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CAN PROSECUTORS BLUFF? *BRADY V. MARYLAND* AND PLEA BARGAINING

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"[A prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones."[1]

INTRODUCTION: FRAMING THE QUESTION

Poker players can bluff. But what about prosecutors? Does the law allow a prosecutor to strike a deal for a guilty plea without telling all she knows about her witnesses? Can she sign the plea agreement and still keep to herself the criminal records, the sweetheart deals, the contradictory statements that make some of her witnesses seem like jokers rather than aces, kings or queens? Does our poker-faced prosecutor strike a "hard blow" against crime in a tough case by convincing defendant to acknowledge his guilt and accept the consequences? Or is her blow a "foul one," cheating defendant of any fair chance to make an informed decision about his own liberty?

To explore those questions, we might start by considering what a rule requiring disclosure in plea negotiations could accomplish. We already have some helpful answers. In today's conference and in earlier articles, Professor McMunigal argues that *Brady*-like disclosure during plea bargaining helps to protect innocent people

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1 Berger v. United States, 295 U.S. 78, 88 (1935).

from being coerced into pleading guilty.[2] I believe his argument is both correct and immensely important to anyone concerned about justice in our system.

Professor McMunigal and my University of Richmond colleague Corinna Lain also have demonstrated how *Brady*-like disclosure in plea negotiation enhances the "accuracy" of plea bargaining.[3] In other words, disclosure helps to prevent innocent people from pleading guilty more than it deters guilty pleas by factually guilty defendants.[4] So, in a system with broader pre-plea disclosure, a guilty plea is more reliably a true measure of factual guilt.

In large measure, I agree with those arguments as well. As a general rule, lawyers in any kind of litigation—civil or criminal—settle cases in part based on an assessment of the risks and benefits of going to trial. Full disclosure promotes more accurate assessments on both sides and produces bargains that more accurately mirror the likely outcome of a trial.[5] Moreover, as a general rule, nondisclosure disproportionately harms the innocent since, almost[6] by definition, guilty defendants know more about the facts surrounding a crime than do those who are factually innocent. Finally, nondisclosure can cause special disadvantages for a population of defendants who are most vulnerable to coercion in the plea bargaining process. Youth, mental infirmities, drug or alcohol abuse may limit the ability of some defendants to understand or recall events that have led to criminal charges.[7] Those defendants more readily may be persuaded of their

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[2] *See generally* Kevin McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989).

[3] *Id.* at 985–97; Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U.L.Q. 1, 29–37 (2002) (suggesting that disclosure under *Brady* is essential).

[4] At the risk of gross oversimplification, the argument goes something like this. Disclosure of exculpatory evidence helps defendant accurately assess the odds of conviction at trial and thereby helps him to avoid "overvaluing" the benefit of a plea agreement. McMunigal, *supra* note 2, at 998–99; Lain, *supra* note 3, at 29–30. Hence, *Brady*-like disclosure will deter some guilty pleas. And, the argument goes, that will benefit the innocent more often than the guilty because, by definition, cases with significant exculpatory evidence are more likely to involve innocents. McMunigal, *supra* note 2, at 991. As Professor McMunigal further points out, a system which requires *Brady* disclosure for trials but not for guilty pleas would tend to encourage prosecutors to "divert *Brady* cases into plea bargaining." *Id.* at 997 (increasing the chances of guilty pleas in the weakest cases).

[5] *See* John G. Douglass, *Fatal Attraction: The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 449–50 (2001) [hereinafter *Fatal Attraction*] (noting that plea bargains resolve a majority of criminal cases).

[6] I say "almost" because, as Professor McMunigal has argued, some elements of some crimes may be beyond the knowledge of any defendant, whether guilty or not. McMunigal, *supra* note 2, at 971–80.

[7] *Id.* at 981–82 (discussing difficulty of some defendants to answer questions about their conduct).

"guilt."[8] And they may be least able to assist their own counsel in finding defenses. In those cases, disclosure by the prosecutor can raise questions for defense counsel where an uncomprehending client may not. In sum, the protection of innocence, even in the context of a guilty plea, is a sound and sufficient reason to consider rules that would promote disclosure in plea bargaining.

