43 (2007) ("Cooperation thus became a necessity for many defendants looking to reduce their sentences."); *see also* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 1989–90.

155. Indeed, an informant can reduce his or her sentence in a federal proceeding by providing the federal government with "substantial assistance." 18 U.S.C. § 3553 (2012).

156. *See* Sam Roberts, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257, 285 n.222 (2005) ("[N]otoriously unreliable witnesses include identification witnesses, young children, and cooperating witnesses such as informants, accomplices, and so-called 'snitches.'" (quoting Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 343 (2001))).

157. Giglio v. United States, 405 U.S. 150 (1972) (holding that nondisclosure and noncommunication of prosecutor's promise to witness that he would not be prosecuted if he cooperated with the government—even though a different prosecutor who did not know about this promise tried the case—was a *Brady* violation).

158. Napue v. Illinois, 360 U.S. 264, 267 (1959).

159. Trott, *supra* note 12, at 1383 (stating that a criminal's willingness to get out trouble includes "lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with

conspirator, a rival gang member, or an innocent person who was at the wrong place at the wrong time.[160] The calumniator overlaps with some of the other informants defined in this section, but is distinguished by the desire to shift as much blame as possible onto another party, regardless of who that other party is.[161] This informant is either responsible for the crime in question, or knows who is responsible, but decides to blame another person or persons who did not commit the crime.[162] These informants are incentivized to blame others for the crime to reduce liability for themselves or for another person.[163]

Unsurprisingly, this type of informant has been responsible for many wrongful convictions in America.[164] Calumniators are one of the more difficult informants to deal with because their incentive, escaping liability, is not as discoverable a benefit as promises or expectations from the government.[165] As such, under *Brady*, some useful information,

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more lies, and double-crossing anyone with whom they come into contact including—and especially—the prosecutor").

160. *See, e.g.*, State v. Statler, 160 Wash. App. 622, 630, 248 P.3d 165, 169 (2011). Statler was one of three men convicted for an armed robbery. All three were later exonerated after their counsel discovered that the informant's testimony was not credible. The informant confessed to being involved in the crime in the case.

161. *Id.* at 628–29. The informant in the case, Dunham, received a seventeen-month juvenile sentence. In exchange, the three men wrongfully imprisoned received a combined total of ninety-nine years in prison. They were released several years after their convictions. Maurice Possley, *Our Clients' Stories of Innocence*, UNIV. WASH. SCH. L. INNOCENCE PROJECT NW. CLINIC, http://www.law.washington.edu/clinics/ipnw/stories.aspx#gassman [https://perma.cc/V7FY-V9FV]; *see also Statler*, 160 Wash. App. at 630, 248 P.3d at 169.

162. People v. Jimerson, 535 N.E.2d 889 (Ill. 1989). The defendant, Verneal Jimerson, was accused with three others, Dennis Williams, Kenneth Adams, and Willie Rainge, for a double murder. *Id.* at 891. They were convicted based in part on perjured incentivized informant testimony and later exonerated. *Id.* at 891, 909. *See also* Steve Mills, *'Ford Heights Four' Exonerated, but Not Free from Pasti*, CHI. TRIB. (Apr. 11, 2014), http://articles.chicagotribune.com/2014-04-11/news/ct-ford-heights-four-met-20140411_1_two-decades-ford-heights-four-northwest-indiana [https://perma.cc/5QN6-LWWD].

163. *See, e.g.*, People v. Williams, 444 N.E.2d 136, 137 (Ill. 1982) (involving a witness who said that she was forced to lie about others involved in a rape and two murders); People v. Rainge, 445 N.E.2d 535, 543 (Ill. App. Ct. 1983) (same); People v. Gray, 408 N.E.2d 1150, 1156 (Ill. App. Ct. 1980) (same); *Statler*, 160 Wash. App. at 630, 248 P.3d at 169 (involving an informant—a defendant in a robbery case—who falsely accused three men as being his accomplices, to protect his friends who did commit the crime).

164. *See, e.g.*, People v. Burrows, 665 N.E.2d 1319, 1328 (Ill. 1996) (holding that granting defendant's new trial was warranted after new evidence showed that primary witness in case admitted her trial testimony was perjured and that she alone killed the victim); Warden, *supra* note 13, at 14 (assigning 45% of wrongful capital convictions to snitch testimony).

165. *Compare* Napue v. Illinois, 360 U.S. 264, 267 (1959) (involving prosecutor's failure to disclose promise not to prosecute witness), *with Statler*, 160 Wash. App. at 628, 248 P.3d at 168 (involving defendant-informant's desire to allow the real accomplices to remain free in addition to

such as criminal history—if it exists—may be required, as material, but it may not capture important incentives that this type of informant has.[166]

5. The Confidential Informant

The confidential informant is a form of witness whose testimony is used in court by law enforcement and prosecutors but whose identity remains hidden from the public and parties at trial.[167] Allowing a witness to testify anonymously helps protect the informant from threats and harm, helps preserve the government's investigation, and allows for the witness's continued participation in the criminal justice system.[168]

These confidential informants are major players in the incentivized informant system.[169] Yet these informants' background information—name, testimonial history, criminal history, and much more—remain hidden to protect their identity.[170] Troublingly, Andrew Chambers Jr. was a confidential informant for most of his cases.[171] Confidential informants play an important role as bread-and-butter witnesses in some areas of criminal law, especially drug cases.[172]

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getting a reduced sentence by telling the government that three later-exonerated men helped him commit the crime).

166. *See Statler*, 160 Wash. App. at 628, 248 P.3d at 168.

167. The U.S. Attorney General defines a confidential informant (CI), or as they put it a "confidential human source," as anyone "who is believed to be providing useful and credible information to the FBI for any authorized information collection activity, and from whom the FBI expects or intends to obtain additional useful and credible information in the future, and whose identity, information or relationship with the FBI warrants confidential handling." U.S. ATTORNEY GENERAL ALBERTO R. GONZALES, THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES 4 (2006) [hereinafter AG INFORMANT GUIDELINES], https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-guidelines-use-of-fbi-chs.pdf [https://perma.cc/376C-Y3MQ]; *see also* FLA. STAT. § 914.28 (2017) (defining confidential informant).

168. Roviaro v. United States, 353 U.S. 53, 62 (1957) ("The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."); *see also* Arthur L. Sr. Burnett, *The Potential for Injustice in the Use of Informants in the Criminal Justice System*, 37 SW. U. L. REV. 1079, 1085 (2008) ("A citizen must have the right to a hearing to endeavor to convince the decision maker that his apprehension and detention is the result of mistaken identity or outright fabrication and falsehood by one or more confidential informants in the intelligence gathering process.").

169. Lord, *supra* note 9.

170. AG INFORMANT GUIDELINES, *supra* note 167, at 4.

171. Wagner, *supra* note 1.

172. ROBERT R. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 64–66 (2000). Indeed, confidential informants are used heavily outside of the drug context at the state and local level. *See Law Enforcement Confidential Informant Practices: J. Hearing Before Subcomm. on Crime, Terrorism, and Homeland Security & Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 107

Because of the extra difficulties confidential informants pose, this Comment does not focus in-depth on changing the government's use of this type of informant.[173] But because information about confidential informants must be disclosed when necessary to prepare a defendant's case, confidential informants remain a part of this overall discussion.[174]

These five general types of informants lay the foundation to determine what information is needed to evaluate an incentivized informant's credibility. In turn, all actors in the criminal justice system can use this information to assess an incentivized informant's credibility before and during a trial.[175]

But how did "snitching" develop in the American criminal justice system? Some countries, such as Canada, as well as several European

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(2007), https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg36784/html/CHRG-110hhrg36784.htm [https://perma.cc/AT9T-BL2F] (statement of Alexandra Natapoff, Professor of Law, Loyola Law School) ("Of course, only about 10 percent of all of our criminal justice system is Federal. Ninety percent is State. So, I agree with your proposition that data collection and guidance monitoring at the State and local level is of paramount importance.").

173. This Comment's aim is to offer several solutions to the false incentivized informant testimony problem. While confidential informants are a large part of the informant system, *see, e.g.*, AUDIT OF CONFIDENTIAL SOURCE PROGRAM, *supra* note 139, at i, this Comment will not try to re-determine when the government should reveal information about its confidential informants. As *Roviaro* already states, there is a balancing between public interest and a defendant's right to prepare his or her case. *Roviaro*, 353 U.S. at 60–62. This concept can readily be applied to the plea deal context before trial. However, requiring information about a confidential informant before a plea deal, as opposed to trial, may require the government to devote more resources to the early phases of cases. *See also* Banks v. Dretke, 540 U.S. 668, 697–98 (2004) ("The Court there [in *Roviaro*] stated that no privilege obtains '[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused.' . . . Accordingly, even though the informer in *Roviaro* did not testify, we held that disclosure of his identity was necessary because he could have 'amplif[ied] or contradict[ed] the testimony of government witnesses.'" (citations omitted)).

174. *Roviaro*, 353 U.S. at 62 ("We believe that no fixed rule with respect to disclosure [of a confidential informant's identity] is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.").

175. *See* United States v. Ruiz, 536 U.S. 622, 631 (2002) ("And in any case, as the *proposed plea agreement at issue here specifies*, the Government will provide 'any information establishing the factual innocence of the defendant' regardless. That fact, along with other guilty-plea safeguards, see Fed. Rule Crim. Proc. 11, diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty." (emphasis added)). Note the facts of the case of *Ruiz* and the government's agreement: (1) the defendant was caught with about sixty-five pounds of marijuana, and (2) the government promised to turn over any facts establishing innocence as a part of the plea deal agreement. *Id.* at 622. As will be discussed later in this Comment, there are certain situations, even under *Ruiz*, where informant impeachment information should be provided to establish the requisite "sufficient awareness" under the U.S. Constitution. *See* Brady v. Maryland, 373 U.S. 83, 86 (1963).

nations, look at this type of incentivized informant testimony with great skepticism and disfavor.[176] The next Part gives a brief history of snitching, and provides three modern examples of where this practice has gone awry.[177]

II. AMERICA'S HISTORY OF SNITCHING: INCENTIVIZED INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM

This Part first gives a brief history of snitching and incentivized informants in America. It then describes modern issues with incentivized informants, using three examples: the informant scandal in Orange County, California; the *Statler* cases from Washington State; and the issues with informant use in Clark County, Nevada.

A. The Foundation, Development, and Rise of Snitches in American Criminal Cases

One of the earliest recordings of a "snitching" case in the United States involved two brothers, Jesse and Stephan Boorn (the Boorn Brothers).[178] In 1819, in Manchester, Vermont the Boorn Brothers were accused and convicted of murdering their brother-in-law, Russell Colvin.[179] One of the Boorn Brothers, Jesse, was placed in a cell next to a known forger, Silas Merrill.[180] Merrill testified at the Boorn Brothers'

176. NATAPOFF, *supra* note 50, at 64 ("Well into the 1970s, '[t]hroughout most of continental Europe . . . virtually all these [undercover] techniques were viewed, even by police officials, as unnecessary, unacceptable, and often illegal.' Today, many European countries engage in some form of these tactics, but to a lesser degree than does American law enforcement." (citations omitted)).

177. The examples are just three of many. And they represent a historical problem of informant use in the American criminal justice system. *See, e.g.*, BROWN, *supra* note 154, at 50 ("Mindful of the decades of abuses committed by Bulger and Flemmi's FBI handlers, in early 2001 Attorney General Janet Reno issued sweeping new guidelines governing the use of informants. Reno's guidelines addressed the FBI's multiple failures in the Bulger case: agents were prohibited from making promises of immunity to informants, a Confidential Informant Review Committee was established to approve and monitor high-level informants, and it became a requirement that federal prosecutors be notified when an informant was under investigation.").

