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Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context

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ACCURACY WHERE IT MATTERS: *BRADY V. MARYLAND* IN THE PLEA BARGAINING CONTEXT

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Too often, what the process purports to secure in its formal stages can be subverted or diluted at its more informal stages.[1]

Since at least the 1960s, the plea bargaining rate for American criminal cases has been around 90%.[2] Still, the fact that so many defendants prefer to

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1. United States v. Bryant, 439 F.2d 642, 644 (D.C. Cir. 1971).

2. Guilty pleas disposed of approximately 95% of all federal cases prosecuted in 1999, and approximately 93% in 1997 and 1998. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, 429 tbl.5.30 (Ann L. Pastore & Kathleen Maguire eds., 1999). Guilty pleas disposed of 91% of all felony cases prosecuted at the state level in 1996, the most recent year for which data is available. *Id.* at 454 tbl.5.51. Scholars have noted the predominance of plea bargaining for at least three decades, with some arguing that economic necessity demands it. *See, e.g.*, DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (Frank J. Remington ed., 1966) (noting studies concluding that approximately 90% of all criminal defendants pleaded guilty); Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 895 n.40 (1980) (citing John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 220 (1977)) (noting that expenditures on the criminal justice system would have to double if guilty plea disposition rates were reduced to 80% of all criminal cases, and expenditures would triple if the figure were reduced to 70%); H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROBS. 102, 105 (1977) (explaining that economic necessity requires a plea disposition rate of 90% or higher). *See also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) ("[Plea Bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.").

confess their guilt in open court rather than take their chances at trial continues to intrigue us.[3] Surely the predominance of plea bargaining at least means that it makes defendants better-off; otherwise they would not strike the deals.[4] After all, defendants must make a choice—they cannot trade in their trial rights and exercise them too. Sometimes, however, they can. A few select rights traditionally associated with trial are so essential to protecting the innocent from wrongful conviction that defendants retain them even though they choose to plea bargain.[5] In short, these so-called "trial rights" protect the nontrial, guilty plea defendant too. The Sixth Amendment right to counsel is one example of such a right.[6] Is *Brady v. Maryland*'s[7] duty to disclose yet another?

Decided in 1963, *Brady v. Maryland* imposes on prosecutors a duty to share with defendants information favorable to the defense and material to guilt or punishment.[8] Under *Brady* and its progeny, prosecutors must disclose impeachment as well as exculpatory information,[9] and are not excused from

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3. Scholars have long debated the merits of plea bargaining. *Compare* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983) [hereinafter Easterbrook, *Criminal Procedure*] (describing plea bargaining as a well-functioning market system that efficiently sets the price of crime), *and* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992) [hereinafter Easterbrook, *Plea Bargaining*] (arguing that plea bargaining is at least as effective as trial in separating the guilty from the innocent), *with* Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975) (maintaining that plea bargaining is inherently involuntary), *and* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992) (concluding that plea bargaining should be abolished based on economic analysis). For a more moderate approach, see Scott & Stuntz, *supra* note 2 (defending plea bargaining using contract principles while recognizing the need for reform).

4. *See* Easterbrook, *Criminal Procedure*, *supra* note 3, at 309.

5. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.6(a), at 1014-17 (3d ed. 2000) (discussing constitutional rights not forfeited by a guilty plea).

6. The Supreme Court has held that the right to counsel is no less important to the guilty plea defendant than it is to the defendant who stands trial. Von Moltke v. Gillies, 332 U.S. 708, 721-22 (1948); Williams v. Kaiser, 323 U.S. 471, 475 (1945). Thus, even plea bargaining defendants may later raise an ineffective assistance of counsel claim. *See* Hill v. Lockhart, 474 U.S. 52, 57 (1985). The Court has repeatedly relied on the right to counsel as a primary means of assuring that innocents do not falsely plead guilty. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (identifying competent counsel as a safeguard against false self-condemnation); Tollett v. Henderson, 411 U.S. 258, 266-67 (1973) (assuming defendant's confession of guilt is accurate absent ineffective assistance of counsel); *Von Moltke*, 332 U.S. at 721-22 (emphasizing counsel's role in assessing defendant's guilt to advise her on proper plea). *See also* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 830-31 (1989) (concluding that attorneys are provided to guilty plea defendants because they are necessary for factually accurate pleas). *But see* Alschuler, *supra* note 3, at 55-58 (arguing that the Supreme Court's reliance on counsel to prevent false conviction of innocents in the plea bargaining context is misplaced).

7. 373 U.S. 83 (1963).

8. *Id.* at 87-88.

9. Giglio v. United States, 405 U.S. 150, 153-55 (1972). *See also infra* note 157 and accompanying text (explaining distinction between impeachment and exculpatory information).

nondisclosure even if they never received a request for the information[10] or were unaware that the government had it to give.[11] At least in some ways, then, *Brady*'s duty to disclose is quite broad.[12] The question is whether it is broad enough to protect defendants who plead guilty as well as those who take their chances at trial, where *Brady* was originally decided. Thus far, the Supreme Court has only considered a defendant's *Brady* rights in the trial context,[13] and has therefore never had occasion to answer this question (though it has recently agreed to do so).[14] Moreover, the Court's prior *Brady* decisions give no hint—even in dicta—as to what the answer to this question might be.[15] That being the case, all one can say with certainty is that the

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10. *See* Kyles v. Whitley, 514 U.S. 419, 433 (1995) ("In *United States v. Agurs*, however, it became clear that a defendant's failure to request favorable evidence did not leave the [g]overnment free of all obligation.") (citation omitted); United States v. Agurs, 427 U.S. 97, 110 (1976) (holding that some evidence favorable to the defense is so valuable that due process requires its disclosure even without a specific request).

11. *See Kyles*, 514 U.S. at 437-38.

12. In other ways, however, the duty is quite narrow. For example, *Brady* does not require the disclosure of tactical information, such as the fact that a witness has died. *See, e.g.*, People v. Jones, 375 N.E.2d 41, 43-44 (N.Y. Ct. App.), *cert. denied*, 439 U.S. 846 (1978). Furthermore, *Brady* only requires the disclosure of favorable information that meets a narrow definition of materiality. *See* United States v. Bagley, 473 U.S. 667, 699-705 (1985) (Marshall, J., dissenting) (lamenting the exacting nature of *Brady*'s materiality standard in part because it permits prosecutors to withhold large amounts of favorable evidence with impunity). For a discussion of *Brady*'s materiality standard in the trial context, see *infra* text accompanying notes 97-100. For a discussion of *Brady*'s materiality standard in the plea bargaining context, see *infra* Part III.

13. *See* Matthew v. Johnson, 201 F.3d 353, 360 (5th Cir.), *cert. denied*, 531 U.S. 830 (2000) ("The Supreme Court has not as yet ruled on whether a prosecutor's failure to disclose material exculpatory information prior to entry of a guilty plea violates the U.S. Constitution.") (footnote omitted). The Court's application of *Brady* in only the trial context is particularly notable given the overwhelming number of cases resolved by guilty plea since at least the 1960s. *See supra* note 2.

14. *See* United States v. Ruiz, 241 F.3d 1157 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 803 (2002) (mem.). At issue in the Supreme Court's review of *Ruiz* are two questions: (1) whether a defendant has a right to *Brady* information before pleading guilty, and (2) if so, whether that right may be waived through a plea agreement. 70 U.S.L.W. 3418 (U.S. Jan 8, 2002) (No. 01-595). I address only the first of those questions in the analysis below, though the Supreme Court has also suggested that some rights are so essential to protecting the innocent that they may never be waived. *See* United States v. Mezzanatto, 513 U.S. 196, 204 (1995) ("There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discredit[ing] the federal courts'." (citing 21 Wright & Grakam § 5039, at 207-08)). Whether *Brady* is one of those rights is a separate question entirely, especially given the conclusions we can draw about defendants willing to explicitly waive their *Brady* rights and plead guilty in the dark. *See infra* text accompanying notes 167-70. In any event, I make no conclusions about the legitimacy of *Brady* waivers; my only point here is that the same considerations would appear to be relevant in deciding both questions. For an analysis of the waiver issue, see Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011 (2000) (analyzing plea bargains that explicitly waive a defendant's *Brady* rights); Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567 (1999) (same).

15. John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 440-41 (2001). Thus far, the closest the Court has come to directly addressing the

Supreme Court has been extremely reluctant to recognize *any* rights retained by defendants who plead guilty, preferring instead to protect the finality of convictions resting on a guilty plea.[16]

Even so, providing *Brady* protections to those who plead guilty has intuitive appeal. If due process prevents prosecutors from obtaining convictions at trial by suppressing favorable evidence, one would think it would also prevent them from obtaining bargained-for convictions by doing the same thing.[17] Reflecting the ambiguity of the issue, state and federal courts across the country are split as to whether defendants who plead guilty can nevertheless claim *Brady*'s protections[18]—and even those jurisdictions holding that *Brady* does protect the guilty plea defendant disagree as to how to doctrinally justify that result.[19] Given the complete lack of consensus on this topic and its obvious practical import, it is especially surprising that few

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topic appears to be a three-justice dissent to the denial of a writ of certiorari in *Neely v. Pennsylvania*, 411 U.S. 954 (1973). In *Neely*, the defendant learned of impeachment material after his guilty plea but before sentencing and wished to withdraw his plea. *Id.* at 955-56. Dissenting Justices Douglas, Stewart, and Marshall agreed that the writ should have been granted, citing *Brady* and noting that "a guilty plea should not be a trap for the unwary or unwilling." *Id.* at 958. Unfortunately, *Neely* offers little as a predictor of the Supreme Court's current position on this issue given changes in the composition of the Court and the unique, pre-sentence procedural posture of the case. *See id.* at 957-58 (focusing analysis on government's lack of prejudice from defendant's early withdrawal of plea).

16. *See* Douglass, *supra* note 14, at 463-65; Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 1020 (1989). *See also* Alschuler, *supra* note 3, at 38-39 (explaining the rationale supporting the Supreme Court's finality doctrine).

17. *See* Douglass, *supra* note 14, at 439.

18. The Second, Sixth, Eighth, Ninth, and Tenth Circuits have all been willing to consider a guilty plea defendant's *Brady* claim on its merits. *See infra* Part I. The Fifth and Seventh Circuits, by contrast, have held that a guilty plea defendant on habeas corpus review has no *Brady* rights, *see, e.g.*, Matthew v. Johnson, 201 F.3d 353, 360 (5th Cir.), *cert. denied*, 531 U.S. 830 (2000); Jones v. Bryant, No. 00-3014, 2001 WL 1637665, at *1 (7th Cir. Dec. 19, 2001), while a number of other state and federal courts have more generally held that *Brady* claims are barred by a defendant's guilty plea. *See, e.g.*, Indelicato v. United States, 106 F. Supp. 2d 151, 156-58 (D. Mass. 2000); Telepo v. Scheidemantel, 737 F. Supp. 299, 305-06 (D.N.J. 1990); United States v. Ayala, 690 F. Supp. 1014, 1016-17 (S.D. Fla. 1988); United States v. Wolczik, 480 F. Supp. 1205, 1210-11 (W.D. Pa. 1979); United States v. Autullo, Nos. 88-CR91-4, 93-C4415, 1993 WL 453446, at *2 (N.D. Ill. Nov. 4, 1993); State v. Reed, 592 P.2d 381, 382 (Ariz. Ct. App. 1979); State v. Martin, 495 A.2d 1028, 1032-33 (Conn. 1985); State v. Kaye, 423 A.2d 1002, 1005 (N.J. Super. Ct. App. Div. 1980); People v. Williams, 548 N.Y.S.2d 772, 773 (N.Y. App. Div. 1989); People v. Day, 541 N.Y.S.2d 463, 467 (N.Y. App. Div. 1989); Adame v. State, No. 07-99-0033-CR, 2001 WL 221622, at *3 (Tex. Crim. App. Mar. 5, 2001). Meanwhile, the First, Third, Fourth, and Eleventh Circuits have explicitly declined to rule on this issue. *See, e.g.*, United States v. Brown, 250 F.3d 811, 816 (3d Cir. 2001); United States v. Matthews, 168 F.3d 1234, 1242 (11th Cir.), *cert. denied*, 528 U.S. 883, 981, 989 (1999); United States v. McCleary, 112 F.3d 511, 1997 WL 215525, at *5 (4th Cir. 1997) (unpublished table decision); Autullo v. United States, 81 F.3d 163, 1996 WL 149346, at *5 (7th Cir. 1996) (unpublished table decision); United States v. Claudio, 44 F.3d 10, 15 (1st Cir. 1995).

19. *See infra* Part I.

scholars have given *Brady*'s application in the plea bargaining context any attention at all.[20]

In the analysis below, I argue that *Brady*'s role in protecting the innocent from wrongful conviction is just as essential in the plea bargaining context as it is at trial, and that therefore even defendants who plead guilty should be entitled to *Brady*'s protections. Still, I ultimately conclude that *Brady*'s application in the plea bargaining context is destined to provide only a shadow of the protection *Brady* provides at trial because of the materiality standard currently used to judge post-plea *Brady* claims. In making both points, I employ a model of the plea bargaining defendant's decision-making process, using modern choice theory to demonstrate *Brady*'s effect on the accuracy of convictions based on a guilty plea. Throughout the discussion, I consider guilty pleas and convictions to be accurate so long as they are supported by some measure of factually guilty conduct.[21]

Part I of this Article examines the judicial approaches currently used to extend *Brady* rights to defendants who plead guilty, concluding that the strongest doctrinal justification for applying *Brady* in the plea bargaining context looks to *Brady*'s effect on the accuracy of a plea. Part II examines *Brady*'s effect on the accuracy of guilty pleas, concluding that the disclosure of material, favorable information is necessary to prevent innocent defendants from falsely pleading guilty. Part III turns to *Brady*'s materiality standard in the plea bargaining context, arguing that the showing currently required for post-plea *Brady* claims fails to realize *Brady*'s accuracy-enhancing potential. Part IV concludes the analysis, underscoring the

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20. This point was made in 1989, *see* McMunigal, *supra* note 16, at 958 (observing that more scholars have recognized the issue than analyzed it), and still holds true today. *See* Douglass, *supra* note 14, at 441 (noting that "[s]cholars have devoted surprisingly little attention to the issue"). Even those who address *Brady*'s application to the guilty plea defendant have often done so while making a related, but different, analytic point. *See, e.g.*, McCoy & Mirra, *supra* note 2, at 933 n.173 (advocating broad pre-plea discovery to minimize unconstitutional conditions inherent in plea bargaining); Eleanor J. Ostrow, Comment, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581, 1606-17 (1981) (advocating broad pre-plea discovery to maximize the consensual nature of plea bargaining transactions).

21. While recognizing that guilt is more often a shade of gray than black or white, I treat defendants as either entirely guilty or entirely innocent to draw the most pointed conclusions regarding *Brady*'s effect in the plea bargaining context. After all, the very essence of plea bargaining is compromise, so we should not expect plea bargains to be accurate in the sense of matching the particular level of a defendant's factual culpability. *See* Scott & Stuntz, *supra* note 2, at 1909 (noting that plea bargains differ from results at trial in that the sentences imposed upon defendants who plead guilty are lower, while the conviction rate for those who bargain is 100%); Ostrow, *supra* note 20, at 1600 (noting that the offense to which a defendant pleads guilty is commonly different from the offense committed because plea bargaining is concerned with the consequences of a plea rather than the factual basis for it). One could, however, relax my starting assumptions and apply the same analysis, with similar, though diluted, results.

importance of protecting innocent defendants who plea bargain as well as those who contest their guilt at trial.

I. IDENTIFYING THE PROBLEM: SQUARE PEGS IN A ROUND HOLE

As mentioned above, state and federal courts across the country are divided as to whether defendants who plead guilty can claim *Brady*'s protections.[22] One circuit, in fact, has contradicted itself and answered the question both ways.[23] Though most courts do allow guilty plea defendants to attack their plea by establishing a *Brady* violation,[24] there is little agreement as to how to doctrinally justify that result.[25] Why should defendants who plead guilty be allowed to make *Brady* claims when a guilty plea forfeits almost every other trial right?[26] In the analysis below, I conclude that an interest in factually accurate pleas might justify that result, but only after identifying serious doctrinal and logical flaws in the judicial approaches currently used to justify post-guilty plea *Brady* claims.

Before proceeding, however, a preliminary concession is in order. Even in the substantial minority of jurisdictions refusing to recognize post-guilty plea *Brady* claims,[27] defendants who plea bargain may still receive *Brady* information. After all, until defendants actually enter a guilty plea, they could always go to trial[28]—and the very possibility of going to trial may mandate

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22. *See supra* note 18 and accompanying text.

23. *Compare* White v. United States, 858 F.2d 416, 422-24 (8th Cir. 1988) (considering a guilty plea defendant's *Brady* claim on the merits), *with* Smith v. United States, 876 F.2d 655, 657 (8th Cir.), *cert. denied*, 493 U.S. 869 (1989) (holding that a guilty plea waives a defendant's *Brady* claim). New York is internally split as well. *Compare* People v. Day, 541 N.Y.S.2d 463, 467 (N.Y. App. Div. 1989) (holding that a guilty plea waives issues of factual guilt, including a *Brady* claim), *with* People v. Burney, 642 N.Y.S.2d 990 (N.Y. Sup. Ct. 1996) (holding that whether a *Brady* violation warrants setting aside guilty plea is determined by a multi-factored test), *and* People v. Armer, 501 N.Y.S.2d 203, 205-06 (N.Y. App. Div. 1986) (holding that a defendant may withdraw a guilty plea once a *Brady* violation is established).

24. *See infra* Part I.A-C.

25. *See infra* Part I.A-C.

