NOTES

DOES *BRADY* APPLY TO SUPERVISED RELEASE REVOCATION HEARINGS?

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Many federal offenders face a term of supervised release upon leaving prison. The successor to the federal parole system, supervised release places conditions upon individuals' freedom. Violation of a condition may result in revocation of release and reimprisonment. To revoke release, the government must prove to a judge by a preponderance of the evidence that a violation occurred. At this proceeding, known as a "revocation hearing," the individual may contest the alleged violation and present their own evidence.

Under Brady v. Maryland *and its progeny, due process requires the government to disclose material exculpatory evidence to criminal defendants. This Note examines the potential application of the* Brady *right to disclosure in supervised release revocation hearings. Lacking clear guidance, federal courts differ in their application of this right in revocation hearings. This Note discusses this divergence within the federal system as well as the corresponding arguments that courts put forth.*

This Note then argues that the U.S. Supreme Court's due process framework supports application of Brady *to supervised release revocations. This Note also argues that* Brady *application is supported by the intertwinement of the* Brady *right and the right to effective counsel, as well as the Court's provision of counsel to contested revocations. Finally, this Note addresses arguments against applying* Brady *and contends they are unavailing.*

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INTRODUCTION

As of September 2021, 108,932 individuals were serving terms of supervised release.[1] The successor to the federal parole system,[2] supervised release places conditions upon individuals released from terms of incarceration.[3] Overseen by probation officers,[4] these conditions range from prohibitions on committing crimes to undergoing regular drug testing.[5] Courts may also tailor further conditions related to an offender's history.[6] The program is designed to be rehabilitative, easing the transition back into the community.[7]

1. *Judicial Business 2021*, U.S. CTS., https://www.uscourts.gov/statistics-reports/judicial-business-2021 [https://perma.cc/A3UX-V8GD] (last visited Sept. 2, 2022).

2. *See* United States v. Reyes, 283 F.3d 446, 458 (2d Cir. 2002) (describing supervised release as "the reformed successor to federal parole").

3. *See* 18 U.S.C. § 3583(d) (listing the conditions "courts shall order, as an explicit condition of supervised release").

4. *See id.* § 3603(2) (requiring probation officers to "keep informed . . . as to the conduct and condition of a . . . person on supervised release").

5. *See id.* § 3583(d); *see also* U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 10 n.44 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf [https://perma.cc/PB4G-HYV2] (listing mandatory conditions).

6. *See* 18 U.S.C. § 3583(d); *see also* U.S. SENT'G COMM'N, *supra* note 5, at 10. Conditions may include, for example, maintaining employment and refraining from alcohol abuse. *Id.*

7. *See* Johnson v. United States, 529 U.S. 694, 708–09 (2000) ("The congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from the prison to liberty.").

If an individual violates a condition, their release may be revoked.[8] As a result, they may be imprisoned for up to five years,[9] in addition to a possible new term of supervision upon release.[10] From April 2017 to March 2020, over one-third of all supervised release cases ended in revocation rather than completion of the sentence.[11] As Judge Jack B. Weinstein has noted, revocation cuts to the core of the program's transitional purpose: "Every time a connection is broken with the world outside of prison . . . it probably becomes more difficult to reconnect."[12]

Before a term of release may be revoked, a revocation hearing must be held.[13] Here, a judge acts as the fact finder to determine both whether a violation occurred and whether revocation is the appropriate response.[14] The government is represented by a United States Attorney[15] and must establish guilt by a preponderance of the evidence.[16] The individual is entitled to several rights, including the right to counsel and to present evidence, along with a limited right to cross-examination.[17]

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8. 18 U.S.C. § 3583(e)(3); *see also* U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 8 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf [https://perma.cc/Q6WQ-CLFV] ("[I]f an offender violates a condition of supervision . . . [the court] may revoke the offender's term of supervision.").

9. 18 U.S.C. § 3583(e)(3) ("[A] defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case . . . .").

10. 18 U.S.C. § 3583(h) ("When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment.").

11. *Table E-7A—Federal Probation System Federal Judicial Caseload Statistics (March 31, 2020)*, U.S. CTS., https://www.uscourts.gov/statistics/table/e-7a/federal-judicial-caseload-statistics/2020/03/31 [https://perma.cc/C4F4-FHKV] (last visited Sept. 2, 2022) (click on "DOWNLOAD DATA TABLE") (34.2 percent from April 1, 2019 to March 31, 2020); *Table E-7A—Federal Probation System Federal Judicial Caseload Statistics (March 31, 2019)*, U.S. CTS., https://www.uscourts.gov/statistics/table/e-7a/federal-judicial-caseload-statistics/2019/03/31 [https://perma.cc/5P4Z-BEGL] (last visited Sept. 2, 2022) (click on "DOWNLOAD DATA TABLE") (35 percent from April 1, 2018 to March 31, 2019); *Table E-7A—Federal Probation System Federal Judicial Caseload Statistics (March 31, 2018)*, U.S. CTS., https://www.uscourts.gov/statistics/table/e-7a/federal-judicial-caseload-statistics/2018/03/31 [https://perma.cc/U87V-TCQX] (last visited Sept. 2, 2022) (click on "DOWNLOAD DATA TABLE") (35.6 percent from April 1, 2017 to March 31, 2018).

12. United States v. Trotter, 321 F. Supp. 3d 337, 340 (E.D.N.Y. 2018).

13. FED. R. CRIM. P. 32.1(b)(2); *see also* U.S. SENT'G COMM'N, *supra* note 8.

14. 18 U.S.C. § 3583(e); *see also* U.S. SENT'G COMM'N, *supra* note 8 (detailing "the procedure courts follow to determine [both] whether an offender has violated . . . supervised release" as well as "the appropriate sentence following a violation").

15. *See* United States v. Pearson, No. 08-20215, 2012 WL 2501118, at *3 (E.D. Mich. June 28, 2012) ("If an application is made for revocation of supervised release . . . the United States Attorney is to prosecute the action and present evidence in support of the allegations of a violation." (citing United States v. Burnette, 980 F. Supp. 1429, 1434 (M.D. Ala. 1997))).

16. 18 U.S.C. § 3583(e)(3); *see also* U.S. SENT'G COMM'N, *supra* note 5, at 36–37 ("At the revocation hearing, the government—typically represented by an assistant United States attorney—bears the burden of proving an alleged violation by a preponderance of evidence.").

17. FED. R. CRIM. P. 32.1(b)(2)(C)–(D); *see also* U.S. SENT'G COMM'N, *supra* note 5, at 36.

While there are limits on the admission of hearsay,[18] neither the Federal Rules of Evidence[19] nor the Sixth Amendment right to confront adversarial witnesses apply.[20]

In a pair of 1970s parole-era decisions, the U.S. Supreme Court addressed the constitutional due process protections accorded to individuals facing revocation of probation or parole.[21] These decisions have been uniformly applied to supervised release.[22] One aspect of due process the Court did not address, however, was the scope of its holding in *Brady v. Maryland*[23] that prosecutors must disclose material exculpatory evidence to criminal defendants.[24] In particular, the Court has not addressed whether *Brady* applies to supervised release revocation, nor revocation hearings in general.[25] Thus, it is unclear whether individuals facing revocation of supervised release are entitled to disclosure of evidence supporting their innocence.[26]

18. *See* United States v. Stanfield, 360 F.3d 1346, 1360 (D.C. Cir. 2004) ("[H]earsay evidence may be admitted in probation revocation hearings if it bears sufficient indicia of reliability."); *see also* U.S. SENT'G COMM'N, *supra* note 8 (noting that evidence must bear "sufficient indicia of reliability").

19. FED. R. EVID. 1101(d)(3); *see also* United States v. Williams, 847 F.3d 251, 253 (5th Cir. 2017) (noting that "the Federal Rules of Evidence do not apply" to a revocation hearing).

20. United States v. Williams, 443 F.3d 35, 45 (2d Cir. 2006) ("[T]he Confrontation Clause of the Sixth Amendment does not apply to supervised-release revocation hearings." (citing United States v. Aspinall, 389 F.3d 332, 342–43 (2d Cir. 2004))); *see also* Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 617 n.210 (2020) (collecting cases).

21. *See* Morrissey v. Brewer, 408 U.S. 471 (1972) (addressing due process protections for parole revocation); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (holding that probation revocation is subject to the same due process as parole).

22. *See* Robert McClendon, *Supervising Supervised Release: Where the Courts Went Wrong on Revocation and How* United States v. Haymond *Finally Got It Right*, 54 TULSA L. REV. 175, 186 (2018); *see, e.g.*, United States v. Hall, 419 F.3d 980, 985 n.4 (9th Cir. 2005) ("Parole, probation, and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner.").

23. 373 U.S. 83 (1963).

24. *See id.* at 87 (holding that failure to produce evidence "favorable to an accused" violates due process "where the evidence is material either to guilt or punishment").

25. *See* United States v. Nix, No. 2:08-cr-00283-6, 2017 WL 2960520, at *2 (D. Nev. July 11, 2017) (discussing disparate treatment of *Brady*'s application to revocation); United States v. Rentas-Felix, 235 F. Supp. 3d 366, 371 (D.P.R. 2017) (noting that courts have "questioned" whether *Brady* applies to revocation); *see also Welcoming* Brady *to Probation Proceedings*, 16 CRIM. PRAC. REP. 5 (2002) ("Most courts have not determined whether *Brady* is applicable in the context of probation revocation hearings.").

26. *Compare Nix*, 2017 WL 2960520, at *2 ("Defendant's assertion that the principles of [*Brady*] are applicable to revocation proceedings is fatally undermined by the case law."), *and* United States v. Jackson, No. 4:02-CR-00094-01-WRW, 2009 WL 1690300, at *1 (E.D. Ark. June 16, 2009) ("Defendant has cited, and I can find, no authority to support his position that *Brady* applies to revocation proceedings."), *with* United States v. Murphy, No. 3:01-CR-115, 2011 WL 13308177, at *2 (W.D.N.C. Mar. 21, 2011) ("[O]f course, the Government must comply with its usual obligations under the *Brady* . . . decision[] regarding this supervised release violation proceeding."), *and* United States v. Ferrara, No. 89-289, 2008 WL 2222033, at *4 (D. Mass. May 23, 2008) (ordering the government provide individual accused of violating supervised release "all material exculpatory evidence or information").

The question is more than academic. From October 2017 to 2020, over 70 percent of federal offenders were sentenced to supervised release.[27] And as the Supreme Court noted in the context of parole, revocation "inflicts a 'grievous loss'" upon the individual and others.[28] Thus, the stakes are high.

The question is also timely. In October 2020, Congress passed the Due Process Protections Act (DPPA).[29] This act amended the Federal Rules of Criminal Procedure (FRCrP) to require judges to remind the government of their *Brady* obligation and to issue model *Brady* orders.[30] In addition to highlighting the importance of *Brady* disclosure,[31] the DPPA is designed to foster uniformity in *Brady*'s application.[32] As one district judge lamented regarding uneven *Brady* practice, "[i]f the courts are to maintain their integrity and high public regard, they should not Balkanize the impact of constitutional obligations."[33] However, although the DPPA may help achieve *Brady* uniformity in its traditional context, it is unlikely to address a more overlooked source of *Brady* division: whether or not its protections apply to individuals facing revocation of supervised release.

This Note seeks to resolve uncertainty about *Brady*'s potential application to supervised release revocation hearings. Part I discusses the history and structure of supervised release and its revocation, as well as the due process protections that have been accorded to individuals facing revocations. Part II discusses the history of the *Brady* right, its connection to the right to counsel, and the Supreme Court's treatment of *Brady* in the context of plea

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27. U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2020, at 10 (2021) [hereinafter OVERVIEW 2020], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/9EVS-YHFJ] (72.9 percent in federal fiscal year 2020); U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2019, at 10 (2020) [hereinafter OVERVIEW 2019], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/FY19_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/96G8-GMPV] (74.8 percent in federal fiscal year 2019); U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2018, at 10 (2019) [hereinafter OVERVIEW 2018], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/4YG3-TEQH] (74.7 percent in federal fiscal year 2018). The federal fiscal year runs from October 1 to September 30 and is designated by the year in which it ends. *See* OVERVIEW 2020, *supra*, at 1 n.2.