178. THE SNITCH SYSTEM, *supra* note 13, at 2. This is not to exclude the prominent use of spies during the Revolutionary War: George Washington employed intelligence networks during the Revolutionary War. DENNIS G. FITZGERALD, INFORMANTS, COOPERATING WITNESSES AND UNDERCOVER INVESTIGATIONS: A PRACTICAL GUIDE TO LAW, POLICY, AND PROCEDURE 6 (2015). While an important source of early government intelligence gathering, these spy practices are only tangentially related to the modern use of informants in the American criminal justice system.

179. THE SNITCH SYSTEM, *supra* note 13, at 2.

180. *Id.*

trial that Jesse Boorn confessed to committing the murder to him.[181] Merrill was freed from jail for his testimony.[182] The Boorn Brothers were sentenced to death.[183] However, right before the Boorn Brothers were hanged, the alleged murder victim, Colvin, reappeared, alive, several states away in New Jersey.[184] Merrill, it turned out, was a pioneer American jailhouse snitch.

Several decades later during the American Civil War, from 1861 to 1865,[185] tens of thousands of Union and Confederate prisoners created ideal conditions for large-scale jailhouse snitching.[186] Indeed, in addition to prisoners providing information to their captors, a sizable portion of these prisoners changed their allegiance after being imprisoned.[187] And while by no means reflecting the modern snitch system, the presence of prisoner-informants, or "razorbacks,"[188] in Civil War prisons demonstrates the core issue with snitches: an innate desire to appeal to authorities in power to gain more favorable treatment.[189]

More than half a century later, after the Prohibition era of the 1920s and early 1930s, another surge in snitching occurred.[190] The Bureau of Alcohol, Tobacco, and Firearms switched its focus from enforcing

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181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Important Proclamations.; The Belligerent Rights of the Rebels at an End*, N.Y. TIMES (May 10, 1865), http://www.nytimes.com/1865/05/10/news/important-proclamations-belligerent-rights-rebels-end-all-nations-warned-against.html [https://perma.cc/FYG8-429A].

186. Ovid Futch, *Prison Life at Andersonville*, *in* CIVIL WAR PRISONS 15 (William Best Hesseltine ed. 1972) ("He will do anything to win approval of those human beings in whose power he finds himself . . . . Considering the conditions that existed in the Andersonville [Confederate-run prison] stockade, it is not surprising that some prisoners turned informers.").

187. *See* PAUL J. SPRINGER & GLENN ROBINS, TRANSFORMING CIVIL WAR PRISONS: LINCOLN, LIEBER, AND THE POLITICS OF CAPTIVITY 59 (2014) ("The defection rate at Camp Lawton in Millen, Georgia was . . . 349 of a total of 9,698 prisoners [who] took the Confederate oath during late October and early November of 1864. This number fell just short of 4 percent of the camp population.").

188. LONNIE R. SPEAR, PORTALS TO HELL: MILITARY PRISONS OF THE CIVIL WAR 317 (1997) ("[R]azorback: A Judas; one who informed on fellow POWs [prisoners of war] for special privileges or treatment; a spy in the prison population who would inform the authorities of any plans or rumors of escapes.").

189. Call, *supra* note 126, at 73–74.

190. *See Oversight Hearings on Bureau of Alcohol, Tobacco, and Firearms, Special Hearing: Department of the Treasury Nondepartmental Witnesses: Hearing Before the Subcomm. of the Comm. on Appropriations*, 96th Cong. 6, 200 (1979) ("The Bureau of Alcohol, Tobacco and Firearms had its origin in enforcement of the alcohol taxation and later prohibition laws . . . . Some of the more serious abuses relating to entrapment involve informants of questionable character who were given incentives to entrap individuals.").

Prohibition to using entrapment and informants for firearms enforcement.[191] And over the next few decades, informant use would grow from an informal part of American law enforcement practices, to an integral part of the criminal justice system.[192]

This growth of informant use exploded in the 1960s and 1970s with the expansion of the Federal Bureau of Investigation's anti-crime efforts and the "War on Drugs."[193] President Nixon's declaration of the War on Drugs, and President Ronald Reagan's reemphasis of this "war" created a then unprecedented expansion of the use of informants.[194] This held especially true for the DEA.[195] Informants also became an important part of efforts to fight organized crime, and, eventually the War on Terror.[196]

But backlash also followed the increased use of incentivized informants.[197] The rise of "no snitching" or anti-informant feelings across America soared when Congress began passing a flurry of anti-crime bills throughout the 1980s and 1990s.[198] These bills included the creation of mandatory minimums for drug offenders.[199] These mandatories could be reduced through "substantial assistance," creating large incentives for informants to testify.[200]

Highlighting the anti-informant sentiment in the 1980s and 1990s, a longtime jailhouse snitch, Leslie Vernon White, admitted to reporters that he consistently provided law enforcement and prosecutors with false

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191. *See id.* at 6–7, 200.

192. FITZGERALD, *supra* note 178, at 1–2, 7–8.

193. *Id.* at 1–2.

194. *See id.* at 18; *Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control* (June 17, 1971), http://www.presidency.ucsb.edu/ws/?pid=3048 [https://perma.cc/S3BF-2TPK]; PAULA MALLEA, THE WAR ON DRUGS: A FAILED EXPERIMENT 34 (2014) ("In 1972, President Richard Nixon first declared a War on Drugs. Legislation produced harsher penalties and expanded the numbers of offences that could be prosecuted . . . . In 1986, under Ronald Reagan, the United States re-dedicated itself to the War on Drugs and passed the *Anti-Drug Abuse Act*.").

195. *See* STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY 74 (1990).

196. FITZGERALD, *supra* note 178, at 1–2, 23.

197. *See generally Law Enforcement Confidential Informant Practices: J. Hearing Before Subcomm. on Crime, Terrorism, and Homeland Sec. & the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 1–2 (2007).

198. BROWN, *supra* note 154, at 11.

199. *Id.*

200. *Id.* Those who provide "substantial assistance" get a "5k" motion from prosecutors—a term coming from the U.S. Sentencing Guidelines—which reduces the cooperator's sentence based on the guideline matrix. *Id.*

testimony.[201] He lied to get benefits from the government.[202] The story was hugely controversial and immediately caught the public's attention.[203]

Leslie Vernon White was a career criminal who provided false testimony in dozens of cases.[204] White sometimes pretended to be a police officer during his time in prison to gather information about an incarcerated person's case through the telephone.[205] Then White would use this information to provide fabricated testimony about an incarcerated person to law enforcement and prosecutors.[206] Because law enforcement and prosecutors believed that there was no other way for White to know about this information, they believed him.[207] The information that White provided, such as the alleged location of the crime and people involved, corroborated information that supposedly only law enforcement and prosecutors had access to.[208] White used this information to make up false stories about incarcerated people and prisoners awaiting trial.[209] Prosecutors convicted numerous individuals based off of this information.[210]

A subsequent grand jury proceeding following the fallout from White's admissions led Los Angeles County to find jailhouse informant testimony inherently unreliable and place severe restrictions on the use of this type of testimony.[211]

Even after the Leslie Vernon White scandal, and many other high-profile informant scandals, incentivized informants continue to be a core

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201. Robert Reinhold, *California Shaken over an Informer*, N.Y. TIMES (Feb. 17, 1989), http://www.nytimes.com/1989/02/17/us/california-shaken-over-an-informer.html [https://perma.cc/5HNX-F97F].

202. *Id.*

203. *Id.*

204. THE SNITCH SYSTEM, *supra* note 13, at 2.

205. Rohrlich, *supra* note 127.

206. *Id.*

207. *See id.*

208. *Id.*

209. *Id.*

210. Reinhold, *supra* note 201 ("Defense lawyers have compiled a list of 225 people convicted of murder and other felonies, some sentenced to death, in cases in which Mr. White and other jailhouse informers testified over the last 10 years in Los Angeles County."). Other jurisdictions should not wait until a scandal of this magnitude or with this much publicity forces them to change their practices dealing with incentivized informants.

211. *See generally* L.A. GRAND JURY REPORT, *supra* note 132.

component of the American criminal justice system.[212] The next section examines three current modern controversies involving incentivized informant testimony: Orange County, California; the *Statler* cases in Washington State; and Clark County, Nevada. These three controversies help show the current scope of issues with incentivized informant testimony. They also highlight the wide geographic range of these issues across America.

B. Contemporary Snitching in America: Three Recent Controversies Showing How Incentivized Informants Continue to Be a Major Contributor to Wrongful Imprisonment

This section outlines incentivized informant testimony in the modern context. It does so first by highlighting disclosure failures by the Orange County, California District Attorney's Office and Sheriff's Department. It then reviews the battle three men endured to get released from prison and receive compensation for being wrongfully convicted from false informant testimony in Washington State. Lastly, this section inspects prosecutors' failures in Clark County, Nevada to keep their promise to track and disclose their informants.[213]

1. Welcome to the O.C.: Informant Misuse in Orange County, California

In late 2014, a scandal involving the Orange County District Attorney's Office (OCDA) broke loose: members of the OCDA were caught lying about, hiding, and misusing their informants in criminal cases.[214]

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212. *See, e.g.*, State v. Larson, 160 Wash. App. 577, 595, 249 P.3d 669, 677 (2011) (involving three men who were convicted based on informant testimony but later found innocent and exonerated).

213. Incentivized informant scandals are major issues in other regions in the U.S. as well, not just Orange County and Clark County. For example, Texas, which continues battling a huge wrongful conviction problem, passed a new law in June of 2017 to reform the use of jailhouse snitches. H.B. 34, 85th Leg., Reg. Sess. (Tex. 2017), https://legiscan.com/TX/text/HB34/id/1625182 [https://perma.cc/Q5NY-AY6N] (requiring prosecutors to keep detailed records about the jailhouse informants that they use, including their criminal history, benefits received for testifying, and the nature of their testimony). This bill went into effect on September 1, 2017. *Id.*; *see also Texas Cracks Down on the Market for Jailhouse Snitches*, N.Y. TIMES (July 15, 2017), https://www.nytimes.com/2017/07/15/opinion/sunday/texas-cracks-down-on-the-market-for-jailhouse-snitches.html?mcubz=1 [https://perma.cc/P9YR-QWTM] ("Texas, which has been a minefield of wrongful convictions—more than 300 in the last 30 years alone—passed the most comprehensive effort yet to rein in the dangers of transactional snitching.").

214. Further scandals continue to plague Orange County. *See* Sharyn Alfonsi, *Informant Says He Was Planted in Orange County to Snitch*, CBS NEWS (May 21, 2017),

Resisting court efforts to disclose informant information, on September 22, 2014, the OCDA dismissed attempted murder charges against Joseph Govey.[215] It was the third time in three months that the same prosecutor, Tony Rackauckas, dropped murder charges after defense attorneys accused Rackauckas and the OCDA of improperly withholding jailhouse informant information.[216] Earlier in June 2014, the superior court judge hearing Govey's case, Judge Thomas Goethals, ordered Rackauckas to disclose a long-held list of jailhouse informants.[217] Instead, to avoid disclosing the jailhouse informant list, Rackauckas opted to dismiss the attempted murder charges against Govey.[218]

Then in early 2015, the controversy ballooned: Judge Goethals discharged the entire OCDA from accused mass-murderer Scott Dekraai's case.[219] In 2014, Dekraai pled guilty to eight charges of first-degree murder and was eligible for the death penalty.[220] There was little doubt about Dekraai's guilt, but the OCDA refused to comply with Judge Goethals' order to turn over jailhouse informant evidence to Dekraai's defense counsel.[221] In response to the OCDA's refusal, Judge Goethals found that the OCDA violated Dekraai's constitutional rights, including his Sixth Amendment right to confront his accuser.[222] The judge then removed all 250 OCDA prosecutors from Dekraai's case.[223]

The Orange County Sheriff's Department (OCSD) fueled Judge Goethals's decision to remove all OCDA prosecutors from Drekaai's case.[224] The OCSD took nearly four years to turn over jailhouse

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https://www.cbsnews.com/news/informant-says-he-was-planted-in-orange-county-jail-to-snitch/ [https://perma.cc/2C5J-PAZA]; Williamson, *supra* note 131.

