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Kevin C. McMunigal
Case Western University School of Law, kevin.mcmunigal@case.edu

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GUILTY PLEAS, *BRADY* DISCLOSURE, AND WRONGFUL CONVICTIONS

Kevin C. McMunigal[†]

This symposium focuses on the role that prosecutorial violations of the disclosure obligations imposed by *Brady v. Maryland*[1] play in wrongful convictions. Other authors published in this symposium examine the connection between *Brady* violations and wrongful convictions primarily in the context of trials. The purpose of this article, by contrast, is to explore a connection between prosecutorial failures to disclose *Brady* material and wrongful convictions in the context of guilty pleas, the primary procedural vehicle our criminal justice system uses for securing criminal convictions.

The duty imposed by *Brady v. Maryland* presents some similar challenges in both the trial and guilty plea contexts. One is the practical question of how to enforce disclosure obligations when prosecutors and police often have sole access to files containing *Brady* material. For the same reason, it is difficult to determine or even estimate how often disclosure obligations are violated. And if a failure to disclose is revealed after a conviction, how should lawyers and judges approach the often difficult counter-factual question of whether the outcome of a trial or guilty plea decision would have been altered by disclosure?

One facet of current discussions of *Brady* in the context of guilty pleas, though, is distinct from discussions of *Brady* in the trial setting. *Brady v. Maryland* and its progeny clearly impose a due process duty on prosecutors to disclose in cases in which guilt is determined through trial. In contrast, whether *Brady* applies when guilt is determined by guilty plea has been and continues to be uncertain.

[†] Judge Ben C. Green Professor of Law, Case Western Reserve University School of Law. I thank Ben Malbasa for his thorough research on and thoughtful assistance with this project.

[1] 373 U.S. 87 (1963).

This article has three objectives. The first is to provide an overview of the development and current status of the law on the question of whether *Brady v. Maryland* applies in the context of guilty pleas. The second is to set forth the reasons why I fear that failure to disclose *Brady* material in the guilty plea context contributes to wrongful convictions.[2] My final objective is briefly to critique Justice Breyer's majority opinion in *United States v. Ruiz*,[3] the only United States Supreme Court case to date that has addressed *Brady* in the guilty plea context.

I.

My experience working as an Assistant United States Attorney in the criminal division of a major metropolitan U.S. Attorney's Office sparked my interest in *Brady* and guilty pleas. I observed that pre-trial exchanges among prosecutors, defense counsel, and judges routinely addressed *Brady* disclosure. Defense lawyers requested, prosecutors agreed, and judges nodded approvingly. But when cases ended in a negotiated guilty plea, as they typically did, the legal fate of *Brady* requests was uncertain. The judge presented the defendant, often orally and in writing, with a list of the rights the defendant was explicitly waiving by choosing to plead guilty. Disclosure under *Brady v. Maryland* was not included in that litany. And neither prosecutor nor defense counsel said anything about *Brady* disclosure.

When I began writing about *Brady* and guilty pleas, I asked a number of defense lawyers and prosecutors if they ever explicitly addressed *Brady* disclosure during the negotiation or entry of a guilty plea. Defense lawyers typically said they did not, because they felt it was obvious that the prosecutor *was* obligated to disclose *Brady* material to the defense prior to entry of a guilty plea. Prosecutors also typically stated that they did not explicitly raise *Brady* disclosure during the negotiation or entry of a guilty plea. But prosecutors explained that they did not do so because, in their view, it was obvious the prosecutor *was not* obligated to turn *Brady* material over prior to entry of a guilty plea. From their perspective, entry of a guilty plea implicitly waived all trial rights, and they saw *Brady* disclosure as exclusively a trial right.

My observations that those involved in the guilty plea process routinely failed to address *Brady* and that prosecutors and defense lawyers failed to do so based on diametrically opposed views of

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[2] I first articulated the arguments in Section II in an earlier article, Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989).

[3] 536 U.S. 622 (2002).

Brady's applicability to guilty pleas may have reflected the state of the law at the time. In 1989, when I first wrote about *Brady* and guilty pleas,[4] few courts had addressed the issue. The courts that *had* addressed it had come to different conclusions about whether *Brady* applied in the guilty plea process.[5] In light of this scarce and divided authority, both the view expressed to me by defense counsel and the view expressed by prosecutors about *Brady*'s applicability to guilty pleas were plausible. In short, few practioners, judges, or academics at that time had given attention to the issue of *Brady*'s application to guilty pleas.

Thirteen years later, when a case dealing with *Brady* and guilty pleas first came before the United States Supreme Court, that situation had changed. By 2002, a large number of federal and state cases had confronted the issue, with the majority recognizing that prosecutors *do* have a due process duty to disclose *Brady* material prior to the entry of a guilty plea. Federal Courts of Appeals in the Second, Ninth and Tenth Circuits adopted this view,[6] along with a federal district court in the Fourth Circuit.[7] State appellate courts in South Carolina, Missouri, New Jersey, Tennessee, Wisconsin, Idaho, Georgia, and Texas had also applied *Brady* to guilty pleas.[8] In contrast, the Federal Court of Appeals in the Fifth Circuit had held

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[4] *See* McMunigal, *supra* note 2.