26. *See, e.g.*, Tollett v. Henderson, 411 U.S. 258, 266-67 (1973) (holding that a guilty plea defendant is barred from challenging an indictment by a grand jury that systematically excluded blacks, even though the defendant was unaware of the constitutional violation at the time of his plea); McMann v. Richardson, 397 U.S. 759, 771-74 (1970) (holding that a guilty plea defendant is barred from raising a Fifth Amendment challenge to the voluntariness of his confession, despite constitutionally deficient state procedure for challenging confession at trial). *See also Tollett*, 411 U.S. at 267 ("When 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 deprivation of constitutional rights that occurred prior to the entry of the guilty plea.").

27. *See supra* note 18.

28. Indeed, it is not unheard of for defendants to profess their desire to contest guilt at trial, only to change their mind at the last minute and enter a guilty plea instead. *See, e.g.*, Sieling v. Eyman, 478 F.2d 211, 213 (9th Cir. 1973); State v. Wagner, 752 P.2d 1136, 1139-40 (Or. 1988), *vacated by* 492

some pretrial disclosures.[29] Moreover, prosecutors taking the "high road" may decide to share *Brady* information with plea bargaining defendants even without a legal or ethical obligation to do so.[30] The question, then, is not whether defendants who plea bargain will get *Brady* information; rather, the question is whether defendants who plea bargain have a remedy if they do not. Given that focus, the discussion below examines only those judicial approaches that provide a remedy in some form or fashion for established post-guilty plea *Brady* claims.

A. Courts Holding That Brady *Claims Negate the Voluntary and Intelligent Nature of a Guilty Plea*

Most courts willing to recognize *Brady*'s application in the plea bargaining context conclude that an established *Brady* violation negates the voluntary and intelligent nature of a guilty plea, rendering the plea invalid.[31]

U.S. 912 (1989).

29. Because *Brady* information must be disclosed in time for its effective use at trial, the need for pre-trial disclosure will necessarily vary with the type of *Brady* information at issue. LAFAVE ET AL., *supra* note 5, § 24.3(b), at 1105. Thus, for example, investigative leads on an alibi witness would require disclosure well before trial, but a witness's inconsistent statements could remain undisclosed until after trial has begun. In the latter example, a prosecutor's obligation under *Brady* and the Jencks Act, 18 U.S.C. § 3500(a) (2000), which requires federal prosecutors to disclose witness's prior recorded statements after they testify, would merge. *See id.* § 24.3(c), at 1107 (discussing the possible overlap of *Brady* and Jencks Act obligations).

30. *See* Douglass, *supra* note 14, at 457-62 (discussing a prosecutor's incentives to disclose *Brady* information voluntarily during plea bargaining but ultimately finding those incentives inadequate). *See also* McMunigal, *supra* note 16, at 1024-27 (discussing the ambiguity in ethics rules over disclosure of *Brady* material in the plea negotiation process and the failure of formal discovery rules to protect guilty plea defendants or assure complete *Brady* disclosure). *But see In re* Grant, 541 S.E.2d 540, 540 (S.C. 2001) (imposing disciplinary sanction on a prosecutor for not disclosing *Brady* information to a defendant before he pleaded guilty). To the extent ethical and legal compulsion to disclose *Brady* information to plea bargaining defendants is absent, any such disclosure becomes subject to the vagaries of prosecutors' individualized trial practice. *See* Uviller, *supra* note 2, at 113-14 (describing informal discovery as capricious because it varies with local tradition, individual prosecutor's attitudes, personal relationships with defense attorneys, and the tactical advantage of sharing certain information).

31. A guilty plea must be voluntary because it is a confession of factual guilt protected by the Fifth Amendment, and it must be intelligent because it represents a waiver of trial rights. Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). Though the Supreme Court has over time distanced itself from the waiver analogy, *see* United States v. Broce, 488 U.S. 563, 573 (1989); Tollett v. Henderson, 411 U.S. 258 (1973), it has continued to adhere to the requirement that a plea be intelligent as well as voluntary. *See* Bousley v. United States, 523 U.S. 614, 618 (1998). The Court has, however, increasingly used the voluntariness requirement to address circumstances previously considered relevant to whether a plea was entered in an intelligent manner. *Compare* Brady v. United States, 397 U.S. 742 U.S. 742, 756 (1970) (holding that the defendant's plea was intelligently made because he received notice of the nature of the charge against him and had competent counsel to advise him), *with* United States v. Broce, 488 U.S. 563, 569-70 (1989) (noting that competent counsel and notice of the nature of the charge are required for a voluntary plea); Marshall v. Lonberger, 459 U.S. 422, 436

Still, courts taking this position differ as to how they reach that result. Some courts hold that *Brady* claims are sufficient per se to negate the voluntary and intelligent nature of a plea,[32] while others consider a *Brady* violation to be just one of a number of circumstances relevant in determining whether a plea is voluntary and intelligent.[33] Still others treat *Brady* claims as a type of governmental misrepresentation that either negates the voluntary and intelligent nature of a plea or renders the plea invalid despite its voluntary and intelligent nature.[34] As discussed below, each approach has its own appeal—and its own pitfalls as well.

1. The Per Se Approach

A number of jurisdictions, most notably the Court of Appeals for the Ninth Circuit, have ruled that *Brady* violations are sufficient per se to negate the voluntary and intelligent nature of a guilty plea, automatically rendering the plea invalid.[35] Most attractive about the per se approach is its common sense recognition that guilty plea decisions made without information absolving a defendant (or at least reducing the penalty of a conviction) are not truly voluntary and intelligent—at least under any ordinary understanding of those terms.[36] In addition, the per se approach to post-guilty plea *Brady* claims is attractive because it avoids the moral hazard problem that limiting

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(1983) (stating that notice of the nature of the charge is essential to a voluntary plea), *and* Henderson v. Morgan, 426 U.S. 637, 645 & n.13 (1976) (noting that a plea may be involuntary because the defendant failed to receive notice of the charge).

32. *See infra* Part I.A.1.

33. *See infra* Part I.A.2.

34. *See infra* Part I.A.3.

35. *See, e.g.*, Sanchez v. United States, 50 F.3d 1448, 1453-54 (9th Cir. 1995); People v. Carter, 687 N.Y.S.2d 12, 15 (N.Y. App. Div. 1999); Gibson v. State, 514 S.E.2d 320, 324 (S.C. 1999); *Ex parte* Lewis, 587 S.W.2d 697, 700-01 (Tex. Crim. App. 1979). *See also supra* note 14 (noting the Ninth Circuit's decision in *United States v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 803 (2002) (mem.)). Interestingly, at least one jurisdiction uses the per se approach only when a prosecutor willfully suppresses *Brady* information. *See* Lee v. State, 573 S.W.2d 131, 133-34 (Mo. Ct. App. 1978). This qualification, however, appears to be inconsistent with the Supreme Court's disregard for a prosecutor's moral culpability in suppressing *Brady* evidence at trial. *See* text accompanying *supra* note 11. *See also* Larry Kupers & John T. Philipsborn, *Mephistophelian Deals: The Newest in Standard Plea Agreements*, CHAMPION, Aug. 1999, at 18, 64 (distinguishing the Ninth Circuit's per se approach from approaches used by other circuits).

36. The term "voluntary" generally means intentional, deliberate, and willful. *See* THE AMERICAN HERITAGE DICTIONARY 1355 (2d ed. 1991). The term "intelligent" generally means knowing or rational. *See id.* at 668. Given these definitions, a guilty plea could hardly be characterized as either voluntary or intelligent when it rests upon a fundamental misunderstanding of the circumstances surrounding the decision to plead guilty.

Brady to the trial context creates, negating any incentive prosecutors might otherwise have to withhold *Brady* information in hopes of eliciting a plea.[37]

Unfortunately, the per se approach is also beset with problems, most notably its dissonance with the Supreme Court's guilty plea jurisprudence. Under current Supreme Court precedent, a voluntary and intelligent guilty plea requires defendants to know only the charges against them and the consequences of pleading guilty, enabling even seriously uninformed guilty pleas to pass constitutional muster.[38] Indeed, the Court has specifically rejected the notion that a defendant is entitled to an accurate assessment of the government's case in order to enter a valid plea, reasoning instead that uncertainty is an inevitable part of the plea bargaining process.[39] Thus, while common sense may tell us that a defendant needs *Brady* information to enter a voluntary and intelligent plea, the Supreme Court's indications are clearly to the contrary.

Equally troubling, the per se approach appears to prove too much. If a valid guilty plea requires a truly informed choice, then it stands to reason that defendants are entitled to information in the government's files that is both for *and against* them. After all, a defendant will not know the strength of a prosecutor's case without both types of information, and the strength of the prosecutor's case is what a defendant most needs to know in order to engage in some semblance of informed decision-making about a plea.[40] Still, it is well settled that prosecutors have no obligation to disclose inculpatory evidence to defendants as a prelude to a bargain or a trial.[41] Thus, the per se

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37. *See Sanchez*, 50 F.3d at 1453.

38. *See Brady*, 397 U.S. at 749-55 (1970). Moreoever, so long as defendants have competent counsel, the voluntary and intelligent nature of their pleas will be presumed. *See id.* at 757-58.

39. *See id.* at 756-57 ("[Plea bargaining considerations] frequently present imponderable questions for which there are no certain answers .... A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action."). *See also* Douglass, *supra* note 14, at 463-69 (recognizing that the Supreme Court's standards for a voluntary and intelligent guilty plea present formidable barriers to the application of *Brady* in the plea bargaining context).

40. *See* Ostrow, *supra* note 20, at 1583 (arguing that a defendant must be able to assess his chances of acquittal in order to meaningfully consent to a plea bargain); *infra* Part II.A.

41. At least one defendant has made the argument, though unsuccessfully. *See* United States v. Kidding, 560 F.2d 1303, 1313 (7th Cir. 1977) (rejecting defendant's claim that had the government disclosed inculpatory evidence before trial, he would have pleaded guilty to a bargain). *See also* United States v. Agurs, 427 U.S. 97, 112 & n.20 (rejecting materiality standard that would focus on defendant's ability to prepare for trial because it would necessarily encompass both inculpatory and exculpatory evidence); Douglass, *supra* note 14, at 468 (recognizing that the right to a fully informed plea would encompass information that is not even available to defendants who choose trial).

Attempting to sidestep such logical difficulties, a few courts have held that a valid guilty plea requires only the information that a defendant is legally entitled to. *See, e.g.*, Lee v. State, 573 S.W.2d 131, 133 (Mo. Ct. App. 1978) ("The question for determination here is whether Lee [made] a knowing,

approach's rationale would support a duty to disclose more expansive than even *Brady*'s proponents are willing to recognize. Given such fundamental doctrinal and logical difficulties, the per se approach falls far short of the persuasive justification necessary for recognizing *Brady* in the plea bargaining context.

2. *The Totality-of-the-Circumstances Approach*

Several jurisdictions, including the Courts of Appeals for the Sixth and Eighth Circuits,[42] likewise recognize that a *Brady* claim can negate the voluntary and intelligent nature of a guilty plea, but consider the totality of the circumstances in arriving at that result.[43] Courts taking this approach view a *Brady* violation as just one of a number of relevant factors in determining whether a plea is voluntary and intelligent, focusing as much on the facts underlying a *Brady* claim as they do on the claim itself.[44] Indeed, under the totality-of-the-circumstances approach, a post-guilty plea *Brady*

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intelligent choice under circumstances where he was deprived of information to which by law he was entitled."); People v. Benard, 620 N.Y.S.2d 242, 245 (N.Y. County 1994) ("It is one thing for defendant and counsel to miscalculate the nature and persuasiveness of the prosecution's case. It is another for defendant and counsel to act without the benefit of information which is required to have been disclosed."). This solution, however, is equally problematic, for it assumes that a plea bargaining defendant is entitled to *Brady* information in the first place.

42. *But see supra* note 23 and accompanying text (noting that the Eighth Circuit has contradicted itself and decided the *Brady* issue both ways).

43. *See, e.g.*, White v. United States, 858 F.2d 416, 423-24 (8th Cir. 1988); Campbell v. Marshall, 769 F.2d 314 (6th Cir. 1985); People v. Burney, 642 N.Y.S.2d 990 (N.Y. Sup. Ct. 1996).

Interestingly, the court in *State v. Gardner*, 885 P.2d 1144 (Idaho Ct. App. 1994), used a totality-of-the-circumstances approach in considering a defendant's *Brady* claim as part of a motion to withdraw his plea. *See id.* at 1148, 1150-53. In *Gardner*, however, the court held that a *Brady* violation would not be sufficient grounds to withdraw the plea if the information withheld pertained to a fact the defendant had admitted in open court when he pleaded guilty. *See id.* at 1151. The approach used in *Gardner* appears to be particularly problematic, for by the time a defendant formally enters a plea, that defendant has every reason to say whatever it takes to get a judge to accept the bargain. *See* Scott & Stuntz, *supra* note 2, at 1912 (describing plea hearings as "rigged to support the deal that the two attorneys have already struck"); Ostrow, *supra* note 20, at 1601 (recognizing a defendant's strong incentive to lie to a judge so that a plea bargain will be accepted); Lee Sheppard, Comment, *Disclosure to the Guilty Pleading Defendant:* Brady v. Maryland *and the* Brady *Trilogy*, 72 J. CRIM. L. & CRIMINOLOGY 165, 165-66 (1981) (noting that by the time a plea is formally entered, the interests of the defendant and the prosecutor are no longer adverse because both want to ensure the success of the bargain).

44. Factors considered by the Sixth Circuit include the factual basis for the plea (focusing on the defendant's in-court admission of guilt), the presence of proper plea-taking procedures, the assistance of competent counsel, the nature of the misconduct at issue compared to the misconduct at issue in the *Brady* trilogy, and likelihood that a constitutional violation had occurred. *See* Campbell, 769 F.2d at 321-22. The Eighth Circuit's totality-of-the-circumstances analysis uses a similar approach, though it has considered at least one additional factor. *See White*, 858 F.2d at 424 (considering the benefit received by the defendant in pleading guilty). For a criticism of the Eighth Circuit's approach in considering a defendant's benefit from pleading guilty, see *infra* note 179.

claim—at least as a constitutional violation—need not be established at all.[45] Thus, even if defendants technically forfeit their *Brady* rights upon entering a guilty plea, courts adopting this approach will still consider the fact that the government suppressed favorable information when determining whether the defendant entered a voluntary and intelligent plea.

The main attraction of the totality-of-the-circumstances approach is its ability to provide guilty plea defendants with relief for *Brady* violations, even if the Supreme Court's guilty plea jurisprudence renders those violations not constitutionally cognizable.[46] Like the per se approach, however, the totality-of-the-circumstances approach is plagued by the fact that under the Court's guilty plea decisions, a *Brady* violation is unlikely to have any effect whatsoever on the voluntary and intelligent nature of a defendant's guilty plea.[47] Moreover, the totality-of-the-circumstances approach appears to be counterintuitive in recognizing the importance of information to a voluntary and intelligent plea while denying that a *Brady* violation is itself sufficient to render a plea invalid. Either a voluntary and intelligent plea requires informed decision-making, in which case *Brady* violations should be sufficient by themselves to render a plea invalid—or it does not, in which case *Brady* violations should have absolutely no effect on the validity of a plea.[48] Both positions are easier to justify than the potential anomaly resulting under the totality-of-the-circumstances approach, where one established *Brady* violation may invalidate a plea while another may not.[49]

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45. The Sixth Circuit has gone so far as to question whether post-plea *Brady* violations as cognizable constitutional violations actually exist, 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." *Campbell*, 769 F.2d at 322 (emphasis omitted). To say that a defendant need not establish a constitutional violation under the totality-of-the-circumstances approach, however, is not to say that the constitutional status of a post-guilty plea *Brady* claim is entirely irrelevant. To the contrary, it is one of the factors considered in determining the voluntary and intelligent nature of a defendant's plea. *See supra* note 44.

46. The totality-of-the-circumstances approach also follows the Supreme Court's admonition that when considering a challenge to a guilty plea, courts must ask whether the plea was voluntary and intelligent, not whether a constitutional violation has occurred. *See* Brady v. United States, 397 U.S. 742, 749 (1970).

47. *See supra* notes 38-39 and accompanying text.

48. In short, if we afford *Brady* rights to the guilty plea defendant, those rights should, like *Brady* rights at trial, be sufficient to upset a conviction—especially considering the fact that even the most competent counsel cannot compensate for suppressed favorable information. *See infra* note 133.

49. Exemplifying this anomaly, the Sixth Circuit in *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985), held that the defendant's plea was voluntary and intelligent, while assuming that the facts presented would have established a valid *Brady* claim had the defendant taken his case to trial. *See id.* at 318.

It would appear, then, that the strength of the totality-of-the-circumstances approach is also its weakness—the back-door treatment of *Brady* claims.[50] By treating *Brady* claims as more of a factual circumstance than an alleged constitutional violation, courts using this approach essentially strip *Brady* of its due process stature, rendering its protections on par with statutory mandates such as the factual basis requirement.[51] As a result, the totality-of-the-circumstances approach may be more flexible than the per se approach, but the distinction makes no meaningful difference—neither approach provides a viable justification for recognizing post-guilty plea *Brady* claims.

3. The Misrepresentation Approach

The third, and final, approach that courts use in holding that a *Brady* violation negates the voluntary and intelligent nature of a guilty plea treats suppressed *Brady* information as official misrepresentation or misconduct.[52] Under the Second Circuit's version of this approach, government misrepresentation provides a reason to invalidate a plea, even if the plea was voluntary and intelligent.[53] Under the Tenth Circuit's version, by contrast,

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50. Indeed, many of the same factors considered under the totality-of-the-circumstances approach would be considered if a post-plea *Brady* claim were formally recognized because they are also relevant in determining whether the suppression of favorable evidence is material. *See* State v. Gardner, 885 P.2d 1144, 1152 (S.C. 1994) (recognizing that inquiry into the effect of a *Brady* violation on a defendant's plea decision is essentially the same as assessing the materiality of the suppressed evidence). For a discussion of *Brady*'s materiality standard in the plea bargaining context, see *infra* Part III.