28. *See* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others.").

29. Pub. L. No. 116-182, 134 Stat. 894 (2020) (codified as amended in scattered sections of 18 U.S.C.); *see also* Press Release, Dan Sullivan, U.S. Sen., Sullivan-Durbin Due Process Protections Act Signed into Law (Oct. 22, 2020), https://www.sullivan.senate.gov/newsroom/press-releases/sullivan-durbin-due-process-protections-act-signed-into-law [https://perma.cc/VQ74-WHH4].

30. Due Process Protections Act § 2.

31. *See* Press Release, Dan Sullivan, *supra* note 29 ("Having these 'Brady orders' in place will make evidence disclosure requirements a priority for prosecutors . . . .").

32. *See* Donald W. Molloy & John S. Siffert, *The Due Process Protection Act: How Rule 5(f) Came to Be and Where Do We Go from Here?*, CHAMPION, March 2021, at 55, 57 (noting the DPPA amendment "explicitly, if not implicitly" requires courts "foster[] a single system of rules for all criminal cases").

33. *Id.*

negotiations. Part III discusses the disparate treatment of the *Brady* right in the context of revocation within the federal court system. Part IV argues that due process and other considerations weigh in favor of applying *Brady* to supervised release revocation hearings.

I. SUPERVISED RELEASE AND REVOCATION

This part discusses supervised release, revocation, and due process. Part I.A discusses the creation of supervised release. Part I.B discusses the procedures underlying the imposition of supervised release, its duration, and its conditions. Part I.C discusses the mechanisms for revoking supervised release. Part I.D discusses the due process protections the Supreme Court has accorded to individuals facing revocations.

A. From Parole to Supervised Release

Supervised release was created as part of the Sentencing Reform Act of 1984[34] (SRA).[35] The SRA abolished the federal parole system and put in place supervised release as its "reformed successor."[36]

Supervised release was intended to solve problems of "indeterminate sentencing" that arose under the parole system.[37] Under federal parole, an incarcerated individual could be conditionally released after serving about one-third of their sentence.[38] The decision of whether to release the individual fell under the "broad discretionary powers" of the United States Board of Parole (the "Board").[39] Thus, sentences were indeterminate, with actual time served subject to the decisions of the Board.[40] The idea behind this indeterminacy was rehabilitative: the possibility of release would incentivize good behavior, while "experts" on the Board could determine whether sufficient rehabilitation had occurred to allow for release from prison.[41]

34. Pub L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of the U.S.C.).

35. *See* Johnson v. United States, 529 U.S. 694, 696–97 (2000) (noting the Sentencing Reform Act "eliminated most forms of parole in favor of supervised release"); Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 959–60 (2013).

36. *See* United States v. Reyes, 283 F.3d 446, 458 (2d Cir. 2002) (describing supervised release as the "reformed successor" to federal parole); *see also* Doherty, *supra* note 34, at 960 ("In place of parole, the SRA created supervised release, a new system of post-incarceration supervision.").

37. *See* Doherty, *supra* note 34, at 966; Schuman, *supra* note 20, at 602; Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 188 (2013).

38. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 226 (1993).

39. Doherty, *supra* note 34, at 991.

40. *Id.* at 987 ("[T]he judge imposed a sentence . . . [and] parole authorities determined the actual duration of the imprisonment.").

41. Stith & Koh, *supra* note 38, at 227.

However, the indeterminacy at the heart of parole came under criticism in the 1970s.[42] In particular, scholars objected to the unchecked discretionary powers wielded by the Board of Parole[43] and the opacity of its decision-making.[44] They also questioned whether uncertainty in fact incentivized prisoners or merely served as a psychological cudgel.[45] The U.S. Senate Committee on the Judiciary, in a report on the SRA, described uncertainty in sentencing as a "grave defect" lacking the "sureness" required for a criminal justice system.[46]

The SRA resolved indeterminacy in sentencing by eliminating the possibility of conditional release.[47] Instead, individuals would be placed on supervision following the completion of their prison sentence,[48] to be overseen by probation officers.[49] Thus, rather than allowing for potential shortening of a prison sentence, supervised release would be imposed at sentencing and served only after completion of the duration of imprisonment.[50] Despite its departure from the methods of parole, supervised release was meant to serve the same rehabilitative purpose by easing an offender's transition back into their community.[51]

Unlike parole, supervised release did not originally have a revocation mechanism.[52] As a result, supervised individuals could not be sent back to prison for violating conditions of their release.[53] This lack of a coercive mechanism was intended to focus the program on rehabilitation and set it apart from the incentives-based structure of parole.[54] Instead, judges were authorized to treat repeated violations as criminal contempt.[55] Reimprisonment would thus require a full jury trial and conviction of criminal contempt beyond a reasonable doubt.[56]

However, Congress added a revocation mechanism before the SRA went into effect.[57] A provision in the Anti-Drug Abuse Act of 1986[58] (ADAA)

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42. *See id.* at 227–28; *see also* Doherty, *supra* note 34, at 991–95 (discussing various contemporary criticisms of parole).

43. *See* Doherty, *supra* note 34, at 991; Stith & Koh, *supra* note 38, at 228.

44. *See* Doherty, *supra* note 34, at 991–92 ("Because of the closed system of individual voting . . . . Prisoners and the public were left to guess at the reasons, creating a deep mistrust of the system.").

45. *See id*.

46. *See* S. REP. NO. 98-225, at 49 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3232.

47. *See* Doherty, *supra* note 34, at 996.

48. Sentencing Reform Act of 1984, ch. 2, sec. 212(a)(2), § 3583(a), 98 Stat. 1837, 1999 (1984).

49. *Id.* § 3601, 98 Stat. at 2001.

50. *See* Doherty, *supra* note 34, at 997.

51. *See* Scott-Hayward, *supra* note 37, at 190.

52. *Id.* at 191; Doherty, *supra* note 34, at 999.

53. Schuman, *supra* note 20, at 604.

54. *See* Doherty, *supra* note 34, at 999 ("Supervised release would provide rehabilitative services, but not in the guise of the coerced cure."); Scott-Hayward, *supra* note 37, at 191.

55. Doherty, *supra* note 34, at 999–1000; Scott-Hayward, *supra* note 37, at 191.

56. Doherty, *supra* note 34, at 1000.

57. *Id.*; Scott-Hayward, *supra* note 37, at 191.

58. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

allowed for revocation upon finding by a preponderance of the evidence that an individual violated a condition of release.[59] Revocation proceedings to determine violations would be governed by the same procedures as probation revocations,[60] which are codified in FRCrP Rule 32.1 ("Rule 32.1").[61] The amendment came after lobbying from probation officials who worried individuals would violate conditions with impunity in the absence of a threat of incarceration.[62]

B. Imposition, Duration, and Conditions of Release

A court may impose a term of supervised release as part of an offender's sentence for a felony or misdemeanor.[63] For some offenses, supervised release is mandatory as provided by an underlying statute.[64] Otherwise, the decision is discretionary.[65] In making their determination, courts are directed to consider many of the same broad factors considered in sentencing, including the nature of the offense and the need for deterrence.[66] The Federal Sentencing Guidelines (the "Guidelines") recommend imposing supervised release for any sentence greater than one year, unless the individual is likely to be deported after imprisonment.[67]

In practice, supervised release is imposed in the majority of cases. In federal fiscal year 2020, for example, 72.9 percent of all federal offenders were sentenced to supervised release.[68] This figure was 74.8 percent in 2019[69] and 74.7 percent in 2018.[70] Excluding immigration cases for which the Guidelines discourage supervised release,[71] over 84 percent of offenders were sentenced to supervised release in federal fiscal year 2018,[72] 2019,[73] and 2020.[74] The trend appears be driven at least in part by deference to the Guidelines: a 2010 report by the U.S. Sentencing Commission found that

59. *Id.* tit. I, sec. 1006(3)(D), § 3583(4), 100 Stat. at 3207-7.
60. *Id.*
61. FED. R. CRIM. P. 32.1.
62. *See* Doherty, *supra* note 34, at 1001–02; *see also* Barbara Meierhoefer Vincent, *Supervised Release: Looking for a Place in a Determinate Sentencing System*, 6 FED. SENT'G REP. 187, 188 (1994).
63. 18 U.S.C. § 3583(a).
64. *Id.*; *see also* OFF. OF GEN. COUNS., U.S. SENT'G COMM'N, PRIMER ON SUPERVISED RELEASE 2 (2020), https://www.ussc.gov/sites/default/files/pdf/training/primers/2020_Primer_Supervised_Release.pdf [https://perma.cc/W6M2-YAB6].
65. *Id.*
66. *See* 18 U.S.C. § 3583(c); *see also* OFF. OF GEN. COUNS., *supra* note 64, at 3.
67. U.S. SENT'G GUIDELINES MANUAL §§ 5D1.1(a)–(c) (U.S. SENT'G COMM'N 2018).
68. OVERVIEW 2020, *supra* note 27.
69. OVERVIEW 2019, *supra* note 27.
70. OVERVIEW 2018, *supra* note 27.
71. *See supra* note 67 and accompanying text.
72. OVERVIEW 2018, *supra* note 27 (84.3 percent).
73. OVERVIEW 2019, *supra* note 27 (85.5 percent).
74. OVERVIEW 2020, *supra* note 27 (85.8 percent).

sentencing courts imposed supervised release in 99.1 percent of cases in which release was not mandatory but recommended by the Guidelines.[75]

Generally, terms of supervised release can range between one to five years, depending on the offense.[76] For some crimes, such as terrorist offenses and offenses involving a minor, terms can run for life.[77] In determining the duration of supervision, courts are directed to consider the same factors used to decide whether to impose a term.[78] Duration may also be mandated by the underlying statute.[79]

In 2020, the average term length imposed (excluding substantially longer sentences for specified crimes) was forty-three months.[80] Similarly, the average term length imposed was forty-four months and forty-six months in 2019[81] and 2018,[82] respectively. Median term length for all three years was thirty-six months.[83]

Judge Weinstein suggested the imposition of lengthy supervised release terms has become the norm. He reported that terms and conditions of release are often "ignored" at sentencing, with all parties—including defense counsel, the prosecution, and the court itself—"assum[ing]" supervised release will be imposed for a "significant period" between three and five years.[84] Similarly, one scholar, Professor Christine Scott-Hayward, reported that, among federal defenders in New York, supervised release is perceived as mandatory such that "they do not even bother to fight its imposition, or even the length of a term."[85]

While on supervised release, individuals may be subject to both mandatory and discretionary conditions.[86] Mandatory conditions include not committing another crime, paying restitution, and not unlawfully possessing a controlled substance, among others.[87] Additional mandatory conditions may also apply to specified crimes.[88] Courts may also create and impose further conditions that are "reasonably related" to factors considered at

75. U.S. SENT'G COMM'N, *supra* note 5, at 52; *see also* Scott-Hayward, *supra* note 37, at 193 ("[T]he Sentencing Guidelines largely govern the sentencing process, including the imposition of supervised release.").

76. 18 U.S.C. §§ 3583(b)(1)–(3).

77. *See id.* §§ 3583(j)–(k).

78. *Id.* § 3583(c).

79. OFF. OF GEN. COUNS., *supra* note 64, at 3.

80. OVERVIEW 2020, *supra* note 27.

81. OVERVIEW 2019, *supra* note 27.

82. OVERVIEW 2018, *supra* note 27.

83. OVERVIEW 2020, *supra* note 27; OVERVIEW 2019, *supra* note 27; OVERVIEW 2018, *supra* note 27.

84. United States v. Trotter, 321 F. Supp. 3d 337, 340 (E.D.N.Y. 2018).

85. Scott-Hayward, *supra* note 37, at 209; *see also* Zachary J. Weiner, Note, *Revoking Supervised Release in the Age of Legal Cannabis*, 94 ST. JOHN'S L. REV. 231, 237 (2020) (noting some judges view supervised release as a "de facto extension of prison sentences").