But is *Brady v. Maryland*[9] the right rule? Is it a rule that the Due Process Clause extends to plea bargaining as well as to trial? And, if so, is it a rule that defendant and prosecutor can never agree to waive in that same plea bargain? Those are the questions that were before the Court in *United States v. Ruiz*.[10] I write here to explain why I feel the unanimous Court answered them correctly, despite my view that more disclosure in plea bargaining would be a good thing.

The Ninth Circuit in *Ruiz*, like several other courts before it,[11] attempted to turn *Brady* into a right to an "informed" guilty plea.[12] The Supreme Court properly found *Brady* ill suited to that task. As a rule that protects against misinformed guilty pleas, *Brady* is at best a "random"[13] kind of protection. It can inform some defendants, but leave others largely in the dark. And the difference has little to do with the potential for innocence.[14] As a practical matter, a nonwaivable *Brady* rule can prohibit agreements that are desirable to defendants and that promote other important public interests like the safety of witnesses or the candor of testimony from cooperating accomplices.[15] The Ninth Circuit's nonwaivable *Brady* rule would

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[8] Indeed, those are the same defendants most likely to have given false confessions of guilt during investigation of the crime. *See* Paul T. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471, 1493 (1995) (noting that the risk of a false confession compounds the risk of a false guilty plea).

[9] 373 U.S. 83 (1963).

[10] 536 U.S. 622 (2002).

[11] United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998); United States v. Wright, 43 F.3d 491, 495 (10th Cir. 1994); White v. United States, 858 F.2d 416, 422–23 (8th Cir. 1988); Miller v. Angliker, 848 F.2d 1312, 1319 (2d Cir. 1988); Campbell v. Marshall, 769 F.2d 314, 321–23 (6th Cir. 1988).

[12] United States v. Ruiz, 241 F.3d 1157, 1164 (9th Cir. 2001)(citing Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995)). Under that approach, undisclosed exculpatory evidence is "material," and therefore sufficient to invalidate a guilty plea, if disclosure would have changed defendant's mind about pleading guilty. *Id.* at 1166 ("Evidence is 'material' if 'there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial.'") (quoting Sanchez, 50 F.3d at 1454)).

[13] "Random" is the Court's word. United States v. Ruiz, 536 U.S. 622, 630 (2002).

[14] Indeed, as I have suggested elsewhere, the Ninth Circuit's version of *Brady* may offer the least protection to innocent defendants who are most vulnerable to coercion in plea bargaining. Douglass, *Fatal Attraction*, *supra* note 5, at 499–503. It can even create perverse incentives for prosecutors to disclose *less* information during plea bargaining. *Id.* at 493–98.

[15] *See infra* text at notes 33–36.

have undermined longstanding discovery rules designed with those interests in mind.

While I agree with the outcome in *Ruiz*, I believe there still may be a role for *Brady* when defendant challenges a guilty plea: a role not foreclosed by the Court's ruling in *Ruiz*, and one more closely aligned with the role *Brady* plays after a guilty verdict at trial. After trial a *Brady* challenge focuses on outcomes. It is a kind of safety net for innocence. In a post-trial *Brady* challenge, we ask whether previously undisclosed information would "undermine confidence in the verdict."[16] We should ask the same question when we apply *Brady* to a guilty plea. The question is not whether defendant made a well informed choice to plead guilty. The question should be whether undisclosed exculpatory evidence undermines confidence in the judgment of guilt entered as a result of that guilty plea. In other words, we should ask whether the evidence raises a reasonable probability that an innocent person has pleaded guilty.

This standard of "materiality" is more doctrinally consistent with *Brady* itself. And, unlike the Ninth Circuit's approach, this standard offers its broadest protection to the most vulnerable defendants. Further, this standard of materiality directs the court to consider not just the "random" assortment of information that may have influenced the defendant's choice to plead guilty, but all information that reflects on guilt or innocence, including the defendant's own statements in court at the time of the plea. This approach focuses not on defendant's decision making, but on his potential innocence. After all, that is the main reason for joining *Brady* and plea bargaining in the first place.