51. *See supra* note 44. Of course, if the Sixth Circuit is correct in surmising that post-plea *Brady* claims do not exist in the first place, *see Campbell*, 769 F.2d at 322, then the totality-of-the-circumstances approach gives guilty plea defendants more protection than they would have under an analysis considering *Brady* claims qua constitutional claims.

52. *See, e.g.*, United States v. Wright, 43 F.3d 491, 499 (10th Cir. 1994); Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988); People v. Benard, 620 N.Y.S.2d 242, 245 (N.Y. Sup. Ct. 1994) (explicitly following *Miller v. Angliker*). Even courts using other approaches to post-plea *Brady* claims have characterized those claims as alleging misrepresentation or other impermissible conduct. *See, e.g.*, *Campbell*, 769 F.2d at 321 (considering a *Brady* claim in the larger class of "misconduct of constitutional proportions"); *Gardner*, 885 P.2d at 1150 (referring to a *Brady* claim as an allegation of "misconduct by the state"); Gibson v. State, 514 S.E.2d 320, 326 (S.C. 1999) (describing a *Brady* violation as a type of prosecutorial misconduct). Commentators have made the analogy as well. *See, e.g.*, Barbara Gamer & John Petty, *A Plea for Openness in Plea Bargaining*, 16 GONZ. L. REV. 81, 94 (1980) (arguing that failing to disclose *Brady* information in plea bargaining equates to misrepresentation); Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1007-12 (1986) (treating *Brady* violations as a form of prosecutorial misconduct under the Supreme Court's guilty plea decisions).

53. *See* United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) ("[W]here prosecutors have withheld favorable material evidence even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge.") (quoting *Miller*, 848 F.2d at 1320); *Miller*, 848 F.2d at 1320 ("[W]e conclude that even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if

government misrepresentation provides a reason to invalidate a plea because it renders the plea no longer voluntary and intelligent.[54] In short, under the Tenth Circuit's version of the misrepresentation approach, *Brady* violations are an example of (rather than an exception to) the rule that only voluntary and intelligent pleas are valid.

As a doctrinal matter, the Supreme Court's guilty plea cases suggest that government misrepresentation does in fact negate the voluntary and intelligent nature of a plea, supporting the Tenth Circuit's version of the misrepresentation approach.[55] However, both versions of this approach are unassailable under the Supreme Court's guilty plea decisions to the extent they hold that pleas based on official misrepresentation are invalid.[56] Furthermore, both versions of the misrepresentation approach avoid the definitional problems that arise when assessing *Brady* claims under the otherwise lax standards for a voluntary and intelligent plea.[57] Equally appealing, the misrepresentation approach is uniquely compatible with the Supreme Court's view that *Brady* violations at trial constitute prosecutorial misconduct because they breach a prosecutor's duty to do justice.[58]

Nevertheless, even the misrepresentation approach to post-guilty plea *Brady* claims is not without its share of doctrinal difficulties, for it has definitional problems of its own. To justify post-plea *Brady* claims under the misrepresentation approach, a court must find that nondisclosure of *Brady* information before a defendant pleads guilty equates to misrepresentation. To make that finding, however, a court must determine that guilty plea defendants are entitled to *Brady* information in the first place. After all, a prosecutor's silence with regards to favorable information can only constitute misrepresentation if the prosecutor has a duty to disclose it.[59] Admittedly, the

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it was entered without knowledge of material evidence withheld by the prosecution.").

54. *See Wright*, 43 F.3d at 495 (reasoning that a guilty plea does not prevent defendants from claiming that their plea resulted from prosecutorial misrepresentation because "[s]uch claims directly challenge the voluntary and intelligent nature of the plea").

55. For example, in *Brady v. United States*, 397 U.S. 742 (1970), the Supreme Court defined a voluntary plea in part by what it was not, explicitly excluding from its definition those pleas induced by threats, misrepresentation, and improper promises. *Id.* at 755. *See also id.* at 757 (recognizing "misrepresentation or other impermissible conduct by state agents" as a basis for invalidating a plea).

56. *See id.*; Walker v. Johnston, 312 U.S. 275, 286 (1941) ("[I]f [the defendant] was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right.") (footnote omitted). What constitutes deception, however, remains to be determined. *See infra* text accompanying notes 59-62.

57. *See supra* notes 38-39 and accompanying text.

58. *See* Smith v. Phillips, 455 U.S. 209, 219 (1982) (referring to "prosecutorial misconduct" and citing *Brady*); Brady v. Maryland, 373 U.S. 83, 88 (1963) (stating that suppressing evidence favorable to the accused "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice").

59. *See* RESTATEMENT (SECOND) OF CONTRACTS § 161(d) (1981). Neither the Second nor the

misrepresentation analogy is more persuasive where a defendant requests *Brady* information and the prosecutor lies, saying there is none—or where a prosecutor provides only some information, concealing the rest. In the end, however, mere silence regarding favorable information (what *Brady* proscribes)[60] cannot equate to misrepresentation absent an obligation to share it.[61] That being the case, the misrepresentation approach is impossible to employ without at some point assuming the very duty to disclose it seeks to establish.[62]

It is tempting to interpret the misrepresentation approach broadly in an effort to elude its circular reasoning. One could, for example, argue that the Supreme Court's refusal to uphold pleas based on misrepresentation reflects a defendant's larger due process right to fair treatment in plea bargaining. Supporting this view, a number of commentators have argued that *Brady* disclosure is essential to fair plea bargaining,[63] and the Supreme Court has recognized the importance of fairness in the plea bargaining context as a whole.[64] Unfortunately, however, the Court's recognition of fairness as a due process bargaining constraint has meant only that the prosecution must keep any plea bargaining promises made—and even then, its failure to do so will only constitute a due process violation when defendants rely on the broken promise to their detriment.[65] In that instance, however, the Court is essentially just enforcing a defendant's right to know the consequences attending a plea,[66] and there is a palpable difference between defendants who

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Tenth Circuits appear to have recognized this difficulty; both simply assume that *Brady* violations equate to misrepresentation. *See Wright*, 43 F.3d at 495-96; *Miller*, 848 F.2d at 1320.

60. *See supra* note 10 and accompanying text.

61. *See supra* note 59 and accompanying text.

62. *See* Alschuler, *supra* note 3, at 59 (recognizing the potential for a misrepresentation-based analysis to be "question-begging").

63. *See, e.g.*, Blank, *supra* note 14, at 2083 (arguing that *Brady* disclosure is an essential component of fundamentally fair plea bargaining process); Sheppard, *supra* note 43, at 166 (maintaining that unfairness in plea bargaining results in part from a defendant's inability to obtain pertinent information); Gamer & Petty, *supra* note 52, at 82-83 (contending that notions of fair play require disclosure of *Brady* information in plea bargaining); Note, *supra* note 52, at 1019 (contending that fundamental notions of fairness necessitate disclosure of *Brady* information in the plea bargaining context).

64. *See* Santobello v. New York, 404 U.S. 257, 261 (1971) (stating that the benefits of plea bargaining "presuppose fairness in securing agreement between an accused and a prosecutor").

65. In *Santobello v. New York*, the Supreme Court held that due process required the state to keep its plea bargaining promises, *see* 404 U.S. at 262, but in *Mabry v. Johnson*, 467 U.S. 504 (1984), the Court limited the rule set forth in *Santobello* to only those instances where the defendant entered a guilty plea in reliance on the promises. *See id.* at 510. Thus, in *Mabry*, the defendant's due process claim failed because the state had withdrawn the plea offer at issue before the defendant entered his plea. *Id.*

66. According to the Court in *Mabry*, *Santobello* was based on the notion that when prosecutors do not perform their end of the bargain, defendants' guilty pleas rest on false premises. *Id.* at 509. In

were deceived as to the true consequences of their pleas (because prosecutors failed to keep their promises) and defendants who knew the consequences of their pleas, but would not have preferred those consequences with better information.

Ironically, even the Supreme Court's characterization of *Brady* violations as prosecutorial misconduct is of limited help;[67] in the negotiation context, unlike at trial, hiding the weaknesses in one's case is considered an accepted convention.[68] Thus, even if due process requires fair bargaining, fair bargaining may not require *Brady* disclosure. Establishing just what fair bargaining does require, however, returns us to the same problem that burdens the more narrow interpretation of the misrepresentation approach. If due process requires fair bargaining, we still have to define what is fair, and *Brady* violations are only unfair if we say they are. Thus, neither version of the misrepresentation approach is free of question-begging difficulties, though those difficulties are perhaps less bothersome than those accompanying the per se and totality-of-the-circumstances approaches.[69]

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the end, then, the Court's fair bargaining mandates are reduced to mere knowledge of the charge and the consequences of pleading guilty. *See supra* note 38 and accompanying text.

67. *See supra* note 58 and accompanying text.

68. *See* Peter A. Joy & Kevin C. McMunigal, *Disclosing Exculpatory Material in Plea Negotiations*, 16 CRIM. JUST. 41, 42 (2001) ("Although affirmative misrepresentation is generally seen as unethical, nondisclosure appears to be an accepted convention for negotiators."). *See also Mabry*, 467 U.S. at 511 (noting that in plea bargaining, the due process clause is not a code of ethics for prosecutors); *supra* note 30 (noting ambiguity in ethics rules regarding a prosecutor's duty to disclose *Brady* information during plea bargaining). Although the Supreme Court has repeatedly emphasized *Brady*'s concern for prosecutorial ethics, *see* Strickler v. Green, 527 U.S. 263, 281 (1999) (discussing special duty of prosecutor to do justice); Kyles v. Whitley, 514 U.S. 419, 437 (1995) (same); United States v. Agurs, 427 U.S. 97, 110 (1976) (same), the fact that even willful suppression of favorable evidence will not necessarily establish a *Brady* violation suggests that reliance on ethical considerations alone to establish *Brady*'s application in the plea bargaining context would be misplaced. *See* Kyles, 514 U.S. at 437-38 (even deliberate suppression of evidence will not amount to a *Brady* violation unless the evidence is material, but suppression of favorable evidence that is material will always amount to a *Brady* violation even if not deliberate); Agurs, 427 U.S. at 110 (same). *See also* Smith v. Phillips, 455 U.S. 209, 220 n.10 (1982) (even in the most egregious cases of willful prosecutorial misconduct, a new trial is appropriate only when trial outcome is affected).

69. One could make the same criticism about *Brady* violations at trial constituting misconduct. Moreover, determining whether a *Brady* violation equates to misrepresentation in the plea bargaining context is arguably question-begging either way. *See* People v. Martin, 669 N.Y.S.2d 268, 276 (N.Y. App. Div. 1998) (Rosenberger, J., dissenting) ("To say that the plea prevents examination of its own validity is illogical."). To the extent that the question-begging difficulty is an inevitable aspect of interpreting the Supreme Court's misrepresentation language, the importance of assessing the viability of post-guilty plea *Brady* claims using independent criteria, such as accuracy interests, becomes even more apparent.

B. *Courts Holding That* Brady *Claims Establish Ineffective Assistance of Counsel*

As if to show just how varied judicial treatment of *Brady* in the plea bargaining context can be, a few courts willing to consider post-guilty plea *Brady* claims on the merits hold that such claims, if valid, establish a Sixth Amendment violation for ineffective assistance of counsel (and hence the invalidity of a plea).[70] Most attractive about the Sixth Amendment approach is its appreciation of the fact that defense attorneys need *Brady* information in order to effectively counsel their clients about the type of plea they should enter.[71]

Even so, the basic premise of the Sixth Amendment approach to post-guilty plea *Brady* claims is that "an attorney may render ineffective assistance through no fault of his own,"[72] and that premise fundamentally misconstrues the Supreme Court's definition of ineffective assistance of counsel. Under the Court's Sixth Amendment cases, an attorney's performance is only ineffective when it is grossly inappropriate under the circumstances, falling outside a wide range of professionally competent conduct.[73] Hence, by definition, it is impossible for an attorney to be constitutionally ineffective without also being at fault. When it comes to *Brady* violations, however, a defense attorney's fault is never at issue; the duty to disclose belongs to prosecutors alone, regardless of what defense attorneys do or fail to do.[74] Thus, *Brady* violations may in practice have a

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70. *See, e.g.*, State v. Simons, 731 P.2d 797, 801-02 (Idaho Ct. App. 1987); Zacek v. Brewer, 241 N.W.2d 41, 50-52 (Iowa 1976). *See also* Blank, *supra* note 14, at 2084 (arguing that a *Brady* violation precludes defense counsel from rendering constitutionally effective assistance); Gamer & Petty, *supra* note 52, at 91-92 (maintaining that effective assistance of counsel is only possible where an attorney can assess the risks of trial for his client).

71. *See, e.g.*, *Zacek*, 241 N.W.2d at 51-52 (noting that effective assistance of counsel requires defense attorneys to properly evaluate facts). *See also* Lee v. State, 573 S.W.2d 131, 134 (Mo. Ct. App. 1978) ("[T]he defense cannot recommend a plea of guilty or discuss a plea of guilty with a defendant unless they are aware of factors which might mitigate the case against their clients.") (internal quotations omitted). Even the Supreme Court has recognized the link between post-plea *Brady* claims and post-plea ineffective assistance of counsel claims. *See* Hill v. Lockhart, 474 U.S. 52, 59 (1985) (recognizing "failure to investigate or discover potentially exculpatory evidence" as an example of ineffective assistance of counsel that could result in an invalid plea). *See also supra* note 70.

72. *Zacek*, 241 N.W.2d at 51.

73. *See* Strickland v. Washington, 466 U.S. 668, 687-88 (1984) (determining that the performance prong of an ineffective assistance of counsel claim requires a showing that counsel made errors so serious that counsel's performance fell below an objective standard of reasonableness and outside a wide range of competence).

74. *See supra* note 10 and accompanying text. If, however, a guilty plea defendant's *Brady* rights are waivable, *see supra* note 15, legal advice concerning such a waiver could conceivably provide the basis for an ineffective assistance of counsel claim.

deleterious effect on the quality of an attorney's advice, but that effect lacks any constitutional significance whatsoever.[75]

Considering *Brady* violations under the rubric of an ineffective assistance of counsel analysis is problematic for two other reasons as well. First, the Sixth Amendment approach assumes that defense attorneys require a certain amount of information to adequately advise their clients, leaving it vulnerable to all the logical and doctrinal problems that burden the other approaches based on informed decision-making discussed above.[76] Second, the Sixth Amendment approach is circuitous, distracting our attention from what a *Brady* violation is really about—the performance of a prosecutor, not a defense attorney.[77] In light of all these considerations, the Sixth Amendment approach to post-plea *Brady* claims is a particularly unsatisfactory way to justify *Brady*'s application in the plea bargaining context.[78]

C. *Courts Considering* Brady *Claims Under a Motion to Withdraw a Defendant's Guilty Plea*

As a final doctrinal avenue for extending *Brady*'s protections to the plea bargaining defendant, it is worth noting that a number of state and federal courts consider *Brady* claims as part of a defendant's motion to withdraw a guilty plea.[79] Courts examining *Brady* claims in this context rely on statutory,

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75. To their credit, courts using a Sixth Amendment approach are at least acting in accordance with the Supreme Court's admonition in *Tollett v. Henderson*, 411 U.S. 258 (1973). In *Tollett*, the Court held that a defendant may attack the voluntary and intelligent nature of his plea only by showing that the advice he received from counsel was constitutionally deficient. *See id.* at 267. However, a literal reading of *Tollett*'s language is clearly inappropriate. Although competent counsel may afford guilty pleas a presumption of being voluntary and intelligent, *see supra* note 38, no one would argue that a defendant coerced into pleading guilty is precluded from challenging the voluntariness of that plea just because he had admittedly competent counsel. *See* Alschuler, *supra* note 3, at 55 ("A guilty plea entered at gunpoint is no less involuntary because an attorney is present to explain how the gun works.").

76. *See supra* text accompanying notes 38-41.

77. *See* Sheppard, *supra* note 43, at 187-89 (recognizing circuitous nature of ineffective assistance of counsel approach to post-guilty plea *Brady* claims).

78. The fact that *Brady* violations do not also constitute Sixth Amendment violations makes independent recognition of *Brady* rights in the plea bargaining context even more important. After all, if a defense attorney's failure to discover favorable evidence is sufficient to invalidate a defendant's guilty plea, *see supra* note 71, why should the result be any different when the government hides the exact same information? In the first case, our problem with the plea is that it is unreliable, *see supra* note 6, but that problem does not suddenly disappear because the party responsible for it has changed.

79. *See, e.g.*, United States v. Brown, 250 F.3d 811, 815-18 (3d Cir. 2001); Carroll v. State, 474 S.E.2d 737 (Ga. Ct. App. 1996); State v. Simons, 731 P.2d 797, 799-803 (Idaho Ct. App. 1987); State v. Johnson, 544 So.2d 767 (La. Ct. App. 1989); 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); Jefferson v. Commonwealth, 500 S.E.2d 219 (Va. Ct. App. 1998).

rather than constitutional, authority to set aside a defendant's conviction, though constitutional considerations are sometimes given statutory significance as well.[80] Although the precise standard for considering post-plea *Brady* claims in this fashion varies across jurisdictions, courts using a statutory approach usually ask whether a defendant's *Brady* claim provides a "fair and just reason" to withdraw a plea if the motion is made before sentencing,[81] and whether denying the motion would result in "manifest injustice" if the motion to withdraw the plea is made after sentencing.[82] Because motions to withdraw a guilty plea are typically left to a trial court's sound discretion, the standard for reviewing *Brady* claims considered under a statutory approach is highly deferential.[83]

Courts considering post-guilty plea *Brady* claims as part of a defendant's motion to withdraw a guilty plea have little choice but to examine those claims in light of the statutory context in which they were brought.[84] Still, a court's discretionary power to allow defendants to withdraw their plea based on a *Brady* violation is hardly the type of guaranteed protection on which a plea bargaining defendant can rely.[85] Moreover, because courts typically

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Naturally, courts can consider post-guilty plea *Brady* claims as part of a defendant's motion to withdraw his plea regardless of their position on the viability of those claims as constitutional violations. *See* United States v. Lampaziane, 251 F.3d 519, 523-25 (5th Cir. 2001) (holding that alleged *Brady* violation is nonjurisdictional challenge waived by guilty plea, but considering facts of claim anyway to decide defendant's motion to withdraw his plea); United States v. Millan-Colon, 829 F. Supp. 620, 634-36 (S.D.N.Y. 1993) (recognizing the misrepresentation approach but considering a post-plea *Brady* claim under defendant's motion to withdraw his plea); United States v. Ayala, 690 F. Supp. 1014, 1016-17 (S.D. Fla. 1988) (same).