[5] *Compare* Campbell v. Marshall, 769 F.2d 314, 322 (6th Cir. 1985) (finding the prosecution's non-disclosure of *Brady* material during plea bargaining "certainly objectionable," but noting that "there is no authority within our knowledge holding that suppression of *Brady* material *prior to trial* amounts to a deprivation of due process.") *and* United States v. Wolczik, 480 F. Supp. 1205, 1210 (W.D. Pa. 1979) ("a defendant cannot expect to obtain *Brady* material for use in a pretrial decision to plead guilty") *with* Fambo v. Smith, 433 F. Supp. 590, 598 (W.D.N.Y. 1977) (refusing to overturn the guilty plea conviction in the case due to lack of prejudice, but stating that "[i]n order to maintain the integrity of the plea bargaining process and to assure that a guilty plea entered by a defendant is done so voluntarily, knowingly and intelligently, a prosecutor has a duty, during the course of plea bargaining, to disclose to the defendant evidence that is as clearly exculpatory of certain elements of the crime charged as is the contested evidence in this case.") *aff'd,* 565 F.2d 233 (1977); Lee v. State, 573 S.W.2d 131, 134–35 (Mo. Ct. App. 1978) (holding that when "exculpatory evidence existed at the time of the guilty plea which reasonably would have led the defendant not to so plead" and "was known to and suppressed by the prosecutor . . . the defendant should be entitled to withdraw his guilty plea.") *and Ex Parte* Lewis, 587 S.W.2d 697, 701 (Tex. Crim. App. 1979) ("We hold that the prosecutor's duty to disclose favorable information (whether relating to the issue of competence, guilt, or punishment) extends to defendants who plead guilty as well as to those who plead not guilty.").

[6] *See* Tate v. Wood, 963 F.2d 20 (2d Cir. 1992); Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995); United States v. Wright, 43 F.3d 491 (1994).

[7] *See* Banks v. United States, 920 F. Supp. 688 (E.D.Va. 1996).

[8] *See* Gibson v. State, 334 S.C. 515 (1999); Lee v. State, 573 S.W.2d 131 (Mo. Ct. App. 1978); State v. Parsons, 775 A. 2d 576 (N.J. Super. Ct. App. Div. 2001); State v. Davis, 823 S.W.2d 217 (Tenn. Crim. App. 1991); State v. Sturgeon, 605 N.W.2d 589 (Wis. Ct. App. 1999); Carroll v. State, 464 S.E.2d 737 (Ga. Ct. App. 1996); State v. Gardner, 885 P.2d 1144 (Idaho Ct. App. 1994); *Ex parte* Lewis, 587 S.W.2d 697.

that *Brady* does not apply in the guilty plea context.[9] Lower courts in some states had divided on the question.

In the past twenty years, the academic literature also has given *Brady* and guilty pleas greater attention. The first articles I found addressing *Brady* and guilty pleas appeared in 1981.[10] In the intervening 26 years, Professor Douglass,[11] Professor Lain,[12] and I, along with a number of student authors,[13] have written on the issue. As with judges, the majority of academic commentators have supported requiring *Brady* disclosure prior to guilty pleas.

In 2002, the Supreme Court finally addressed *Brady* in the guilty plea context. With little analysis and less hesitation, the Court severely restricted, and left open the possibility of entirely rejecting, application of *Brady* to guilty pleas. In doing so, the Court neither addressed nor noted the substantial body of federal and state case law supporting application of *Brady* to guilty pleas. Though the precise scope of the *Ruiz* decision is subject to ambiguity, there is little question that the case marks a significant restriction of *Brady* rights in the guilty plea context and runs counter to the trend in lower federal and state courts prior to *Ruiz*.

In response to the Supreme Court's decision in *Ruiz*, the American College of Trial Lawyers proposed modifying Federal Rule of Criminal Procedure 11 to impose a duty to disclose exculpatory information in the guilty plea context.[14] This proposal has not been adopted by the Federal Rules Committee.

II.

The past ten years have provided vivid lessons on why we need to be concerned about wrongful convictions in our criminal justice system. Cases in which DNA evidence demonstrated wrongful

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[9] *See* Matthew v. Johnson, 201 F.3d 353 (5th Cir.2000).

[10] Eleanor J. Ostrow, Comment, *The Case for Prep Plea Disclosure*, 90 YALE L.J. 1581 (1981); Lee Sheppard, Comment, *Disclosure to the Guilty Pleading Defendant:* Brady v. Maryland *and the* Brady *Trilogy*, 72 J.CRIM.L. & CRIMINOLOGY 165 (1981).

[11] John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437 (2001).

[12] Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1 (2002).

[13] *See* Shane M. Cahill, United States v. Ruiz, *Are Plea Agreements Conditioned on Brady Waivers Unconstitutional?*, 32 GOLDEN GATE U. L. REV. 1 (2002); Erica G. Franklin, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567 (1999); David Aaron, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005 (1999).

[14] American College of Trial Lawyers, *Proposal: Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure* 11 and 16, 41 AM. CRIM. L. REV. 93 (2004).

convictions revealed a host of sources of inaccuracy in criminal trials. Among these have been failures by police and prosecutors to disclose exculpatory information, the use of jailhouse informants, eyewitness identification error, inadequate legal representation, inadequate access to scientific expertise and resources, misuse of scientific evidence, coerced confessions, and the psychological phenomenon of escalation of commitment.[15] Though trials produced most of the erroneous convictions revealed so far by DNA, the factors causing inaccuracy are not limited to the trial context. Rather, they operate in both the trial and guilty plea contexts.