I. THE FAILED MARRIAGE OF *BRADY* AND PLEA BARGAINING

A. Adapting Brady *to Plea Bargains: How the Ninth Circuit and Other Courts Constructed a Nonwaivable Right to an Informed Plea*

It should matter that a defendant stands in open court, represented by counsel, and confesses his guilt in the form of a guilty plea. In the eyes of the Supreme Court, it does matter—a lot. For one thing, by pleading guilty defendant waives not only the right to trial but also the right to challenge constitutional violations that may have preceded the plea.[17] After "a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the

[16] Kyles v. Whitley, 514 U.S. 419, 435 (1995).
[17] Tollett v. Henderson, 411 U.S. 258, 267 (1973).

deprivation of constitutional rights that occurred prior to the entry of the guilty plea."[18]

Any theory that allows a defendant to raise a *Brady* challenge in the wake of a guilty plea must first surmount the considerable hurdle of the plea itself and the waiver that goes along with it. A number of courts,[19] including the Ninth Circuit,[20] constructed a theory to accomplish that. To do so, they borrowed from—or perhaps stretched—two doctrines recognized by the Supreme Court. The first is that a guilty plea is valid only if it is "voluntary and intelligent."[21] A plea entered in ignorance of substantial undisclosed exculpatory evidence, those courts held, is not an "intelligent" plea and, hence, not a valid waiver of rights.[22] Second, borrowing from cases dealing with ineffective assistance of counsel in the guilty plea process,[23] those courts have found that *Brady* evidence is "material" to a guilty plea if there is a reasonable probability that its disclosure would have caused defendant to reject the plea bargain and choose trial.[24] The result is a *Brady*-based doctrine tied to defendant's decision making. He has a right to withdraw a plea where his decision to plead guilty would have been different but for the prosecutor's nondisclosure of *Brady* evidence. This, in essence, is what the Ninth Circuit and other courts did in the series of opinions that led to *Ruiz*.

Indeed, the Ninth Circuit went one step further. It held in *Ruiz* that the disclosure rule cannot be waived, even by explicit terms in the plea agreement.[25] Such a waiver, the court found, could not be voluntary and intelligent if entered in ignorance of *Brady* material. In effect, defendant would not know what he was waiving.[26] The end result for the Ninth Circuit in *Ruiz* was a nonwaivable right of the defendant to be informed of *Brady* evidence when he decides whether to accept a plea bargain.

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[18] *Id.*

[19] United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998); United States v. Wright, 43 F.3d 491, 495 (10th Cir. 1994); White v. United States, 858 F.2d 416, 422–23 (8th Cir. 1988); Miller v. Angliker, 848 F.2d 1312, 1319 (2d Cir. 1988); Campbell v. Marshall, 769 F.2d 314, 321–23 (6th Cir. 1988).

[20] Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995).

[21] Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[22] Ruiz v. United States, 241 F.3d 1157, 1164 (9th Cir. 2001) (citing *Sanchez*, 50 F.3d at 1453); *White*, 858 F.2d at 422–23); *Miller*, 848 F.at 1319; *Campbell*, 769 F.2d at 321–23.

[23] Hill v. Lockhart, 474 U.S. 52, 59 (1985) (permitting withdrawal of a plea where "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial").

[24] *E.g.*, *Sanchez*, 50 F.3d at 1454; *Miller*, 848 F.2d at 1321–22.

[25] *Ruiz*, 241 F.3d at 1165.

[26] *Id.*

B. Why Ruiz *Was a Weak "Test Case" for Extending* Brady *to Plea Bargaining*

If the Department of Justice had concerns as lower courts began to extend *Brady* into the world of plea bargaining, then folks in the Solicitor General's Office must have rejoiced when *Ruiz* materialized as the "test case" in the Supreme Court. It is hard to imagine facts more favorable to the government. First, unlike most *Brady* cases, *Ruiz* was not litigated under a cloud of government misconduct. There was no indication that the government actually withheld anything exculpatory. Second, there was no suggestion of innocence. Ruiz had been caught red-handed with thirty kilograms of marijuana in her luggage.[27] Finally, Ruiz pled guilty and never tried to withdraw her plea. She sought only the benefits of the more favorable plea offer she had rejected earlier because it contained a limited waiver of *Brady* rights.[28]