80. Some courts, in fact, hold that where a constitutional violation is established, defendants are automatically entitled to withdraw their pleas. *See, e.g., Sturgeon*, 605 N.W.2d at 593; State v. Gardner, 885 P.2d 1144, 1148 (Idaho Ct. App. 1994).

81. Rule 32(e) of the Federal Rules of Criminal Procedure provides that a defendant may withdraw his plea with the court's permission. FED. R. CRIM. P. 32(e). Rule 32(e) further provides that a defendant's motion to withdraw made prior to sentencing will be granted upon a showing of a fair and just reason. *Id. See also* Aram A. Schvey & Katherine Gates, *Twenty-Ninth Annual Review of Criminal Procedure: Guilty Pleas*, 88 GEO. L.J. 1228, 1257-59 (2000) (discussing Rule 32(e) requirements).

82. *See, e.g., Carroll*, 474 S.E.2d at 740 (noting that withdrawal of plea is appropriate only to correct manifest injustice); *Simons*, 731 P.2d at 799 (stating that the withdrawal of a guilty plea after sentencing is proper only to correct manifest injustice); *Jefferson*, 500 S.E.2d at 223 (same).

83. *See, e.g., Carroll*, 474 S.E.2d at 740 (reviewing the trial court's refusal to grant a motion to withdraw a guilty plea under an abuse of discretion standard); *Simons*, 731 P.2d at 803 (same); *Sturgeon*, 605 N.W.2d at 593 (same).

84. *But see* United States v. Avellino, 136 F.3d 249, 261-62 (2d Cir. 1998) (determining that if a *Brady* violation is established, statutory framework allowing trial courts the discretion to deny a defendant's motion to withdraw is inappropriate).

85. Because this approach relies on statutory authority to provide a guilty plea defendant relief for a *Brady* violation, the protection afforded is (at least in theory) subject to the whim of state and federal legislatures. Moreover, the discretion afforded to judges under this approach means that even established *Brady* violations may not result in the withdrawal of a defendant's plea. Of course, in

consider prejudice to the government in exercising their discretion on motions to withdraw a plea, the statutory approach to post-plea *Brady* claims could lead to unfair results, holding against the defendant what the government brought upon itself.[86] Thus, while the statutory approach to post-plea *Brady* claims may avoid the pitfalls of a constitutional analysis, it is still the least attractive option for guaranteeing *Brady* protections to the plea bargaining defendant.

D. Another Way?

Given the above discussion, none of the judicial approaches currently used to justify post-plea *Brady* claims seem particularly satisfactory. This recognition, in fact, is one reason a substantial minority of courts have concluded that *Brady* claims do not survive a plea.[87] Still, the Supreme Court's guilty plea cases appear to provide another, thus far overlooked, possible basis for recognizing post-plea *Brady* claims—*Brady*'s affect on the accuracy of convictions based on a guilty plea.[88] Without a doubt, the Supreme Court's guilty plea cases rely heavily on the assumption that a

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jurisdictions holding that formal consideration of defendants' *Brady* claims are barred by their subsequent guilty pleas, the statutory approach may be defendants' only option. *See Lampaziane*, 251 F.3d at 523-25 (holding that the alleged *Brady* violation is a nonjurisdictional challenge waived by guilty plea, but considering the facts of the claim anyway to decide the defendant's motion to withdraw his plea).

86. *See United States v. Avellino*, 136 F.3d 249, 262 (3d Cir. 1998) ("And in the context of a proven *Brady* violation, we would think it entirely inappropriate to allow the government to defeat the motion [to withdraw a plea] by arguing that the warranted remedy for its own constitutional violation is likely to cause it prejudice."). *See also* Schvey & Gates, *supra* note 81, at 1257 & n.1304 (noting that Rule 32(e) motions to withdraw a plea shifts the burden to the government to show prejudice from the withdrawal once the defendant establishes a fair and just reason to withdraw the plea). Some courts, however, have resolved this tension by holding that where a constitutional violation is established, a defendant has established manifest injustice as a matter of law. *See supra* note 80.

87. The Fifth Circuit's recent opinion in *Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000), provides perhaps the most thoughtful explanation of the minority view. *See id.* at 360-64. For a listing of other courts refusing to recognize post-guilty plea *Brady* claims, see *supra* note 18.

88. Though a few courts have considered the accuracy of a defendant's conviction in ruling on a post-guilty plea *Brady* claim, none thus far appear to have recognized accuracy as its own doctrinal justification for considering those claims. *See, e.g.*, Matthew v. Johnson, 201 F.3d 353, 370 (5th Cir.), *cert. denied*, 121 S. Ct. 291 (2000) (refusing to recognize habeas petitioner's post-plea *Brady* claim while noting confidence in his factual guilt); White v. United States, 858 F.2d 416, 423 (8th Cir. 1988) (applying the totality-of-the-circumstances approach and considering the factual basis supporting a defendant's guilty plea); Campbell v. Marshall, 769 F.2d 314, 321-22 (6th Cir. 1985) (same); State v. Gardner, 885 P.2d 1144, 1148, 1151-52 (Idaho Ct. App. 1994) (concluding that a *Brady* violation equates to 'manifest injustice' while questioning the defendant's factual guilt). The court in *Banks v. United States*, 920 F. Supp. 688 (E.D. Va. 1996), comes closest to justifying post-plea *Brady* claims based on the accuracy interests they promote, though even in that case the court only used accuracy interests as a reason to follow other circuits recognizing post-plea *Brady* claims, rather than as an independent doctrinal justification. *See id.* at 691.

guilty plea defendant is in fact guilty.[89] Indeed, the presumption that guilty pleas are factually accurate is the very reason the Court has been unwilling to upset the finality of a guilty plea.[90] At the same time, however, the Supreme Court's guilty plea cases clearly contemplate the continuing viability of constitutional claims necessary to ensure the factual accuracy of a plea.[91] In fact, the Court has explicitly (though perhaps inartfully) stated that a guilty plea only precludes those claims consistent with factual guilt and conviction once factual guilt is established.[92] Hence, post-plea *Brady* claims may be

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89. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation."); Brady v. United States, 397 U.S. 742, 757-58 (1970) (noting that defendant's claim did not question the truth or reliability of his guilty plea); McMann v Richardson, 397 U.S. 759, 773 (1970) (same); Parker v. North Carolina, 397 U.S. 790, 797 n.10 (1970) (noting the record's silence as to any circumstance doubting the integrity of the defendant's guilty plea). *See also* McCoy & Mirra, *supra* note 2, at 926 (noting that the Court's requirements that a plea be voluntary, intelligent, and in some instances supported by a factual basis are consistent with an attempt to limit inaccurate results).

90. *See, e.g.*, Brady v. United States, 397 U.S. at 757-58 (noting that the outcome of the defendant's case might be different if the Court believed that innocent defendants falsely condemn themselves); McMann v. Richardson, 397 U.S. at 773 (finding the defendant's coerced confession claim irrelevant because his conviction was based on a guilty plea, not the allegedly coerced confession, and the admissibility of that confession had no bearing on the accuracy of the plea). Given its starting assumption that guilty pleas are accurate, the Court's general unwillingness to recognize post-plea constitutional claims is hardly remarkable. As Professor Alschuler has noted in discussing the Supreme Court's guilty plea cases,

> It would have been enough for the Court to have said: "These defendants have solemnly admitted their guilt, and that being so, we do not care what may have happened to them in the past. The whole purpose of criminal proceedings is to determine whether a defendant is guilty, and once that question is satisfactorily answered in the affirmative, the state's consequent right to incarcerate the defendant is established absolutely."

Alschuler, *supra* note 3, at 32-33. Ultimately, Professor Alschuler rejects this view of the Supreme Court's guilty plea cases, though his analysis did not consider the Court's late 1975 decision in *Menna v. New York*, 423 U.S. 61 (1975) (presumably because the article was written before *Menna* was decided). Still, even Professor Alschuler's analysis cites as an "extreme example" of an obviously invalid plea the case where a prosecutor deliberately misleads defense counsel concerning the nature of the state's evidence. *See id.* at 33.

91. *See, e.g.*, Tollett v. Henderson, 411 U.S. 258, 267 (1973) (explaining that a guilty plea stops the criminal adjudication process and that therefore a guilty plea defendant may not make claims *independent* of factual guilt relating to constitutional violations that occurred before the plea was entered); Brady v. United States, 397 U.S. at 757-58 (professing to take "great precautions" to guard against inaccurate pleas and expecting lower courts to do the same, ensuring that there is nothing to question the reliability of a defendant's admission of guilt). *See also* Menna v. New York, 423 U.S. 61 (1975), discussed at *infra* note 92.

92. In *Menna v. New York*, 423 U.S. 61 (1975), the Supreme Court departed from its general approach to guilty pleas and allowed a post-plea double jeopardy claim to be heard. In explaining why the case at bar was different from other claims that the Court had held were barred by a defendant's guilty plea, the Court explained:

> The point of these cases is that 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. In most cases, factual guilt is a sufficient basis for the State's imposition of

doctrinally viable if, like post-plea Sixth Amendment ineffective assistance of counsel claims, they are vital to protecting the assumption underlying the Court's guilty plea cases as a whole—that defendants who plead guilty are in fact guilty.[93]

At least at first glance, relying on accuracy interests to doctrinally justify post-plea *Brady* claims is particularly appropriate for two reasons. First, the chief goal of the criminal justice system—indeed, its very reason for existence—is to accurately sort the factually guilty and innocent.[94] Thus, if *Brady* plays a necessary role in that sorting process, its legitimacy in the plea bargaining context is difficult to deny. Second, *Brady*'s sole purpose at trial is to protect the innocent from wrongful conviction.[95] Thus, if *Brady* does apply in the plea bargaining context, common sense tells us it is because *Brady* can serve the same purpose there. The question, then, becomes one of *Brady*'s impact on the accuracy of guilty pleas, to which I turn next.[96]

> punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.

Id. at 62 n.2. Though the Court's use of a triple negative in the above passage is less than helpful, its point remains (fairly) clear: a guilty plea presumptively resolves the issue of factual guilt, so unless a post-plea claim questions that presumption—or, as in *Menna*, questions the imposition of punishment even when factual guilt is established—it is irrelevant and therefore precluded.

93. *See* McMunigal, *supra* note 16, at 967 (noting the compatibility of *Brady* and the Supreme Court's guilty plea jurisprudence). Naturally, the analysis that follows assumes that the Supreme Court is sincere in its stated desire to protect the innocent defendant tempted to plea bargain. Others have questioned this premise. *See* Alschuler, *supra* note 3, at 30-37 (recognizing the Court's professed concern for accurate guilty pleas, but questioning its sincerity).

94. *See* Schulhofer, *supra* note 3, at 2002 (stating that the criminal justice system's mission is to ascertain guilt and appropriate punishment); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2012 (1992) (noting that the core function of the criminal justice process is the separation of the innocent from the guilty); McCoy & Mirra, *supra* note 2, at 915-16 (stating that a state's criminal procedure system is designed to accurately identify the guilty and innocent). *See also* Berger v. United States, 295 U.S. 78, 88 (1935) ("The twofold arm of [the law] is that guilt shall not escape nor innocence suffer.").

95. *See* Kyles v. Whitley, 514 U.S. 419, 434 (1995) (noting that the question under *Brady* is whether the defendant received a fair trial, meaning a trial verdict worthy of confidence); United States v. Bagley, 473 U.S. 667, 678 (1985) ("Consistent with 'our overriding concern with the justice of the finding of guilt,' a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.") (quoting United States v. Agurs, 427 U.S. 97, 112 (1976))) (citation omitted); United States v. Agurs, 427 U.S. 97, 104 (1976) (noting *Brady*'s overriding concern with the fairness of the finding of guilt).

96. It would be a mistake to assume that because a constitutional right is essential to be accuracy of convictions at trial, it is automatically essential to the accuracy of convictions following a plea. In *McMann v. Richardson*, 397 U.S. 759 (1970), for example, the Supreme Court held that a defendant's coerced confession claim was barred by his guilty plea, *id.* at 773, although the Fifth Amendment's protection against coerced confessions is undoubtedly designed to protect the accuracy of convictions at trial. *See* Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1039 n.113 (1987) ([S]ome rights, such as the rights which guard against coerced

II. *BRADY*'S EFFECT ON THE ACCURACY OF CONVICTIONS BASED ON A GUILTY PLEA

Any assessment of Brady's effect on the accuracy of convictions based on guilty plea must begin with a closer look at the nature of *Brady*'s duty to disclose. Recall that *Brady* only requires the disclosure of information that is both favorable to the defense and material to guilt or punishment.[97] Focusing first on *Brady*'s materiality requirement, defendants at trial must establish "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[98] Usually, this requirement leads courts to ask whether there is a reasonable probability (i.e., a good chance) that with *Brady* disclosure a defendant would have been acquitted at trial, though conceivably courts could also ask whether a defendant would have just received a lighter sentence.[99] Thus, at least at trial, *Brady*'s materiality standard typically results in a defendant's conviction being overturned whenever a court's confidence in the accuracy of that conviction is seriously shaken.[100]

Given the nature of *Brady*'s materiality standard at trial, it is not surprising that the doctrine plays a crucial role there in protecting the innocent defendant from wrongful conviction. Indeed, *Brady* disclosure is perfectly aligned with accuracy interests in the trial context, reversing a conviction only when we believe the defendant may well be innocent. Assuming *Brady*'s materiality standard in the guilty plea context does the same thing,[101] the doctrine's accuracy-enhancing effect on convictions supported by a guilty plea is equally clear. Because of *Brady*'s materiality standard, guilty plea defendants who can establish a valid *Brady* claim by

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confessions, specifically protect the accuracy of the fact-finding process."). Indeed, before *McMann* was decided, the Supreme Court explicitly recognized that allowing coerced confessions to come before a jury posed a danger of convicting the innocent. *See* Johnson v. New Jersey, 384 U.S. 719, 728 (1966). *See also* Alschuler, *supra* note 3, at 34 (criticizing the Supreme Court's refusal to recognize that claims affecting the accuracy of trial will automatically affect the accuracy of guilty pleas as well).

97. *See supra* text accompanying note 8.

98. *Bagley*, 473 U.S. at 682 (relying on Strickland v. Washington, 466 U.S. 668, 694 (1984)).

99. Ironically, *Brady* involved the suppression of evidence relevant to the defendant's punishment rather than guilt. Brady v. Maryland, 373 U.S. 83, 84 (1963). At trial, Brady admitted his involvement in a first-degree murder but claimed that a companion, Boblit, committed the actual killing. Based on that version of events, Brady's attorney argued to the jury that his client should be spared the death penalty. *Id.* The jury rejected the argument and sentenced Brady to death. *Id.* After trial, Brady's attorney discovered that the prosecution had suppressed a statement by Boblit admitting that he had actually strangled the victim, despite a request to see all of Boblit's out-of-court statements. *Id.*

100. *See supra* note 95.

101. *See infra* notes 178-79 and accompanying text.

definition also establish that they may well be innocent. Given that point, it is difficult to imagine how *Brady* could *not* play a crucial role in promoting accurate convictions based on a plea. Still, *Brady*'s accuracy-enhancing effect on guilty pleas is not solely attributable to its materiality standard; the fact that *Brady* requires disclosure of information favorable to the defense matters too. To understand why, we first need some understanding of a defendant's decision-making process in considering a plea, which modern choice theory applied to the plea bargaining context provides.[102]

A. The Model

Using choice theory to explain the actions of plea bargaining parties is hardly new.[103] Simply stated, choice theory tells us that prosecutors and defendants plea bargain because both parties can avoid the costs and uncertainties of trial.[104] When a conviction at trial appears imminent, plea bargaining allows prosecutors to save the costs of going to trial, which they disproportionately bear, and allows the defendants to benefit from those cost savings, as well as any cost savings of their own.[105] When a conviction at trial is less than certain, the push to plea bargain is even stronger. Defendants bargain to avoid the chance that they could be convicted at trial and receive a higher (possibly maximum) sentence, while prosecutors bargain to avoid the possibility that trial could yield no conviction at all.[106] Thus, when the outcome at trial is uncertain, both parties have something to lose by going to trial aside from the cost of trial itself, and their incentive to plea bargain increases to the extent that they believe their worst case scenario may come true.

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102. Of course, not every guilty plea results from a plea bargain, but the overwhelming majority do, and regardless, the decision-making dynamics are the same. In both cases, defendants consider the costs of a conviction against its benefits, which include avoiding the punishment, personal embarrassment, and financial outlay of trial. Thus, for analytical purposes, I treat every plea as a bargained-for plea. *See* Ostrow, *supra* note 20, at 1593-94 (noting that it is futile to distinguish between implicit and explicit inducements to plead guilty because both have the same effects on a defendant's decision-making).