215. Rex Dalton, *More Murder Charges Dropped in Wake of DA Informants Case*, VOICE OC (Sept. 30, 2014), http://voiceofoc.org/2014/09/more-murder-charges-dropped-in-wake-of-da-informants-case/ [https://perma.cc/9W4U-CDJR]. Govey had a criminal record at the time that the charges were filed. *Id.*

216. *Id.*

217. *Id.*

218. *See id.*

219. Christopher Goffard, *Orange County D.A. Is Removed from Scott Dekraai Murder Trial*, L.A. TIMES (Mar. 12, 2015, 6:55 PM), http://www.latimes.com/local/orangecounty/la-me-jailhouse-snitch-20150313-story.html [https://perma.cc/SS8M-N36Z].

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Christopher Goffard, *Stakes Rise in Jailhouse Informant Case as Judge Blasts O.C. Sheriff*, L.A. TIMES (Dec. 16, 2016, 9:35 AM), http://www.latimes.com/local/california/la-me-ln-oc-jail-snitch-scandal-20161216-story.html [https://perma.cc/FW8S-P7WK].

informant information in Drakaai's case.[225] When the OCSD finally turned over this information, it was heavily redacted.[226] The OCSD also denied having a jail informant program, a statement later contradicted by "Special Handling" documents about jailhouse informants revealed during discovery.[227]

Next, after a hearing in Drakaai's case, Santa Ana Assistant Public Defender Scott Sanders revealed that the OCSD maintained a secret twenty-five-year-old computerized database on informants with potentially exculpatory information.[228] During a 2015 hearing, Judge Goethals found that two members of the OCSD intentionally lied or willfully withheld information in the Drakaai case.[229]

Judge Goethals expressed his dismay at the scandal: "[i]t apparently stems from [Rackauckas'] loyalty to his law enforcement partners at the expense of his other constitutional and statutory obligations."[230]

One year later, Judge Goethals overturned Henry Rodriguez's murder conviction, another high-profile OCDA case.[231] The judge found the government's use of jailhouse informants troubling and that it potentially violated Rodriguez's Sixth Amendment right against self-incrimination.[232]

As the Orange County informant scandal received national scrutiny, in late 2016, the U.S Department of Justice (DOJ) launched a civil rights investigation of both the OCDA and the OCSD.[233] The Los-Angeles-based DOJ announced the investigation at the end of 2016 after defense attorneys made allegations that the OCDA violated several defendants' rights by using informants to gather evidence in secret.[234]

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225. *Id.*

226. *Id.*

227. *Id.*

228. Dahlia Lithwick, *You're All Out: A Defense Attorney Uncovers a Brazen Scheme to Manipulate Evidence, and Prosecutors and Police Finally Get Caught*, SLATE (May 28, 2015, 1:38 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/orange_county_prosecutor_misconduct_judge_goethals_takes_district_attorney.html [https://perma.cc/R6E2-QM8C].

229. Goffard, *supra* note 219.

230. *Id.*

231. Scott Moxley, *OC Judge Overturns Murder Conviction Because of Prosecution Cheating*, OC WEEKLY (Feb. 25, 2016, 1:29 PM), http://www.ocweekly.com/news/oc-judge-overturns-murder-conviction-because-of-prosecution-cheating-6999292 [https://perma.cc/89E5-M2LF].

232. *Id.*; *see also* U.S. CONST. amend. VI.

233. Kelly Puente & Tony Saavedra, *Feds Launch Investigation into Orange County D.A.'s Office, Sheriff's Department over Jailhouse Informants*, ORANGE COUNTY REG. (Dec. 16, 2016, 1:11 PM), http://www.ocregister.com/articles/-738533.html [https://perma.cc/MR7S-UN7M].

234. *Id.*

The DOJ's investigation is ongoing in 2018 as of this Comment's writing and remains in its preliminary stages.[235] Regardless of the DOJ's results, the incentivized informant scandal in Orange County, California demonstrates the greater need for guidelines, laws, and rules that control how the government uses these informants.

2. *Snitch Deal: A Fight for Freedom and Just Compensation in the* Statler *Cases*

Paul Statler,[236] Robert Larson, and Tyler Gassman were convicted of first-degree robbery, two counts of first-degree assault, and two counts of drive-by shooting in February of 2009.[237] Their convictions came from a drug-related event in 2008 in Spokane Valley, Washington.[238]

The *Statler* cases[239] began in 2008 when five men, including Anthony Kongchunki and Matthew Dunham, robbed two males in an OxyContin drug transaction.[240] One or more of the robbers fired shots as they fled the scene.[241] Later that same month, Kongchunki and Dunham were arrested for a different robbery.[242] After investigating the 2008 robbery, law enforcement learned that the shotgun used in that robbery was

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235. *Id.* However, in the interim, the State Bar of California recently recommended suspending a prosecutor at the OCDA for at least one year. *See* Matt Ferner, *State Bar Recommends Suspension of Orange County Prosecutor for Withholding Evidence*, HUFFPOST (Oct. 12, 2017, 5:53 PM), https://www.huffingtonpost.com/entry/state-bar-recommends-suspension-of-orange-county-prosecutor-for-withholding-evidence_us_59dfadace4b04d1d518046ed [https://perma.cc/3S9T-X773]. The State Bar of California found that this prosecutor willfully withheld material exculpatory evidence from a defendant during a criminal child abuse case. *Id.* And at a 2013 hearing to address the prosecutor's failure to turn over *Brady* evidence, the prosecutor indicated that she would withhold the information again. *See id.*; Sandra Lee Nassar, A Member of the State Bar, No. 199305, 14-O-00027-YDR (State Bar of Cal. Oct. 10, 2017), http://members.calbar.ca.gov/courtDocs/14-O-00027.pdf [https://perma.cc/56R2-WRU9] (finding by clear and convincing evidence that OCDA prosecutor suppressed evidence which violated *Brady* and recommending bar suspension).

236. Maurice Possley, *Paul E. Statler*, NAT'L REGISTRATION EXONERATIONS (July 26, 2013), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4233 [https://perma.cc/GRN7-W9N2] [hereinafter *Statler*, NRE].

237. Larson v. State, 194 Wash. App. 722, 729, 375 P.3d 1096, 1101 (2016), *review denied*, 186 Wash. 2d 1025, 385 P.3d 117 (2016).

238. *See Statler*, NRE, *supra* note 236.

239. Even though this incident involved three men, Statler, Larson, and Gassman, who were wrongfully convicted in three separate but related cases, common local usage refers to their three criminal cases as the "*Statler* cases." So, this Comment follows that usage.

240. *Larson*, 194 Wash. App. at 726–27, 375 P.3d at 1098–99.

241. *Id.* at 727, 375 P.3d at 1099.

242. *Id.*

located at Paul Statler's home.[243] Law enforcement searched Statler's home and found the shotgun there.[244]

Meanwhile, Kongchunki and Dunham sat in the Spokane County jail for one month, where, given ample time to craft a consistent story together, they told police that Statler, Larson, and Gassman were involved in the robberies.[245] But when the government declined to offer Kongchunki a non-prison sentence, he recanted his story and said that none of the three other men—Paul Statler, Robert Larson, and Tyler Gassman—participated in the robberies.[246] Detective Marske, the investigating officer, responded ominously to Kongchunki's recantation: lying at trial is perjury.[247] So, only Dunham[248] testified against Statler, Larson, and Gassman.[249] Dunham received a reduced sentence of seventeen months of confinement in a juvenile detention facility.[250] In exchange, the three men received a combined ninety-nine year sentence.[251] Statler was sentenced to forty-one years in prison, Gassman thirty-eight years, and Larson twenty years.[252]

In 2012, three years after Statler, Larson, and Gassman were convicted, Spokane County Superior Court Judge Michael J. Price dismissed their 2009 convictions for robbery, assault, and drive-by

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243. *Id.*

244. *Id.* at 727–28, 375 P.3d at 1099–1100.

245. *Id.* at 728, 375 P.3d at 1100.

246. *Id.*; *see also* Kip Hill, *Wrongful Imprisonment Claims Fail Before Spokane Judge*, SPOKESMAN-REV. (Feb. 17, 2015, 4:23 PM), http://www.spokesman.com/stories/2015/feb/17/imprisoned-men-lose-lawsuit-against-state/ [https://perma.cc/QYB5-YPRG] (describing how the initial lawsuit involving Statler, Larson, and Gassman for their wrongful imprisonment claims failed).

247. *Larson*, 194 Wash. App. at 728, 375 P.3d at 1100.

248. It is worth noting that Dunham implicated Statler, Larson, and Gassman in four different cases, and it was only in one of these cases that a court found the trio guilty. *See* State v. Statler, 160 Wash. App. 622, 630, 248 P.3d 165, 169 (2011); State v. Larson, 160 Wash. App. 577, 595, 249 P.3d 669, 677 (2011); State v. Gassman, 160 Wash. App. 600, 607, 248 P.3d 155, 158 (2011).

249. *Larson*, 194 Wash. App. at 728, 375 P.3d at 1100.

250. *Id.* at 728–29, 375 P.3d at 1100–01.

251. *Statler*, 160 Wash. App. at 630, 248 P.3d at 169; Possley, *supra* note 161.

252. *Statler*, 160 Wash. App. at 630, 248 P.3d at 169; *Larson*, 160 Wash. App. at 595, 249 P.3d at 677; *Gassman*, 160 Wash. App. at 607, 248 P.3d at 158; *see also* State v. Gassman, 175 Wash. 2d 208, 210, 283 P.3d 1113, 1114 (2012) (holding that Washington Appeals Court abused its discretion when imposing sanctions on the state for careless actions in prosecuting Gassman's case because there was no showing that the state intentionally acted in bad faith while prosecuting Gassman); Possley, *supra* note 161.

shooting.[253] Judge Price dismissed the case, citing doubts about the witness Dunham based on post-conviction evidence.[254] The government originally promised to re-try Statler, Larson, and Gassman, but finally dismissed their charges in 2013.[255]

The trio later filed for compensation for wrongful conviction in 2014 under Washington State's Wrongly Convicted Persons Act.[256] In 2014, the Washington State Court of Appeals denied their request for compensation.[257] However, the Washington State Court of Appeals reversed the denial in 2016 and remanded the case for the trial court to decide whether the trio was "actually innocent" by clear and convincing evidence.[258] In April 2017 all three men were awarded under Washington's wrongful compensation statute.[259] They were found "actually innocent" of the crimes that they served over three years in prison for.[260]

The *Statler* cases are an example of the accomplice and calumniator informants defined earlier in this Comment. Dunham, the incentivized informant in the *Statler* cases, testified not only to get a reduced sentence, but also to protect three of his accomplices.[261] The other accomplice's (Kongchunki) recantation was excluded from the initial

253. Thomas Clouse, *Judge Throws Out Robbery Convictions: Three Men Freed After Four Years in Custody*, SPOKESMAN-REV. (Dec. 15, 2012, 12:00 PM), http://www.spokesman.com/stories/2012/dec/15/judge-throws-out-robbery-convictions/ [https://perma.cc/969V-YTPE].