86. 18 U.S.C. § 3583(d).

87. *Id.*

88. *Id.* For example, defendants convicted of domestic violence for the first time are to attend court-approved rehabilitation if "readily available." *Id.*

sentencing and involve "no greater deprivation of liberty than is reasonably necessary" for deterrence and treatment.[89]

The Guidelines provide a list of thirteen recommended "standard" discretionary conditions, including "liv[ing] at a place approved by the probation officer" and "allow[ing] the probation officer to visit the defendant at any time at his or her home or elsewhere."[90] The Guidelines further recommend certain "special" conditions tailored to specific types of offenses or specific identities of offenders, such as individuals with dependents.[91]

Judge Richard A. Posner found that courts often "rely heavily" upon the recommendations of probation officers in imposing conditions.[92] Judge Posner further suggested that courts do not often examine the rationales behind these recommendations.[93] One reason for this "judicial insouciance," Judge Posner explains, is the infrequency of adversarial challenge.[94] That is, defendants are unlikely to object to conditions which will only affect them in the distant future, instead focusing on short-term matters such as their surrender date and the prison in which they will be placed.[95] Indeed, Professor Scott-Hayward reports that in thirty-eight sentencing hearings she observed in the U.S. District Court for the Eastern District of New York over a three-month period, no objections were raised to the number or type of conditions imposed.[96]

C. The Mechanisms of Revocation

If a probation officer or the government believes a supervisee violated a condition of their release, they may file a petition with the court to revoke supervised release.[97] The court may then issue a summons or arrest warrant for the supervised individual.[98]

At their initial appearance following arrest or in response to a summons, the individual is informed of the alleged violation, their right to counsel, and their right to a preliminary hearing.[99] Unless waived, the court then holds a preliminary hearing at which the government must establish probable cause that a violation occurred.[100] If this burden is met, the court may detain the individual or release them pending a revocation hearing.[101] The burden is on

89. *Id.*
90. U.S. SENT'G GUIDELINES MANUAL § 5D1.3(c) (U.S. SENT'G COMM'N 2018).
91. *Id.* § 5D1.3(d).
92. United States v. Siegel, 753 F.3d 705, 710 (7th Cir. 2014).
93. *See id.* at 711 ("Often judges seem not to look behind the recommendations, as suggested by the fact that in his sentencing statement the judge may recite the conditions of supervised release that he is imposing without giving reasons for why he imposed those particular conditions.").
94. *See id.*
95. *See id.*
96. *See* Scott-Hayward, *supra* note 37, at 205, 209.
97. U.S. SENT'G COMM'N, *supra* note 5, at 35.
98. *Id.*
99. *See* FED. R. CRIM. P. 32.1(a).
100. *See id.* 32.1(b)(1).
101. *Id.* 32.1(a)(6).

the individual to establish by clear and convincing evidence that they will neither flee nor pose a danger to the community if released.[102] The court must then hold a revocation hearing "within a reasonable time."[103]

At a revocation hearing, the court must first determine whether a violation in fact occurred.[104] The offender is entitled to certain rights, including a right to counsel, to disclosure of the evidence against them, to present evidence, and to question adverse witnesses unless the "interest of justice" does not require those witnesses to appear.[105] The court serves as fact finder and the burden is on the government to establish a violation by a preponderance of the evidence.[106] The government is represented by a United States Attorney who prosecutes the alleged violation and argues the defendant's guilt.[107] The supervising probation officer may be called as a witness.[108]

The hearing is subject to fewer procedural requirements than trials. Neither the Federal Rules of Evidence[109] nor the Sixth Amendment's right to confront adverse witnesses applies.[110] Additionally, the government may introduce evidence uncovered during an unconstitutional search and seizure that would otherwise be inadmissible at trial.[111] However, hearsay statements must bear "sufficient indicia of reliability" to be admitted.[112]

If the court finds that a violation occurred, it must then determine whether revocation is appropriate.[113] For some offenses, such as possession of a firearm or possession of a controlled substance under certain circumstances, revocation is mandatory.[114] Otherwise, the court is directed to consider the same broad factors that guided the decision to impose supervised release.[115] Instead of revocation, the court may also continue or extend the term of supervision, modify its conditions, or sentence the offender to home detention.[116] The Guidelines recommend revocation for all violations

102. *Id.*
103. *Id.* 32.1(b)(2).
104. *See* OFF. OF GEN. COUNS., *supra* note 64, at 12.
105. FED. R. CRIM. P. 32.1(b)(2)(A)–(E).
106. *See* 18 U.S.C. § 3583(e)(3).
107. *See supra* note 15.
108. *See* United States v. Pearson, No. 08-20215, 2012 WL 2501118, at *3 (E.D. Mich. June 28, 2012) ("The probation officer's participation in the guilt-or-innocence phase of the proceeding is limited to being a sworn witness, if he or she is called by either the United States Attorney, the defendant, or the court." (citing United States v. Burnette, 980 F. Supp. 1429, 1434 (M.D. Ala. 1997))).
109. *See supra* note 19.
110. *See supra* note 20.
111. *See* United States v. Hightower, 950 F.3d 33, 37 (2d Cir. 2020) (noting that "the exclusionary rule does not apply in revocation proceedings"); *see also* United States v. Charles, 531 F.3d 637, 640 (8th Cir. 2008) ("Whether evidence was obtained in violation of the Fourth Amendment to revoke [the defendant's] supervised release is immaterial as the exclusionary rule generally does not apply in revocation of supervised release proceedings.").
112. *See supra* note 18.
113. *See* 18 U.S.C. § 3583(e).
114. *Id.* § 3583(g).
115. *Id.* § 3583(e).
116. *Id.* §§ 3583(e)(1)–(4).

consisting of criminal offenses punishable by greater than one year.[117] For offenses punishable by less than one year, or technical violations that are not criminal offenses, the Guidelines recommend either revocation or extension of the term of supervision and/or modifications to its conditions.[118]

In practice, revocation is common. According to federal court system data, revocation, as opposed to completion of the sentence, accounted for over one-third of all supervised release cases terminated between April 2017 and March 2020.[119] This data is consistent with a 2010 U.S. Sentencing Commission report which found that revocation accounted for one-third of all supervised release cases terminated between 2005 to 2008.[120]

If the court decides to revoke release, it must then determine the proper sentence of imprisonment. In doing so, courts are directed to consider the same factors that guided their determinations of imposition and revocation.[121] However, the duration of imprisonment may not exceed the maximum statutory release term authorized by the underlying offense.[122] Additionally, the duration is limited depending upon the severity of the underlying offense, with the maximum set at five years for a class A felony.[123] In calculating sentences, individuals are not given credit for time served under supervision.[124] The court may also impose additional supervision following release, so long as the total sentence—including imprisonment—does not exceed the term of release authorized by the underlying offense.[125] The Guidelines set forth recommended sentences, calculated using the type of violation and the individual's criminal history.[126]

D. Revocation and Due Process

In two federal parole-era decisions, *Morrissey v. Brewer*[127] and *Gagnon v. Scarpelli*,[128] the Supreme Court laid out the constitutional protections accorded to parole and probation revocation.[129] These decisions have been uniformly applied by circuit courts to supervised release revocation.[130]

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117. *See* U.S. SENT'G GUIDELINES MANUAL § 7B1.3(a)(1) (U.S. SENT'G COMM'N 2018). The cited section refers to Grade A, B, and C violations. For definitions of each, see *id.* § 7B1.1(a).

118. *See id.* § 7B1.3(a)(2).

119. *See supra* note 11 and accompanying text.

120. U.S. SENT'G COMM'N, *supra* note 5, at 68.

121. *See* 18 U.S.C. § 3583(e).

122. *Id.*

123. *See id.*

124. *Id.*

125. *Id.* § 3583(h).

126. *See* U.S. SENT'G GUIDELINES MANUAL § 7B1.4(a) (U.S. SENT'G COMM'N 2018). Sentences range from three to sixty-three months. *Id.*

127. 408 U.S. 471 (1972).

128. 411 U.S. 778 (1973).

129. *See* McClendon, *supra* note 22 (describing *Morrissey* and *Gagnon* as the "pair of parole-era Supreme Court cases in which the Court held that defendants facing revocation were not entitled to the full slate of constitutional protections normally due a defendant facing criminal prosecution").

130. *See supra* note 22.

In *Morrissey*, the Court addressed the question of whether the Due Process Clause[131] requires a state to hold a hearing prior to revoking parole.[132] Petitioners filed habeas corpus petitions alleging due process violations after their parole was revoked solely on the recommendations of parole officers.[133] The district court agreed with the state that no hearing was required.[134]

The court of appeals affirmed the district court's ruling after balancing the parties' competing interests.[135] The appellate court reasoned that prison officials should be given "wide discretion" in dealing with individuals in their custody.[136] It found that "non-legal, non-adversary considerations" were often the basis for revocation decisions, lessening the need for procedural restrictions.[137] Further, holding adversary hearings akin to criminal proceedings would destroy the parens patriae role of the parole board and lead to decreased granting of parole due to administrative burden.[138]

The Supreme Court began its analysis by noting that revocation is distinct from criminal prosecution.[139] Because the individual has already been convicted, they enjoy "conditional," not "absolute," liberty.[140] As a result, he is not due "the full panoply of rights" that would be accorded to a criminal defendant.[141]

However, the Court found revocation is nonetheless subject to some due process requirements.[142] While the parolee's liberty is not absolute, their scope of freedom includes "many of the core values" of unqualified liberty such that revocation "inflicts a 'grievous loss,'" the Court explained.[143] Thus, their liberty is "valuable" enough to come with the protections of due process.[144] As a result, revocation of that liberty requires some form of ordered process.[145]

The Court examined the various interests at stake to determine the nature of this ordered process. First, it identified the state's "overwhelming" interest in reimprisoning an individual without the burden of a full trial if they have in fact violated parole.[146] Second, it identified the interests of both the individual and society in ensuring revocation is based on an "appropriate

131. U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .").
132. *See Morrissey*, 408 U.S. at 472 ("We granted certiorari in this case to determine whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his parole.").
133. *See id.* at 474.
134. *See id.* at 475.
135. *See* Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972).
136. *Id.* at 948.
137. *See id.* at 949.
138. *Id.* at 949–50.
139. *See Morrissey*, 408 U.S. at 480.
140. *See id.*
141. *Id.*
142. *See id.* at 482.
143. *See id.*
144. *See id.*
145. *Id.*
146. *Id.* at 483.

determination" and not "erroneous information."[147] While the individual's stake is based on preserving their liberty, society has an interest in "restoring" the individual to normal life.[148] Finally, it identified a societal interest in "fair treatment" to enhance parole's rehabilitative goals.[149] Balancing these interests, the Court held that due process requires "an informal hearing" designed to ensure that the finding of a violation is based on "verified facts" and "informed by an accurate knowledge" of the parolee's conduct.[150]

Finally, the Court delineated what such a hearing would procedurally entail. Broadly, it found the parolee must be able "to show, if he can, that he did not violate the conditions," or, separately, that the violation does not warrant revocation.[151] Declining to write a full code of procedure, the Court set out to decide "the minimum requirements of due process."[152] "They include," the Court stated:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[153]

Notably, the Court explicitly declined to decide the question of whether a parolee is entitled to counsel.[154]

Despite these newfound protections, the Court once again emphasized that revocation is not equivalent to prosecution.[155] Rather, the revocation process should remain "flexible enough" to consider material that is inadmissible in criminal trials.[156] The Court explained that the procedural requirements it set out would not abridge this flexibility and imposed no "great burden."[157]

Less than a year later, in *Gagnon*, the Supreme Court addressed the question left open in *Morrissey*: whether due process also requires provision of counsel at a revocation hearing.[158] In *Gagnon*, the defendant filed a

147. *See id.* at 483–84.
148. *See id.* at 484 ("Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions.").
149. *Id.*
150. *Id.*
151. *Id.* at 488.
152. *See id.* at 488–89.
153. *Id.* at 489.
154. *See id.*
155. *See id.*
156. *Id.*
157. *Id.* at 490.
158. *See* Gagnon v. Scarpelli, 411 U.S. 778, 779 (1973), *superseded by statute*, Criminal Justice Act Revision of 1986, Pub. L. No. 99-651, § 102(a)(1), 100 Stat. 3642, 3642 (codified

habeas corpus petition alleging a due process violation after his probation was revoked without a hearing.[159] He further argued that he would be entitled to counsel if a hearing were held.[160] The district court agreed, granting the writ and ordering the state to provide counsel at the hearing should it decide to seek revocation.[161]

The court of appeals affirmed. On the issue of a required hearing, the court relied on circuit precedent.[162] As to the right to counsel, the court reasoned that because revocation requires finding that a violation occurred, there is "likely to be an issue of fact," the "just determination" of which may be aided by counsel.[163] Given this role in fact-finding, the court held that the provision of counsel is necessary to ensure the right to a hearing is "meaningful."[164]

The Supreme Court quickly dispatched with the question of a defendant's right to a hearing by applying *Morrissey* to revocation of probation.[165] The Court found parole and probation revocation to be "indistinguishable" for due process purposes.[166] Specifically, neither is part of criminal prosecution, but both result in a loss of liberty.[167] Thus, both require the due process protections outlined in *Morrissey*.[168]

The Court then turned to the alleged right to counsel. It began by noting that although probation officers typically serve a supervisory, rather than punitive, role, this position is altered once they recommend revocation.[169] While this "modification in attitude" does not turn the officer into a prosecutor determined to convict, the Court found their role vis-à-vis the probationer or parolee is "surely compromised."[170] Due process thus requires an "accurate finding of fact" to resolve the difference in viewpoint between the parole officer and the individual in their charge.[171]

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as amended at 18 U.S.C. § 3006A) (providing counsel for indigent defendants accused of violating parole).