Inadequate representation by defense counsel, for example, plagues guilty pleas as well as trials. Adequacy of representation is likely an even greater problem in the guilty plea context than the trial context. Retained defense lawyers are typically paid less if a case ends in a guilty plea rather than a trial, often in the form of a flat fee. Defense counsel, therefore, have less financial incentive to thoroughly investigate and prepare the case when he knows the defendant will accept a plea offer. Aside from the financial incentive, trial by its very nature prompts greater investigation and preparation than a guilty plea. A trial, because it involves detailed presentation and examination of witnesses and exhibits, is more likely to expose poor preparation by defense counsel than a guilty plea hearing, at which defense counsel plays a minimal role and the only source of evidence is the defendant. Inadequate representation that becomes public at a trial may lead to embarrassment, damage to reputation with judges and peers, malpractice liability, disciplinary sanction, and reversal on appeal. Such risks from inadequate representation if the client pleads guilty are dramatically less than if the client's case goes to trial. Plea negotiation pressures from prosecutors to resolve cases quickly and have defendants forego discovery and disclosure rights—as in *Ruiz* "fast track" pleas discussed in Section III, below—reinforce incentives for defense counsel not to adequately investigate and prepare a client's case if the client pleads guilty.

In the trial context, rush to judgment and escalation of commitment can turn witnesses, police officers, and prosecutors into unwitting contributors to a wrongful conviction when they form an early opinion about a person's guilt and then refuse to look for or consider later evidence inconsistent with that opinion. Rather than reexamine a position, they tend to escalate their commitment to it. In the guilty plea context, both the defense lawyer and, oddly enough in

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[15] *See, e.g.*, Alafair Burke, Commentary, Brady's *Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575 (2007).

some cases, the defendant himself may be subject to the same psychological phenomenon and become unwitting contributors to a wrongful conviction.

A false coerced confession may undermine the accuracy of a guilty plea as well as the accuracy of a jury verdict. A confession, whether false or not, increases the likelihood of conviction at trial. Therefore, it will simultaneously increase the pressure for a defendant to plead guilty, whether innocent or not.

What about *Brady* violations? Is there reason to believe that the failure to disclosure *Brady* material contributes to factually inaccurate guilty pleas? Failure to disclose exculpatory information at trial means jurors will render a decision without that information and thus be more likely to render an inaccurate verdict. But there is no jury at a guilty plea hearing. Does access to exculpatory information help assure that a defendant's admission of guilt at a guilty plea hearing is accurate?

The most plausible and intuitively appealing, but ultimately misguided, response to the question of whether *Brady* disclosure aids accuracy in guilty pleas is that it does not. Two factors prompt such a response. First, it is appealing to assume that a defendant entering a guilty plea, unlike a juror at a trial, *knows* whether or not he "did it" without having to rely, as jurors must, on evidence, including exculpatory evidence, outside his own perceptions and memories. A second appealing assumption is that a defendant is very unlikely to plead guilty falsely in open court. After all, the defendant is aware that his factual statements admitting guilt in a guilty plea hearing are against penal and social interest, having been warned by the judge both that an admission of guilt at the hearing is the basis for a criminal conviction and that potentially harsh consequences follow a criminal conviction. In addition, such statements are made after having received advice of counsel and are often made under oath and penalty of perjury.

Undoubtedly most defendants who plead guilty know, and can therefore accurately establish, the facts determining their criminal liability and are sincere when they confess their guilt in a guilty plea. My arguments in the remainder of this section aim to demonstrate, though, that an unknown but likely troubling number of defendants pleading guilty probably lack such knowledge and sincerity and that we should examine closely our assumptions about defendant knowledge and sincerity in the guilty plea context. Once we understand the knowledge and sincerity risks posed by guilty pleas,

we can see how *Brady* disclosure in the guilty plea context helps reduce those risks.

A. Knowledge

The notion that a defendant knows whether or not he "did it"—that is, whether or not he or she engaged in an act that fulfills the conduct element of the charged offense—is undoubtedly true in most cases. But it is not true in all cases. Moreover, the fact that a defendant knows if he engaged in the conduct required for a crime does not mean that the defendant has adequate knowledge about other elements of the crime or other factors that may be critical in determining criminal liability. The view that because a defendant knows if he "did it" he can reliably determine through admissions at a plea hearing all facts critical to establishing liability is flawed. It is based on unexamined assumptions and reflects a highly restricted, simplistic view of guilt and innocence as based solely on conduct. It ignores many of the factors our substantive criminal law uses to define criminal liability, such as circumstances, results, causation, mental state, and defenses.

In an earlier article, I analyzed in detail the potential weaknesses in a defendant's knowledge concerning facts that may determine criminal liability and provided examples of situations in which the defendant is not a reliable witness for establishing her own criminal liability.[16] Cases that have occurred since I wrote that article provide further examples of such knowledge deficiencies and reinforce the need for *Brady* disclosure in the guilty plea context.