254. *Id.*

255. *See Triple Exoneration: Charges Dismissed Against Three Men Wrongly Imprisoned on Testimony of Informant*, UNIV. WASH. SCH. L. (Apr. 12, 2013), https://www.law.uw.edu/news/2013/ipnwtripleexoneration/ [https://perma.cc/C5ZQ-M246].

256. Larson v. State, 194 Wash. App. 722, 375 P.3d 1096 (2016), *review denied*, 186 Wash. 2d 1025, 385 P.3d 117 (2016); *see also* WASH. REV. CODE § 4.100.060(1)(c)(ii) (2016) (allowing compensation for wrongful imprisonment after showing by clear and convincing that the claimant did not commit the crime or crimes).

257. *See Larson*, 194 Wash. App. 722, 375 P.3d 1096.

258. *Id*. at 725, 375 P.3d at 1098.

259. *Spokane County Superior Court Enters Order Awarding Compensation for Wrongful Convictions*, TERRELL MARSHALL L. GROUP PLLC (Apr. 13, 2017), http://terrellmarshall.com/spokane-court-awards-compensation-wrongful-convictions/ [https://perma.cc/RY9H-GQ8W] ("This was the first case ever tried under Washington's wrongful conviction compensation statute, chapter 4.100 RCW."); *see also* Nina Culver, *Spokane County's Insurer Offers $2.25 Million Settlement to Three Men Wrongfully Convicted of Robbery*, SPOKESMAN-REV. (June 7, 2017, 10:20 PM), http://www.spokesman.com/stories/2017/jun/07/spokane-countys-insurer-offers-225-million-settlem/ [https://perma.cc/PQE3-6AE6] (describing how Statler, Larson, and Gassman received a settlement for their wrongful imprisonment after suing under Washington's wrongful conviction compensation statute).

260. Culver, *supra* note 259.

261. *Larson*, 194 Wash. App. at 728–29, 375 P.3d at 1100–01.

case, but later used to discredit Dunham's testimony at the post-sentencing phase.[262]

3. *Clark County Prosecutors Break Their Promise to Track and Record Their Use of Informants*[263]

In 2008, facing a law mandating that prosecutors in Nevada maintain a database on their use of informants, the Clark County District Attorney's Office (CCDAO) promised to maintain this database in lieu of legislation.[264] That year, on June 9, a Nevada-based criminal defense association, the Nevada Attorneys for Criminal Justice (NACJ),[265] approached the Nevada Legislature's Advisory Committee on the Administration of Justice.[266] A representative of the NACJ, Assistant Federal Public Defender Lori Teicher, discussed a proposal for reducing false informant testimony.[267] Teicher suggested that the Nevada State Legislature pass a bill requiring prosecutors to maintain a database of their informants and promises that prosecutors knew were made to these informants.[268]

Clark County District Attorney Christopher J. Lalli responded: there were informal mechanisms in place for tracking witness-informants and Lalli's organization was creating a formal policy for tracking the

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262. *See generally Larson*, 194 Wash. App. 722, 375 P.3d 1096.

263. Dameon Pesanti, *Inside Information: Cops Use Confidential Informants to Go Where They Can't*, CHRON. (Oct. 23, 2015), http://www.chronline.com/crime/inside-information-cops-use-confidential-informants-to-go-where-they/article_09cdf67e-7a02-11e5-9758-5f374b9ca0a0.html [https://perma.cc/FVD3-EALG]; Ken Ritter, *'Surreal' Feeling for Nevada Man Freed After 23 Years*, ASSOCIATED PRESS (June 30, 2017), http://www.businessinsider.com/ap-surreal-feeling-for-las-vegas-man-freed-after-23-years-2017-6 [https://perma.cc/6EHQ-ZA74].

264. Bethany Barnes, *DA Criminal Informant Safeguard Rarely Used in Clark County, Records Suggest*, LAS VEGAS REV. J. (Mar. 13, 2016, 9:57 PM), http://www.reviewjournal.com/news/las-vegas/da-criminal-informant-safeguard-rarely-used-clark-county-records-suggest [https://perma.cc/6TQT-657D].

265. ADVISORY COMM. ON THE ADMIN. OF JUSTICE, NEV. STATE LEG., MINUTES OF THE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE 15 (2008), https://www.leg.state.nv.us/Session/74th2007/Interim_Agendas_Minutes_Exhibits/Minutes/AdminJustice/IM-AdminJustice-060908-10118.pdf [https://perma.cc/CN5Z-87HP] [hereinafter NEVADA LEG. JUNE 9, 2008 MINUTES] (statement of Lori Teicher). The NACJ is affiliated with the National Association of Criminal of Criminal Defense Lawyers (NADCL).

266. ADVISORY COMM. ON THE ADMIN. OF JUSTICE, NEV. STATE LEG., MINUTES OF THE 2015-2016 INTERIM ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE 14 (2016), https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/6844 [https://perma.cc/NYF8-H5F7] [hereinafter NEVADA LEG. 2016 INTERIM MINUTES].

267. NEVADA LEG. JUNE 9, 2008 MINUTES, *supra* note 265, at 15 (statement of Lori Tiecher).

268. *Id.*

issue.[269] Then, during another meeting with the Committee on the Administration of Justice on July 7, 2008, Lalli said that legislation was not necessary to mandate maintaining internal informant databases.[270] Lalli mentioned an informant database, including an inducement index that the neighboring Churchill County District Attorney's Office implemented.[271] He said that the CCDAO would also create and maintain a database of informants and the promises made to them.[272]

Yet five years later in 2013, the database had a mere 130 entries, an alarmingly low figure given that the CCDAO prosecuted over 33,000 criminal cases between 2008 and 2013.[273] In response, the Committee on the Administration of Justice met again on June 14, 2016 to address the informant issue.[274] At this meeting, the Commission concluded that "[i]t does not seem that voluntary adoptions of these [informant database] polices and implementation is really happening effectively."[275] After eight years of the CCDAO's failure to implement an informant database system, the Commission once again started considering statutory requirements.[276]

Also at the June 14, 2016 meeting, the Rocky Mountain Innocence Center Innocence Project presented an "Innocence Protections Proposal" to the Nevada State Advisory Commission on the Administration of Justice.[277] The Rocky Mountain Innocence Center's presentation reemphasized the need for an informant database.[278] It also suggested

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269. *Id.* at 16 (statement of Christopher J. Lalli).

270. ADVISORY COMM. ON THE ADMIN. OF JUSTICE, NEV. STATE LEG., MINUTES OF THE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE 17 (2008), https://www.leg.state.nv.us/74th/Interim_Agendas_Minutes_Exhibits/Minutes/AdminJustice/IM-AdminJustice-070708-10118.pdf [https://perma.cc/2PPP-VLCD] [hereinafter NEVADA LEG. JULY 7, 2008 MINUTES] (statement of Christopher J. Lalli).

271. *Id.* at 17–19. "Inducement index" means a record of the promises made to informants in exchange for their testimony. *Id.*

272. *Id.*

273. Barnes, *supra* note 264; *see also* The Law Offices of Jeffrey Jaeger, *Use of Confidential Informants in Clark County Remains Murky Issue*, FACEBOOK (June 14, 2016), https://www.facebook.com/notes/the-law-offices-of-jeffrey-jaeger-chtd/use-of-confidential-informants-in-clark-county-remains-murky-issue/1736429003299757/ [https://perma.cc/58ZY-FLC5] (lamenting the CCDAO's failure to track informants in a database).

274. *See* NEVADA LEG. 2016 INTERIM MINUTES, *supra* note 266, at 1.

275. *Id.* at 14.

276. *Id.*

277. ROCKY MOUNTAIN INNOCENCE CTR. INNOCENCE PROJECT, INNOCENCE PROTECTIONS PROPOSAL PRESENTED TO THE NEVADA STATE ADVISORY COMMITTEE ON THE ADMINISTRATION OF JUSTICE 1 (2016), https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/4361 [https://perma.cc/7HNE-SJFF].

278. *Id.* at 5.

statutes mandating: (1) pretrial disclosure of the prosecution's intent to use an informant, and (2) requiring corroboration for all informant testimony.[279] And, most importantly, the Rocky Mountain Innocence Center noted that the CCDAO failed to adequately maintain an informant database, suggesting that a voluntary adoption policy was not effective.[280]

Then, on November 1, 2016, the Commission on the Administration of Justice met again to discuss the informant database issue.[281] They had several agenda proposals for the issue, including requiring every Nevada State prosecutor's office, not just Clark County's, to track informant use through databases.[282] And in February of 2017, the Commission issued a Final Report discussing draft legislation recommendations for informant databases in Nevada.[283] These recommendations included establishing a legislative study on the use of "criminal justice information sharing" systems and "encouraging all criminal justice stakeholders" to work together to create "a statewide criminal justice information sharing database."[284]

Finally, the Nevada Senate Committee on Judiciary passed Senate Bill 277 to fund a study about integrating criminal justice information systems for informant use.[285] The bill created a subcommittee that will review criminal justice information systems and determine how to integrate such a system statewide.[286] As of January 2018, this

279. *Id.*

280. *Id.*

281. ADVISORY COMM. ON THE ADMIN. OF JUSTICE, NEV. STATE LEG., MEETING NOTICE AND AGENDA 1 (2016), https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/9455 [https://perma.cc/3XFQ-CBJ6].

282. *Id.* at 18–19. There were some other recommendations, including pre-trial reliability hearings by the judge, as well as jury instructions warning about an informant's reliability. *Id.* at 19.

283. ADVISORY COMM. ON THE ADMIN. OF JUSTICE, NEV. STATE LEG., FINAL REPORT 2–3 (2017), https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/9887 [https://perma.cc/3XFQ-CBJ6].

284. *Id.*; *see also* CLARK COUNTY, SCOPE OVERVIEW, https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/9095 [https://perma.cc/5TLG-DMGA] (encouraging Clark County officials to create and maintain an informant database).

285. *See* S.B. 277, 79th Leg., Reg. Sess. (Nev. 2017), https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Bill/5238/Overview [https://perma.cc/P3VY-GW78].

286. *Id.* § 1.3. This subcommittee is called the Subcommittee on Criminal Justice Information Sharing of the Commission. *Id.*; *see also* Jeff Schied, *Democrats Advance Criminal Justice Agenda, in Tempered Form*, NEV. INDEP. (June 18, 2017, 2:10 AM), https://thenevadaindependent.com/article/democrats-advance-criminal-justice-agenda-in-tempered-form [https://perma.cc/A4ED-3W27] ("The subcommittee will be authorized to appoint working groups and make recommendations for changes in criminal justice information policies. The bill, sponsored by the Senate Judiciary Committee, passed unanimously out of both houses. It was approved by the governor on May 24.").

subcommittee has not met.[287] But its eventual meeting and review of criminal information sharing will shape the future for how informants are handled in Nevada. It may also serve as a model for all U.S. states.

America has used incentivized informants in criminal proceedings from its founding years until today.[288] Since then, as the criminal justice system grew, informant use exploded.[289] The three ongoing issues in Orange County, California, Washington State, and Clark County, Nevada show that incentivized informants remain a major concern for wrongful imprisonment. These issues also show that American states are struggling to address false informant testimony.[290] To solve this problem, a variety of approaches are needed.