159. *See* Scarpelli v. Gagnon, 317 F. Supp. 72, 74 (E.D. Wis. 1970), *aff'd sub nom.* Gunsolus v. Gagnon, 454 F.2d 416 (7th Cir. 1971), *aff'd in part*, *rev'd in part sub nom.* Gagnon v. Scarpelli, 411 U.S. 778 (1973).

160. *See Scarpelli*, 317 F. Supp. at 76 ("[T]he petitioner in this case further contends that if he is entitled to a hearing prior to revocation of his probation, he is also entitled to the assistance of counsel at that hearing.").

161. *Id.* at 78–79.

162. *See* Gunsolus v. Gagnon, 454 F.2d 416, 418–20 (7th Cir. 1971), *aff'd in part*, *rev'd in part sub nom.* Gagnon v. Scarpelli, 411 U.S. 778 (1973).

163. *Id.* at 422.

164. *See id.* at 423.

165. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

166. *Id.* ("Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one.").

167. *Id.*

168. *Id.*

169. *See id.* at 785.

170. *Id.*

171. *See id.* at 782 ("When the officer's view of the probationer's or parolee's conduct differs in this fundamental way from the latter's own view, due process requires that the difference be resolved before revocation becomes final.").

While *Morrissey* serves this interest by providing "substantial protection against ill-considered revocation," it does not follow that counsel is never required.[172] Echoing the court of appeals, the Court found that the "effectiveness" of the rights guaranteed by *Morrissey* may depend on the presence of counsel.[173] Specifically, a probationer or parolee may be unable to present "his version of a disputed set of facts" pro se where doing so requires examining or cross-examining witnesses or offering complex evidence.[174]

However, the Court declined to establish a blanket rule requiring counsel at all revocation hearings.[175] The Court explained that such a rule would impose costs without regard to the probability that counsel would actually contribute to a particular proceeding.[176] For example, "most" revocations are based on convictions of crimes or admissions to violations, eliminating the need for fact-finding.[177] As to costs, the Court pointed to both the "significant[]" alteration to the nature of the proceeding—becoming more akin to a trial—as well as the financial costs of counsel, a longer record, and judicial review.[178]

Instead, the Court held that counsel must be provided where a defendant's version of events "can fairly be represented only by a trained advocate."[179] Discretion for provision of counsel is left in the hands of the authority overseeing the revocation, to be determined on a case-by-case basis.[180] However, the Court identified two situations in which counsel should "[p]resumptively" be provided: (1) where the individual contests the charged violation or (2) where the individual seeks to offer complex reasons why revocation is nonetheless inappropriate.[181] In sum, the Court found that counsel would be constitutionally unnecessary in most cases but would be required by "fundamental fairness—the touchstone of due process"—in others.[182]

The core procedural holding of *Morrissey*, made applicable to probation by *Gagnon*, has been codified in Rule 32.1.[183] The rule currently governs

172. *See id.* at 786.
173. *See id.*
174. *Id.* at 786–87 ("Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.").
175. *See id.* at 787.
176. *See id.*
177. *See id.*
178. *Id.*; *see id.* at 788 ("Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.").
179. *Id.* at 788.
180. *See id.*
181. *Id.* at 790.
182. *Id.*
183. *See* United States v. LeBlanc, 175 F.3d 511, 515 (7th Cir. 1999) (noting that Rule 32.1 is "largely a codification" of *Morrissey*).

the procedure for revocation or modification of probation or supervised release.[184] The rule also provides for the right to counsel at all revocation hearings.[185]

Subsequently, courts of appeals uniformly applied *Morrissey* and *Gagnon* to revocation of supervised release.[186] As one court explained: "Like parole and probation, fewer constitutional safeguards are needed to protect the conditional liberty interest during supervised release."[187]

II. THE *BRADY* RIGHT

This part discusses the *Brady* right from multiple angles. Part II.A discusses the creation and subsequent refinements of the *Brady* right. Part II.B discusses the connection between the *Brady* right and the right to effective counsel. Part II.C discusses the Supreme Court's analysis of *Brady*'s application to plea negotiations.

A. The Brady *Right to Disclosure*

In *Brady v. Maryland*, the Supreme Court considered whether the Due Process Clause requires prosecutors to disclose exculpatory evidence to criminal defendants.[188] The petitioner, John Brady, was convicted of murder and was sentenced to death for his participation in a strangulation.[189] Prior to trial, Brady asked prosecutors for statements made by his companion to support the contention that he himself had not performed the actual killing.[190] In doing so, Brady hoped to avoid the death penalty.[191] While prosecutors disclosed several statements, they failed to provide the companion's confession to performing the strangulation.[192] After learning of this omission, Brady moved for a new trial or sentencing.[193]

The Court began by noting its previous decision in *Mooney v. Holohan*.[194] There, the defendant challenged his conviction by alleging it was based on perjured testimony and deliberately suppressed evidence.[195] Disagreeing with the government's narrow constitutional reading, the *Mooney* Court held that "deliberate[ly]" deceiving the court by use of testimony "known to be

184. *See* FED. R. CRIM. P. 32.1.

185. *Id.* 32.1(b)(2)(D). The advisory committee for the rules notes that although *Gagnon* does not *require* counsel in all circumstances, 18 U.S.C § 3006A(b) entitles defendants to counsel whenever charged with violation of probation. *See* FED. R. CRIM. P. 32.1 advisory committee's note to 1979 addition.

186. *See supra* note 22.

187. United States v. Gomez-Gonzalez, 277 F.3d 1108, 1111 (9th Cir. 2002).

188. *See* Brady v. Maryland, 373 U.S. 83, 84–85 (1963).

189. *See* Brady v. State, 174 A.2d 167, 168 (Md. 1961), *aff'd*, 373 U.S. 83 (1963).

190. *See Brady*, 373 U.S. at 84.

191. *See Brady*, 174 A.2d at 169.

192. *See id.*

193. *See id.* The Court of Appeals of Maryland granted relief regarding sentencing, but not a new trial. *Id.* at 172.

194. 294 U.S. 103 (1935); *see Brady*, 373 U.S. at 86.

195. *Mooney*, 294 U.S. at 110.

perjured" violates due process.[196] Such a procedure would be the mere "pretense of a trial," the Court explained, failing to embody fundamental ideas of justice.[197]

Unlike in *Mooney*, however, Brady did not allege that the suppression was intentional.[198] Nonetheless, the Court found the principle in *Mooney* was not based on punishment of prosecutorial misconduct but "avoidance of an unfair trial."[199] Whether intentional or not, withheld exculpatory evidence creates a "proceeding that does not comport with standards of justice."[200] Thus, the Court extended *Mooney* and held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[201] This requirement of disclosure became known as the "*Brady* Rule."[202]

The Court has since expanded the types of material that fall under *Brady*. In *Giglio v. United States*,[203] the Court addressed whether due process requires disclosure of a nonprosecution promise made to a witness who agreed to testify.[204] The Court extended *Brady*'s disclosure requirement, holding that insofar as a witness's credibility is important to a case, a jury is "entitled to know" about any agreement relevant to that credibility.[205] Thus, following *Giglio*, *Brady* requires disclosure of both exculpatory evidence establishing factual innocence, as well as "impeachment evidence" shedding light on the credibility of a witness.[206] Both types of evidence are treated identically for purposes of a *Brady* analysis.[207]

The Court has also expanded the types of situations in which *Brady* applies. In *United States v. Agurs*,[208] a defendant challenged her murder conviction after prosecutors failed to provide evidence of the victim's criminal background, which would have supported her self-defense claim.[209] However, although *Brady* imposed a duty to disclose "upon request,"[210] the defendant in *Agurs* had made no such request.[211] Nonetheless, the Court held

196. *Id.* at 112.
197. *See id.*
198. *Brady*, 174 A.2d at 169 (noting Brady did not allege that the suppression "was the result of guile").
199. *Brady*, 373 U.S. at 87.
200. *See id.* at 88.
201. *Id.* at 87.
202. *See, e.g.*, William Talbert, Comment, *The* Brady *Rule: A Watchdog Without Teeth*, 86 UMKC L. REV. 237, 240 (2017).
203. 405 U.S. 150 (1972).
204. *Id.* at 150–51.
205. *See id.* at 154–55.
206. *See* Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3605 (2013).
207. *See* Kyles v. Whitley, 514 U.S. 419, 433 (1995) (noting that the Court has "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes").
208. 427 U.S. 97 (1976).
209. *Id.* at 98–99.
210. *See supra* note 201 and accompanying text.
211. *See Agurs*, 427 U.S. at 99.

that material exculpatory evidence must be disclosed even in the absence of a request.[212] In doing so, the Court noted that *Brady* marked a shift in focus from primarily prosecutorial misconduct to potential harm to the defendant.[213] Thus, where evidence is of "substantial value" to the defendant, "elementary fairness" requires its disclosure.[214]

Further, the Court has refined its standard of "materiality" for *Brady* claims. In *United States v. Bagley*,[215] the Court considered when a failure to disclose *Brady* material would require reversal of a conviction. The Court found that the concern underlying *Brady* and its progeny was maintaining "confidence" in the trial outcome, where suppressed evidence could "make the difference between conviction and acquittal."[216] Thus, the Court held that evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[217] Reasonable probability, the Court explained, is "sufficient to undermine confidence" in the verdict.[218]

Finally, the Court has addressed the applicability of *Brady* post-conviction. In *District Attorney's Office for the Third Judicial District v. Osborne*,[219] a defendant convicted partially on the basis of DNA evidence sought access to more precise DNA testing in hopes of clearing his name.[220] Relying on circuit precedent applying *Brady* to post-conviction proceedings, the court of appeals held that the defendant's claim of actual innocence entitled him to such a test under *Brady*.[221] Reversing, the Court held that *Brady* was the "wrong framework" for the defendant's claim.[222] The Court reasoned that an individual found guilty and imprisoned has been "constitutionally deprived of his liberty"[223] and does not have the "same liberty interests as a free man."[224] As a result, his due process interests are "limited" and do not parallel those found preconviction.[225] Thus, due process does not require the level of protection that *Brady* affords.[226]

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212. *See id.* at 110 ("[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request."); *see also* Petegorsky, *supra* note 206, at 3606.