The issue framed by these facts likewise was highly favorable to the government, for two reasons. First, the Ninth Circuit rule was nonwaivable.[29] In effect, it was an inflexible constitutional mandate that no plea could be entered until the government had completed a search for *Brady* material and disclosed it all to defendant, even if the parties wanted to go forward with the plea at an earlier stage. In a world where early guilty pleas based on limited information have become routine,[30] often because they are favorable to a defendant,[31] that kind of rule posed serious practical concerns.[32]

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[27] United States v. Ruiz, 536 U.S. 622, 625 (2002).

[28] *Id.* at 626.

[29] *Id.*

[30] Indeed, the plea agreement rejected by Ruiz came before indictment and was part of a "fast track" program designed to handle routine drug importation cases which arise in large numbers from Mexican border crossings in the Southern District of California. *Ruiz*, 241 F.3d at 1160–61 (citing United States v. Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000).

[31] *See Fatal Attraction*, *supra* note 5, at 505–06.

[32] No doubt, as Professor McMunigal points out, the Supreme Court overstated those concerns when it suggested that the Ninth Circuit rule "could lead the Government . . . to abandon its heavy reliance upon plea bargaining. . . ." *Ruiz*, 536 U.S. at 632. Still, as the facts of *Ruiz* suggest, an inflexible rule would add costs and delays to the disposition of many routine cases.

One concern which neither the parties nor the Court addressed in *Ruiz* is a problem that arises in the many cases where a plea bargain is aimed at securing defendant's testimony as a cooperating government witness. Concerns over the credibility of cooperating witnesses are well documented. *See* Stephen Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381 (1996). If *Brady* required prosecutors to disclose all favorable evidence while negotiating a plea and cooperation agreement, such disclosures might influence cooperating defendants to "tailor" their stories to fit those disclosures in an effort to curry favor with the prosecutor. In those cases, by giving *Brady* disclosure to one defendant, a prosecutor unwittingly might encourage false testimony against a different defendant. *See Fatal Attraction*, *supra* note 5, at 506 n. 296.

Second, the "*Brady* waiver" proposed by the government in *Ruiz* was limited. The government agreed to disclose any information "establishing the [defendant's] factual innocence."[33] The waiver covered only "impeachment information" relating to government witnesses or informants, and information supporting affirmative defenses.[34] By requiring disclosure of impeachment evidence in advance of any guilty plea, the Ninth Circuit touched an especially sensitive government nerve: concern over witness safety and protection of informants in ongoing investigations. The Ninth Circuit rule conflicted with limitations on witness-related discovery in the Federal Rules of Criminal Procedure[35] and the Jencks Act.[36] In effect, the Ninth Circuit rule would have given broader discovery rights to a defendant who sought an early plea bargain than to one who was preparing for trial.[37] As a result, even before the Court addressed the doctrinal basis for the Ninth Circuit's rule of informed choice in plea bargaining, the rule had two strikes against it.

C. Why Brady *Fails as a Right to an "Informed" Plea Bargain*

At trial, the government puts its inculpatory case before the jury in order to get a conviction. *Brady* insures that the jury gets the rest of the story, at least insofar as it consists of important exculpatory evidence. Sometimes, *Brady* can work the same way in plea negotiations. Where the prosecutor shows only her most favorable

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[33] *Ruiz*, 536 U.S. at 625.

[34] *Id.*

[35] FED. R. CRIM. P. 16(a)(2) (exempting prosecution witness statements from pretrial discovery).

[36] 18 U.S.C. § 3500 (2000). Given the longevity of the Jencks Act in a world where legislators recognize that the vast majority of cases are resolved through plea bargaining, one might argue that the Act reflects a legislative endorsement of the notion that prosecutors are free to negotiate guilty pleas while disclosing little or nothing about government witnesses.

[37] In many state courts, discovery rules allow the prosecution to avoid disclosing even the names of prosecution witnesses before trial. *See* Cary Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U.L. REV. 641, 659 (1989) (noting that about half of the states require pretrial disclosure of witness identity). In federal prosecutions, only defendants facing the death penalty are entitled to a list of government witnesses before trial. *See generally* 18 U.S.C. § 3432. The Jencks Act, 18 U.S.C. § 3500 and FED. R. CRIM. P. 16(a)(2) protect a witness's prior statements from disclosure until the witness actually testifies at trial.