The defendant in *State v. Gardner*[17] was charged with vehicular manslaughter after the car he was driving crossed the center line of a highway and ran into an oncoming truck, killing one person and seriously injuring three others. Tests indicated that Gardner was under the influence of marijuana and sleep deprived. Gardner pled guilty, stating at the hearing that "he could not remember anything about the accident and believed that he might have fallen asleep while driving because he had not slept the previous night."[18] The sentence imposed was ten years, with a four year minimum. But Gardner turned out to have been wrong about causing the collision. Because the prosecution had not disclosed it to him, Gardner did not know that evidence indicated his front tire had blown out and that the tire failure, rather

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[16] *See* McMunical, *supra* note 2, at 970–84.

[17] 126 Idaho 428, 885 P.2d 1144 (Idaho Court of Appeals).

[18] *Id.* at 1147.

than an act on his part, had caused his car to swerve into oncoming traffic.

A witness, in a car following Gardner's car at the time of the accident, observed the left front tire of Gardner's car blow out, causing the accident. A written statement given by the witness to the Idaho State Police stated: "when the blue car [Gardner's vehicle] was about ten feet in front of the truck I believe the driver's front tire blew. The whole [sic] jumped into the oncoming lane like it was on rails."[19] In a deposition, "the witness further explained that he observed the left-front tire blowing out. He saw a puff of dust and rock chunks that appeared to have been caused by the tire blowing, then the car immediately jerked to the left."[20] The Idaho court of appeals found that the *Brady* disclosure duty applies to guilty pleas, that the prosecution's failure to disclose the report violated this duty, and vacated Gardner's guilty plea.

The *Gardner* case is an excellent example of a defendant who thought he had done something that caused another person's death, but was mistaken. He did not have adequate knowledge to establish the facts that determined his liability. Without disclosure of the witness report, he would have been wrongly convicted and served a prison term of at least four years. *Brady* disclosure was key to preventing and remedying a wrongful homicide conviction and significant wrongful imprisonment.

In addition to illustrating the importance of disclosure in the guilty plea context, *Gardner* suggests that other factors associated with wrongful convictions also may have played a role in Gardner's guilty plea. One is adequacy of representation. The name and address of the exonerating witness in *Gardner* were listed on an accident report attached to the complaint, which would have been provided to defense counsel early in the case. There is no indication in the reported opinion that defense counsel interviewed the witness prior to Gardner pleading guilty. Instead, it appears that the exculpating witness's testimony came to the defense lawyer's attention as a byproduct of later civil litigation arising from the collision. A fairly cursory examination of Gardner's car after the accident also would have revealed evidence of the tire blowout.

Rush to judgment and escalation of commitment may also have played a role in Gardner's wrongful guilty plea conviction. The evidence in the case early on revealed that Gardner was under the influence of marijuana at the time of the accident. Given the

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[19] *Id.*
[20] *Id.*

defendant's uncertainty about what happened, it appears that not only the police and prosecutor, but also defense counsel and even the defendant himself, formed early judgments about the defendant's conduct having caused the collision and refused to seek or consider evidence inconsistent with those judgments, such as the possibility of tire failure having caused the collision.

Carroll v. State,[21] a Georgia case, provides another example of a defendant who pled guilty when she did not know key facts for determining her criminal liability. Like *Gardner*, the case involved a homicide charge arising out of an automobile wreck. In *Carroll*, though, only a single car was involved. The defendant was the 19-year-old driver of a car in which two adults and a toddler were passengers. During a heavy rainstorm, Carroll lost control of the car, which went off the road, turned over, and ejected one of the passengers, who died. Neither alcohol nor drugs were involved.

The officer who investigated the accident scene was taking—but had yet to complete—his first class in accident reconstruction. Despite his lack of qualifications, he nonetheless concluded in a written "information sheet" and in his testimony at a preliminary hearing, that the defendant's speed was 70 mph in a 35 mph zone and that the condition of the road and its shoulder "had no impact on the accident." Without independent knowledge of her exact speed, the road conditions, and what caused her to lose control of the car, Carroll pled guilty, relying on the officer's "expert" conclusions.

The investigating officer's conclusions about speed and the role of road conditions in causing the wreck turned out to be unsupported by the evidence collected at the scene of the wreck. An experienced accident reconstruction expert—the instructor teaching the accident reconstruction course in which the investigating officer was enrolled—reviewed the investigating officer's work. Days before the defendant pled guilty, the experienced examiner concluded that it was not possible to calculate the speed of Carroll's car based on the data the investigating officer had collected and that in his view, the condition of the road *had* played a role in what he viewed as an accident. As in *Gardner*, a defendant erroneously pled guilty because she simply did not know facts critical to determining her criminal liability. The Georgia Court of Appeals reversed Carroll's conviction and allowed her to withdraw her guilty plea.

The *Carroll* case also strongly suggests that lack of defense access to an independent expert witness, a factor associated with wrongful

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[21] 222 Ga. App. 560, 474 S.E. 2d 737 (1996).

convictions at trial,[22] played a role in Carroll's guilty plea. Nothing in the reported opinion indicates that defense counsel in *Carroll* obtained an independent accident reconstruction analysis that could have revealed the errors in the investigating officer's conclusions about speed and road conditions. Rather, his client pled guilty in reliance on erroneous "expert" analysis provided by the state. If the experienced expert working for the state had not reviewed the investigating officer's reconstruction analysis, there is no indication that the errors in that analysis would otherwise have been revealed.