213. *See Agurs*, 427 U.S. at 104 n.10 ("Although in *Mooney* the Court had been primarily concerned with the willful misbehavior of the prosecutor, in *Brady* the Court focused on the harm to the defendant resulting from nondisclosure.").

214. *Id.* at 110.

215. 473 U.S. 667 (1985).

216. *Id.* at 676–78.

217. *Id.* at 682.

218. *Id.*

219. 557 U.S. 52 (2009).

220. *Id.* at 56–60.

221. *See* Osborne v. Dist. Att'y's Off. for the Third Jud. Dist., 521 F.3d 1118, 1127–28 (9th Cir. 2008), *rev'd*, 557 U.S. 52 (2009).

222. *See Osborne*, 557 U.S. at 69.

223. *Id.* (quoting Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)).

224. *Id.* at 68.

225. *Id.* at 69.

226. *See id.*

B. Brady *and the Right to Effective Counsel*

The Sixth Amendment provides for a right to counsel "in all criminal prosecutions."[227] In *Strickland v. Washington*,[228] the Supreme Court held that this implies a right to "effective" counsel.[229] Commentators and courts have noted a deep connection between the right to effective counsel and the right to *Brad*y disclosure. For example, commentators have described these rights as "symbiotic"[230] and sharing a "unity of purpose"[231] as well as a "doctrinal link."[232] Similarly, the Supreme Court has labeled both rights as "hav[ing] the effect of ensuring against the risk of convicting an innocent person."[233]

Ultimately, both *Brady* and the right to counsel seek to ensure that verdicts are reliable.[234] In an adversarial system in which defendants face financial and structural disadvantages, *Brady* and *Strickland* ensure that fact finders are presented with an effective defense from which they can reach a reliable conclusion.[235] To do so, these rights work in tandem: *Brady* ensures defense counsel has access to material exculpatory evidence, while *Strickland* ensures that material exculpatory evidence is presented to the fact finder by defense counsel.[236] Thus, the Supreme Court analyzes the materiality of a *Brady* violation by asking how the evidence would impact the jury *if* utilized by effective counsel.[237] Similarly, highly effective counsel can render a *Brady* violation immaterial by uncovering suppressed evidence on their own.[238] At bottom, there is a single inquiry: whether the fact finder was

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227. U.S. CONST. amend. VI.

228. 466 U.S. 668 (1984).

229. *See id.* at 686–87.

230. John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error Review*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1154 (2005); *see also* Petegorsky, *supra* note 206, at 3647 (describing *Brady* and the right to counsel as "two sides of the same coin").

231. Blume & Seeds, *supra* note 230, at 1194; *see also* Brief for Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae in Support of George Alvarez at 18, Alvarez v. City of Brownsville, 904 F.3d 382 (5th Cir. 2018) (No. 1:11-cv-78) ("The rights to effective assistance of counsel and to exculpatory information serve complementary roles . . . .").

232. Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1183 n.109 (2012).

233. *See* Herrera v. Collins, 506 U.S. 390, 398–99 (1993) (listing rights, including the right to counsel and to disclosure of *Brady* material, that help prevent the conviction of innocents).

234. *See* Blume & Seeds, *supra* note 230, at 1194.

235. *See infra* notes 241–41 and accompanying text.

236. *See* Blume & Seeds, *supra* note 230, at 1179 (noting that both the *Brady* and *Strickland* inquiries "ask what competent counsel would have done" with the suppressed evidence); *see also* Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1163 n.111 (1982) (noting that the *Brady* inquiry is "linked to an assumption that the evidence would have been presented effectively").

237. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 441 (1995) ("In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable."); *see also* Blume & Seeds, *supra* note 230, at 1179.

238. *See* Babcock, *supra* note 236; Blume & Seeds, *supra* note 230, at 1178 n.95.

presented with material evidence favorable to the accused or the verdict was rendered unreliable by its omission.[239]

Justice Thurgood Marshall recognized this interplay in his dissent in *Bagley*. Arguing that the Court's materiality standard was too high, Justice Marshall reasoned that the Court's "stringent" ineffective counsel standard "makes an effective *Brady* right even more crucial."[240] While the greater onus may be placed on the prosecutor or the defense counsel, the common goal is to ensure that, in a "skewed" adversarial system,[241] the defendant has the factual support to mount "a reasonable defense."[242]

Agurs is instructive. There, the defendant was found inside a motel room struggling with a man over a knife.[243] The man later died of his injuries.[244] The defendant claimed self-defense but was convicted of murder.[245] Notably, the victim had twice been convicted of violent crimes involving a knife.[246] Despite some awareness of this criminal history, defense counsel declined to investigate based on an incorrect belief that the defendant would need to prove knowledge of these prior convictions to introduce them on a self-defense theory.[247] Thus, the jury was provided no evidence of the victim's arrests or convictions in evaluating the defendant's self-defense claim.[248]

However, a month after trial, defense counsel learned of his legal error and sought out the victim's criminal record.[249] The prosecutor provided access to his files, which contained a paper disclosing the victim's prior convictions.[250] Subsequently, the defendant moved for a new trial.[251] She argued both that counsel was ineffective for failing to bring the victim's record before the jury, and that prosecutors had violated *Brady* by failing to disclose the convictions.[252] Despite the analytical differences between these claims, both concerned the same underlying issue: whether the jury should have learned about the victim's criminal history.[253]

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239. *See* Blume & Seeds, *supra* note 230, at 1180–81; *see also infra* note 253 and accompanying text.

240. United States v. Bagley, 473 U.S. 667, 695 n.3 (1985) (Marshall, J., dissenting).

241. *See id.*

242. *See id.* at 694 ("[A]n inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense. When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision.").

243. United States v. Agurs, 510 F.2d 1249, 1250 (D.C. Cir. 1975), *rev'd*, 427 U.S. 97 (1976).

244. *Id.*

245. *See id.* at 1250–51.

246. *See id.* at 1251.

247. *See id.*

248. *Id.*

249. *See id.*

250. *See id.*

251. *Id.*

252. *Id.*

253. *See* Babcock, *supra* note 236, at 1172 ("[T]he whole issue in *Agurs* was whether the jury should have heard about [the victims'] character. It seems clear that they should have.").

Tellingly, neither the court of appeals nor the Supreme Court focused on the respective roles of the parties to whom *Brady* and *Strickland* are addressed—the prosecutor and defense counsel. Instead, the decisions centered on the single piece of suppressed evidence underlying both claims and its potential impact on the jury.[254] As a judge in the U.S. Court of Appeals for the Fifth Circuit explained, when *Brady* and *Strickland* claims are both brought concerning a piece of exculpatory evidence not presented to the jury, the resulting inquiries are "identical," requiring a single determination as to whether the proceeding was rendered "*unreliable*."[255] Thus, one pair of commentators described the analytical separation of *Brady* and *Strickland* claims as a "false distinction," arguing for its collapse into a single reliability determination.[256]

Given their singular focus on reliable verdicts, both rights also share an identical standard of materiality.[257] Both ask whether, but for the violation, there is a reasonable probability that the result of the proceeding would have been different.[258] Notably, the standards are not just identical, but were developed in tandem.[259] In *Bagley*, the Court explicitly adopted its "*Strickland* formulation" of materiality for *Brady* claims.[260] Meanwhile, in *Strickland*, the Court described its materiality test as "find[ing] its roots" in the Court's *Brady* precedent.[261] In doing so, the Court drew a parallel between one cause of "omission of certain evidence," attorney error, and other possible causes, including *Brady* violations and the deportation of witnesses.[262] Thus, the rights are linked not only practically, but doctrinally within the Court's jurisprudence.

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254. *See* United States v. Agurs, 427 U.S. 97, 112 (1976) ("[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."); *Agurs*, 510 F.2d at 1253 ("The materiality of undisclosed evidence is a much more significant factor than prosecutorial misconduct or defense negligence.").

255. *See* Kyles v. Whitley, 5 F.3d 806, 831–32 (5th Cir. 1993) (King, J., dissenting), *rev'd*, 514 U.S. 419 (1995) ("[T]he inquiry for both claims is identical . . . . Under *Strickland* and *Bagley*, this court must determine whether there is a 'reasonable probability' that, but for the two constitutional errors working in conjunction, [the] jury, considering all of the relevant evidence, would not have unanimously found either that there was sufficient evidence to prove beyond a reasonable doubt that [the defendant] was guilty or . . . should receive a death sentence. The heart of the inquiry here is whether the constitutional infirmities rendered the proceeding *unreliable*." (citations and footnotes omitted)).

256. *See* Blume & Seeds, *supra* note 230, at 1194.

257. *See* Leslie Kuhn Thayer, Comment, *The Exclusive Control Requirement: Striking Another Blow to the* Brady *Doctrine*, 2011 WIS. L. REV. 1027, 1048–49.

258. United States v. Bagley, 473 U.S. 667, 682 (1985); Strickland v. Washington, 466 U.S. 668, 694 (1984).

259. *See* Thayer, *supra* note 257, at 1049.

260. 473 U.S. at 682.

261. 466 U.S. at 694.

262. *See id.* ("An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable . . . . Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness." (citation omitted)).

C. Brady *and Plea Negotiations*

In *United States v. Ruiz*,[263] the Supreme Court addressed *Brady*'s applicability to plea negotiations. In particular, the defendant challenged the constitutionality of a plea agreement that would have required the provision of exculpatory factual information but waived any right to impeachment evidence.[264] Thus, the Court analyzed whether due process requires disclosure of impeachment evidence prior to a guilty plea.[265] While plea negotiations differ from revocations, the Court's decision can provide a blueprint for analyzing *Brady*'s potential application to new contexts.

To analyze the due process claim, the Court adopted its framework from an earlier case, *Ake v. Oklahoma*.[266] There, the Court described its due process determination as guided by three factors:

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.[267]

The Court noted that these were the "very considerations" that led to its initial adoption of *Brady* and *Giglio* disclosure rights.[268]

First, the Court found that the value of impeachment evidence to the defendant was "limited."[269] While the Court did not identify the private interest at stake, in *Ake* it described the interest in the accuracy of a proceeding that risks an individual's liberty as "almost uniquely compelling."[270] Nonetheless, the Court found that impeachment evidence was "special in relation to the *fairness of a trial*."[271] In particular, a defendant at the plea stage would likely be unaware of the prosecution's potential case, and thus unable to gauge the value of impeaching any single witness.[272] Given this "random way" in which impeachment evidence could be helpful, the Court stated it could not describe such evidence as "critical" at the plea stage.[273]

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263. 536 U.S. 622 (2002).
264. *See id.* at 625–26.
265. *Id.* at 625.
266. 470 U.S. 68 (1985); *see Ruiz*, 536 U.S. at 631 ("This Court has said that due process considerations include not only (1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests." (citing Ake v. Oklahoma, 470 U.S. 68, 77 (1985)).
267. *Ake*, 470 U.S. at 77.
268. *See Ruiz*, 536 U.S. at 631.
269. *Id.*
270. *Ake*, 470 U.S. at 78.
271. *Ruiz*, 536 U.S. at 629.
272. *See id.* at 630 ("The degree of help that impeachment information can provide will depend upon the defendant's own independent knowledge of the prosecution's potential case—a matter that the Constitution does not require prosecutors to disclose.").
273. *Id.*

The Court did acknowledge the defendant's concern that, in the absence of impeachment evidence, innocent individuals would plead guilty.[274] However, it found that provision of exculpatory factual information, as provided in the agreement, along with other criminal procedure safeguards, "diminishes the force" of this concern.[275]

Second, the Court found that requiring disclosure of impeachment evidence would "seriously interfere" with the government's interest in securing "factually justified" guilty pleas.[276] In particular, disclosure would risk "premature[ly]" identifying government witnesses, disrupting ongoing investigations, and exposing witnesses to potential harm.[277] Further, it could require devotion of "substantially more resources to trial preparation prior to plea bargaining," eliminating the efficiencies of the plea bargaining process.[278] As a result, it could lead the government to abandon its "heavy reliance" on plea bargaining altogether.[279]

Balancing these considerations, the Court held that disclosure of impeachment evidence is not required prior to the acceptance of a plea agreement.[280] Due process does not "demand[] so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit."[281]

III. UNEVEN APPLICATION OF *BRADY*

This part discusses the disparate treatment that *Brady* claims have received in the federal court system. Part III.A discusses courts that have held that *Brady* does not apply to revocation. Part III.B discusses courts that have held that *Brady* applies to revocation or that have directed the government to comply with its requirements. Part III.C discusses courts that have faced *Brady* claims in the context of revocation but declined to reach the question of its application.