III. HOW TO REDUCE FALSE IMPRISONMENT CAUSED BY INCENTIVIZED INFORMANTS: PROPOSED SOLUTIONS

An informant's purpose is to help the government convict a guilty criminal, not an innocent person. [291] This Part suggests several solutions to help reduce wrongful imprisonment from false incentivized informant testimony.[292]

There are a variety of ways to reduce the problems with incentivized informant testimony.[293] This Comment offers solutions that can be used alone or combined with one another. It first suggests how to identify and define "incentivized informant." Next, it suggests ways that state and local governments can improve informant use. These solutions include statutes, court rules, and other rules and guidelines to guide local

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287. *See Advisory Committee on Nevada Criminal Justice Information Sharing*, NEV. STATE LEG., https://www.leg.state.nv.us/App/InterimCommittee/REL/Interim2015/Committee/268/Overview [https://perma.cc/PJK3-GQY5].

288. THE SNITCH SYSTEM, *supra* note 13, at 2.

289. FITZGERALD, *supra* note 178, at 1–2, 7–8.

290. *See, e.g.*, Barnes, *supra* note 264 (reporting that the CCDAO was rarely updating their informant database despite their promises to do so).

291. "A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system." United States v. Bemal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993) (citations omitted). For a great discussion about prosecutors' use of incentivized informants, see Trott, *supra* note 12, at 1432.

292. While much of this Comment's focus is on prosecutors, law enforcement also plays a huge role in the incentivized informant system. *See* STATE'S DUTY TO DISCLOSE EXCULPATORY MATERIAL EXTENDED BEYOND INDIVIDUAL PROSECUTOR ASSIGNED TO CASE, 20 NO. 10 CRIM. PRAC. REP. 3 (2006) ("Unknown to the prosecuting attorney, for the past 10 years the snitch had been a police informant for the local police department and even had his own confidential informant number." (citing Maryland v. Williams, 896 A.2d 973 (Md. 2006))).

293. *See generally* NATAPOFF, *supra* note 50.

governments on their use of incentivized informants. And finally, this Comment identifies a pre-plea deal legal standard for informant disclosure under *Ruiz* in light of a circuit split among the U.S. Courts of Appeals.

A. Identifying and Defining Incentivized Informants: How Legislatures, Courts, and Other Governmental Actors Should Frame the Informant Issue

The first step to reduce false incentivized informant testimony is to define "incentivized informant." The second step is to decide what information affects these informants' credibility and should be collected and turned over to the accused and to the court. Legislatures, courts, and government actors in turn can use this information to propose various solutions to the incentivized informant issue.

1. "Incentivized Informant" Is a Witness Who Testifies in Exchange for a Benefit

The definition of "incentivized informant" determines the scope and effect that a solution, such as a statute or court rule, has on reforming informant use.[294] An incentivized informant is a witness who has an incentive to testify on behalf of the government.[295] The term has two parts: "incentivized" and "informant."

a. Government Actors Should Define "Incentive" as Certain Benefits Offered to Witnesses

An incentive is a reason or motivation for doing something.[296] In the informant context, this could be to escape criminal liability, obtain a reduced sentence, receive money, prevent friends or accomplices from being incarcerated, as well as myriad other reasons to testify for the government.[297] How "incentive" or similar terms like "benefit" or

294. *See, e.g.*, 725 ILL. COMP. STAT. 5/115-21 (2017) ("For the purposes of this Section, 'informant' means someone who is purporting to testify about admissions made to him or her by the accused while incarcerated in a penal institution contemporaneously.").

295. *See* E.S.S.B. 5038, 65th Leg., Reg. Sess. (Wash. 2017).

296. *See, e.g.*, *id.* ("'Benefit' means any deal, payment, promise, leniency, inducement, or other advantage offered by the state to an informant in exchange for his or her testimony, information, or statement"); 725 ILL. COMP. STAT. 5/115-21 ("any deal, promise, inducement, or benefit that the offering party has made or will make in the future to the informant").

297. NATAPOFF, *supra* note 50, at 28.

"inducement" are defined dictates what information the government must collect and disclose to the accused and the court.[298]

Academics and state legislatures have defined "incentive" several different ways.[299] For example, a bill proposed in the Washington State Legislature in the 2017 legislative session, Engrossed Substitute Senate Bill (ESSB) 5038, defined "benefit"—analogous to "incentive"—as the following:

> "Benefit" means any deal, payment, promise, leniency, inducement, or other advantage offered by the state to an informant in exchange for his or her testimony, information, or statement, but excludes a court-issued protection order. "Benefit" also excludes assistance that is ordinarily provided to both a prosecution and defense witness to facilitate his or her presence in court including, but not limited to, lodging, meals, travel expenses, or parking fees.[300]

ESSB 5038 limited the definition of incentives to those benefits promised by or expected from the government. Yet this definition does not capture other incentives that a witness might have to lie, such as escaping criminal liability or preventing a friend or family member from being incarcerated.[301] The government cannot know every benefit that an informant expects. But the government can—and should—know about promises that it makes to an informant.[302]

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298. *See* 725 ILL. COMP. STAT. 5/115-21 (requiring the government to disclose a jailhouse informant's testimonial history, promises made by the offering party, any recantations by the informant, and other information bearing on the informant's credibility); CAL. PENAL CODE § 1127a (West 2017) ("For purposes of subdivision (c), 'consideration' means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness.").

299. *See, e.g.*, NATAPOFF, *supra* note 50, at 28 (listing various informant incentives, including drugs, money, clothing, and other gifts); 725 ILL. COMP. STAT. 5/115-21(c)(2) ("[P]rosecution shall timely disclose . . . any deal, promise, inducement, or benefit that the offering party has made or will make in the future to the informant."); E.S.S.B. 5038.

300. E.S.S.B. 5038.

301. *See, e.g.*, State v. Statler, 160 Wash. App. 622, 630, 248 P.3d 165, 169 (2011) (finding three later-exonerated men guilty based on informant testimony); State v. Larson, 160 Wash. App. 577, 595, 249 P.3d 669, 677 (2011) (same); State v. Gassman, 160 Wash. App. 600, 607, 248 P.3d 155, 158 (2011) (same); *cf.* State v. Gassman, 175 Wash. 2d 208, 210, 283 P.3d 1113, 1114 (2012) (reversing sanctions against the government that it received because of constantly changing the defendants' alleged crime date). All three of these cases resulted in the wrongful conviction of three men because the testifying incentivized informant wanted his other three accomplices to remain free.

302. United States v. Bagley, 473 U.S. 667, 684 (1985).

This definition excludes from "benefit" something that is an ordinary transaction cost borne by the government.[303] These costs include per diem, housing, and transportation.[304] These were excluded from the definition of "benefit" in ESSB 5038 because they are so small that they are unlikely to act as an incentive for a witness to testify. This definition also helps reduce concerns about confidential informants, mentioned in Part I, by excluding some disclosures under a court-issued protection order.[305]

It is more difficult for the government to know a witness's subjective view of what a benefit is.[306] Despite this uncertainty, the government can often discover or anticipate what benefits a witness might expect and why.[307] For example, if the government has the discretion to significantly reduce a witness's sentence, but has not promised to do so, then this should still warrant disclosure to the defense.[308]

b. "Informant" Should Be Defined as a Witness Who Testifies for the Government in Exchange for a Benefit

The second term, "informant," is someone who testifies on behalf of the government in exchange for or in expectation of a benefit.[309] The informant is a government witness who has a stake in testifying at trial.[310] For example, Washington State's E.S.S.B. 5038 offers the following definition of "informant":

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303. E.S.S.B. 5038.

304. *Id.*

305. *Id.*; *see also* Roviaro v. United States, 353 U.S. 53, 62 (1957).

306. *See* 725 ILL. COMP. STAT. 5/115-21 (2017) (limiting the government's disclosure obligation to promises or offers that the government made to the informant, as well as other information that the government discovers through the course of its investigation).

307. CALIFORNIA JURY INSTRUCTIONS: CRIMINAL (CALJIC) 3.20 (2016) ("In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness."); 725 ILL. COMP. STAT. 5/115-21(c) (requiring the government to disclose any deal, promise, or inducement "that the offering party has made or will make in the *future* to the informant" (emphasis added)). The Illinois State government requires the prosecution anticipate future promises and disclose this to the defense.

308. THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 7 (2007), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf [https://perma.cc/M4Q5-PYST] (giving a list of jurisdictions whose jury instructions tell the jury to consider a witness's expected benefits for testifying, including Colorado, Connecticut, Illinois, Montana, Ohio, Oklahoma, and Wisconsin).

309. CALIFORNIA JURY INSTRUCTIONS: CRIMINAL, *supra* note 307; E.S.S.B. 5038.

310. *See* E.S.S.B. 5038 § 1(2)(a).

> (2)(a) "Informant" means the following individuals who provide information or testimony in exchange for, or in expectation of, a benefit: (i) Any criminal suspect, whether or not he or she is detained or incarcerated; and (ii) Any incarcerated individual. (b) An informant does not include an expert witness or a victim of the crime being prosecuted.[311]

An incentivized informant has something to gain from testifying.[312] It is legally acceptable for the government to use these types of witnesses.[313] But all material impeachment evidence about these witnesses must be turned over to the defense in anticipation of trial.[314] So, the next step is to determine what information materially affects an informant's credibility.

c. Determining the Criteria Material to an Informant's Credibility as a Witness

Material exculpatory impeachment evidence for a government witness must be turned over to the defense.[315] Whether evidence is material depends on if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the proceeding's outcome would have been different.[316]

The information that bears on an informant's credibility as a witness according to U.S. Supreme Court case law includes (1) prior inconsistent statements or false statements made by a witness or informant;[317] (2) any material exculpatory evidence favorable to the defendant that is known by others acting on the government's behalf;[318] (3) the prosecutor's

311. E.S.S.B. 5038; *see also* Robert M. Bloom, *Jailhouse Informants*, 18 CRIM. JUST. MAG. 1, (2003), http://www.americanbar.org/publications/criminal_justice_magazine_home/crimjust_spring2003_jailhouse.html [https://perma.cc/A38V-3Y3G] (criticizing the unreliability and history of using incentivized informants).

312. *See, e.g.*, H.B. 34, 85th Leg. Sess. (Tex. 2017) ("An attorney representing the state shall track . . . any benefits offered or provided to a person in exchange for testimony described by Subdivision (1).").

313. *See generally* Larson v. State, 194 Wash. App. 722, 725, 375 P.3d 1096, 1098 (2016), *review denied*, 186 Wash. 2d 1025, 385 P.3d 117 (2016); NATAPOFF, *supra* note 50, at 28.

314. Giglio v. United States, 405 U.S. 150 (1972).

315. *Id.*

316. Kyles v. Whitley, 514 U.S. 419, 440–41 (1995). One of the issues with materiality is that it can be difficult to assess and enforce. Whether something could reasonably affect the trial's outcome can usually be determined only when the trial is over or nearing completion. Moreover, even if something is material, a losing defendant would have to know about missing material evidence and press for its disclosure on appeal.

317. *See id.* at 453–54; *Giglio*, 405 U.S. at 153.