It is true, as Professor McMunigal argues, that most prosecutors in most cases choose voluntarily to make earlier disclosure of witness-related information than the rules require. Hence, disclosure of impeaching information would pose little burden on the government and raise few concerns about witness intimidation in most cases. But the Ninth Circuit's nonwaivable constitutional mandate would apply to every case, including those where early identification of government witnesses could risk lives and shut down ongoing investigations. In rejecting that inflexible rule, the Supreme Court recognized the need for "careful tailoring" of rules requiring disclosure relating to witnesses. *Ruiz*, 536 U.S. at 632. Once again, the breadth of the Ninth Circuit rule made *Ruiz* an easier case for the government.

cards, *Brady* disclosure can offer a more realistic view of the strength of the government's case, allowing defendant to make a more fully informed choice to plead guilty or go to trial. That seems to be the model that the Ninth Circuit had in mind. And it may be an accurate model for many cases.[38]

But whether *Brady* works that way for a given defendant is largely a matter of chance. *Brady* disclosure is more, or less, valuable to a given defendant depending upon what else he knows about the government's case when he chooses to accept a plea bargain.[39] Weaknesses in an eye-witness's identification, for example, may tell a defendant little about the strength of the government's case until he knows how many other eye witnesses there may be. The uncertain benefit of *Brady* disclosure is readily apparent in the case of impeachment evidence, the kind that was at issue in *Ruiz*. Impeaching evidence means little to the defendant who does not know the inculpatory story that the witness will tell. Almost certainly it will mean less to that defendant than to others who know the rest of the story. And there is no constitutional principle that requires the government to disclose the rest of the story.[40]

Brady applies only to information "favorable" to the defense.[41] It says nothing about unfavorable evidence. Under the best of circumstances, *Brady* provides only a piece of the information relevant to a defendant's choice to accept or reject a plea bargain. As a rule protecting defendant's right to an informed guilty plea, then, *Brady* is a mismatch from the start. The *Ruiz* Court said as much when it noted the "random" way in which *Brady* disclosure "may, or may not, help a particular defendant."[42]

II. *BRADY* AS A RULE OF INNOCENCE

Ruiz leaves little room to argue that *Brady* protects "informed choice" in plea bargaining. Nevertheless, we may find a role for *Brady* if we shift our focus, ever so slightly, from the defendant's *choice* to the defendant's potential *innocence*. The question is not

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[38] In many cases the prospect of inducing a plea gives prosecutors an incentive to offer more informal discovery than the rules require. *See Fatal Attraction, supra* note 5, at 457–58; U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' OFFICE MANUAL §9-6.200 (Sept. 1997) (encouraging prosecutors to consider informal pretrial disclosure to "enhance the prospects that the defendant will plead guilty").

[39] *See generally Fatal Attraction, supra* note 5, at 491–92.

[40] There is no constitutional rule that would require prosecutors to disclose that witness's statements inculpating defendant. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case. . . .").

[41] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[42] *Ruiz*, 536 U.S. at 630.

whether defendant made an informed choice to plead guilty. The question is whether undisclosed *Brady* evidence undermines our confidence in the adjudication of guilt that is based on that plea. Viewed in that light, *Brady* may play the same role after a guilty plea that it plays after a guilty verdict.

A. Brady *After a Guilty Verdict: A Limited Rule Tied to Outcome at Trial*

In the context of trial *Brady v. Maryland* requires a prosecutor to disclose evidence that is "favorable" to the defense and "material" to guilt or punishment.[43] Though *Brady* initially was welcomed as a broad rule of pretrial discovery, the Court's views on "materiality" have left *Brady* with a more limited function. The Court has limited *Brady*'s reach in large measure because of the way we enforce the rule. The central problem is one of "bad timing."[44] *Brady* is a prospective rule, enforced only in retrospect. *Brady* requires disclosure at or before trial. But it is routinely enforced only after a guilty verdict, when previously undisclosed evidence comes to light. At that point, judicial efforts to enforce *Brady* conflict with judicial interests in preserving the finality of a jury's verdict. Reluctance to overturn a verdict leads to a limited view of the government's disclosure obligation.