A. Excluding Brady

Several district courts, as well as at least one circuit court, have held that *Brady* does not apply to revocation hearings. These courts generally provide a few different arguments.

First, these courts have held that because revocation is not a criminal prosecution, *Brady* does not apply. For example, in *United States v. Ataya*,[282] the U.S. Court of Appeals for the Eleventh Circuit explicitly stated, albeit in a terse footnote of an unpublished opinion, that "*Brady* only applies to

274. *See id.* at 631.
275. *Id.*
276. *Id.*
277. *Id.* at 631–32.
278. *Id.* at 632.
279. *Id.*
280. *Id.* at 633.
281. *Id.* at 632.
282. 145 F. App'x 331 (11th Cir. 2005).

criminal prosecution and not to probation revocation hearings."[283] Similarly, a district court in California stated that "a parole revocation hearing is not a criminal prosecution, which is the type of proceeding to which the *Brady* rule applies."[284] These decisions cite to *Morrissey* or *Gagnon*, where the Supreme Court stated revocation is not equivalent to prosecution.[285] While neither case explicitly states that *Brady* is confined to prosecution, *Brady* itself only concerned a challenge to a trial and sentencing,[286] and discussed trial fairness.[287] Further support for limiting *Brady* to prosecution—or at least not to revocation—can also be found in the Court's statement in *Osborne* that *Brady* is the "wrong framework" for post-conviction relief.[288]

Second, courts have found that Rule 32.1, by codifying *Morrissey*,[289] provides all the due process protections required for revocation. For example, in *United States v. Nix*,[290] a district court in Nevada stated that "so long as Rule 32.1 is followed, a probationer will receive all the due process he is entitled to."[291] Similarly, a district court in California held that *Brady* was inapplicable in part because Rule 32.1 only requires disclosure of evidence used *against* the defendant, not evidence that could be used on the defendant's behalf.[292] This reading of Rule 32.1 as exhaustive of due process rights at revocation finds support in the language of *Morrissey* itself, where the Court described its task as putting forth "the minimum requirements of due process."[293]

Third, courts have held that *Brady* is inapplicable because it applies to prosecutors, not the probation office. In *United States v. Gonzalez*,[294] a district court in Colorado found that "while *Brady* applies to prosecutors . . . the Probation Office is not a prosecutor."[295] In particular, the court noted that, unlike prosecutors, the probation office is a neutral "investigatory and

283. *Id.* at 333 n.2. Notably, the court did not supply a rationale beyond a citation to *Gagnon*. *See id.*

284. Turner v. Larsen, No. C 11-6191, 2012 WL 12899114, at *5 (N.D. Cal. Apr. 19, 2012); *see also* Gonzales v. Bartos, No. CV 06–2558, 2009 WL 825812, at *15 (D. Ariz. Mar. 30, 2009) ("[P]robation revocation proceedings are not criminal prosecutions, and thus are not subject to the strictures of *Brady*.").

285. *See supra* note 139, 167 and accompanying text.

286. *See supra* note 193 and accompanying text.

287. *See supra* note 199 and accompanying text.

288. *See supra* note 222.

289. *See supra* note 183.

290. No. 2:08-cr-00283-6, 2017 WL 2960520 (D. Nev. July 11, 2017).

291. *Id.* at *2.

292. *See* United States v. Berger, 976 F. Supp. 947, 950 (N.D. Cal. 1997) (citing United States v. Donaghe, 924 F.2d 940, 944 (9th Cir. 1991)). While the court does not state this finding explicitly, it describes as "law to the contrary" a circuit decision limiting Rule 32.1 disclosure to evidence used against a probationer. *See id.*

293. *See supra* note 152.

294. No.13-cr-424, 2016 WL 8458986 (D. Colo. May 28, 2016).

295. *Id.* at *3 (quoting United States v. Neal, 512 F.3d 427, 434 (7th Cir. 2008)); *see also* United States v. Nix, No. 2:08-cr-00283-6, 2017 WL 2960520, at *2 (D. Nev. July 11, 2017) ("Defendant's reliance on *Brady* further fails because his motion concedes that the documents he seeks are in the custody of the probation office . . . ." (citing United States v. Gonzalez, No.13-cr-424, 2016 WL 8458986, at *3 (D. Colo. May 28, 2016))).

supervisory arm of the court."[296] The court also relied on *United States v. Zavala*[297] for the holding that *Brady* disclosure "is not compelled . . . if the [evidence is] in the hands of . . . the probation office."[298] *Zavala* in turn relied on *United States v. Trevino*,[299] which found the language of *Brady* "directed entirely to the proper role of the prosecutor."[300] This position finds support in both the facts of *Brady* and its central holding, which refers to suppression "by the prosecution."[301]

Finally, courts have relied on the apparent consensus that *Brady* does not apply, or a lack of precedent for finding that it does. In *United States v. Garreau*,[302] a district court in South Dakota found that courts addressing the issue "appear to agree that the *Brady* rule does not apply to adult postconviction revocation proceedings,"[303] citing *Ataya*, *Nix*, and *Gonzalez*, among others.[304] Similarly, a district court in Arkansas stated it could find "no authority to support" *Brady*'s application,[305] while a district court in California found that the probationer himself "cited no authority" for applying *Brady*.[306] Lastly, in *Nix*, the court found that no circuit court has held that *Brady* applies to revocation.[307]

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296. *See Gonzalez*, 2016 WL 8458986, at *3 (quoting United States v. Davis, 151 F.3d 1304, 1306 (10th Cir. 1998)).

297. 839 F.2d 523 (9th Cir. 1988).

298. *Gonzalez*, 2016 WL 8458986, at *3 (quoting United States v. Zavala, 839 F.2d 523, 528 (9th Cir. 1988)).

299. 556 F.2d 1265 (5th Cir. 1977).

300. *Id.* at 1270 ("*Brady* involved evidence available to and suppressed by the prosecution; its language is directed entirely to the proper role of the prosecutor in according the accused a fair trial . . . ."). In particular, the defendants in *Trevino* sought access to a presentence report, compiled by the probation office, of a governmental witness to impeach that witness. *See id.* at 1270. The court "decline[d] to extend *Brady*'s reach by holding that a discovery motion addressed in effect to a court or its probation officer, rather than the prosecution, asking production of a witness' presentence report, must be granted under *Brady*'s authority." *Id.* at 1271.

301. *See supra* note 201 and accompanying text.

302. 558 F. Supp. 3d 794 (D.S.D. 2021).

303. *Id.* at 798.

304. *See id.* at 798 n.18. However, not all the court's citations support *Brady*'s inapplicability. For example, the court cites *United States v. Neal*, 512 F.3d 427 (7th Cir. 2008), where the circuit court *declined* to "reach the substantive issue whether . . . an individual subject to revocation proceedings is entitled to exculpatory material." *Id.* at 438. The court also cites *United States v. Jones*, No. 5:14-CR-74, 2017 WL 278478 (E.D. Ky. Jan. 20, 2017), *objections overruled by* No. 5:14-074, 2017 WL 460811 (E.D. Ky. Feb. 2, 2017), where the court denied a discovery request for potentially exculpatory information. *Id.* at *1. However, the court did not address *Brady*, but only Rule 32.1. *Id.* Additionally, in overruling objections to the order, the district court found that even under Rule 32.1, "a defendant in a supervised release revocation hearing does have a limited right to discovery . . . if the defendant is able to demonstrate that the requested evidence will likely uncover *mitigating evidence material to the case*." United States v. Jones, No. 5:14-074, 2017 WL 460811, at *3 (E.D. Ky. Feb. 2, 2017) (emphasis added).

305. United States v. Jackson, No. 4:02-CR-00094-01, 2009 WL 1690300, at *1 (E.D. Ark. June 16, 2009) ("Defendant has cited, and I can find, no authority to support his position that *Brady* applies to revocation proceedings.").

306. United States v. Berger, 976 F. Supp. 947, 950 (N.D. Cal. 1997).

307. *See* United States v. Nix, No. 2:08-cr-00283-6, 2017 WL 2960520, at *2 (D. Nev. July 11, 2017).

B. Applying Brady

A few district courts have applied *Brady* to revocation, either explicitly or by directing prosecutors to comply with its mandates.

In *United States v. Dixon*,[308] a district court in West Virginia noted that other courts "questioned" *Brady*'s applicability to revocation.[309] Addressing the argument that Rule 32.1 provides all necessary due process, the court found that some courts "suggest" that due process requires more than adherence to the rule.[310] Specifically, the court pointed to language from two opinions from the U.S. Court of Appeals for the Ninth Circuit: one referring to a violation of "neither [Rule 32.1] *nor due process*,"[311] and the other to a finding of "no violation of [Rule 32.1] *or of due process*."[312] The court reasoned that this language may point to an analytical separation between the requirements of the rule and those of due process.[313]

The *Dixon* court then addressed the language of *Morrissey* itself. On the one hand, the court found that *Brady*'s inapplicability is supported by *Morrissey*'s discussion of the "*conditional*," rather than "*absolute*," liberty at stake in revocation.[314] On the other hand, the court noted that *Morrissey* recognized a societal interest in not basing revocation on "*erroneous*" information.[315] After noting that the question was "close[]," the court held it would be inappropriate to "categorically refuse" the compulsion of exculpatory evidence.[316] In particular, the court pointed to language from *Morrissey* concerning the need for "*accurate knowledge*" of the parolee's behavior, as well as the parolee's right to "*show*" that he did not commit the alleged violation.[317] The court thus grounded its holding in the defendant's "valid interests" in presenting evidence on his own behalf.[318]

However, the court also recognized that exculpatory evidence would likely be in the hands of a probation officer, rather than prosecutors.[319] Further, the court found it would be unreasonable to ask probation officers "unfamiliar" with *Brady* and its progeny to discharge a *Brady* requirement.[320] Instead, the court instituted a procedure whereby probation officers would submit potential *Brady* material to the court for final review and possible

308. 187 F. Supp. 2d 601 (S.D. W. Va. 2002).
309. *Id.* at 602 (citing United States v. Berger, 976 F. Supp. 947, 950 (N.D. Cal. 1997)).
310. *Id.* at 603.
311. *Id.* (quoting United States v. Donaghe, 924 F.2d 940, 944 (9th Cir. 1991)).
312. *Id.* (quoting United States v. Tham, 884 F.2d 1262, 1265 (9th Cir. 1989)).
313. *See id.*
314. *See id.* at 603 n.2 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).
315. *See id.*
316. *Id.* at 604.
317. *See id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 484, 488 (1972)).
318. *See id.* at 605 ("This procedure takes into account a defendant's valid interests in bringing to the Court's attention evidence in mitigation of sentence and in support of not revoking supervised release or probation.").
319. *See id.* at 604.
320. *See id.*

disclosure.[321] As a result, defendants would receive *Brady* material without placing an "unreasonable burden" upon the probation office.[322]

Other courts simply directed the government to comply with *Brady* during revocation. A district court in Massachusetts, issuing a summons for a violation of supervised release, advised the government that it must follow Rule 32.1 and "also provide . . . all material exculpatory evidence or information" as per *Brady*.[323] Similarly, a district court in North Carolina stated that, in addition to Rule 32.1, the government must "of course . . . comply with its usual obligations under the *Brady* & *Giglio* decisions regarding this supervised release revocation proceeding."[324] Finally, a district court in Puerto Rico ordered a probation officer to disclose any notes taken during the defendant's supervision that were related to the alleged violation and "may exculpate the defendant's conduct."[325]

C. Equivocating on Brady

Several courts entertained *Brady* challenges to revocation but declined to reach the question of whether *Brady* applies. Some did so explicitly, while others simply rejected *Brady* claims for lack of materiality or prejudice.