318. *Kyles*, 514 U.S. at 437.

knowing use of perjured testimony;[319] (4) charges the witness or informant is facing—if the charges are associated with a deal or bargain with the government;[320] (5) benefits the prosecution promises to the witness or informant;[321] and (6) prior criminal convictions.[322]

Those seeking to expand the scope of "material" information under *Brady* can do so using statutes, court rules, or other guidelines.[323] The following example is some of the material information required by a bill proposed in the Washington State Legislature in the 2017 legislative session:

> (a) The complete criminal history of the informant, including any pending criminal charges or investigations in which the informant is a suspect; (b) Any benefit the state has provided or may provide in the future to the informant in the present case, including any written agreement related to a benefit, and information related to the informant's breach of any conditions contained within the agreement; (c) The substance, time, and place of any statement allegedly given by the defendant to the informant, and the substance, time, and place of any statement given by the informant to law enforcement implicating the defendant in the crime charged, including the names of all persons present when any statement was allegedly given by the defendant to the informant . . . [and] (i) Any other material or information in the possession, custody, or control of the state that bears on the credibility or reliability of the informant or the informant's statement.[324]

These definitions—what "informant," "incentive," and "material" mean—lay the foundation for legislatures, courts, and other government actors to propose solutions for the incentivized informant issue. Going

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319. United States v. Agurs, 427 U.S. 97, 103 (1976).

320. United States v. Bagley, 473 U.S. 667 (1985). Some jurisdictions go as far as to require prosecutors to disclose all current charges against an informant, even if no deal or agreement is formally discussed. *See, e.g.*, Ruetter v. Solem, 888 F.2d 578, 581 (8th Cir. 1989) (holding that the government's failure to disclose to the defense that the government's key witness had applied for sentence commutation was a *Brady* violation which required reversing the defendant's conviction).

321. *Bagley*, 473 U.S. at 684.

322. *See id.* at 113–14 (holding that prosecutor's failure to disclose victim-witness's criminal record, though relevant under *Brady*, nonetheless did not require disclosure because it was not material to the case); *see also* WASH. SUPER. CT. CRIM. R. 4.7(a)(vi) (2016) ("[T]he prosecuting attorney shall disclose to the defendant . . . any record of prior criminal convictions known to the prosecuting attorney.").

323. *See* 725 ILL. COMP. STAT. 5/115-21 (2017) (requiring the government to turn over "any other information relevant to the informant's credibility").

324. E.S.S.B. 5038, 65th Leg., Reg. Sess. (Wash. 2017).

beyond current case law, these actors have a variety of options to reduce wrongful imprisonment caused by incentivized informant testimony: statutes, court rules, informant databases, and jury instructions.

B. State Statutes Can Protect and Bolster Brady*'s Constitutional Guarantees by Regulating Incentivized Informants*

State statutes are an effective way to regulate incentivized informant testimony.[325] As described earlier, these statutes can define "incentivized informant" and describe what information the government must collect and disclose.[326] These statutes can directly tell the government, including law enforcement and prosecutors, what information to collect and disclose.[327] Or, a statute may give discretion to the court or prosecutors on how to regulate informants.[328]

One example of a statute giving discretion to courts is pretrial reliability hearings.[329] A pretrial reliability hearing gives the presiding judge the ability to screen a potential witness and exclude this witness if the judge thinks that this witness is not credible.[330] This hearing is similar to in camera review and reliability hearings for experts.[331] Just like expert witnesses, the judge would determine whether the informant is credible enough and has sufficient knowledge to testify.[332]

Illinois currently uses pretrial reliability hearings to vet incentivized informants:

> The court shall conduct a hearing to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing. If the prosecution fails to show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial. At this hearing, the court shall consider the factors

325. *See* CAL. PENAL CODE § 1111.5 (West 2017); 725 ILL. COMP. STAT. 5/115-21; H.B. 34, 85th Leg. Sess. (Tex. 2017); E.S.S.B. 5038.

326. *See. e.g.*, 725 ILL. COMP. STAT. 5/115-21.

327. *See id.*

328. *Id.*

329. *Id.*

330. *Id.* ("If the prosecution fails to show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial.").

331. FED. R. EVID. 702; Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

332. *See* FED. R. EVID. 702.

> enumerated in subsection (c) as well as any other factors relating to reliability.[333]

While the pretrial reliability hearing can do some good, its ultimate effectiveness depends on what the judge decides is or is not reliable.[334] In addition, it takes from the trier of fact the ability to assess a witness's credibility.[335] Unlike expert testimony, a person's credibility is not based on technical information.[336] One could argue that the judge is so familiar with the criminal justice system that she is better suited to assess credibility than jurors. But this could also dangerously blur the line between the judge as the "gatekeeper" and the jury as the trier of fact.[337]

Another option that some statutes use is to require independent corroboration for informant testimony: there must be independent evidence verifying the truth of the informant's testimony, such as the defendant's DNA at the scene of the crime.[338] Indeed, the California Penal Code requires independent corroboration.[339] Yet even corroboration may not be enough in some situations.[340] In the *Statler* cases, discussed earlier in this Comment, police found a shotgun in Paul Statler's home.[341] The police noted that this shotgun matched a witness's description of the shotgun used in the robbery.[342] Then the prosecuting attorney's office used this independently corroborated information with false incentivized informant testimony at trial.[343] Three men—Statler, Gassman, and Larson—were convicted based on this information.[344]

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333. 725 ILL. COMP. STAT. 5/115-21.

334. *See* JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW, *supra* note 308, at 7.

335. ALEXANDRA NATAPOFF, ACLU, THE CONFIDENTIAL INFORMANT ACCOUNTABILITY ACT: PROPOSALS, https://www.aclu.org/sites/default/files/pdfs/drugpolicy/informant_proposedlegislation.pdf [https://perma.cc/HTA8-VES4].

336. *See Daubert*, 509 U.S. at 589–92.

337. *See generally id.*

338. "A jury or judge may not convict a defendant, find a special circumstance true, or use a fact in aggravation based on the uncorroborated testimony of an in-custody informant." CAL. PENAL CODE § 1111.5 (West 2017).

339. *Id.*

340. *See, e.g.*, Larson v. State, 194 Wash. App. 722, 726–27, 375 P.3d 1096, 1098–99 (2016), *review denied*, 186 Wash. 2d 1025, 385 P.3d 117 (2016) (reversing trial court's imposition of a heightened burden for claimants like Statler, Larson, and Gassman to get compensation under Washington's wrongful conviction statute).

341. *Larson*, 194 Wash. App. at 726–27, 375 P.3d at 1098–99.

342. *Id.*

343. *Id.*

344. *Id.* at 729, 375 P.3d at 1101.

They were later found innocent after officials discovered that the informant, Dunham, lied about the trio's involvement.[345]

An additional option is to use court rules to encourage government disclosure of informants.[346] These too can be pushed by state legislatures, or courts can take the initiative and pass these rules. Examples include the American Bar Association's Model Rule 3.8, Special Responsibilities of a Prosecutor, and states' equivalent ethical rules.[347] However, even court rules have limitations: government actors are rarely punished for violating Rule 3.8.[348]

Statutes can be used as one method to regulate incentivized informants in the criminal justice system. However, pushback in some state legislatures by law enforcement, prosecutors, and other organized groups may be a major obstacle to passing these types of statutes.[349]

C. Informant Databases Force Prosecutors and Law Enforcement to Account for Their Informants

As noted earlier in this Comment, the issue with incentivized informants is not solely with prosecutors. Law enforcement also plays a major role in the use of this type of testimony.[350] Sometimes prosecutors lack information about an informant that law enforcement possesses.[351]

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345. *See* Clouse, *supra* note 253.

346. *See* WASH. SUPER. CT. R. 4.7 (a)(vi) (2016).

347. MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2017); *see also* Wayne D. Garris, Jr., *Model Rule of Professional Conduct 3.8: The ABA Takes a Stand Against Wrongful Convictions*, 22 GEO J. LEGAL ETHICS 829, 836 (2009) (describing the potential for new provisions in the ethical rules to encourage prosecutors to take a more active role in preventing wrongful convictions).

348. *See* Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 300–01 (2001).

349. *See, e.g.*, E.S.S.B. 5038, 65th Leg., Reg. Sess. (Wash. 2017) (failing to pass informant reform bill in the state House after strong opposition by organized law enforcement and prosecutor interest groups—the Washington Association of Sheriffs and Police Chiefs (WASPC) and the Washington Association of Prosecuting Attorneys (WAPA)).

350. *See* STATE'S DUTY TO DISCLOSE EXCULPATORY MATERIAL EXTENDED BEYOND INDIVIDUAL PROSECUTOR ASSIGNED TO CASE, 20 NO. 10 CRIM. PRAC. REP. 3 ("Unknown to the prosecuting attorney, for the past 10 years the snitch had been a police informant for the local police department and even had his own confidential informant number." (citing Maryland v. Williams, 896 A.2d 973 (Md. 2006)).

351. *See generally* Youngblood v. West Virginia, 547 U.S. 867 (2006).

And what prosecutors do not know, they cannot disclose to the defense.[352]

Databases tracking informant information, including their names, promises the government offered them, and other information affecting informants' credibility is another solution.[353] This is a solution that can be self-enforcing, meaning law enforcement and prosecutors collect this information as a matter of internal policy.[354] But experience suggests that consistent compliance to collect and maintain an informant database may be better done through statute.[355]

Federal law does not mandate that prosecutors and law enforcement share databases cataloging informants.[356] However, databases are a practical way to make sure prosecutors have all the information that they need to turn over to the defense.[357] Furthermore, this information should be available to the court or the defense when noncompliance is suspected. Databases are also a way for prosecutors to satisfy their constitutional "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[358]

Even though databases can be used to expose the information and history of an informant, a proper compliance mechanism is required.[359] For state legislatures considering enacting a database law for informants, the Clark County, Nevada case is instructive: legislators created a subcommittee to investigate informant databases due to a lack of entries

352. Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 273 ("[T]he answer to *Brady* violations might be finding a way to relieve police and prosecutors of the responsibility for identifying 'exculpatory' evidence rather than punishing them for perceived misconduct.").

353. NEVADA LEG. 2016 INTERIM MINUTES, *supra* note 266, at 1.

354. NEVADA LEG. JULY 7, 2008 MINUTES, *supra* note 270, at 70 (statement of Christopher J. Lalli).

355. *See* NEVADA LEG. 2016 INTERIM MINUTES, *supra* note 266, at 1.

356. *See* Associated Press, *Authorities Fear Dangers of Online 'Rat' Database*, NBC NEWS (Nov. 30, 2006, 10:05 PM), http://www.nbcnews.com/id/15978145/ns/us_news-crime_and_courts/t/authorities-fear-dangers-online-rat-database/#.WjS_3d-nHyQ [https://perma.cc/5PT5-3ASK].

357. *See Williamson*, *supra* note 131 ("The database tracking inmates' movements around the jail and the reason for those movements is significant, because Orange County law enforcement and prosecutors were in the habit of placing targeted suspects in proximity to criminal informants.").

358. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995).

359. *See, e.g.*, NEVADA LEG. 2016 INTERIM MINUTES, *supra* note 266, at 1 (discussing the need for legislative action after a county prosecuting attorney's office failed to maintain an informant database).

in a self-enforced CCDAO—a prosecutor's office—informant database.[360]

Whether the CCDAO's lack of action came from willful disobedience or mere neglect,[361] a law requiring prosecutors to catalog informants in a database may encourage greater compliance with informant databases.

Informant databases should be a joint responsibility for law enforcement and prosecutors. In this way, prosecutors are not solely liable for failures to provide information about government informants.[362] This system is also more robust because law enforcement is usually the first government actor to deal with informants.[363] If law enforcement and prosecutors are forced to work together in maintaining an informant database, then neither can blame the other for failing to provide this information. Both would be legally required to comply. The onus would not just fall on prosecutors to gather and maintain an informant database.