103. *See, e.g.*, Easterbrook, *Criminal Procedure*, *supra* note 3; Scott & Stuntz, *supra* note 2.

104. *See* Scott & Stuntz, *supra* note 2, at 1935-40 (discussing incentives to plea bargain). The very fact that defendants have a choice other than trial allows them to possibly improve their situation. *See* Easterbrook, *Criminal Procedure*, *supra* note 3, at 309 (noting that defendants presumably make themselves better off by plea bargaining or they would not strike the deals).

105. Taking a case to trial is more costly than settling it, and this is true to an even greater extent for prosecutors who have limited resources and a seemingly unlimited number of cases. *See* Easterbrook, *Criminal Procedure*, *supra* note 3, at 297; Scott & Stuntz, *supra* note 2, at 1935.

106. *See* Scott & Stuntz, *supra* note 2, at 1936-40. This is not to deny that prosecutors bargain to spare the costs of trial too. *See supra* note 105 and accompanying text.

Setting aside for a moment the additional costs associated with trial, the corresponding risks that both prosecutors and defendants face lead them to engage in essentially the same pre-plea decision-making analysis.[107] Both parties identify their best option by weighing the uncertain but harsh punishment at trial against the certain but lower punishment of a plea bargain; the only difference between the two is whether their best option imposes more punishment or less.[108] All other things being equal, rational defendants will only bargain if they believe that the punishment in a plea offer is less than the punishment that would result from a conviction at trial, taking into account the fact that at trial they at least have a chance of acquittal.[109] Rational prosecutors, by contrast, will only bargain if, all other things being equal, they believe a plea offer imposes more punishment than what they could get following a conviction at trial, again taking into account the chance of acquittal there.[110] Because both prosecutors and defendants are just looking to improve their lots vis-à-vis trial, each party will most likely find a number of plea offers attractive, some being better deals than others.[111]

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107. I temporarily set aside the cost impetus to plea bargain in order to isolate the parties' reaction to risk. Moreover, because the cost of going to trial is greater for prosecutors than defendants, *see supra* note 105, considering the costs of trial at this point unnecessarily complicates the analysis without adding much predictive power to the defendant's decision-making process, the ultimate focus of the model. For a model that simultaneously considers both factors, see Easterbrook, *Criminal Procedure*, *supra* note 3, at 331-32. For a discussion of *Brady*'s effect on a prosecutor's cost impetus to bargain, see *infra* notes 143-48 and accompanying text.

108. In short, both parties compare the expected punishment of trial with the expected punishment of a plea bargain, both taking into account the chance of no punishment at all (i.e., an acquittal) at trial. Defendants maximize their well-being by choosing the option with the lowest expected punishment amount, while prosecutors do just the opposite. For more complex versions of this model, see Easterbrook, *Criminal Procedure*, *supra* note 3, at 331-32; Scott & Stuntz, *supra* note 2, at 1936-40.

109. *See* McCoy & Mirra, *supra* note 2, at 894 (noting that defendants choose the course of action that keeps their penalty to a minimum—even if it means pleading guilty); Scott & Stuntz, *supra* note 2, at 1961 ("If the prosecutor wants to reach a bargain, she must offer the defendant something better than the expected value of going to trial, discounted for the defendant's risk aversion."). *See also* Douglass, *supra* note 14, at 447 (stating that defendants plea bargain because they believe the bargain, a reduced sentence, is preferable to the result that would follow at trial, a higher sentence).

110. Restating the parties' basic treatment of uncertainty in formulaic fashion, rational defendants will plead guilty when in their estimate $C(t) \times P(t) > P(pb)$, where $C(t)$ is the chance of conviction at trial, $P(t)$ is the punishment expected at trial assuming a conviction, and $P(pb)$ is the certain punishment accompanying a plea bargain. For rational prosecutors, just the opposite is true; they will strike a deal only when in their estimate $C(t) \times P(t) < P(pb)$.

111. Judge Easterbrook recognizes the same point, but uses the terms "maximum settlement offer" and "minimum settlement demand" to represent the least attractive plea bargain each side would be willing to accept. *See* Easterbrook, *Criminal Procedure*, *supra* note 3, at 297. Under Judge Easterbrook's model, defendants would find any offer attractive that was below their maximum settlement demand (i.e., the most punishment they would be willing to take), while prosecutors would find any offer attractive that was above their minimum settlement demand (i.e., the least amount of punishment they would be willing to agree to). *See id.* The principle, however, is the same: both sides have an array of possible plea bargains that they will, to varying degrees, find attractive.

Thus, when considering both parties' choice dynamics together, we should envision an overlapping range of mutually advantageous plea bargains, rather than a single "hit or miss" bargaining point.[112]

For defendants choosing between trial and a plea, the outcome of the above analysis turns on the estimated chance of conviction at trial because the other two factors in the equation—the expected punishment at trial and expected punishment following a plea—are generally known.[113] If the chance of conviction at trial is quite high, a defendant will most likely take a plea offer with punishment only slightly lower than that expected at trial; defendants who believe they will be convicted anyway will generally take whatever discount in punishment they can get. Conversely, if the chance of conviction at trial is exceedingly low, a defendant will likely pass on even the sweetest of deals; defendants who are certain they will be acquitted at trial will generally find no offer of punishment attractive. Thus, for defendants, the estimated chance of conviction at trial is crucial to pre-plea decision-making because it affects the minimal sentencing differential (i.e., the difference between punishment at trial and punishment under a plea) required to make pleading guilty their best option. In short, the lower the estimated chance of conviction at trial, the more lucrative a plea offer must be.[114]

Unfortunately, however, the chance of conviction at trial depends to a large extent on something a defendant knows relatively little about: the prosecutor's case.[115] Though a defendant may have some knowledge of the prosecutor's case from both formal and informal discovery, knowledge of all (or even the most important part) of it is unlikely.[116] As a result, defendants have to hazard a guess as to the overall strength of the government's evidence, which is where their knowledge of guilt or innocence becomes important. Typically, defendants know whether or not they are guilty of the

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112. *See id.*

113. Admittedly, to some extent the punishment expected at trial is also unknown, but under any scenario a defendant at least knows the maximum punishment possible for a particular offense, while sentencing guidelines give an even more precise idea of the likely punishment. A prosecutor's willingness to bargain also turns on the estimated chance of conviction at trial, though prosecutors' information deficits are different. *See* Scott & Stuntz, *supra* note 2, at 1936-37.

114. *See* McCoy & Mirra, *supra* note 2, at 895.

115. *See* Douglass, *supra* note 14, at 448. The other factor affecting the chance of conviction of trial is the strength of the defendant's case, which a defendant does know something about. *See* Scott & Stuntz, *supra* note 2, at 1936-37.

116. *See* Douglass, *supra* note 14, at 457-61 (discussing prosecutorial incentives to disclose inculpatory and exculpatory information, but ultimately finding them inadequate to assure full disclosure); Steven L. Friedman, Comment, *Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial*, 119 U. PA. L. REV. 527, 529-32 (1971) (criticizing informal and formal discovery devices as a means of informing a defendant about the prosecutor's case).

offense charged.[117] Thus, some know they are guilty and some (hopefully fewer) know they are innocent, while a few are unsure of their status either way because of some ambiguity in the facts, the law, or both. Though all three groups have every incentive to protest their innocence to a prosecutor, their private knowledge of guilt or innocence (where existent) affects the way they individually assess their chance of conviction at trial and the way they weigh their options once that basic assessment is made.

To the extent we have any confidence whatsoever that evidence reflects reality, we expect a prosecutor's case to be weaker where a defendant is factually innocent than where a defendant is factually guilty.[118] After all, if a defendant is truly innocent, there can only be so much evidence erroneously suggesting guilt. In this regard, defendants' expectations are no different; factually innocent defendants are generally more optimistic than guilty ones in predicting the strength of the government's evidence at trial.[119] Indeed, only guilty defendants have an exceptionally good reason to assume the worst: they know they committed the crime. Thus, at least where they know their status, innocent and guilty defendants will likely treat certain plea offers differently because they make systematically different assessments of their chance of conviction at trial. Because innocent defendants are more optimistic about the chance of an acquittal, they will view deals that would be marginally advantageous for a guilty defendant as not advantageous at all.[120]

Even so, defendants who know they are innocent have another reason to choose trial that guilty defendants do not: righteous indignation. For the factually guilty defendant, pleading guilty may not be ideal, but it is not a travesty of justice. For the innocent defendant, a guilty plea is exactly that. It is false self-condemnation, which common sense tells us no defendant will undertake lightly.[121] Thus, one would expect innocent defendants to make

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117. Scott & Stuntz, *supra* note 2, at 1936-37; McMunigal, *supra* note 16, at 984 (recognizing that cases where defendants are without such information are limited). Prosecutors, by contrast, know the strength of their case but not whether a given defendant is truly innocent or guilty. Scott & Stuntz, *supra* note 2, at 1936-37. *See also infra* note 130.

118. *See* Scott & Stuntz, *supra* note 2, at 1937.

119. McCoy & Mirra, *supra* note 2, at 924. *See also* Scott & Stuntz, *supra* note 2, at 1937 (recognizing that a defendant's true conduct with regard to an alleged offense bears powerfully on that defendant's prediction about the evidence at trial).

120. *See* Easterbrook, *Plea Bargaining*, *supra* note 3, at 1969-70; Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 80 n.97 (1988). Concededly, a defendant's optimism in assessing the chance of conviction at trial will be affected by other factors as well, including faith in the defendant's defense attorney and what the attorney said about the chance of conviction at trial. Factors such as these, however, are not sufficiently systematic to be accounted for in any meaningful way.

121. *See* McCoy & Mirra, *supra* note 2, at 894 (recognizing that even innocent defendants facing

fewer deals than guilty defendants not just because their estimate of the chance of conviction at trial is lower, but also because they are more reluctant to plead guilty in the first place.

At least two authors, Professors Scott and Stuntz, have disagreed with this contention, arguing that innocent defendants are highly risk averse and therefore just as likely to bargain (in fact, more so in certain instances) as their factually guilty counterparts.[122] According to Professors Scott and Stuntz, guilty defendants are more prone to risk-taking than those who are innocent because the very act of committing a crime suggests a preference for gambling.[123] Though the premise underlying this argument—that criminals tend to be risk-takers—is reasonable enough, the same rationale suggests that innocent defendants will also be risk-takers, at least where they have a criminal history.[124] Indeed, individuals with a criminal past may be particularly susceptible to false charges not only because police "round up the usual suspects" when investigating certain crimes, but also because police may assume, based on a person's prior indiscretions, that an otherwise ambiguous act was committed with criminal intent.[125] Thus, while criminal activity may be an effective indicator of a defendant's risk-taking proclivities, it is not perfectly (or even consistently or predictably) matched to factually guilty defendants alone.[126] To the extent that innocent defendants have a criminal background, they could be risk takers too.

Even innocent defendants without a criminal background, however, have unique reasons to resist falsely pleading guilty. As others have noted, the collateral consequences of a conviction (even under a plea) are disproportionately large for defendants whose records are otherwise clean.[127]

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strong cases may choose trial just to vindicate themselves).

122. Scott & Stuntz, *supra* note 2, at 1948-49.

123. *Id.* at 1943.

124. Professors Scott and Stuntz implicitly recognize the problem by noting: "[R]isk aversion is a much more plausible assumption where innocent defendants are concerned *(especially those with relatively clean records)*." *Id.* (emphasis added).

125. This famous line from the movie *Casablanca* is not far from reality, reflecting our intuition that those who have committed crime before may well commit it again. The same idea explains why, for example, police trying to solve a burglary will focus their attention on known burglars in the area, whether or not that focus is justifiable. Although as a practical matter a criminal history may be helpful in investigating crime, we also know that it can erroneously suggest guilt. Indeed, this risk is the rationale behind Rule 404 of the Federal Rules of Evidence, which generally excludes the use of character evidence to establish a defendant's guilt at trial. *See* FED. R. EVID. 404 advisory committee note.

126. In short, defendants who have a criminal record may well be innocent of the crime charged, just as defendants without a criminal record may well be guilty. *See* Scott & Stuntz, *supra* note 2, at 1944 (recognizing that lack of a prior record will not help a prosecutor identify factually innocent defendants).

127. *See, e.g.*, McMunigal, *supra* note 16, at 987-88 (comparing the disincentives to plead guilty

Thus, at least in some instances, the stigma and possible employment consequences of a conviction may make the innocent defendant without a criminal record unwilling (or unable) to plead to anything at all. Moreover, innocent defendants without a criminal record may assume, erroneously or not, that they have less need for leniency from a prosecutor because their lack of prior convictions will get them some leniency from the judge.[128] Given these considerations, it is difficult to conclude that the risk preferences of innocent and guilty defendants differ in a significant or meaningful way, particularly as a factor offsetting the bargaining dynamic differences between the two groups that are otherwise undisputed.[129] That being the case, choice theory tells us exactly what we might surmise just by using common sense: it is more difficult to get an innocent defendant to plead guilty than a defendant who is in fact guilty.[130]

To conclude that it is more difficult to get innocent defendants to plead guilty, however, is not to say that they will never do so. Rather, it means that innocent defendants require a larger sentencing differential to find a plea bargain attractive than do factually guilty defendants, who are more willing to strike a deal in the first place.[131] In other words, because innocent

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for defendants who have a record with the disincentives to plead guilty for defendants who do not have a record).

128. In other words, defendants with clean records discount the likely punishment at trial. *Id.* at 987.

129. Even Professors Scott and Stuntz recognize that an innocent defendant's estimate of the chance of conviction at trial will differ from that of the guilty defendant. Scott & Stuntz, *supra* note 2, at 1937-39.

130. Several commentators agree with this proposition. *See, e.g.*, Easterbrook, *Plea Bargaining*, *supra* note 3, at 1969-70; McCoy & Mirra, *supra* note 2, at 924-25; Schulhofer, *supra* note 3, at 1983. Interestingly, Professors Scott and Stuntz posit that even if innocent defendants are more likely than guilty defendants to refuse initially to bargain, guilty defendants will copy innocent defendants' actions to (falsely) signal their innocence in hopes of triggering better offers, thereby erasing any differences between the two groups that otherwise might have existed. Scott & Stuntz, *supra* note 2, at 1946. I find this rejoinder unpersuasive for two reasons. First, the guilty defendant's ability to copy the innocent defendant's actions is limited. At some point, prosecutors under their own bargaining constraints (political, office-policy-related, or otherwise) will make defendants a final offer, in effect saying, "This is the best I can do; take it or leave it." At that point, copying the innocent defendant's signal serves no purpose; even guilty defendants will just ask themselves whether they are better off with the offer or trial. Second, even if this were not the case, guilty defendants would have a difficult time copying an innocent defendant's signal because they do not know what that signal is. Like prosecutors, guilty defendants cannot tell whether a defendant's decision to reject a plea signals innocence, or a preference for risk-taking—or just that the defendant cannot afford a conviction. Thus, while guilty defendants undoubtedly know how to protest their innocence, they do not know how to act like innocent defendants because they do not know who those innocent defendants are. In the end, then, the guilty defendant asks the same question as the innocent defendant: Am I better off with a plea bargain or a trial? At least at the margin, innocent and guilty defendants will answer that question differently—even though their different answers are impossible for a prosecutor to recognize as such because of other, equally plausible inferences one might draw from a refusal to bargain.

131. *See* McMunigal, *supra* note 16, at 985-87 (exploring impact of sentencing differentials on

defendants are already more inclined to choose trial, it will take a better bargain to change their mind. Although the possibility of such a bargain is low where the chance of conviction at trial is low (recall that even factually guilty defendants will refuse a generous offer when they are certain of acquittal at trial),[132] the possibility of an offer too good for even the innocent defendant to refuse is much higher where the chance of conviction at trial is high.[133] After all, where they believe they will be convicted anyway, even innocent defendants will just be looking to cut their losses.[134] As a result, choice theory also provides an important insight as to one reason innocent defendants plead guilty: they are faced with an intolerably high estimate of the chance of conviction at trial.[135]

B. Introducing Brady

Given our discussion thus far, *Brady*'s role in protecting the accuracy of convictions based on a guilty plea seems all too obvious. Disclosure of material information favorable to the defense lowers a defendant's estimate of the chance of conviction at trial, which in turn increases the minimum sentencing differential necessary to make pleading guilty that defendant's best option.[136] For the innocent defendant, the effect is even more exaggerated, further increasing the minimum benefit necessary to induce a false guilty plea.[137] Of course, disclosing favorable information will not

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innocent defendant's willingness to plead guilty).

132. *See supra* text accompanying notes 113-14.

133. Moreover, the coercive influence of a high sentencing deferential is not at all dissipated by competent counsel. McMunigal, *supra* note 16, at 988-89. One can, however, at least debate the harm of an innocent defendant pleading guilty because the deal offered is too good to refuse. See *infra* note 134.

134. *See* Alschuler, *supra* note 3, at 34 ("[I]t is better to be an innocent person on probation than an innocent person in prison."); Easterbrook, *Plea Bargaining*, *supra* note 3, at 1969 ("[I]t is bad enough to be unjustly convicted, and worse yet to be unjustly convicted and receive a sentence higher than one could have obtained."). Although the minimum sentencing differential required by an innocent defendant to plead guilty is larger than the differential required by a guilty defendant, it is still smaller where the chance of conviction at trial is high in comparison to where it is low. *See supra* text accompanying notes 113-14.

135. *See* Easterbrook, *Plea Bargaining*, *supra* note 3, at 1970 (contending that innocent defendants plead guilty not because of a flaw in the bargaining process, but because of flaws in the trial process that result in a significant risk of conviction regardless of actual innocence or guilt); Easterbrook, *Criminal Procedure*, *supra* note 3, at 311 (arguing that if the penalty of going to trial is high enough, even the innocent will plead guilty).