As a result, the Court has set a high bar for "materiality." And the test for materiality is tied directly to the result which defendant seeks to unravel. Hence, the Court has told us, favorable evidence is "material" only if "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[45] A "reasonable probability," the Court explains, "is a probability sufficient to undermine confidence in the outcome."[46]

B. Brady *After a Guilty Plea: Seeking Confidence in the Judgment of Guilt*

After a trial, *Brady* focuses on results. When exculpatory information in government hands comes to light after the verdict, we ask whether the information "undermine[s] confidence in the outcome." After a guilty plea, *Brady* should lead us to ask the same question. Does the previously undisclosed information undermine

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[43] *Brady*, 373 U.S. at 87 (1963).

[44] *See Fatal Attraction, supra* note 5, at 443 (discussing *Brady*'s "bad timing" as a "prospective rule, enforced only retrospectively").

[45] United States v. Bagley, 473 U.S. 667, 682 (1985).

[46] *Id.*

confidence in the outcome? And the "outcome" is a judgment of guilt entered pursuant to that guilty plea. Stated differently, a post-plea *Brady* disclosure should overcome a judgment of guilt where the undisclosed favorable evidence, viewed in conjunction with the plea itself and with defendant's factual admissions in connection with the plea, give rise to a reasonable probability that defendant is innocent.

As a matter of constitutional doctrine, this approach accords *Brady* essentially the same function after a plea that it plays after a trial. In both contexts *Brady* functions as a kind of safety net for innocence. It gives courts an opportunity to scrutinize the judgment of guilt—whether it follows a trial or a plea—to determine whether nondisclosure has resulted in a miscarriage of justice.

But unlike the Ninth Circuit's doctrine in *Ruiz*, which focuses on defendant's tactical decision making leading up to a guilty plea,[47] this approach gives substantial weight to the guilty plea itself in deciding whether to set aside an otherwise final judgment of guilt. It allows courts to recognize a guilty plea for what it is in most cases: a reliable statement of factual guilt. In this respect, I suggest, this approach is as consistent as one can be with the Court's somewhat inconsistent decisions on the finality of guilty pleas.[48] In effect, it clothes a voluntary guilty plea with a strong, but not conclusive, presumption of finality.

Still, as Professor McMunigal has pointed out, there are more than a few circumstances that should lead us to question the accuracy or sincerity of a guilty plea. Those include cases where the elements of factual guilt may not be fully within a defendant's knowledge, or cases where youth or mental disability affect defendant's

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[47] The Ninth Circuit's doctrine of "informed choice" was unrelated to innocence. It allowed a defendant to take back a guilty plea if he was misinformed as a result of government disclosure, no matter how accurate and sincere his in-court admission of guilt may have been. Indeed, the most likely application of the *Ruiz* rule in most cases would have been to allow renegotiation of more favorable plea bargains by guilty defendants. *See Fatal Attraction, supra* note 5, at 489 n.224.

[48] The oft-quoted dictum in *Menna v. New York*, 423 U.S. 61 (1975), suggests the Court views guilty pleas as conclusive evidence of factual guilt: "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Id.* at 63 n.2. But statements in the Court's more fully developed guilty-plea opinions are more circumspect: "This mode of conviction [through guilty plea] is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial." Brady v. United States, 397 U.S. 742, 750 (1970). Indeed, the Court in *Brady v. United States* went on to say that its confidence in the factual accuracy of guilty pleas "is based on our expectations that courts will satisfy themselves . . . that there is nothing to question the accuracy and reliability of the defendant's admissions that they committed the crimes with which they are charged." *Id.* My suggested approach would not accord guilty pleas the absolute factual finality suggested by the dictum in *Menna*. But it is thoroughly consistent with the more measured language of *Brady v. United States*.