D. Jury Instructions: Alerting Jurors About Non-Credible Witnesses Is an Incremental Step to Regulate the Effect of False Incentivized Informant Testimony

Several jurisdictions have enacted jury instruction requirements that warn juries of the incentives that witnesses may have to testify and lie.[364] The purpose is to ensure that jurors adequately account for potentially dubious testimony from incentivized informants.[365] But empirical

360. Barnes, *supra* note 264; *see also* NEVADA LEG. 2016 INTERIM MINUTES, *supra* note 266, at 1.

361. Records strongly indicate that the CCPAO was neglectful and did not make the time to enter informants into the database. An email from the Chief Deputy District Attorney to the CCPAO stated in part: "[s]eems like it's time for a little reminder about the inducement index . . . I received a stream of emails to make entries into the index after my last reminder. But, the stream has dried up. So, either no inducements are being given or else people are forgetting about the index." Barnes, *supra* note 264.

362. Though it is, ultimately, the prosecutors who face a motion for a new trial if law enforcement fails to turn over material information about an informant. Youngblood v. West Virginia, 547 U.S. 867 (2006).

363. *See* NATAPOFF *supra* note 50, at 84–85 (noting that police are subject to few documentation requirements, and their decisions to make an arrest or investigate a crime are not usually subject to judicial challenge or review).

364. *See, e.g.*, CALIFORNIA JURY INSTRUCTIONS: CRIMINAL, *supra* note 307 ("The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness.").

365. *See, e.g.*, *Instructing About Informer's Testimony*, 2 FEDERAL TRIAL HANDBOOK: CRIMINAL § 75:22 (4th ed.) ("While the testimony of an informer is competent evidence, it should be accompanied by instructions designed to call the attention of the jury to the character of the

evidence indicates that these jury instructions may not have a significant impact in preventing wrongful convictions.[366]

Several states have jury instructions specifically for informant testimony.[367] One example of this type of jury instruction comes from North Carolina:

> You may find from the evidence that a State's witness is interested in the outcome of this case because of the witness' activities as an [informer] [undercover agent]. If so, you should examine such testimony with care and caution in light of that interest. If, after doing so, you believe the testimony in whole or in part, you should treat what you believe the same as any other believable evidence.[368]

Another example of jury instructions addressing informant testimony comes from Alaska:

> An informant is someone who provides evidence against someone else for money or to escape or reduce punishment for [his] [her] own misdeeds or crimes. The testimony of an informant must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informant's testimony has been affected by the agreement [he] [she] has with the prosecution or [his] [her] own interest in the outcome of this case or by prejudice against the defendant.[369]

Even if jury instructions do not often affect a jury's decision in incentivized informant cases, these instructions are a step in the right

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informer, leaving to the jury the question of the value and credibility of his testimony. . . However, where the informer's testimony has been adequately corroborated, no specific instruction relating directly to the testimony of informer is required." (citations omitted)).

366. NATAPOFF, *supra* note 50, at 178; *see also* Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUM. BEHAV. 137 (2008) (describing two small-scale experiments showing that jurors' verdict decisions did not change appreciably when they were told that a witness was getting a benefit to testify).

367. *See* ALASKA PATTERN JURY INSTRUCTIONS (CRIMINAL) 1.23 (2017); CALIFORNIA JURY INSTRUCTIONS: CRIMINAL, *supra* note 307.

368. NORTH CAROLINA PATTERN JURY INSTRUCTIONS: CRIM 104.30 (2015); *see also* United States v. Luck, 611 F.3d 183 (4th Cir. 2010) (finding ineffective assistance of counsel when the defendant's counsel failed to request an informant jury instruction); Bryan Gates, *Failure to Request a Jury Instruction on Informants*, N.C. CRIM. L.: UNC SCH. GOV'T BLOG (July 13, 2010), http://nccriminallaw.sog.unc.edu/failure-to-request-a-jury-instruction-on-informants/ [https://perma.cc/V83F-7WXC] (suggesting that a defense counsel's failure to request an informant jury instruction after *United States v. Luck* is automatically ineffective assistance of counsel).

369. ALASKA PATTERN JURY INSTRUCTION (CRIMINAL), *supra* note 367.

direction.[370] Instead of taking the government's witness at face value as a credible actor, the jury is asked to consider whether the witness has any incentives to lie. As such, a jury instruction, even if negligible in application, is better than nothing. But a more effective step in the right direction in preventing wrongful imprisonment from incentivized informants would involve disclosing informant information during plea deals.[371]

IV. AFTER *RUIZ*: REQUIRING INCENTIVIZED INFORMANT DISCLOSURE BEFORE PLEA DEALS WHEN THE GOVERNMENT'S CASE RELIES ON MATERIAL EXCULPATORY EVIDENCE SUPPORTING ACTUAL INNOCENCE

While this Comment proposes solutions to prevent wrongful imprisonment caused by false incentivized informant testimony for a defendant facing trial, plea deals comprise the bulk of how criminal cases end.[372] Indeed, out of 83,941 federal cases in 2010, 96.8% of these cases ended in plea deals instead of a trial.[373] And at the state level, in 2006, 94% of the 592,420 sample state felony cases ended in guilty pleas.[374] Yet in *United States v. Ruiz*, the Supreme Court found that the Constitution generally does not require pre-guilty plea disclosure of impeachment information partly because it is difficult to tell when this information is useful to the accused.[375]

This Part first dissects *Ruiz*'s analysis. It compares *Ruiz* to different U.S. Courts of Appeals' interpretations.[376] It also describes how *Ruiz*,

370. NATAPOFF, *supra* note 50, at 178.

371. *Id.* at 81.

372. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf [https://perma.cc/LY56-T3NC] ("[S]cholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process [of plea deals].").

373. 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 50.

374. SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 25 tbl.4.1 (2010), https://www.bjs.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/NK4P-PXPK]. The total sample size of state court guilty pleas was 592,420. *Id.* at 43. The average guilty plea prison sentence was 1.4 months compared to 8.9 months for trial cases. *Id.* at 44. The large discrepancy between plea sentences and trial sentences may be attributed to higher penalties—or less to lose—under certain circumstances, which cause a defendant to take their case to trial.

375. United States v. Ruiz, 536 U.S. 622, 629 (2002).

376. *See, e.g.*, Robertson v. Lucas, 753 F.3d 606, 622 (6th Cir. 2014) ("We do not decide whether appellants have a constitutional right to receive exculpatory *Brady* material from law enforcement prior to entering into a plea agreement.").

U.S. Supreme Court precedent, and other case law support a standard which sometimes requires the government to turn over exculpatory informant information before a plea deal. Finally, this Part offers a legal standard consistent with *Ruiz*'s reasoning that courts can follow to require the government to turn over this information. This is especially important, because some U.S. Courts of Appeals are split on how to interpret *Ruiz* in the plea deal context.[377]

A. Ruiz*'s Reasoning and Other Supreme Court Precedent Support a Standard to Require Disclosing Material Exculpatory Evidence Before Plea Deals*

Ruiz leaves open the possibility that, if exculpatory evidence is material to the accused's defense, or a lack of information about a dubious informant prevents a valid constitutional waiver for a valid plea deal, then the government must turn over exculpatory information about an informant.[378] Both arguments come from *Ruiz*'s narrow case-specific analysis and U.S. Supreme Court precedent.

As a part of the *Ruiz* Court's reasoning, it considered the ability of a court to determine whether information about an informant is useful to the accused.[379] However, if the government's case stands or falls based on an informant's testimony—material exculpatory evidence supporting factual innocence—a court can readily determine that this information would be useful to the accused.[380] That is, false informant testimony that is the primary basis for the government's case is not a "degree of help" that will "depend upon the defendant's own independent knowledge of the prosecution's potential case."[381] Unlike impeachment evidence, disclosing exculpatory evidence would make a potentially innocent suspect feel less pressure to agree to a plea deal. In contrast, a guilty suspect would not get this information and would feel more pressure to

377. *See* United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010) (noting a split between the Fifth and Seventh Circuits' interpretation of *Ruiz*).

378. *Ruiz*, 536 U.S. at 629.

379. *Id.* at 639. For a brief discussion countering Justice Thomas's valid concern in his concurrence about improperly relying on a "usefulness standard," see *supra* note 250.

380. *See, e.g.*, McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003) ("Thus, we have a question not directly addressed by *Ruiz*: whether a criminal defendant's guilty plea can ever be 'voluntary' when the government possesses evidence that would exonerate the defendant of any criminal wrongdoing but fails to disclose such evidence during plea negotiations or before the entry of the plea.").

381. *Ruiz*, 536 U.S. at 630.

accept a plea deal.[382] As the Seventh Circuit properly notes, government knowledge about an informant may sometimes rise to the level of material exculpatory evidence implicating due process and the validity of constitutional waivers.[383]

The *Ruiz* Court also stated that a valid constitutional waiver of a plea deal must be knowing, intelligent, voluntary, and made with sufficient awareness, but that it does not require complete knowledge of the information.[384] The Court acknowledged that sometimes the accused must know some of this information, but that the defendant Ruiz did not need to know these facts in her case given that immigration agents had *already found* thirty kilograms of marijuana in her luggage.[385] There was little support in Ruiz's case that she needed to know the impeachment information to make a voluntary waiver.

Furthermore, the U.S. Supreme Court in *Boykin v. Alabama*[386] reiterated a long-held principle: a guilty plea cannot be truly voluntary unless the defendant understands the law in relation to the facts.[387] Unlike Ruiz's case, where additional facts about impeachment evidence would not help her understanding of her case when she was caught with over sixty-five pounds of marijuana, other cases would differ.[388]

When an informant's testimony provides the primary evidence pointing toward guilt, and the government knows of its falsity, then the accused may not understand the true facts of the case without knowing key information about the informant.[389] In these cases, defendants cannot

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382. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ [https://perma.cc/G9R4-2W2C] ("Against this background, the information-deprived defense lawyer, typically within a few days after the arrest, meets with the overconfident prosecutor, who makes clear that, unless the case can be promptly resolved by a plea bargain, he intends to charge the defendant with the most severe offenses he can prove.").

383. *See Mangialardi*, 337 F.3d 782.

384. *Ruiz*, 536 U.S. at 630.

385. *Id.* at 625.

386. 395 U.S. 238 (1969).

387. *Id.* at 243 n.5 (citing Johnson v. Zerbst, 304 U.S. 458, 466 (1938)).

388. *Ruiz*, 536 U.S. at 625.

389. *See Zerbst*, 304 U.S. at 466 ("[A] prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention."). This Comment notes the very real danger that some guilty criminals will learn that the state's evidence is weak or the evidence is something not tying them to their crime, refuse a plea deal, risk trial, and in some cases, get away without punishment. This risk is real. However, given the duty of the government to protect a person's life, liberty, and the fact that nearly 50% of wrongful capital conviction cases are attributable to dubious snitch testimony, the risk is well worth it. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Warden, *supra* note 13.

validly waive their constitutional rights and accept a plea deal. This is because defendants are not aware of the relevant circumstances and likely consequences of going to trial, as opposed to accepting a guilty plea.