136. A number of commentators have recognized this point. *See, e.g.*, Douglass, *supra* note 14, at 441-42; McMunigal, *supra* note 16, at 990-97. *See also* McCoy & Mirra, *supra* note 2, at 933 (noting that overestimated chances of conviction at trial can create a substantial risk of inaccurate pleas).

137. Because *Brady* disclosure lowers a defendant's estimate of the chance of conviction at trial, it simultaneously makes any given plea offer less attractive, increasing even further the minimum sentencing differential required to make pleading guilty an innocent defendant's best option. *See supra*

prevent all innocent defendants from pleading guilty, for a sentencing differential could still be coercively high.[138] Nevertheless, it will at least prevent defendants from grossly overestimating their chance of conviction at trial, reducing the likelihood that innocents will plead guilty just because their only other option appears to be futile.[139]

Even so, choice theory suggests that *Brady* disclosure is essential to the accuracy of guilty pleas for other, though perhaps less obvious, reasons as well. As previously noted, some defendants (though relatively few) do not know whether they are innocent or guilty because of some ambiguity in the facts or law.[140] Here, too, *Brady* has a role to play, for it can remedy the information defects that keep these defendants from knowing their true status and bargaining accordingly.[141] Admittedly, *Brady*'s helpfulness in this regard is limited where the uncertainty in a defendant's status results from an ambiguity in the law as opposed to the facts, but even then a defendant could only benefit by knowing the correct facts under the law in the first place. In short, to the extent that defendants who know they are innocent act differently (at least at the margin) than those who do not, it pays in terms of accuracy to assist that sorting process—which is precisely what *Brady* does.[142]

Still, *Brady*'s accuracy-enhancing effect on guilty pleas is not solely attributable to defendants' decision-making, for *Brady* influences the way

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text accompanying notes 113-14; McMunigal, *supra* note 16, at 991-92.

138. *See* McMunigal, *supra* note 16, at 996-97. One can, however, at least debate the harm of an innocent defendant pleading guilty because the deal offered is too good to refuse. *See supra* note 134.

139. Importantly, this analysis does not in any way suggest that a defendant is entitled to an accurate assessment of the chance of conviction at trial in order to enter a valid plea, a proposition squarely rejected by the Supreme Court. *See supra* note 39 and accompanying text. Rather, *Brady*'s effect on a defendant's estimate of the prosecutor's case against him is relevant because it explains *why* the disclosure of *Brady* information promotes factually accurate pleas, a justification for recognizing post-guilty plea *Brady* claims of its own.

140. *See supra* note 117 and accompanying text; McMunigal, *supra* note 16, at 984 (noting that a defendant's inability to resolve critical factual issues relevant to guilt or innocence is a limited, but important, subset of all guilty plea cases).

141. *See* McMunigal, *supra* note 16, at 970-84. Indeed, in the extreme, certain defendants could believe they are factually guilty (and bargain accordingly) only to find out later that they are not. Cases where *Brady* has served this "self-identifying" purpose are not uncommon. *See, e.g.*, Carroll v. State, 474 S.E.2d 737 (Ga. Ct. App. 1996) (holding that the defendant was entitled to withdraw her guilty plea to vehicular homicide where she entered the plea without knowing her speed at the time of the accident and where the state suppressed information that defendant's speed did not contribute to accident); State v. Gardner, 885 P.2d 1144 (Idaho Ct. App. 1994) (holding that defendant was entitled to withdraw his guilty plea to vehicular manslaughter where the government suppressed eyewitness information establishing that accident occurred when defendant's tire had a blow-out, even though defendant admitted using marijuana beforehand).

142. *See* McMunigal, *supra* note 16, at 970-84 (analyzing *Brady*'s effect on a defendant's ability to identify his status properly, so that his guilty plea can be relied on as an accurate reflection of factual guilt).

prosecutors do business too. Until now, we have set aside the additional costs associated with trial to isolate the parties' treatment of risk in the plea bargaining process.[143] Yet these costs provide an incentive to plea bargain as well, and as they increase, so does the attractiveness of pleading a case rather than taking it to trial.[144] For prosecutors, compliance with *Brady*'s disclosure requirements is costly in time and effort.[145] Thus, unless *Brady* applies in the plea bargaining context as well as trial, the additional costs it imposes gives prosecutors yet another reason (aside from the risk of acquittal) to bargain cases with favorable evidence—and hence another reason to make a favorable plea offer.[146] Because *Brady* cases are by definition weaker to start with (and therefore already prone to quite lucrative plea offers),[147] limiting *Brady* to the trial context merely exacerbates the initial problem—increasing even further the incentive to plead guilty for those we are least certain ought to do so.[148]

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143. *See supra* note 107.

144. *See supra* note 105 and accompanying text.

145. *See* Douglass, *supra* note 14, at 504-05 (noting that *Brady* disclosure in the plea bargaining context would entail time and effort); Sheppard, *supra* note 43, at 181 (noting that compliance with *Brady*'s disclosure mandate is expensive for prosecutors in terms of time). Indeed, the cost of complying with *Brady* disclosure may be one reason prosecutors in California have required defendants to explicitly waive their *Brady* rights before conferring plea bargaining concessions, the legality of which is currently before the Supreme Court. *See supra* note 14.

146. *See* McMunigal, *supra* note 16, at 997 ("A criminal justice system that condemns concealment of *Brady* material as a due process violation at trial, but not in plea bargaining, essentially encourages prosecutors to divert *Brady* cases into plea bargaining."). *See also supra* text accompanying note 37 (noting moral hazard problem that results from limiting *Brady* to trial context). Ironically, Professor Douglass argues that the costs of applying *Brady* in the plea bargaining context are so significant that they provide a reason *not* to recognize post-plea *Brady* claims. *See* Douglass, *supra* note 14, at 505-07. It would seem, however, that disclosing *Brady* information prior to a guilty plea would still be less costly to prosecutors than going to trial—especially when other cases are competing for their attention and the chance of prevailing on a *Brady* case is comparatively small. In short, suppressing *Brady* information will not change the fact that a case is weak, so prosecutors still have all the incentive they need to strike a deal. Moreover, as others have argued, *Brady* protections actually promote plea bargaining by assuring defendants that they do not have to go to trial just to know evidence in their favor. *See* McMunigal, *supra* note 16, at 1017 ("If the *Brady* right were openly recognized as not applying in guilty plea cases . . . defendants would be given an increased incentive to go to trial on the chance that *Brady* material might be forthcoming."); Note, *supra* note 52, at 1019 (recognizing the symbolic importance of extending *Brady* protections to the plea bargaining defendant as an assurance of fair dealing).

147. *See* McMunigal, *supra* note 16, at 991; Sheppard, *supra* note 43, at 170.

148. As Professor McMunigal rightly recognizes, suppressing *Brady* information during plea bargaining causes three factors to converge, each of which increases the possibility of convicting the innocent: weak cases (suggesting questionable guilt to start with), larger sentencing differentials (reflecting a prosecutor's eagerness to plea bargain the weak cases), and ignorance of evidence suggesting innocence (causing a defendant to overestimate the chance of conviction at trial). *See* McMunigal, *supra* note 16, at 991-92.

C. *Potential Accuracy Pitfalls of* Brady *in the Plea Bargaining Context*

Although affording *Brady* protections to those who plead guilty will protect some innocent defendants, it will undoubtedly protect some guilty defendants too. Indeed, because we are by definition concerned with defendants who have already said they are guilty once, the concern that *Brady* will mainly benefit the guilty is substantial—especially when one considers the potential consequences of an overturned plea. Although invalidating a defendant's guilty plea because of a *Brady* violation would technically only result in a new trial, the potential windfall to defendants who prevail on their post-guilty plea *Brady* claims is enormous. Retrying cases is not only costly for prosecutors, but difficult as well, because time is not a prosecutor's friend.[149] Witnesses relocate or are no longer willing to testify, evidence may not have been properly preserved (or preserved at all), and the momentum to prosecute the case *again* is almost nonexistent.[150] Thus, when considering *Brady*'s overall effect on the accuracy of convictions supported by a guilty plea, it must be conceded that affording *Brady* protections to the guilty plea defendant will, at least in some instances, result in the factually guilty avoiding conviction altogether.[151]

Still, *Brady*'s propensity to protect the factually guilty is uniquely self-limiting. As already discussed, *Brady*'s materiality standard requires defendants to show a reasonable probability of innocence in order to establish a *Brady* violation at trial.[152] Assuming *Brady*'s materiality standard in the plea bargaining context does the same thing,[153] the only defendants who would prevail on their post-plea *Brady* claims would be the ones we believe may well be innocent. As for those defendants, the possibility that they are guilty instead is a risk our criminal justice system mandates we take. As exemplified by the "beyond a reasonable doubt" burden-of-proof in criminal trials, the core philosophy underlying our criminal justice system is that it is better for ten guilty defendants to go free than for an innocent defendant to suffer unjustly.[154] Thus, the fact that post-plea *Brady* claims will

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149. Although time is also not a defendant's friend, the fact that prosecutors bear the burden of proof at trial means that evidentiary problems arising upon remand are particularly problematic for the government.

150. *See* Easterbrook, *Criminal Procedure*, *supra* note 3, at 318.

151. Given the dynamics discussed above, however, it may also just mean that the guilty will end up repleading to a more lenient deal. *See supra* Part III.A. Even that possibility, however, should be considered a potential downside of applying *Brady* in the plea bargaining context.

152. *See supra* notes 98-100 and accompanying text.

153. *See infra* notes 178-79 and accompanying text.

154. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (viewing the "beyond a reasonable doubt" standard as a "fundamental value determination of our society that it is far worse to

on occasion protect the factually guilty as well as the factually innocent is hardly unacceptable; our criminal justice ethos requires no less.[155]

Setting aside the above concern, two more potential accuracy pitfalls of *Brady* in the plea bargaining context deserve consideration. In a recent article, Professor Douglass raises substantial concerns about *Brady*'s ability to promote factually accurate guilty pleas, in part because of the effects *Brady* disclosure may have on a prosecutor's incentives.[156] The key to understanding Professor Douglass's point is the recognition that not all *Brady* evidence is alike. Some evidence, commonly known as "exculpatory evidence," favors a defendant by affirmatively establishing innocence. Other evidence, commonly known as "impeachment evidence," favors a defendant by raising doubts about the prosecutor's proof of guilt.[157] Though the materiality standard for both types of *Brady* evidence is the same (in the guilty plea context, defendants must show that the violation affected their

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convict an innocent man than to let a guilty man go free"). *See also* McCoy & Mirra, *supra* note 2, at 916-17 (concluding that the criminal justice system's concern for accuracy is essentially a one-sided interest in not convicting the innocent).

155. Indeed, protecting the guilty is to some extent an indispensable part of protecting the innocent because aside from making inferences from the evidence, we simply cannot tell the two groups apart. *See* Easterbrook, *Plea Bargaining*, *supra* note 3, at 1970 ("Innocent persons are accused not because prosecutors are wicked but because these innocents appear to be guilty.") (emphasis omitted); McCoy & Mirra, *supra* note 2, at 922 ("It would be nearly impossible to distinguish guilty pleas entered by the innocent from guilty pleas entered by the guilty."). This is not to say, however, that the innocent and the guilty do not respond to plea bargaining differently, at least at the margin. *See supra* note 130 and accompanying text. Moreover, it is worth noting that post-guilty plea ineffective assistance of counsel claims raise the same concerns, but that has not kept the Supreme court from recognizing their legitimacy. *See supra* note 6.

156. Douglass, *supra* note 14, at 493-99. Professor Douglass also argues that few innocent defendants would challenge the validity of their plea based on a *Brady* violation (or win, even if they did) because they are risk averse and received the biggest benefit from pleading guilty (due to the large sentencing differentials that accompany weak cases). *Id.* at 502. As already discussed, I disagree with the risk aversion assumption. *See supra* notes 122-30 and accompanying text. As to the benefits innocent defendants likely receive, I agree that we should expect them to be substantially large, but I disagree that large benefits will always prevent *Brady* from making a difference in the innocent defendant's plea decisions. Granted, sometimes they will, *see supra* text accompanying note 138, but another factor causing innocent defendants to plead guilty is an intolerably high estimate of the chance of conviction at trial—and *Brady* disclosure *does* make a difference there. *See supra* text accompanying notes 135-39. Moreover, even defendants who reaped substantial benefits from a deal the first time around (whether innocent or guilty) have at least one reason to challenge their pleas anyway: the government may have an extremely difficult time reconstructing its case. *See supra* text accompanying note 150. *See also infra* note 179 (arguing that *Brady*'s post-plea materiality standard should not consider the benefit a defendant received from a plea bargain). I address Professor Douglass's remaining points at *supra* note 146, *infra* text accompanying notes 171-73, and *infra* notes 176-77.

157. *See* Douglass, *supra* note 14, at 494-96 (explaining the difference between "directly exculpatory" evidence and "impeaching" evidence). An example of exculpatory evidence is information about the identity or location of an alibi witness, and an example of impeachment evidence is the prior perjury conviction of a prosecution witness.

decision to plead guilty),[158] the fact that impeachment evidence is tied to the government's proof of guilt results in a frightening possibility: prosecutors can circumvent disclosure by limiting what defendants know about their case.[159] Indeed, defendants who know nothing at all about the case against them could never meet the materiality standard for impeachment *Brady* evidence; if defendants are ignorant about the prosecutor's proof of guilt, how could knowledge of the impeachment information that goes with it ever affect their decision to plead? Thus, at least when it comes to impeachment evidence (which is by far the most common *Brady* type),[160] Professor Douglass is exactly right: the less defendants know, the less protection they get.[161] Prosecutors, then, have an incentive to withhold information, and that incentive is strongest in the cases they most need to plead—the ones too weak to win at trial.[162]

Though certainly disturbing, Professor Douglass's adverse incentive problem is at least limited by a number of practical restraints. As Professor Douglass recognizes, prosecutors have an incentive to disclose inculpatory evidence despite the presence of matching impeachment information: they want the defendant to plead guilty.[163] Yet even if a prosecutor decided to stonewall in a given case, the fact that inculpatory information is routinely provided in other cases would create a problem of its own. Defense counsel are repeat players in the criminal justice system and a wary bunch by

158. The precise showing required by the materiality standard is discussed at *infra* Part III.

159. *See* Douglass, *supra* note 14, at 494-98. Interestingly, prosecutors in California have actually made the distinction between exculpatory and impeachment evidence that Professor Douglass predicts, contending that their *Brady* disclosure obligations before trial are limited to exculpatory, as opposed to impeachment, information. *See* Franklin, *supra* note 14, at 568-69 (discussing *Brady* waivers).

160. *See* Douglass, *supra* note 14, at 494-95 (noting that most *Brady* evidence is impeachment evidence).

161. Professor Douglass does not argue that the same problem exists for exculpatory evidence not tied to the government's case. *Id.* at 496. Moreover, Professor Douglass appears to concede that limiting *Brady* to trial would have an adverse incentive problem of its own; as the Ninth Circuit has recognized, it would allow prosecutors to avoid *Brady* disclosure altogether by pleading cases with *Brady* information. *See* Douglass, *supra* note 14, at 498; *supra* note 37 and accompanying text.

162. As Professor Douglass rightly recognizes, prosecutors have an incentive to disclose weaknesses in the strongest cases (where the disclosure does not matter) and to conceal weaknesses in the weakest cases (where it does). *Id.* at 497-98. The less *Brady* information prosecutors disclose, the better their cases look—and the better their cases look, the less prosecutors must offer to induce a plea. *Id.* Of course, if *Brady* applies in the plea bargaining context, the incentive problem is no problem at all because prosecutors then have a constitutionally-imposed duty to disclose, regardless of their own predilections.

163. *Id.* at 498. *See also* Uviller, *supra* note 2, at 114. On the other hand, it must be conceded that in some cases, disclosure of impeachment information may be so detrimental to other interests prosecutors may have, such as protecting the identity of cooperating witnesses, that they may still prefer to circumvent such disclosure by keeping certain inculpatory information to themselves. To the extent they do so, however, the harm is debatable. *See infra* notes 167-70 and accompanying text.

necessity; no doubt they would interpret a prosecutor's refusal to share evidence of guilt as a signal that something was seriously amiss with the government's case.[164] Thus, even if prosecutors tried to circumvent *Brady*'s disclosure mandate for impeachment evidence by bluffing, they would not be very successful. Indeed, it is not entirely clear whether successfully circumventing *Brady* is even possible, for a defendant could always learn about inculpatory information from other sources.[165] If, for example, a defendant's own investigation identified government witnesses or other evidence with matching impeachment information, that defendant would still be entitled to the impeachment information despite a prosecutor's best efforts to conceal it. Thus, the prospect of prosecutors successfully avoiding *Brady* disclosure by refusing to share evidence of guilt is troubling, but at least unlikely.[166]

Nevertheless, even if prosecutors withheld inculpatory and impeachment evidence, the result for defendants ignorant of both is not terribly troubling. As previously discussed, one factor causing innocent defendants to plead guilty (and the factor most relevant to our analysis) is an intolerably high estimate of the chance of conviction at trial.[167] Yet unless they have a reason to conclude differently, innocent defendants are unlikely to make such high estimates; to the contrary, they have every reason to believe they will be vindicated at trial and acquitted.[168] Thus, to the extent prosecutors might suppress inculpatory evidence to avoid *Brady* disclosure of matching impeachment information, the harm is debatable. So long as innocent defendants remain ignorant of the facts falsely condemning them, they have no reason to plead guilty falsely and no need for information mitigating those falsely-condemning facts.[169] The adverse incentive problem, in short, is

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164. *See* Ostrow, *supra* note 20, at 1588 (noting that "many defense attorneys have a continuing relationship with prosecutors that is more reciprocal than adversarial").