Both *Gardner* and *Carroll* illustrate that there are situations in which disclosure of *Brady* material in the guilty plea context is just as crucial to an accurate determination of criminal liability as it is in the trial context.

B. Sincerity

Lack of sincerity on the defendant's part in pleading guilty, in my view, is likely an even more pervasive source of inaccuracy in guilty pleas than defects in a defendant's knowledge. In other words, rather than defendants pleading guilty because they wrongly but sincerely think they are guilty, as in *Gardner* and *Carroll*, defendants may also falsely condemn themselves when they know they are not guilty. My concern about sincerity arises from the incentives influencing both prosecutors and defendants in plea negotiations. As I argued at length in my previous article, cases in which *Brady* material exists are particularly prone to creating incentives that encourage false self-condemnation.

If a prosecutor discovers the existence of *Brady* material, the most likely response is to dismiss the case for legal, ethical and strategic reasons. If the prosecutor does not dismiss, the next most likely response is to attempt to resolve the case through a guilty plea, especially if no obligation to disclose exculpatory information applies in the guilty plea context. If the prosecutor chooses to plea bargain, the existence of *Brady* material she is obligated to disclose if the case goes to trial creates a powerful incentive to offer a high sentencing differential. This in turn creates a powerful incentive for an innocent defendant to plead guilty.

Consider the following scenario. The government indicts a defendant on an armed robbery charge arising from a violent mugging. The prosecution's case is based entirely on the testimony of the victim, who identified the defendant from police photographs of

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[22] *See* Paul C. Giannelli, Brady *and Jailhouse Snitches*, 57 CASE W. RES. L. REV. 593 (2007).

persons with a record of similar violent crime. With only the victim's testimony to rely on, the prosecutor is unsure of her ability to obtain a conviction at trial. She offers the defendant a guilty plea limiting his sentencing exposure to five years, a significant concession in light of the defendant's substantial prior record and the fact that the charged offense carries a maximum penalty of fifteen years incarceration. As trial nears, the victim's confidence in the identification appears to wane. The robbery took place at night. He was frightened and saw his assailant for a matter of seconds. The victim refuses to talk to the defense, but confides to the prosecutor his fear of a mistake in the photo identification. He is now unsure if the man he picked from the police photographs is the man who robbed him. On the eve of trial, the defendant responds to the prosecutor's plea offer. He indicates that he is willing to plead guilty if the prosecutor will limit the sentence to one year. Is the prosecutor free to accept a guilty plea without disclosing the victim's statement of uncertainty about the identification?

In this scenario, the existence of exculpatory information weakening the prosecutor's case creates an incentive for the prosecutor to offer a very large discount on the potential sentence, from 15 years to 1 year. This discount in turn creates a very large incentive for false self-condemnation. In short, we should expect to find cases with *Brady* information diverted by prosecutors from the trial to the guilty plea arena. We should also expect prosecutors in such cases to offer these sorts of sentencing differentials that undermine confidence in the defendant's admission of guilt.

State v. Johnson,[23] a 1989 Louisiana Court of Appeal case, strongly suggests that the defendant in the case pled guilty to charges he did not, in fact, commit and that the failure to disclose exculpatory information contributed to that plea. Johnson was charged with selling illegal drugs to the same undercover police officer on two occasions, September 12 and October 11. The undercover officer testified that the same person sold her the drugs on both occasions and that there was no doubt in her mind on this question. She also testified that Johnson was that individual, despite the fact that "there were glaring differences"[24] between Johnson's appearance and the officer's prior descriptions of the drug seller. The defendant testified, as did his mother and fiancé, that he was elsewhere at the time of the offenses. After his fiancé testified, the prosecution showed the defense an arrest report on an unrelated offense that contradicted his

[23] 544 So.2d 767 (1989).

[24] *Id.* at 771.

alibi defense on one of the charges. In response, the defendant pled guilty to one of the drug offenses in return for dismissal of the other charge and an agreement not to bring perjury charges against him, his mother or his fiancé. He received a sentence of six year at hard labor on the charge to which he pled guilty.

But state records later revealed that Johnson had an apparently unimpeachable alibi for one of the offenses. He was in state custody at the time of the offense and thus could not have committed that offense. And the undercover officer's complete certainty that the same man committed both crimes indicated that Johnson had not committed the other offense either. The Louisiana court set aside the guilty plea, conviction, and sentence.

The facts in *Johnson* suggest powerful incentives operating on the defendant to falsely condemn himself. Not only did the defendant avoid conviction on a charge, but he avoided the threat of perjury charges against himself, his mother and his fiancé. The undercover officer's misidentification of Johnson, despite confidence in her identification and glaring discrepancies from her prior descriptions of the seller, are a hallmark of erroneous conviction cases.

III.

To assess the Supreme Court's 2002 decision in *United States v. Ruiz*, it is helpful to understand the context in which the case arose. As mentioned above, during the 1990's there was a strong trend in the lower federal and state courts applying *Brady v. Maryland* to guilty pleas. In a 1995 case, *Sanchez v. United States,*[25] the Ninth Circuit became part of this trend. Despite the development of a split in the circuits on this question, the Supreme Court did not grant certiorari in a case directly addressing whether *Brady* applies to guilty pleas.