The *Ruiz* Court uses the analogy of a defendant waiving her right to remain silent: she can waive this right even though she does not know the specific questions that she will be asked.[390] But this waiver is different than a plea deal waiver. A waiver of the right to remain silent is premised on answering a set of any questions. But a plea deal waiver is premised on the accused's belief that the government has a legitimate, non-fabricated, case.[391]

Moreover, targeting situations where the government's case is mostly based on an informant's testimony, and the government has material exculpatory evidence supporting actual innocence, would not overly burden the government in its use of informants. That is because this only applies to a subset of cases where the government primarily relies on informant testimony for its case and the government knows it is false. Yet even if requiring the government to turn over this type of information before a plea deal involves a lot of cases, this is more cause for concern: many more people are at risk of pleading guilty to crimes that they did not commit.[392]

Ruiz and other U.S. Supreme Court precedent leave open—and strongly suggest—a constitutional requirement that the government turn over material exculpatory evidence supporting factual innocence to the accused before plea deals.[393]

Indeed, the Seventh Circuit was correct in applying a distinction between exculpatory and impeachment evidence.[394] Material evidence supporting factual innocence bears on whether the guilty plea is voluntary because a defendant must understand the basic facts of their case.[395] Mere impeachment evidence goes to credibility, which does not affect voluntariness of a guilty plea.[396] That is, impeachment evidence

390. *Ruiz*, 536 U.S. at 632.

391. *See* McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003).

392. *See* Rakoff, *supra* note 382.

393. *Compare* United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (per curiam) (rejecting distinction between impeachment and exculpatory evidence under Ruiz in the context of plea deals), *with Mangialardi*, 337 F.3d at 787–88 (stating that when the government knowingly and primarily relies on non-credible informant testimony, then *Ruiz* strongly suggests disclosure before a guilty plea).

394. *See generally Mangialardi*, 337 F.3d 782.

395. *See generally* Boykin v. Alabama, 395 U.S. 238 (1969).

396. *See* United States v. Ruiz, 536 U.S. at 623.

does not go to the facts of the case, but the weight of the government's case. In contrast, material exculpatory evidence—the government's knowledge that the accused is innocent because the informant lied—goes to the core facts of the case.[397] This is much like the video evidence in *Alvarez v. City of Brownsville*.[398] In *Alvarez*, there was material exculpatory evidence showing that the defendant was actually innocent: the video showed that the defendant did not assault the detention officer and that this detention officer was lying.[399]

Similarly, the Second Circuit supports a pre-plea requirement for exculpatory information.[400] Prior to *Ruiz*, the Second Circuit found that the government's obligation to disclose *Brady* materials is relevant to the accused's decision to plead guilty.[401] Specifically, a defendant is entitled to full awareness of evidence favorable to the accused and known by the government.[402] This included material exculpatory information about informants.[403]

Additionally, the Tenth Circuit noted that *Ruiz* did not address whether the government is required to disclose exculpatory, rather than impeachment, evidence before a plea deal.[404] The Fourth Circuit also noted this split in 2010.[405]

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397. *See Mangialardi*, 337 F.3d at 788.

398. 860 F.3d 799 (5th Cir. 2017).

399. *Id.* at 800.

400. *See* United States v. Persico, 164 F.3d 796, 804–05 (2d. Cir. 1999).

401. *Id.* at 804.

402. *Id.*

403. *Id.* at 804–05. Even though *Perisco* was decided before *Ruiz*, it was based on both material impeachment and exculpatory evidence. Post *Ruiz*, lower district courts in the Second Circuit continue to require pre-plea disclosures for material exculpatory evidence. *See, e.g.*, United States v. Danzi, 726 F. Supp. 2d 120, 128 (D. Conn. 2010) ("[T]he Second Circuit has not yet had an opportunity to consider whether *Ruiz*'s reasoning—that impeachment material need not be disclosed to a criminal defendant pre-plea—also encompasses exculpatory material . . . [t]he Court declines the Government's invitation to hold that *Ruiz* applies to exculpatory as well as impeachment material"). *But see* Friedman v. Rehal, 618 F.3d 142, 154 (2d Cir. 2010) ("[T]he 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." (internal citations omitted)).

404. United States v. Webb, 651 Fed. App'x 740, 744 (10th Cir. 2016) (noting the circuit split on the pre-plea issue, but not deciding it because the government did not possess the information before the plea). These pre-plea issues raise another important question: is the government required to fix the issue once it gets exculpatory information after a guilty plea and sentencing? The answer, at least according to the American Bar Association, is yes. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2017).

405. United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010); *see also* Price v. U.S. Dep't of Justice Att'y Office, 865 F.3d 676, 681 (D.C. Cir. 2017) ("a 'prosecutor is permitted to consider

Given that U.S. Supreme Court precedent and the U.S. Constitution suggest some form of pre-plea disclosure, the final task is to articulate a legal standard that conforms with the *Ruiz* Court's analysis.

B. The Plea Deal Standard Completing Ruiz*: When the Government Must Turn over Material Exculpatory Evidence to the Accused Before a Plea Deal*

The *Ruiz* Court's major concerns about pre-plea disclosures were whether a court could tell if the evidence in question was material, and about interfering with the government's use of informants.[406] For the first concern, if the government's case primarily relies on an informant's testimony, where the government knows of the accused's factual innocence, then this evidence should automatically be disclosed to the defense.[407] Indeed, Justice Thomas in his concurrence noted the *Ruiz* majority's reliance on the 'usefulness to the accused' standard: "[t]he Court, however, suggests that the constitutional analysis turns in some part on the 'degree of help' such information would provide to the defendant at the plea stage."[408] Similarly, for the second concern, the government only has to disclose information about informants in limited situations where the government has evidence of the accused's factual innocence.[409]

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only legitimate criminal justice concerns in striking [a plea] bargain'" and "[t]his set of legitimate interests places boundaries on the rights that can be bargained away in plea negotiations" (citations omitted)); Town of Newton v. Rumery, 480 U.S. 386, 401 (1987) (O'Connor, J., concurring).

406. *See generally* United States v. Ruiz, 536 U.S. 622, 629 (2002).

407. Disclosure is compelled not under *Brady*, but to comply with the U.S. Constitution.

408. *Id.* at 633. Justice Thomas opposed the majority's constitutional analysis of providing information before plea deals based on the usefulness of certain types of information to the defendant or the accused. He thought this was wrong because *Brady*—the majority's focal case in *Ruiz*—strictly focused on avoiding an unfair *trial* to the accused. *Id.* at 633–34. He makes a good point. However, even if the majority improperly relied on *Brady* for its "usefulness to the defendant or accused" analysis, their conclusion that sometimes this information may have to be provided before plea deals is still proper when relying on two separate, more sound standards this Comment previously raised: (1) a guilty plea cannot be truly voluntary unless the defendant understands the law in relation to the *facts*, Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969) (citing Johnson v. Zerbst, 304 U.S. 458, 466 (1938) (emphasis added)); and (2) there must be an adequate record for the court to review to ensure that the accused fully understands the plea and its consequences. *Boykin*, 395 U.S. at 243–44 ("When the judge discharges that function, he leaves a record adequate for any review that may be later sought . . . and forestalls the spin-off of collateral proceedings that seek to probe murky memories." (citations omitted)).

409. The government may also request a court-issued protection order. *See, e.g.*, E.S.S.B. 5038, 65th Leg., Reg. Sess. (Wash. 2017) (allowing the government to apply for a court-issued protection order to protect a witness's identity).

Thus, consistent with the Seventh Circuit's position, this Comment proposes the following standard for when the government must turn over material exculpatory evidence about an informant:

> When the government's case primarily relies on informant testimony that it knows is false and shows actual innocence, then the government must disclose this information before a guilty plea. The government's knowledge of the accused's factual innocence, without the accused's knowledge, means that the accused cannot be sufficiently aware of the facts needed to make a voluntary waiver of the accused's constitutional rights.[410]

Government power's coercive nature and an accused's inability to be sufficiently aware that the government is relying on false informant testimony requires better disclosure. When the government's case mostly depends on informant testimony, evidence of factual innocence should be given to the accused before a plea deal.[411] Especially because it is very rare that the accused will accept a plea deal, later discover that most of the government's case was based on unreliable informant testimony, and successfully appeal their sentence, without spending a long time in jail or prison.[412]

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410. *See* McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003); *Boykin*, 395 U.S. at 243 n.5 (1969) (citing *Zerbst*, 304 U.S. at 466). This standard may also be applied to the non-informant context.

411. *See* Cairel v. Alderden, 821 F.3d 823 (7th Cir. 2016); *Mangialardi*, 337 F.3d at 787 ("The Supreme Court's decision in *Ruiz* strongly suggests that a *Brady*-type disclosure might be required under the circumstances of this particular case."); Scott Baker & Claudio Mezzetti, *Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial*, 17 J. L. ECON. & ORG. 149 (2001); Rakoff, *supra* note 382; Matthew Clarke, *Dramatic Increase in Percentage of Criminal Cases Being Plea Bargained*, PRISON LEGAL NEWS (Jan. 15, 2013), https://www.prisonlegalnews.org/news/2013/jan/15/dramatic-increase-in-percentage-of-criminal-cases-being-plea-bargained/ [https://perma.cc/SR77-K8W7]; Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html [https://perma.cc/JK9Q-4RUN]; Christine Dempsey, *State Victim Advocate: Too Many Plea Deals*, HARTFORD COURANT (Nov. 19, 2010), http://articles.courant.com/2010-11-19/news/hc-victim-advocate-request-1120-20101119_1_plea-bargains-michelle-cruz-trials [https://perma.cc/EFP6-DJRX]; *The Plea*, *Introduction*, FRONTLINE PBS (Jun. 17, 2004), http://www.pbs.org/wgbh/pages/frontline/shows/plea/etc/synopsis.html [https://perma.cc/38GJ-LAMN] ("[The judge] told me point blank—he said, "I will give your son 25 to life, so you better take the plea, or if you don't take the plea, he's getting it." (internal quotations omitted)); *The Plea*, *Interview with Defense Attorney Stephan Bright*, FRONTLINE PBS (Jan. 29, 2004), http://www.pbs.org/wgbh/pages/frontline/shows/plea/interviews/bright.html [https://perma.cc/T8MY-TM8V] ("One reason that a lot of people plead guilty is because they're told they can go home that day because they'll get probation. What they usually don't take into account is that they're being set up to fail.").

412. Goode, *supra* note 411.

CONCLUSION

Reducing wrongful imprisonment caused by false informant testimony requires two steps: (1) determining the type of information that affects these informants' credibility and how it should be collected, and (2) turning over this information to the accused and the court so that all actors can accurately assess these informants' credibility.

By redefining what "material" evidence is, legislatures, courts, and government actors can extend *Brady*'s scope to make the government more rigorously assess their use of incentivized informants. Furthermore, enhanced rules for collecting and disclosing information about informants increases the chances of finding not only pertinent credibility information but also material *Brady* evidence that may not have been otherwise discovered. These rules should apply to plea deals for both impeachment evidence and material exculpatory evidence.

Lastly, *Ruiz*'s holding leaves open the opportunity to require the government to turn over material exculpatory evidence about informants that show the accused's actual innocence.[413] Because plea deals cover at least 95% of all criminal cases, both state and federal, this change would make a huge difference.[414] At the very least, recent informant scandals—and disputes among the U.S. Courts of Appeals—warrant another look at *Ruiz* and how it is interpreted.[415] In light of this, the U.S. Supreme Court ought to reexamine and clarify its position in *Ruiz*. A desire for efficiency and a loyalty to precedent should not override a person's core constitutional right of due process of law.[416]

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413. *See* United States v. Ruiz, 536 U.S. 622, 629 (2002).

414. PLEA AND CHARGE BARGAINING, *supra* note 372; 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 50; FELONY SENTENCES IN STATE COURTS, *supra* note 374.

415. Barnes, *supra* note 264; *see also* Dalton, *supra* note 215; United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010) ("To date, 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.").

416. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § I; Arizona v. Gant, 556 U.S. 332, 351 (2009) ("The doctrine of stare decisis does not require us to approve routine constitutional violations.").