165. From my own experience, I found that defendants often know much about a prosecutor's case from their own investigation, even if it is only informal. Word travels fast on the street, and defendants may know when former allies turn against them even before prosecutors do.

166. A defendant may also be entitled to impeachment evidence without knowing the inculpatory evidence it matches if that evidence is crucial to an exculpatory evidence lead. In any event, it is entirely possible that prosecutors applying *Brady* in the plea bargaining context will not even think about the issues discussed above because they will continue to just ask themselves whether disclosure could make a difference at trial. *See infra* text accompanying note 230.

167. *See supra* text accompanying note 135.

168. *See* Scott & Stuntz, *supra* note 2, at 1939 ("Since [the defendant] knows whether he is innocent, he is well positioned to guard against overly high assessments of the likelihood of conviction."); *supra* text accompanying notes 118-20.

169. Impeachment evidence is only important to the innocent defendant because it counteracts the coercion to plea bargain that knowledge of overwhelming inculpatory evidence creates. Thus, without the coercion to falsely plead guilty, the information mitigating that coercion loses its significance as well.

arguably not a problem at all because the only defendants willing to plead guilty without knowing the evidence against them most likely know something we do not: they committed the crime.[170]

Recognizing the latter point is also essential in addressing another perceived accuracy pitfall of *Brady*'s application in the plea bargaining context: its inability to provide the information necessary for a defendant to engage in fully informed decision-making about a plea. Admittedly, *Brady* disclosure only provides defendants with half of the information they need to accurately assess their chance of conviction at trial, revealing the weaknesses in a prosecutor's case but never the strengths.[171] Again, however, innocent defendants ignorant of inculpatory evidence are unlikely to plead guilty falsely on that account; they view the unknowns in a prosecutor's case optimistically because they know they are in fact innocent.[172] Thus, while innocent defendants may overestimate the chance of conviction at trial because they know about inculpatory evidence but not exculpatory or impeaching evidence, their ignorance of inculpatory evidence alone is unlikely to have the same affect. In sum, when it comes to the strengths in a prosecutor's case (at least during plea bargaining), what innocent defendants do not know will not hurt them.[173]

Given these considerations, it would appear that *Brady*'s role in securing accurate convictions is just as essential in the plea bargaining context as it is at trial. That being the case, doctrinally justifying post-plea *Brady* claims is not so difficult after all; like the Sixth Amendment right to counsel, *Brady* is simply too important a protection for the innocent to limit its application to

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170. For the same reason, the fact that defendants often plea bargain early, before either party has much information, is of limited concern. *See* Douglass, *supra* note 14, at 455-56 & n.75 (noting that the earliest pleas are most valuable to the parties but made on the least amount of information). The very fact that these defendants are willing to plead guilty in the dark should tell us that they are predicting the outcome at trial based in part on information of their own—i.e., their private knowledge of guilt or innocence.

171. As Professor Douglass explains, "*Brady* may suggest some 'melting' around the edges of the government's case, but it will not expose the iceberg that the defendant may face at trial." Douglass, *supra* note 14, at 453. Nor will *Brady* require disclosure of nonevidentiary information relevant to the strength of a prosecutor's case, such as the fact that a witness has died. *See, e.g.*, People v. Jones, 44 N.Y.2d 76, 82 (N.Y.), *cert. denied*, 439 U.S. 846 (1978). *See also* David Aaron, Note, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005, 3006-07 (1999) (explaining that *Brady* does not require disclosure of nonevidentiary facts because knowledge of such facts would not prevent factually inaccurate convictions).

172. *See supra* text accompanying notes 118-19.

173. The same cannot be said for factually guilty defendants, but there is no harm in factually guilty defendants pleading guilty—even if only because they overestimated their chance of conviction at trial.

trial.[174] To conclude that *Brady* is necessary to secure accurate convictions based on a guilty plea, however, is not to say that courts recognizing post-guilty plea *Brady* claims have exhausted the doctrine's full potential in that regard. As Professor Douglass rightly recognizes, post-plea *Brady* claims are rarely successful because defendants can rarely meet *Brady*'s materiality standard after a plea.[175] While practical problems such as the absence of a trial record are partly to blame for this difficulty,[176] I argue in Part III that the most serious problem is more innate: the materiality standard currently used to judge post-guilty plea *Brady* claims is itself too onerous.[177]

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174. *Supra* notes 5-6 and accompanying text. This is not to suggest, however, that *Brady* rights are therefore inalienable; that is a different question altogether. *See supra* note 14.

175. *See* Douglass, *supra* note 14, at 479 & n.184 (noting that post-guilty plea *Brady* claims are "an exercise in futility for most defendants" and listing several dozen cases where the reviewing court refused to find a post-guilty plea *Brady* claim material); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 61 n.204 (1997) (noting that cases overturning guilty pleas based on a *Brady* violation are almost nonexistent); Franklin, *supra* note 14, at 590 & n.156 (noting that in only two of several dozen post-guilty plea *Brady* cases a defendant succeeded in meeting the materiality standard and listing those findings). In my own search of over one hundred state and federal post-guilty plea *Brady* cases, I found only a dozen of instances when a defendant prevailed on his claim. *See, e.g.*, Miller v. Angliker, 848 F.2d 1312, 1324 (2d Cir. 1988); Lewis v. United States, 985 F. Supp. 654, 658 (S.D. W. Va. 1997); Banks v. United States, 920 F. Supp. 688, 693 (E.D. Va. 1996); United States v. Millan-Colon, 829 F. Supp. 620, 636 (S.D.N.Y. 1993); Carroll v. State, 474 S.E.2d 737, 740 (Ga. Ct. App. 1996); State v. Gardner, 885 P.2d 1144, 1153 (Idaho Ct. App. 1994); State v. Johnson, 544 So.2d 767, 773 (La. Ct. App. 1989); Lee v. State, 573 S.W.2d 131, 134-35 (Mo. Ct. App. 1978); State v. Parsons, 775 A.2d 576, 581-82 (N.J. Super. Ct. App. Div. 2001); People v. Curry, 627 N.Y.S.2d 214, 216 (N.Y. App. Div. 1995); Gibson v. State, 514 S.E.2d 320 (S.C. 1999); *Ex parte* Lewis, 587 S.W.2d 697, 701 (Tex. Crim. App. 1979); State v. Sturgeon, 605 N.W.2d 589, 598 (Wis. Ct. App. 1999). In almost every one of those cases, the evidence of actual innocence is exceptionally strong. *See infra* note 198.

176. Douglass, *supra* note 14, at 480. While I agree with Professor Douglass that the absence of a trial record makes applying *Brady* in the plea bargaining context more difficult, the same difficulty has not made post-guilty plea Sixth Amendment ineffective assistance of counsel claims unworkable. In both cases, courts considering a post-plea claim conduct evidentiary hearings on the issue, considering factors such as the factual basis supporting a defendant's plea, records of formal discovery, and preliminary hearing testimony. Still, to the extent defendants making a post-plea *Brady* claim are disadvantaged from the start, we have yet another reason to ensure *Brady*'s materiality standard in the plea bargaining context is not unduly harsh, the topic of *infra* Part III. *See* Sheppard, *supra* note 43, at 178 (arguing that *Brady*'s materiality standard should be lower in cases where a defendant's conviction rests upon a guilty plea because neither side has had the opportunity to present evidence).

177. I must concede that another problem with *Brady*'s application in the plea bargaining context is equally problematic: its prospective duty to disclose information that can only retrospectively be defined. This problem, however, is identical to the definitional problem accompanying *Brady*'s application at trial. *See* United States v. Bagley, 473 U.S. 667, 699-705 (1985) (Marshall, J., dissenting) (lamenting the inherent difficulty in applying prior to trial a definition of materiality that turns on the outcome at trial). Moreover, it is entirely unclear whether definitional ambiguity in *Brady*'s duty to disclose is a good thing or bad. *See* Kyles v. Whitley, 514 U.S. 419, 439-40 (1995) (noting that uncertainty in *Brady*'s duty to disclose will encourage prosecutors to resolve doubtful questions in favor of disclosure).

III. USING ACCURACY INTERESTS TO DEFINE MATERIALITY IN THE PLEA BARGAINING CONTEXT

Because accuracy interests provide the strongest doctrinal and normative justification for applying *Brady* in the plea-bargaining context, it makes sense to look to those same interests as a guide in fashioning a materiality standard best suited for post-guilty plea *Brady* claims. As mentioned early in Part II, *Brady*'s accuracy-enhancing effect on guilty pleas is maximized when the materiality standard for post-plea *Brady* claims does just what *Brady*'s materiality standard does at trial, overturning a conviction whenever our confidence in a defendant's guilt is seriously shaken.[178] Thus, the ideal materiality standard for post-guilty plea *Brady* claims translates into the guilty plea context a defendant's required showing at trial—that with *Brady* disclosure, there is "a reasonable probability that ... the result of the proceeding would have been different."[179]

Adapting *Brady*'s materiality standard at trial to the guilty plea context, courts have thus far unanimously required defendants to show a reasonable probability that with *Brady* disclosure, they would have insisted upon going to trial.[180] Given the current doctrinal landscape, this result is hardly

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178. *See supra* notes 100-01 and accompanying text.

179. United States v. Bagley, 473 U.S. 667, 682 (1985). *See also* text accompanying *supra* note 98. Recognizing what *Brady*'s post-plea materiality standard should require is essential to answering one last point made by Professor Douglass. *See supra* text accompanying note 156. As Professor Douglass recognizes, we can expect innocent defendants to have the weakest cases and so we can also expect them to receive the most benefit from pleading guilty; they demand a larger sentencing differential (because they are innocent) and prosecutors are willing to give it (because they will likely lose at trial). Douglass, *supra* note 14, at 486-87. That being the case, Professor Douglass is right that innocent defendants will find it most difficult to prevail on post-plea claims—at least when courts (like the Eight Circuit) consider the benefit a defendant received in pleading guilty. *See supra* note 44. Concededly, if courts consider the benefits a defendant received in pleading guilty when determining whether suppressed favorable information is material, *Brady* violations will be the most difficult to prove in the weakest cases. The Supreme Court, however, has told us that *Brady* violations should be easiest to prove in the weakest cases; if the evidence against a defendant is already questionable, it will take less *Brady* evidence to show that the result of the proceeding may well have been different. *See* United States v. Agurs, 427 U.S. 97, 112-13 (1976) (admonishing courts to evaluate the materiality of suppressed favorable evidence in light of other incriminating evidence supporting a defendant's conviction). It would appear, then, that considering the benefit a defendant received from a plea will consistently lead us to the wrong result, and that therefore courts should not do it. Still, the phenomenon bolsters the point of this section—that when defining materiality for post-plea *Brady* claims, it is crucial to remain focused on what *Brady*'s materiality standard does at trial, reversing a defendant's conviction whenever *Brady* information creates a reasonable probability of innocence.

180. *See, e.g.*, United States v. Walters, 269 F.3d 1207, 1214-15 (10th Cir. 2001); United States v. Avellino, 136 F.3d 249, 261-62 (2d Cir. 1998); Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995); White v. United States, 858 F.2d 416, 424 (8th Cir. 1988); Indelicato v. United States, 106 F. Supp. 2d 151, 158 (D. Mass. 2000); State v. Gardner, 885 P.2d 1144, 1152 (Idaho Ct. App. 1994); State v. Parsons, 775 A.2d 576, 580-81 (N.J. Super. Ct. App. Div. 2001); Gibson v. State, 514 S.E.2d

surprising. In 1985, the Supreme Court in *Hill v. Lockhart*[181] adopted the "insist upon trial" standard as the prejudice showing necessary to establish a post-guilty plea ineffective assistance of counsel claim.[182] Because *Brady*'s materiality standard at trial was borrowed from the prejudice prong for ineffective assistance of counsel claims at trial,[183] the most obvious materiality standard for post-guilty plea *Brady* claims is the prejudice standard adopted in *Hill*. In theory, *Hill*'s prejudice standard is less than ideal for post-plea *Brady* claims because the government plays a role in bringing *Brady* violations about, a fact the Supreme Court has previously found significant.[184] Still, the Court has ignored this difference between the claims in the trial context, so it is hard to imagine why the two standards should differ in claims made after a plea. As a doctrinal matter, then, the "insist upon trial" materiality standard currently used to judge post-guilty plea *Brady* claims can be considered a foregone conclusion.

Nevertheless, while going to trial may be one way a guilty plea proceeding's result could be different, it is not the only way. Clearly, the result would also be different if *Brady* disclosure caused a defendant to reject a particular bargain and strike a better deal. Although a number of commentators have recognized that *Brady* disclosure may just lead to a better bargain for some defendants,[185] none have considered this possibility in the context of identifying the proper materiality standard for post-guilty plea

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320, 325 (S.C. 1999); State v. Sturgeon, 605 N.W.2d 589, 596 (Wis. Ct. App. 1999).

181. 474 U.S. 52 (1985).

182. *Id.* at 59.

183. *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (borrowing from the prejudice standard established in *Strickland v. Washington*, 466 U.S. 668 (1984)). Interestingly, the test announced in *Strickland* for establishing prejudice was, in turn, based on one of three materiality standards employed in a previous *Brady* case, *United States v. Agurs*, 427 U.S. 97 (1976). *See Strickland*, 466 U.S. at 694 (selecting the appropriate test for prejudice and citing *Agurs*).

184. *See Agurs*, 427 U.S. at 111 (noting that *Brady*'s materiality standard reflects the fact that the government is responsible for *Brady* violations). Paradoxically, the Supreme Court in both *Hill* and *Strickland* justified adopting the same showing as the prejudice standard for ineffective assistance of counsel claims by stating that "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Strickland*, 466 U.S. at 693; *Hill*, 474 U.S. at 57 (quoting *Strickland*).

185. *See* Douglass, *supra* note 14, at 489 n.224 ("Indeed, the likely result of a successful post-conviction *Brady* claim is a guilty plea by the same defendant with an agreement for a reduced sentence."); Franklin, *supra* note 14, at 591 (noting that impeachment information will unlikely cause defendants to go trial; most will simply sign a better plea agreement); Ostrow, *supra* note 20, at 1617 (noting that undisclosed information most likely affects the terms of the plea agreement). *See also* Tollett v. Henderson, 411 U.S. 258, 271 (1973) (Marshall, J., dissenting) (noting that if the defendant had recognized the potential constitutional violation, he might have been able to secure a more favorable bargain); Scott & Stuntz, *supra* note 2, at 1958 (arguing that most attorney error in the plea bargaining context is not constitutionally cognizable because it affects the price of a plea rather than its existence).

Brady claims. Perhaps, however, we should. After all, *Brady*'s materiality standard at trial only requires defendants to show a reasonable probability that the result of the proceeding would have been different;[186] it does not require them to show *how*. Though the point is hardly worth mentioning at the guilt phase of trial, where the only alternative to a conviction is acquittal, it has much more force at the sentencing phase of trial—and *Brady* applies there too.[187] Thus, the most comparable post-plea materiality standard to *Brady*'s materiality standard at trial only requires defendants to show that a particular plea would not have occurred, regardless of what else would have. In short, it requires defendants to show a reasonable probability that with *Brady* disclosure, they would have rejected the plea they in fact took.[188] Not surprisingly, the difference between the "reject the plea" and "insist upon trial" materiality standards is palpable,[189] and that difference has accuracy implications of its own. To see why, we return to the plea bargaining defendant's decision-making dynamics, extending the analysis modeled above.

A. The "Insist Upon Trial" Materiality Standard

The "insist upon trial" materiality standard for post-plea *Brady* claims is based on the assumption that where *Brady* disclosure creates a reasonable probability of a different result at trial, defendants will insist upon resolving

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186. *See supra* note 98 and accompanying text.

187. Thus, where a defendant's *Brady* claim challenges the sentence received at trial (as did the claim in *Brady* itself), *see supra* note 99, the defendant need only show a reasonable probability that with *Brady* disclosure, the sentence would have been different. *See* Brady v. Maryland, 373 U.S. 83, 89-90 (1963). Because plea bargaining creates a particular outcome as to guilt and punishment at once, it is even more apparent that the materiality standard for post-plea *Brady* claims should only require defendants to show that they would not have agreed to the bargain they in fact took.

188. Although this showing also means that defendants would have insisted upon trial in lieu of that particular plea, there is no indication that courts using the "insist upon trial" materiality standard really have the "reject the plea" showing in mind. *See, e.g.*, *Hill*, 474 U.S. at 59 ("[T]he defendant must show that there is a reasonable probability that, but for counsel's errors, he *would not have pleaded guilty and would have insisted on going to trial.*") (emphasis added); Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995) ("[T]he issue in a case involving a guilty plea is whether 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.*") (emphasis added). In any event, equating the two standards is unrealistic because it fails to account for the possibility that the parties will continue to bargain and reach agreement on a different deal. *See infra* text accompanying notes 212-13 (recognizing continuing incentives for parties to bargain).

189. Put in most stark terms, the "insist upon trial" materiality standard asks what a defendant would have done, while the "reject the plea" materiality standard asks what a defendant would not have done. Again, the "reject the plea" standard would only require defendants to show that they would not have pleaded guilty to the terms they in fact pleaded guilty to. Thus, it would not require them to show that they would have—or even could have—struck a better deal with the government.

their charges there.[190] That being the case, the "insist upon trial" materiality standard purports to mirror *Brady*'s materiality standard at trial, reversing a conviction whenever a reasonable probability exists that the defendant may be innocent.[191] The idea, in short, is that if defendants are truly innocent, they will use *Brady* disclosure to assert their innocence at trial.

Considering the "insist upon trial" materiality standard in light of the plea bargaining defendant's decision-making dynamics discussed above is both feasible and illuminating, but using our model requires an extra logical step. At least at first glance, the model previously employed does not account for an "insist upon trial" option; it only presents a defendant's decision-making calculus with regards to a particular plea. To say that a defendant would insist upon trial, however, is just another way of saying that the defendant would prefer trial to *any* plea.[192] In other words, the defendant who would insist upon trial is one who would choose trial over each and every offer a prosecutor might conceivably make. That being the case, the showing required by the "insist upon trial" materiality standard is not so difficult to model after all: we just need to identify the point at which there is no sentencing differential high enough to make pleading guilty a defendant's best option.