After the Ninth Circuit's holding in *Sanchez* that a defendant pleading guilty retains *Brady* rights—that such rights are not automatically or implicitly waived by entry of a guilty plea—the United States Attorney's Office for the Southern District of California incorporated an *express* waiver of *Brady* rights in what were termed "fast track" plea agreements. These agreements made an express waiver of *Brady* a condition for a defendant to receive a reduction in sentence. The express waiver, though, was not complete. The defendant waived the right to receive *Brady* material that constituted impeachment information or was relevant to an affirmative defense. But under the agreement, the prosecution agreed to turn over "any

[25] 50 F.3d 1448 (9th Cir. 1995).

[known] information establishing the factual innocence of the defendant."[26]

The express waiver at issue in *Ruiz* thus restricted *Brady* disclosure in two ways. First, it limited the theories of relevance requiring disclosure, excluding information relevant to impeachment and affirmative defenses and including only information bearing on "factual innocence." Neither the fast track agreement nor the Supreme Court's opinion in *Ruiz* identified the theories of relevance that fall within the phrase "factual innocence."

The second way in which the fast track agreement restricted *Brady* disclosure was by significantly raising the persuasiveness threshold triggering disclosure of information bearing on "factual innocence." Under the *Brady* rule, information must be turned over only if it is *material.* The Supreme Court's most recent iterations of the *Brady* rule define *material* as creating "a reasonable probability that the government's suppression [of the information] affected the outcome of the case."[27] In other words, the information "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[28] In short, information in the trial context must be disclosed if it is likely to create reasonable doubt in the mind of a juror.

In contrast, the disclosure obligation set forth in the plea agreements approved by the Supreme Court in *Ruiz* required disclosure only if the information *establishes* factual innocence. The phrase "establishing factual innocence" indicates that to warrant disclosure, the exculpatory information must have greater persuasive force than required by the *Brady* materiality standard in the trial context. In essence, rather than creating reasonable doubt about guilt, the information must prove innocence in order to mandate disclosure. As with the meaning of factual innocence, the level of persuasiveness required for a particular item of favorable information to *establish* factual innocence (e.g., a preponderance standard, a clear and convincing standard, or a beyond reasonable doubt standard) was not clarified by the fast track agreement or the Supreme Court's *Ruiz* opinion.

The defendant in *Ruiz* challenged the validity of this express *Brady* waiver as a condition to a plea agreement, the Ninth Circuit found the express waiver unconstitutional, and the Supreme Court granted review. The Court consequently addressed *Brady's* application to

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

[27] United States v. Bagley, 473 U.S. 667, 675 (1985).

[28] Kyles v. Whitley, 514 U.S. 419, 435 (1995).

guilty pleas for the first time in a case that presented the issue obliquely rather than directly.

The Supreme Court overruled the Ninth Circuit and approved the fast track plea agreements at issue in the case. That much is clear. But Justice Breyer did not limit his opinion to considering the issue of express waiver. Rather, he addressed also the issue of implicit waiver and found that defendants pleading guilty have no right to disclosure of *Brady* information relevant either to impeachment or an affirmative defense. Although he did not explicitly state a conclusion about what, if any, right to disclosure of exculpatory information a defendant pleading guilty retains, the Court approved the fast track plea agreement at issue in *Ruiz* with its highly restrictive disclosure obligation regarding exculpatory information bearing on "factual innocence." Thus, in *Ruiz*, the Supreme Court either extinguished or severely restricted the right of a defendant pleading guilty to receive every category of *Brady* information.

In my view, the Supreme Court got it wrong in *Ruiz*. The restriction it approves of any prosecutorial obligation to disclose *Brady* material in the context of plea bargaining is bad public policy and bad constitutional law. The Court's reasoning in support of this result is both superficial and flawed.

I will not offer here a detailed critique of *Ruiz*, but simply note some of the weaknesses in the opinion. One flaw in the Court's analysis is its failure even to acknowledge, much less consider, the substantial body of case law from both the federal circuits and the state courts applying *Brady* in the context of guilty pleas, the primary thrust of which is contrary to the Court's conclusion. Nor did the Court acknowledge any of the academic commentary or the arguments advanced in that commentary on the issue of *Brady* disclosure in the guilty plea context. Again, the primary thrust of the academic commentary, like the existing case authority, was contrary to the result reached by the court. The court's failure to acknowledge or address both prior authority and academic commentary contrary to the court's position seriously undermines the persuasiveness of its analysis.

Gross overstatement of the burdens that disclosure of *Brady* material in the guilty plea context would impose on the government is another flaw in the *Ruiz* opinion. Throughout his review of these potential burdens, Justice Breyer ignores the materiality limitation on *Brady* disclosure that severely restricts what the government must produce and thus limits the burden of producing it. Despite the fact that the hemming in of the constitutional disclosure obligation

through the development of a strict materiality requirement is perhaps the dominant theme in the Supreme Court's line of *Brady* cases, the Court treats the mandating of *Brady* disclosure in the guilty plea context as the functional equivalent of mandating open file discovery.