In *United States v. Quiroz*,[326] the U.S. Court of Appeals for the Eighth Circuit addressed a challenge to an order denying the defendant's motion for a continuance of his revocation hearing.[327] The defendant argued that a compelling reason for continuance existed because the government failed its *Brady* duty to provide the defendant with several reports, and the defendant required additional time to review these reports for exculpatory evidence.[328] However, the court concluded that the defendant "fail[ed] to come even close" to establishing that the requested evidence contained exculpatory information.[329] Thus, in the absence of a potential *Brady* violation, it affirmed the denial of a continuance.[330]

In *United States v. Neal*,[331] the U.S. Court of Appeals for the Seventh Circuit addressed a direct *Brady* challenge to a supervised release revocation.[332] The defendant argued that *Quiroz* supported application of

321. *See id.* 604–05.
322. *See id.*
323. United States v. Ferrara, No. 89-289, 2008 WL 2222033, at *3 (D. Mass. May 23, 2008).
324. United States v. Murphy, No. 3:01-CR-115, 2011 WL 13308177, at *2 (W.D.N.C. Mar. 21, 2011).
325. United States v. Rivera Guio, Crim. No. 12-691, 2019 WL 11637272, at *3 (D.P.R. Nov. 27, 2019). Notably, the court made clear that Rule 32.1 only requires disclosure of evidence used against the defendant, but nonetheless held that *Brady* requires further disclosure than is provided for under the rule. *See id.* at *1.
326. 374 F.3d 682 (8th Cir. 2004).
327. *Id.* at 684.
328. *See id.*
329. *Id.* In fact, the court found the reports contained "multiple" admissions by the defendant to violating conditions of release. *Id.*
330. *See id.*
331. 512 F.3d 427 (7th Cir. 2008).
332. *See id.* at 436.

Brady by entertaining a *Brady* challenge to revocation.[333] However, the court rejected this claim, finding that the Eighth Circuit did not decide the "foundational question" of *Brady*'s applicability, but instead rejected the motion "[w]ithout first making this determination."[334] In support, the court noted that *Quiroz* did not "directly" involve a *Brady* claim, but rather a motion for a continuance.[335] Nonetheless, the court found that the defendant's claim failed for similar reasons of proof, as in *Quiroz*.[336] Thus, the court rejected the claim but noted that it too "need not reach" the question of *Brady*'s applicability.[337]

The U.S. Courts of Appeals for the Third and Fourth Circuits followed suit. In *United States v. Petlock*,[338] the Third Circuit addressed a *Brady* challenge to a supervised release revocation.[339] The court rejected the claim after finding that the defendant "faile[d] to identify" any exculpatory material or to explain how such material could have "advanced a colorable defense," as the violation was based on a guilty plea.[340] Similarly, in *United States v. Mitchell*,[341] the Fourth Circuit rejected a *Brady* challenge to a supervised release revocation after finding that the requested evidence "could have no effect" on the revocation decision.[342] In neither case did the court address the issue of *Brady*'s applicability.

Lastly, in *United States v. Rentas-Felix*,[343] a district court in Puerto Rico faced a *Brady* challenge to a supervised release revocation.[344] The court noted that other courts have "questioned" whether *Brady* applies to revocation proceedings because they are not criminal prosecutions.[345] However, the court rejected the claim after finding that the defendant was not prejudiced by the absence of the alleged material.[346] Thus, the court did not address the direct question of whether *Brady* in fact applies.[347]

IV. *BRADY* SHOULD APPLY TO SUPERVISED RELEASE REVOCATION HEARINGS

This part seeks to resolve uncertainty surrounding *Brady*'s application to supervised release revocation hearings. Part IV.A argues that due process balancing, as outlined in *Ruiz*, supports *Brady*'s application to supervised

333. *See id.*
334. *Id.* at 437.
335. *Id.* at 436.
336. *See id.* at 437.
337. *See id.* at 438.
338. 843 F. App'x 441 (3d Cir. 2021).
339. *See id.* at 444.
340. *Id.* at 445.
341. 429 F. App'x 271 (4th Cir. 2011).
342. *See id.* at 276.
343. 235 F. Supp. 3d 366 (D.P.R. 2017).
344. *See id.* at 369–70.
345. *Id.* at 371 (collecting cases).
346. *Id.* at 372.
347. *See id.* at 371 ("*Assuming Brady* applies here, however, defendant's challenge cannot stand." (emphasis added)).

release revocations. Part IV.B argues that application of *Brady* is also supported by the Supreme Court's provision of counsel in contested revocation hearings in *Gagnon*. Part IV.C argues that the reasons put forth to support *Brady*'s inapplicability are unavailing.

A. Due Process Balancing Favors Application of Brady

In *Ruiz*, the Court laid out the due process analysis to employ when evaluating *Brady*'s potential application to new contexts.[348] The Court explained that it looks to three factors: the private interest affected by the state action, the value of the additional procedural safeguard sought, and the governmental interest that would be adversely impacted by the additional safeguard.[349] In *Ruiz*, the Court found that the value of impeachment evidence at the plea stage was too "comparatively small" to outweigh the "radical" change its disclosure would require.[350] In the context of supervised release, however, these factors point favorably toward *Brady* application.

The first factor is the private interests at stake. These are twofold: the interest of the supervisee and the interest of society at large.

The Court has described the interest of an individual facing revocation in strong terms. In *Morrissey*, it described parole revocation as inflicting a "grievous loss."[351] The Court acknowledged that supervised individuals do not enjoy total liberty but conditional liberty dependent on observance of restrictions.[352] Nonetheless, the Court found this liberty contains "many of the core values" of unqualified liberty, making it "valuable" under the U.S. Constitution.[353] Echoing these findings, the Court stated in *Gagnon* that revocation is a "serious deprivation" of freedom.[354] Thus, the individual has an important interest in ensuring revocation is based on accurate findings of fact.[355]

Society also has an interest in accuracy due to its stake in the offender's future. As the Court explained in *Morrissey*, a societal interest in rehabilitation is harmed when revocation is unwarranted or based on "erroneous information."[356] This accords with Judge Weinstein's observation that revocation severs community ties, making it more difficult for the individual to reintegrate.[357] The Court reiterated this point in *Gagnon*, reasoning that the state has an interest in accurate fact-finding to ensure it is not "unnecessarily interrupting" rehabilitation.[358] Thus, both the individual

348. *See supra* note 266.
349. *See supra* notes 266–66 and accompanying text.
350. *See supra* note 281.
351. *See supra* note 28 and accompanying text.
352. *See supra* note 140 and accompanying text.
353. *See supra* notes 143–43 and accompanying text.
354. *See* Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973).
355. *See id.* at 785 (noting that the supervised individual has an interest in accurate fact-finding to "insure that his liberty is not unjustifiably taken away").
356. *See supra* notes 147–47 and accompanying text.
357. *See supra* note 12 and accompanying text.
358. *See Gagnon*, 411 U.S. at 785.

and society share a common interest in ensuring revocation hearings produce accurate findings of fact.[359]

The second factor is the value of the additional safeguard. Here, a comparison to *Ruiz* is useful.

In *Ruiz*, the Court found that impeachment evidence is not "critical" at the plea stage given its limited value.[360] In particular, a defendant cannot foresee whether such evidence is helpful, given the defendant's lack of knowledge of the prosecution's potential case.[361] Thus, the additional safeguard would produce evidence with little practical value for the defendant in their present situation.

In contrast, *Brady* disclosure would produce evidence highly relevant for a revocation hearing. In *Morrissey*, the Court held that individuals facing revocation have due process rights to present evidence and to cross-examine adverse witnesses, absent a finding of good cause.[362] By providing evidence that establishes factual innocence and impeaches adverse witnesses,[363] *Brady* disclosure serves these two rights exactly. Thus, the safeguard lacks the weakness identified in *Ruiz*: the uncertain benefit of any evidence disclosed.[364] Rather than being speculative, the value of *Brady* information at revocation would be concrete, employed by the defendant in exercise of their due process rights to present their case.

The third factor is the adverse impact of the additional safeguard on the governmental interest.

In *Morrissey*, the Court described an "overwhelming" governmental interest in being able to revoke parole "without the burden of a new adversary criminal trial."[365] Thus, it cautioned that the process should remain "flexible."[366] While *Brady* disclosure would burden the government, its cost can be procedurally blunted, would not apply in every case, and would not run afoul of *Morrissey*'s prescription for flexibility.

The primary burden on the government would be familiarizing probation officers with *Brady* to allow them to discharge their obligation.[367] This is not an immaterial cost.[368] However, this burden can be procedurally blunted. In particular, the district court in *Dixon* instituted a mechanism whereby officers would submit potential *Brady* material to the court for final review and disclosure.[369] As a result, officers would not need to become *Brady* experts but could rely on the experience of the court. By tapping into existing

359. *See id.* (noting that "[b]oth the probationer or parolee and the State have interests in the accurate finding of fact").
360. *See supra* note 273.
361. *See supra* note 272.
362. *See supra* note 153 and accompanying text.
363. *See supra* note 206 and accompanying text.
364. *See supra* note 272 and accompanying text.
365. *See supra* note 146.
366. *See supra* note 156.
367. *See supra* notes 319–19 and accompanying text.
368. *See supra* note 320 and accompanying text.
369. *See supra* note 321.

sources of knowledge, this procedure lessens the marginal burden on the probation office.[370]

Additionally, *Brady* disclosure would not be required in every case. As the Court noted in *Gagnon*, revocation may often occur without a factual dispute, such as when it is based on a separate conviction or a confession to the violation.[371] For example, for the twelve-month period ending June 2021, 32.7 percent of revocations were based on convictions for new offenses.[372] For the prior twelve-month period, the figure was 29.9 percent.[373] Thus, for a significant number of cases, *Brady* would impose no additional cost, lessening the overall burden.

Finally, requiring *Brady* disclosure would not run afoul of *Morrissey*'s prescription that revocation hearings remain "flexible."[374] In particular, the Court sought to preserve a procedural distinction between a revocation hearing and a criminal trial.[375] Applying *Brady* would not erase this distinction. For one, both the Federal Rules of Evidence and the Sixth Amendment's right to confront adverse witnesses would continue to not apply.[376] For another, the individual would still have no right to a jury,[377] and the government would still bear a lessened "preponderance of the evidence" standard.[378] In these cases, there is no factual dispute at the revocation stage that necessitates *Brady* disclosure. Thus, *Brady* application would not render revocation rigid, but would instead leave intact major procedural differences between revocation hearings and trials.

In sum, due process considerations warrant *Brady* application to supervised release revocation hearings. First, both the individual and society share a common interest in accurate fact-finding at revocation. Second, *Brady* would provide relevant evidence that the individual could employ, in exercise of their due process rights to present evidence and cross-examine witnesses. Finally, the burden of *Brady* disclosure could be procedurally blunted, would not apply in every case, and would leave intact the core distinctions between revocation hearings and trials. As opposed to the "radical" change for a "comparatively small" benefit that was rejected in *Ruiz*,[379] *Brady* disclosure at revocation could amount to a comparatively small change for a potentially radical benefit.

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370. *See supra* note 322 and accompanying text.

371. *See supra* note 177 and accompanying text.

372. *See Table E-7A—Federal Probation System Federal Statistical Tables for the Federal Judiciary (June 30, 2021)*, U.S. CTS., https://www.uscourts.gov/statistics/table/e-7a/statistical-tables-federal-judiciary/2021/06/30 [https://perma.cc/2A3Z-ZPPD] (last visited Sept. 2, 2022) (click on "DOWNLOAD DATA TABLE").

373. *See Table E-7A—Federal Probation System Federal Statistical Tables for the Federal Judiciary (June 30, 2020)*, U.S. CTS., https://www.uscourts.gov/statistics/table/e-7a/statistical-tables-federal-judiciary/2020/06/30 [https://perma.cc/6WEA-H7R8] (last visited Sept. 2, 2022) (click on "DOWNLOAD DATA TABLE").