understanding of his own guilt.[49] They also include cases where the pressure of a too-good-to-be-true plea bargain could lead a defendant to plead guilty despite his factual innocence. An approach which asks a court to consider the probability of innocence *in spite of* the guilty plea, invites the court to consider all of these factors which might affect the sincerity or accuracy of the plea. In the absence of such factors, only the most powerfully exculpatory *Brady* disclosure would lead a court to overturn a final judgment.[50] But where such factors are present and undermine our confidence in the in-court confession of guilt, the post-plea *Brady* calculus may well be, and should be, more generous to the defendant. An approach focused on defendant's potential innocence would allow such factors to weigh in defendant's favor, thus granting the most protection in cases where false guilty pleas are most likely. By contrast, under the *Ruiz* doctrine of "informed choice," such factors were at best irrelevant,[51] and at worst tended to work against the defendant.[52]

Finally, a post-plea *Brady* approach focused on factual innocence may encourage courts to demand a more fully-developed factual record at the time of the plea itself.[53] Indeed, an increased insistence by courts on factual development at the guilty-plea stage would itself encourage increased disclosure—of both inculpatory and exculpatory evidence—during plea bargaining.[54]

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[49] *See* McMunigal, *supra* note 2, at 971–82.

[50] This approach is consistent with outcomes in those courts which have applied the *Brady* doctrine in reviewing guilty pleas. Even where courts consider post-plea *Brady* claims on the merits, few cases result in findings favorable to defendants. Most find that the undisclosed evidence was not "material" to the plea decision. *See Fatal Attraction, supra* note 5, at 479 n. 184 (citing numerous cases where courts have found evidence not "material," compared to only a few reaching an opposite result).

[51] The Ninth Circuit standard at issue in *Ruiz* purported to be an "objective standard," *Sanchez*, 50 F.3d at 1454, which presumably would not take into account personal characteristics of a given defendant.

[52] By focusing on defendant's decision making—*i.e.*, whether the disclosed *Brady* evidence would have caused defendant to reject a plea agreement and go to trial—the *Ruiz* standard made the benefit of the plea bargain itself a relevant factor. Presumably, the sweeter the bargain, the more likely a defendant would accept the offer even with knowledge that the government's case was weak. Hence, the *Ruiz* approach gave the least protection where defendants were tempted by the most generous bargains: exactly the cases where we are most likely to see innocent defendants coerced into guilty pleas. *See Fatal Attraction, supra* note 5, at 500.

[53] A more detailed account of the prosecutor's evidence, and a defendant's more detailed account of his own participation in the offense, would provide a substantial record to assist a court that was later faced with a motion to withdraw a plea on *Brady* grounds.

[54] To satisfy a court concerned with avoiding later challenges to a guilty plea, prosecutors would have an incentive to detail their inculpatory case at the time of the plea. As for exculpatory evidence, even those prosecutors who might be tempted to "bluff" defense counsel during bargaining would be far less sanguine about bluffing a court at the plea proceeding.

III. CONCLUSION: *BRADY*'S SYMBOLIC VALUE

Despite the Court's narrow definition of "materiality," *Brady*'s symbolic power in the pretrial context remains stronger than its corrective power in the world of post-trial motions. Most prosecutors want to avoid *Brady* problems altogether. "No criminal conviction," they are taught, "is worth your own integrity, not to mention your license to practice law." As a result, most prosecutors disclose more "*Brady* material" in the process of pretrial discovery than the constitutional rule actually demands.[55] And that is a good thing in a world where limited discovery rules often handicap the opportunity for an effective defense. Indeed, *Brady*'s greatest value may be symbolic. It stands as a constitutional reminder to prosecutors that they cannot serve as architects of unfairness.[56] Most of them take that obligation very seriously. In the context of plea bargaining, *Brady*'s symbolic power likewise may be its greatest virtue. For that reason alone we should be cautious not to stretch the Supreme Court's opinion in *Ruiz* into a doctrine that excludes *Brady* from the plea-bargaining world altogether. To the extent that we concede as a constitutional principle that prosecutors *can* bluff, we risk promoting as an ethical principle that they *should.*

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[55] *See Fatal Attraction, supra* note 5, at 458–60.

[56] *Brady* itself drives home the point:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when an accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

Brady, 373 U.S. at 87–88.