The Court accepts, for example, the entirely implausible argument, apparently advanced by the government, that the burden of *Brady* disclosure might require the prosecution "to abandon its heavy reliance upon plea bargaining." The implausibility of this argument is demonstrated not only by the narrow definition of what qualifies as *Brady* material, but also by the fact that prosecutors did not in fact abandon plea bargaining in any of the federal circuits or states that have mandated *Brady* disclosure in guilty pleas over the past few decades.

The Court's review of these burdens reveals the Supreme Court's lack of familiarity with the realities of discovery practice in federal criminal cases. Justice Breyer points out, for example, the fact that the Jencks Act authorizes disclosure of witness statements only after a witness has testified. But federal trial judges routinely require the disclosure of Jencks material in advance of trial in order to avoid having to grant continuances during trials for defense counsel to examine the statements for use in cross-examination. Prosecutors routinely provide Jencks material well in advance of trial, as well as witness statements that do not even qualify for disclosure under Jencks or Rule 16, in order to convince defendants to plead guilty. So, far from the "radical change" that Justice Breyer suggests would result, requiring *Brady* disclosure would be a modest marginal increase in the discovery burdens placed on prosecutors.

This symposium's focus, though, is on the relationship between *Brady* and wrongful conviction. From this perspective, the primary flaw in *Ruiz* is the Court's summary dismissal of any possible connection between *Brady* disclosure and wrongful conviction through guilty plea.

A. Affirmative Defenses

Justice Breyer devotes a single, short paragraph to exculpatory information relating to affirmative defenses, and just a single sentence to dismissing any need for disclosure of such information. In doing so, he appears to accept without examination a view of innocence that excludes consideration of long established and widely accepted criminal law principles of justification and excuse embodied in affirmative defenses. In relation to affirmative defense information, he is unable to identify a single scenario in which requiring

prosecutors to disclose *Brady* material in the context of guilty pleas would provide any benefit to our criminal justice system, despite the fact that cases from the lower federal and state courts, as well as academic commentary, illustrate situations in which disclosure of information relating to an affirmative defense can significantly contribute to avoiding inaccuracy in guilty pleas.

One example would be a defendant failing to raise a valid entrapment defense because the defendant and her lawyer do not know that the person who enticed the defendant to commit the crime was an agent of the government, either an undercover law enforcement officer or a government informant. Such entrapment, in which the defendant was unaware of the agency relationship between the government and the person who enticed the defendant to act as a drug runner, could quite plausibly exist in just the sort of case at issue in *Ruiz*. Drug cases in which the prosecution wishes to avoid revealing the sort of agency relationship required for an entrapment defense are precisely the sort of cases in which the prosecution is likely to seek a guilty plea and willingly offer a significant sentencing differential to avoid such disclosure.

The insanity defense provides another example. The prosecution might have records that show the defendant suffers from a mental illness that would create the basis for an insanity defense. [29]The defendant might be incapable or unwilling to convey this information to his lawyer. Especially if the prosecutor is pressing for a fast track resolution, a valid insanity defense could well be missed without prosecutorial disclosure of such records.

Provocation provides a third example of a defense the appropriate application of which in the guilty plea context could hinge on prosecutorial disclosure. Some jurisdictions limit the provocation defense to certain victims. Maryland, for example, requires that "the victim was the person who provoked the rage."[30] The defendant in certain situations, such as a bar fight among strangers and involving multiple participants, might well not know whether a person he killed

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[29] A case illustrating this scenario is *Ex Parte* Lewis, 587 S.W.2d 697. The defendant, Lewis, was charged with murder and the trial court appointed counsel to represent him. On the same day as the appointment of counsel, Lewis pleaded guilty to the murder charge, later receiving a sentence of five years to life. A letter from a state psychiatrist in the prosecutor's file at the time of the guilty plea reported the results of a psychiatric examination of Lewis conducted 11 days before the guilty plea. The report contained substantial indications of Lewis's present incompetence and his insanity at the time of the offense, as well as suggestions of mental retardation, alcohol abuse, and a basis for a claim of self-defense. The letter was not disclosed during the guilty pea process. *Id.* at 699–700.

[30] *Dennis v. State*, 105 Md. App. 687 (1995) (quoting Maryland State Bar Association Committee on Criminal Pattern Jury Instructions 4:17.4C).

was in fact one of his provokers.[31] If the prosecution has evidence showing that the victim was one of the provokers, such disclosure could be critical for a defendant and his lawyer to accurately determine the applicability of a provocation defense.

B. Impeachment

Justice Breyer similarly devotes only one sentence to the possible connection between disclosure of impeachment information and the factual accuracy of guilty pleas. He concludes that the prosecution's obligation to turn over "information establishing the factual innocence of the defendant," along with Rule 11's provisions on entry of a guilty plea, "diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty."[32]

Impeachment is the process of challenging a witness with the objective of weakening or entirely discrediting that witness's testimony. By definition, then, impeachment information does not directly prove or disprove guilt or innocence. But it can entirely discredit or call into serious question the adequacy of proof of guilt.

Impeachment can take place through cross-examination of the witness, referred to as intrinsic impeachment, or through other witness testimony or documents, referred to as extrinsic impeachment. In either form, but especially in its intrinsic form, it is a process vividly associated with trials because of the potential drama of a personal confrontation between accused and accuser. One might, for this reason, erroneously conclude, as Justice Breyer does in *Ruiz*, that impeachment evidence has no role to play in the guilty plea process since witnesses are not cross-examined or challenged at a guilty plea hearing. Indeed, a defendant who pleads guilty explicitly waives the right to confront and cross-examine witnesses.