374. *See supra* note 156.

375. *See supra* note 156 and accompanying text.

376. *See supra* notes 19–20.

377. *See supra* note 14 and accompanying text.

378. *See supra* note 16.

379. *See supra* note 281.

B. Gagnon*'s Application of the Right to Counsel to Revocation Supports Application of* Brady *to Revocation*

Gagnon's expansion of the right to counsel at contested revocations provides similar support for the adoption of *Brady* at those hearings.[380] As noted, *Brady* and the right to counsel share a "unity of purpose" in ensuring the reliability of a verdict.[381] In particular, these rights work in tandem to ensure that relevant evidence is presented on behalf of the defense.[382] Thus, both ask the same question: whether the result of the proceeding would have been different had the omitted evidence been introduced.[383] Their divergence in focus simply points to the two possible causes for the omission of evidence in an adversarial situation: the government and defense counsel.[384]

In *Gagnon*, the Court made clear a concern with the production of relevant evidence and the reliability of the verdict at the revocation stage. As the Court stated, provision of counsel would be necessary to present "a disputed set of facts" and handle the "cross-examining of witnesses."[385] Further, effective representation would promote accurate fact-finding, as outlined in *Gagnon* and *Morrissey*.[386] Thus, provision of counsel at revocation plays the same role as at trial: ensuring evidence is presented and proceedings are thereby accurate.

In this light, it would be anomalous to provide for counsel, but not *Brady* disclosure, at a contested revocation hearing. First, both rights serve the same purpose in securing reliable verdicts.[387] If this purpose was considered weighty enough in *Gagnon* to support the costly burden of providing counsel,[388] it would seem weighty enough to support the less burdensome requirement of further disclosure.[389] Second, because of the symbiotic relationship between these rights,[390] failure to apply *Brady* may undermine their shared purpose. Specifically, if material evidence is not brought to the judge's attention, this would threaten the accuracy of the revocation finding.[391] However, in the absence of *Brady*, a defendant would only have recourse to challenge this finding if the omission was due to counsel's error.

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380. *See supra* note 181.
381. *See supra* notes 231–38 and accompanying text.
382. *See supra* notes 234–41 and accompanying text.
383. *See supra* notes 255–57 and accompanying text.
384. *See supra* note 262 and accompanying text; *see also* Blume & Seeds, *supra* note 230, at 1154 ("[T]he *Brady* and *Strickland* doctrines . . . govern the core functions of the main players in the adversarial system.").
385. *See supra* note 174.
386. *See supra* notes 171–73 and accompanying text.
387. *See supra* notes 234–38 and accompanying text.
388. *See supra* note 178.
389. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 490 (1972) (describing the requirements of an informal hearing, including disclosure of the evidence against the defendant, as "not impos[ing] a great burden").
390. *See supra* note 230.
391. *See, e.g.*, *Morrissey*, 408 U.S. at 484 (noting that revocation must be based on "verified facts").

If instead the material evidence was buried in a probation officer's file, the defendant would have no grounds for appeal.[392] Thus, an unreliable finding would stand, despite the Court's clear concern for accuracy in both *Morrissey*[393] and *Gagnon*.[394]

C. Arguments Against Brady *Application Are Unavailing*

Several federal courts have declined to apply *Brady* to revocation. As noted, these courts generally point to a few arguments: (1) *Brady* only applies to criminal prosecutions; (2) Rule 32.1 provides all the due process required at revocation; (3) *Brady* only applies to prosecutors, not probation officers; and (4) a lack of precedent applying *Brady* to revocation.[395] As this section will show, these arguments are unavailing.

First, courts have held that because revocation is not a criminal prosecution, *Brady* does not apply.[396] However, while the facts of *Brady* only concern prosecution,[397] the Court did not so limit its decision. Rather, in its core holding, the Court referred more broadly to determinations of "guilt . . . or punishment."[398] Additionally, the Court's standard for *Brady* materiality looks to the effect of suppressed evidence on a "proceeding," not a prosecution.[399] Thus, the Court's language does not support this narrow reading of *Brady*'s application.

In *Brady*, the Court does refer to maintaining the integrity of trials as a motivation for its rationale.[400] However, this should not be read to limit its holding. First, *Brady* itself concerned not only a trial, but also a sentencing.[401] Second, the Court's discussion of fair trials was an explication of a previous case, *Mooney*,[402] which *did* challenge only a trial.[403] Finally, the Court emphasized the importance of fair trials in contrast to a singular focus on prosecutorial misconduct.[404] It did this to explain its holding that due process would be violated by suppressed evidence regardless of the prosecutor's good faith.[405] Thus, the Court's discussion of fair trials was meant to provide context for its decision, not to cabin its holding.

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392. *See, e.g.*, United States v. Donaghe, 924 F.2d 940, 944 (9th Cir. 1991) (noting that under Rule 32.1, probation officers are not required to disclose evidence to defendants unless it will be used against them).

393. *See supra* note 150 and accompanying text.

394. *See supra* note 171 and accompanying text.

395. *See supra* Part III.A.

396. *See supra* notes 282–87 and accompanying text.

397. *See supra* note 193 and accompanying text.

398. *See supra* note 201 and accompanying text.

399. *See supra* note 217 and accompanying text. The Court continues to speak of a "proceeding" when determining *Brady* materiality. *See, e.g.*, Turner v. United States, 137 S. Ct. 1885, 1893 (2017).

400. *See supra* note 199.

401. *See supra* note 193.

402. *See supra* notes 198–99 and accompanying text.

403. *See supra* note 195.

404. *See supra* notes 199–99 and accompanying text.

405. *See supra* notes 198–201 and accompanying text.

Notably, the government's brief in *Ruiz* put forth the argument that *Brady* is solely a trial right.[406] Although the Court found for the government, it declined to take this path. In fact, only Justice Thomas agreed, writing in concurrence that *Brady* is supported by the principle of avoiding unfair trials.[407] The majority only went so far as to describe *Brady* as "trial-related."[408] Thus, the Court has declined an open invitation to explicitly limit *Brady* to trials.

In *Osborne*, the Court did state that *Brady* is the "wrong framework" for post-conviction relief.[409] However, this should not be read to exclude revocation. First, the defendant in *Osborne* was seeking *Brady* material to challenge a verdict.[410] Thus, the Court looked to the due process accorded to individuals seeking "relief from convictions."[411] In contrast, *Brady* material at revocation would be used to challenge an *alleged* violation, rather than to seek relief from a past finding. Second, the Court noted that the defendant in *Osborne* had limited "liberty interests" due to his imprisonment.[412] In contrast, an individual facing revocation possesses many of the "core values" of unqualified liberty, as explained in *Morrissey*.[413] These differences in both the potential use of *Brady* material, as well as the status of the individual seeking the material, urge against an expansive reading of *Osborne* to cover revocation.

Second, courts have held that Rule 32.1, by codifying *Morrisey*, provides all the due process required for revocation.[414] However, there is disagreement among courts as to whether the procedural protections provided by Rule 32.1 and constitutional due process are in fact indistinguishable at the revocation stage. At the district level, at least four courts directed the government to comply with *both* Rule 32.1 *and Brady*.[415] Further, the *Dixon* court pointed to language from the Ninth Circuit that it understood to "suggest" a divergence between the requirements of Rule 32.1 and constitutional due process.[416] Meanwhile, circuit courts do not appear to have squarely addressed the issue. Thus, the question of whether Rule 32.1 provides the requisite due process for revocation is unsettled. This uncertainty weighs against relying on Rule 32.1 to foreclose *Brady* application on its face.

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406. *See* Brief for the United States at 12, United States v. Ruiz, 536 U.S. 622 (2002) (No. 01-595) ("The purpose of the Court's *Brady* decisions is therefore to protect the fairness of the trial and to guard against the risk that an innocent person might be found guilty because the government withheld evidence. That purpose is not implicated when a defendant enters a plea in open court . . . .").

407. United States v. Ruiz, 536 U.S. 622, 633–34 (2002) (Thomas, J., concurring).

408. *See id.* at 631.

409. *See supra* note 222.

410. *See supra* note 220.

411. *See* Dist. Att'y's Off. for the Third Jud. Dist. v. Osborne, 557 U.S. 52, 69 (2009) (quoting Pennsylvania v. Finley, 481 U.S. 551, 559 (1987)).

412. *See supra* note 224.

413. *See supra* note 28.

414. *See supra* notes 289–92 and accompanying text.

415. *See supra* Part III.B.

416. *See supra* notes 311–11.

To be sure, the *Morrissey* Court described its task as providing the "minimum requirements" of due process.[417] However, the Court also said those requirements "include" the procedures it set forth.[418] Thus, the Court did not clearly map the procedures it outlined onto the requirements of due process. Instead, due process would have to at least "include" those procedures. Notably, the Court explicitly reserved judgment on whether due process would also require provision of counsel.[419] This provides further evidence that the procedures it set forth were not meant to be exhaustive of the due process right. In any case, this lack of a clear equivalence further urges against using Rule 32.1 to foreclose *Brady* application absent the substantive due process analysis outlined in *Ruiz.*

Third, courts have held that probation officers are not subject to *Brady* due to their neutral "supervisory" role, in contrast to prosecutors.[420] However, this ignores the Court's statement in *Gagnon* that an officer undergoes a "modification in attitude" once they have recommended revocation.[421] While officers are not thereby transformed into prosecutors, their stance of neutrality toward the supervisee is "compromised."[422] As a result, a focus on the officer's "benevolent attitude" is misplaced at the revocation stage.[423] Thus, reliance on an officer's neutral stance to foreclose *Brady* application ignores this alteration in status.

Additionally, prosecutors have taken on a much greater role in revocation. At the time of *Gagnon*, the Court noted that the state was represented by a parole officer rather than a prosecutor.[424] In contrast, at a supervised release revocation hearing, a prosecutor represents the government and argues the defendant's guilt.[425] At the fact-finding stage at which *Brady* is relevant, the probation officer only participates if called as a witness.[426] Thus, even if *Brady* is directed at the role of prosecutors, it is nonetheless implicated at a supervised release revocation hearing.

Finally, courts have pointed to an apparent consensus that *Brady* is inapplicable, or alternatively, to a lack of precedent holding that it applies.[427] However, this ignores at least four district courts that directed the government to comply with *Brady* disclosure in revocation hearings.[428] Additionally, although no circuit court has expressly applied *Brady* to revocation,[429] the Third, Fourth, and Eighth Circuits have entertained *Brady*

417. *See supra* note 152 and accompanying text.
418. *See supra* note 153.
419. *See supra* note 154 and accompanying text.
420. *See supra* notes 294–301 and accompanying text.
421. *See supra* notes 169–69 and accompanying text.
422. *See supra* note 170.
423. Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973).
424. *Id.* at 789 ("In a revocation hearing . . . the State is represented, not by a prosecutor, but by a parole officer . . . .").
425. *See supra* note 15.
426. *See supra* note 108.
427. *See supra* notes 302–06 and accompanying text.
428. *See supra* Part III.B.
429. *See supra* note 307.

claims in the revocation context.[430] Conversely, only the Eleventh Circuit has held *Brady* inapplicable, albeit in a terse footnote of an unpublished opinion.[431] Meanwhile, the Seventh Circuit is the only circuit to address the issue at length, but did so in dicta before declining to decide the merits.[432] In sum, the landscape is fluid, belying any notion that consensus exists.

CONCLUSION

Access to the constitutional protections of *Brady* should not differ depending on the federal district in which a supervised release revocation hearing is held. Thus, after highlighting the disparate treatment that *Brady* claims have received among federal courts, this Note argued for *Brady*'s uniform application. By addressing the reasons put forth against *Brady*'s application, this Note also showed that existing arguments do not support *Brady*'s exclusion. Rather, addressing *Brady*'s application requires a due process analysis that balances the interests at stake. This balance favors *Brady*'s application to supervised release revocation. Further, this finding is logically supported by the Supreme Court's provision of counsel to contested revocations.

430. *See supra* Part III.C.
431. *See supra* note 283 and accompanying text.
432. *See supra* notes 331–36 and accompanying text.