But when a defendant and defense counsel rely, during a guilty plea hearing, on information previously provided by the prosecution, rather than relying on the defendant's independent knowledge, to establish an element of an offense or eliminate an affirmative defense, revealing important impeachment information advances accuracy in precisely the same way as it does at trial—by alerting the person relying on the information provided by the government to weaknesses in that information. In the trial context, the person placing reliance on the witness is a juror or judge. In the guilty plea context, it is the

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[31] See *State v. Lawton*, 298 N.J. Super. 27 (1997), for a case presenting a provocation fact pattern in which the defendant was mistaken about the identity of his attackers.

[32] *Ruiz*, 536 U.S. at 631.

defendant. In cases in which the defendant lacks knowledge, disclosure of material impeachment can help guard against defendants and defense lawyers erroneously relying on unreliable evidence when pleading guilty.

The *Carroll* case, discussed previously, provides a good fact pattern for illustrating the potential importance of impeachment information in the guilty plea context. Assume that, in a vehicular manslaughter case, the prosecution provides the defense with its expert's report indicating the defendant driver was going 70 mph in a 35 mph speed zone and that driver negligence, rather than road conditions, caused the car crash in which a passenger was killed. The defendant is not sure how fast she was driving or what caused the car to crash. Would revelation of any of the following impeachment items help prevent a wrongful conviction through a guilty plea in which the defendant and her lawyer rely on the assertions made in the expert's report?

- The expert was inebriated at the time he made his measurements or ran his calculations.

- The expert was shown to be suffering from a mental impairment that compromised his ability to do his measurements and calculations.

- The expert was about to be indicted for having falsified test results in a large number of prior vehicular homicide cases, always in favor of the prosecution's theory of the case.[33]

- A preliminary draft of the expert's report concluded that the defendant was *not* speeding and that road conditions *did* cause the crash. The measurement data in this early draft used to support these conclusions indicate that the measurement data in the final report given to the defense were altered by the expert. Note that under the Federal Rules of Evidence and most state evidence codes, these prior inconsistent statements would be admissible solely to impeach and not for their truth on the merits of the case.

[33] For an account of an expert who falsified test results in as many as 133 cases, see *In re* W. Va. State Police Crime Lab, 438 S.E.2d 501 (W.Va. 1993) and Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997).

- The expert had falsified his qualifications and was not in fact qualified to make the expert conclusions set forth in his report.

In each of these scenarios, the impeachment evidence would notify the defendant and defense counsel of serious weaknesses in the expert's conclusions. Just as informing a juror or judge of these weaknesses at trial helps avoid an erroneous finding of fact, informing the defendant and his lawyer of these weaknesses would help avoid a wrongful admission of liability in the guilty plea context based on a defendant's lack of knowledge about how fast she was driving and what caused her car to crash.

Impeachment evidence also implicates the concern expressed in Section II, above, about defects in sincerity compromising the accuracy of guilty plea confessions. Impeachment evidence that qualifies as material under *Brady* may weaken the prosecution's case as significantly as exculpatory information bearing directly on an element of an offense or an affirmative defense. A piece of impeachment evidence that completely destroys the credibility of the prosecution's primary witness, in other words, can be just as debilitating to the prosecution as a DNA test eliminating the defendant as a rapist or murderer. Accordingly, it can create just as powerful an incentive for a prosecutor to avoid trial by disposing of a case through a guilty plea and to offer a sentencing differential that threatens to compromise the sincerity of a defendant's factual admission of guilt. In the guilty plea context, disclosure of impeachment information, just like disclosure of exculpatory information bearing on an element, helps to nullify the threat to accuracy posed by such a sentencing differential.

CONCLUSION

What are the prospects for mandating prosecutorial disclosure of information favorable to the accused in the context of guilty pleas? Prior to *Ruiz,* mandating such a disclosure duty grounded in due process looked very promising as more and more state and lower federal courts interpreted *Brady v. Maryland* as imposing such a duty. But the *Ruiz* opinion and the attitude it reflects on the part of the Supreme Court toward guilty pleas now make the prospect of grounding such a prosecutorial duty in *Brady v. Maryland* bleak.

The most promising avenue to creating such a prosecutorial duty in plea bargaining now appears to be pressing legislators either to modify criminal procedure rules, as the American College of Trial

lawyers has suggested, or creating a statutory disclosure duty, as Congress did in the Jencks Act. One advantage of grounding such a duty in a rule or statute rather than extending *Brady v. Maryland* is that legislatures could shape that duty free of the unduly restrictive materiality limits that have so closely cabined *Brady v. Maryland* and kept it from fulfilling much of its promise. One disadvantage of the rule or statutory approach is that Congress and each state legislature would need to act individually to create such a duty for prosecutors within each jurisdiction. Congress acting to modify the Federal Rules of Criminal Procedure might spur state legislatures to act, especially if a state's rules of criminal procedures are modeled, as many are, on the Federal Rules of Criminal Procedure. We can also hope that the notoriety of wrongful convictions exposed by DNA evidence will move legislators to modify criminal procedure rules to require greater prosecutorial disclosure in both the trial and guilty pleas settings.