Given what we already know about the plea bargaining defendant's decision-making dynamics, finding the point at which defendants "insist upon trial" (albeit imprecisely) is not difficult. As previously discussed, a defendant's estimated chance of conviction at trial determines the size of the sentencing differential needed to make pleading guilty that defendant's best option.[193] The lower the chance of conviction at trial, the higher the differential must be—and this is true regardless of a defendant's factual guilt. At some point, of course, the chance of conviction at trial will be so low that even an exceptionally large differential could not force a plea; again, to the extent defendants are certain they will be acquitted at trial, they will reject even the sweetest of deals.[194] At every other point, however, even the innocent defendant has an incentive to plead guilty, if the price is right.[195]

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190. Indeed, the Supreme Court in *Hill v. Lockhart* made this point explicitly, explaining that a defendant's ability to meet the "insist upon trial" prejudice standard for post-guilty plea ineffective assistance of counsel claims depended largely on whether the violation would have changed the outcome at trial, had the defendant chosen trial in the first place. *Hill*, 474 U.S. at 60.

191. *See supra* notes 98-100 and accompanying text.

192. Seen in this way, a defendant's decision to insist upon trial is actually a number of decisions rejecting every plea bargain that might be otherwise made.

193. *See supra* notes 113-14 and accompanying text.

194. *See supra* notes 113-14 and accompanying text.

195. *See supra* notes 132-34 and accompanying text.

That price will be higher than the guilty defendant's minimum demand, and prosecutors may not be willing (or able) to pay it[196]—but it exists. Thus, although the particular point at which a defendant would reject every deal is impossible to define with precision, and although that point will come earlier for defendants who are innocent than those who are guilty (the latter being more willing to plea bargain to start with), our model at least tells us its general location: where the chance of conviction at trial is exceedingly low.[197]

Given that realization, the problem with using the "insist upon trial" materiality standard to judge post-guilty plea *Brady* claims becomes clear: defendants can only meet it where the suppressed *Brady* evidence is strong enough to plummet the chance of conviction at trial. Indeed, in practice, the result is just what our model predicts; only where the suppressed *Brady* evidence is strong enough to make acquittal at trial inevitable are courts willing to invalidate a defendant's plea.[198] Whenever *Brady* evidence is that

196. A prosecutor's ability to make the low-ball offers necessary to induce innocent defendants to plead guilty is limited to some extent by external constraints such as office policy or political pressures. *See* Easterbrook, *Criminal Procedure*, *supra* note 3, at 299 (recognizing that prosecutors are responsible to superiors and public). In addition, prosecutors are making the same cost-benefit assessments that defendants are, so if the offer necessary to induce a plea is too lenient, prosecutors may well determine that they could do better at trial regardless of its attendant costs and risks. *See supra* notes 106-10 and accompanying text.

197. Even when the chance of conviction is exceedingly low, pleading guilty may be a defendant's best option if the consequences of a conviction at trial are intolerable. An obvious example is where a defendant faces the death penalty if convicted at trial, precisely the circumstances at issue in *Brady v. United States*, 397 U.S. 742 (1970). *See* Alschuler, *supra* note 3, at 55-58 (discussing the facts of *Brady v. United States*).

198. *See, e.g.*, Miller v. Angliker, 848 F.2d 1312, 1322-24 (2d Cir. 1998) (setting aside defendant's plea where prosecutor suppressed information indicating that another person committed the offenses); Lewis v. United States, 985 F. Supp. 654, 657-58 (S.D. W. Va. 1997) (setting aside defendant's plea-based conviction for mail fraud where prosecutor suppressed information showing defendant never used the United States Postal Service to deliver the fraudulent document); Carroll v. State, 474 S.E.2d 737, 740 (Ga. Ct. App. 1996) (holding that the defendant was entitled to withdraw a guilty plea to vehicular homicide where prosecutor suppressed information tending to show that road conditions contributed to the accident and that the state could not determine the defendant's speed); State v. Gardner, 885 P.2d 1144 (Idaho Ct. App. 1994) (holding that the defendant was entitled to withdraw a vehicular manslaughter plea where prosecutor suppressed eyewitness testimony that victim's death was caused by a tire blowout and not the defendant's fatigue or drug use); State v. Johnson, 544 So. 2d 767, 773 (La. Ct. App. 1989) (determining that the defendant's guilty plea to distribution of marijuana was invalid where prosecutor suppressed alibi information); Lee v. State, 573 S.W.2d 131, 133-34 (Mo. Ct. App. 1978) (determining that the defendant was entitled to withdraw a guilty plea where prosecutor suppressed evidence that victim made a false identification in the photo lineup and was shown a picture of defendant before identifying the defendant in person); People v. Curry, 627 N.Y.S.2d 214, 215-16 (N.Y. App. Div. 1995) (holding that the defendant was entitled to withdraw a guilty plea to possession of controlled substance where the prosecutor suppressed videotaped evidence of a police officer shaking down drug dealers, stealing their money, and selling stolen drugs); Gibson v. State, 514 S.E.2d 320, 325-26 (S.C. 1999) (holding that the defendant's manslaughter plea must be set aside where prosecutor suppressed information tending to show that a

strong, however, prosecutors will most likely lack the authority and inclination to pursue a conviction in the first place. After all, a defendant's charge must at least be supported by probable cause,[199] and already overburdened prosecutors have little incentive to devote their time and attention to a loser case.[200] Thus, for charges that are prosecuted at all, the chance of conviction at trial will almost always be a real enough possibility for defendants to conclude that at some point, a plea bargain is their best option. In short, choice theory tells us (and reality confirms) that the defendant who would insist upon trial with *Brady* disclosure is truly rare because cases where suppressed *Brady* evidence is that strong seldom exist.[201]

Practicalities aside, the "insist upon trial" materiality standard is also problematic because it results in defendants having to prove their innocence. Assuming (as we must) that trial provides a reasonably accurate means of determining a defendant's guilt, the chance of acquittal at trial corresponds to the chance we believe a defendant may be innocent.[202] That being the case, requiring defendants to show a small chance of conviction at trial equates to requiring them to show a small chance of factual guilt, which is just another way of saying that defendants must establish they are probably not guilty. Thus, while the "insist upon trial" materiality standard purports to reverse a conviction whenever *Brady* evidence creates a "reasonable probability" of innocence (as does *Brady*'s materiality standard at trial),[203] in fact it is much more demanding.[204]

In part, forcing guilty plea defendants to show they are probably not guilty is troubling because it conflicts with Supreme Court precedent. As the

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key eyewitness could not possibly have seen what she was expected to testify to at trial); *Ex parte* Lewis, 587 S.W.2d 697, 701 (Tex. Crim. App. 1979) (holding that the defendant's guilty plea was invalid where prosecutor suppressed information tending to show that the defendant was incompetent to stand trial and insane at the time of the offense). *See also supra* note 175.

199. *See* U.S. CONST. amend IV.

200. Prosecutorial resources are limited and already overtaxed, which is part of the reason prosecutors bargain in the first place. *See supra* note 105.

201. This is not to say that such cases never exist. As Professor McMunigal recognizes, the very existence of *Brady* cases shows that some charges are nevertheless prosecuted. *See* McMunigal, *supra* note 16, at 993-94 (noting countervailing factors that may incline a prosecutor to pursue particularly weak cases, such as a defendant's bad record or other criminal activity).

202. We can never truly know whether a defendant is factually guilty or innocent, so the only benchmark we can use is the anticipated result of trial. At trial, the "beyond a reasonable doubt" burden of proof tells us that defendants should be acquitted when we believe they may be innocent. Hence, discussing the chance of acquittal at trial is just a proxy for discussing the chance we believe a defendant may be innocent.

203. *See supra* notes 98-100 and accompanying text.

204. One could, of course, argue that the insist upon trial materiality standard *should* be more demanding, a point considered *infra* text accompanying notes 215-24.

Court has recently explained, a "reasonable probability" of a different result at trial does not mean the result there would *probably* have been different.[205] To a large extent, however, the trouble with forcing guilty plea defendants to show they are probably not guilty is more fundamental, implicating the accuracy interests that *Brady* is designed to promote. Clearly, the "insist upon trial" materiality standard will protect defendants who are obviously innocent (or at least enough like the innocent to warrant treating them as such). For defendants who may well be innocent, however, the "insist upon trial" standard will offer no protection at all. Again, as long as the chance of conviction at trial remains a real possibility, even innocent defendants will not find themselves in the enviable position of being able to insist upon trial at any cost. Thus, while the "insist upon trial" materiality standard is effective in protecting only the innocent, it does not protect them enough. That being the case, the "insist upon trial" standard is an inappropriate choice for maximizing the accuracy-enhancing potential that justifies *Brady*'s application in the plea bargaining context in the first place.

B. The "Reject the Plea" Materiality Standard

Although the above analysis concluded that *Brady* disclosure will seldom cause a defendant to insist upon trial, the likelihood that disclosure will cause a defendant to reject a particular plea remains to be determined. Before turning to that issue, however, a point of clarification is in order. When asking whether *Brady* disclosure would have led a defendant to reject a plea (or at least whether it would have had a reasonable probability of doing so), the question is not whether disclosure after the fact would cause a defendant to want a better deal (surely it would), but rather whether disclosure beforehand would cause a defendant to want a better deal before agreeing to plead guilty. The analysis, then, is prospective in nature and focused on only one plea bargain, the one the defendant actually took.

From the analysis thus far, we know that *Brady*'s effect on a defendant's decision to accept or reject a particular plea depends on the extent to which it lowers the estimated chance of conviction at trial.[206] By lowering the chance of conviction at trial, *Brady* disclosure increases the minimum sentencing differential (i.e., the minimum discount in punishment) needed to make pleading guilty a defendant's best option. Whether that new differential is substantial enough to affect a defendant's decision-making with regards to a particular plea depends on the strength of the *Brady* information itself. In

205. *See* Kyles v. Whitley, 514 U.S. 419, 434 (1995).
206. *See supra* text accompanying note 136.

short, *Brady* disclosure will undoubtedly reduce the attractiveness of any given plea offer; the question is whether that plea offer is still attractive enough.

Sometimes *Brady* disclosure will lower the chance of conviction at trial (and hence raise a defendant's sentencing differential demand) only slightly so that a particular plea offer is still a good deal for a defendant, though not as good a deal as it was before.[207] Defendants finding themselves in this situation would take the plea anyway and hence would not meet the "reject the plea" materiality standard—exactly the result we want where *Brady* information is too weak to significantly affect the probability that a defendant would be convicted at trial.[208] Other times, however, *Brady* information will be stronger, lowering the chance of conviction at trial enough to affect a defendant's willingness to take a particular plea.[209] Although it is impossible to precisely identify this point (and in any event it would be different for innocent and guilty defendants),[210] it is unlikely that any defendant would be willing to accept the same deal originally pleaded to where *Brady* disclosure created a reasonable probability of acquittal at trial. After all, if *Brady* information is strong enough to suggest that a defendant may be innocent, a plea offer would have to account for that fact—and more—to remain that defendant's best option.[211]

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207. The Second Circuit's decision in *United States v. Avellino*, 136 F.3d 249 (2d Cir. 1998), provides such an example. In *Avellino*, the court held that the government's suppression of a perjury conviction against one of its witnesses was not material where that witness had "an atrocious criminal record" of which the defendant was aware, including convictions for high-jacking, burglary, arson, and murder. *See id.* at 258.

208. Under these circumstances, the term "*Brady* information" is technically inappropriate because if information favorable to the defense is not material, it is by definition not *Brady* information at all. *See* Strickler v. Greene, 527 U.S. 263, 281 (1999) (recognizing the distinction).

209. The strength of the *Brady* information necessary to affect a defendant's willingness to take a particular plea will depend on the other evidence against a defendant. If that evidence is weak, for example, then even relatively weak *Brady* information could affect the attractiveness of a given plea; if the evidence in a prosecutor's case is otherwise strong, however, the *Brady* information will need to be stronger to have the same effect. *See* United States v. Agurs, 427 U.S. 97, 112-13 (1976) (noting that materiality assessment should consider other evidence supporting a defendant's guilt). *See also supra* note 179 (discussing application of *Agurs* in plea bargaining context).

210. Recall that innocent and guilty defendants have different plea bargaining proclivities. *See supra* text accompanying notes 117-21.

211. Theoretically, it is possible for *Brady* disclosure to create a reasonable probability of acquittal at trial but not affect a defendant's plea decision. However, this result is only possible where prosecutors make offers much more lenient than defendants without *Brady* information would demand, and there is no reason to believe they would be so felicitous. Because of the large percentage of cases that are plea bargained, *see supra* note 2, prosecutors are negotiators as much as they are trial lawyers. Thus, prosecutors are well versed in the art of getting the most—as opposed to the least—punishment possible out of a given plea bargaining situation.

To conclude that *Brady* disclosure may in some instances lead defendants to reject a particular plea, however, is not to say that in those instances they would necessarily insist upon trial. Whether defendants would actually insist upon trial in light of newly-disclosed *Brady* evidence depends on the extent to which *Brady* disclosure lowers the chance of conviction at trial. Under the "reject the plea" standard, the chance of conviction at trial need not be so low that defendants would reject every plea; it just has to be low enough for defendants to reject the one they in fact pleaded to. Of course, the stronger the *Brady* evidence, the more likely it would be to have both effects, but the "reject the plea" standard would not require that result. Given practical considerations, the distinction is significant. If incentives to plea bargain exist at (nearly) every turn as I have argued,[212] there is every reason to believe that after *Brady* disclosure, the parties could still make themselves better off by striking a deal. Again, the cases that prosecutors most want to deal are the weak ones they believe they would lose at trial.[213] Thus, when a particular offer will not meet a defendant's sentencing differential demand because of *Brady* disclosure, a prosecutor has every reason to make another offer that will. In reality, then, *Brady* disclosure might reduce the chance of conviction at trial enough for a defendant to insist upon trial in a few cases, but more often it will just affect the terms of the bargain struck.[214]

Clearly, the "reject the plea" materiality standard is less demanding than the "insist upon trial" materiality standard. That difference, in fact, is the reason the "reject the plea" standard best matches *Brady*'s materiality standard at trial.[215] Even so, it is worth considering whether *Brady*'s materiality standard in the plea bargaining context *should* be higher than the materiality standard used at trial.[216] After all, defendants raising post-guilty plea *Brady* claims have, by definition, already said they are guilty once, and those being honest about that fact would also find the "reject the plea"

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212. *See supra* notes 104-12 and accompanying text.

213. *See supra* text accompanying note 106.

214. *See* Schulhofer, *supra* note 3, at 1984 (contending that lowering information barriers will not keep innocent defendants from pleading guilty). Annecdotal evidence supports this conclusion. *See, e.g.*, United States v. James, 960 F.2d 147, 1992 WL 80318, at *1 (4th Cir. 1992) (unpublished table decision) (considering the defendant's argument that had he received *Brady* information, he may have been able to negotiate a more favorable plea agreement); Mustread v. Gilmore, 966 F.2d 1148, 1152 (7th Cir. 1992) (noting that the defendant already knew that the victim was changing her story and used that information to negotiate a plea to a lesser charge). *See also supra* note 185; *infra* note 226.

215. *See supra* text accompanying notes 97-100, 210-11.

216. The higher "insist upon trial" standard could be seen as a concession for recognizing post-guilty plea *Brady* claims in the first place—a way to protect the finality of guilty pleas and the obviously innocent guilty plea defendant too. It merits noting, however, that courts using the "insist upon trial" standard do not justify it in this manner. Rather, they see the standard as comporting with the materiality standard used for *Brady* claims at trial. *See supra* note 191 and accompanying text.

standard easier to meet. Given the potential windfall to guilty defendants who prevail on their post-plea *Brady* claims,[217] one might well conclude that when a defendant has pleaded guilty, who cares if the government gets a better deal than it would have had *Brady* disclosure been made?[218]

Framing the question this way, however, misses the point. The virtue of the "reject the plea" standard is not that it keeps the government from striking a particularly favorable deal, but that it allows us to be confident in the accuracy of a defendant's plea.[219] That confidence is only possible if the materiality standard for post-plea *Brady* claims reverses a conviction whenever our confidence in a defendant's guilt is seriously shaken—i.e., whenever a defendant shows a reasonable probability that *Brady* disclosure would have resulted in an acquittal at trial.[220] As discussed above, only the "reject the plea" standard achieves this result;[221] the "insist upon trial" standard is too demanding.[222] That being the case, the fact that a defendant might ultimately choose to use *Brady* disclosure to strike another, more favorable deal, is irrelevant; if pleading guilty (again) makes innocent defendants better off, we should fully support that result.[223] As for the factually guilty defendants who will also benefit from the lower "reject the plea" standard, we should consider them the inevitable byproduct of our core criminal justice philosophy—that adequate protection of the innocent is worth some unintended protection of the guilty as well.[224]

As a practical matter, however, we can be only minimally disturbed about the idea of defendants using an established *Brady* claim to negotiate a favorable plea because they do that now. Defendants who win on a post-trial *Brady* claim get a new trial, but nothing stops them from striking a deal on remand instead[225]—and that is exactly what some defendants do.[226]

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217. *See supra* text accompanying notes 150-51.

218. Given the fact that public opinion thinks plea bargaining results in dispositions that are too lax, see Scott & Stuntz, *supra* note 2, at 1909 n.4, the point has even more force.

219. One might also answer that it is fundamentally unfair to hold anyone to a bargain—at least one that results in the deprivation of liberty—that they did not really mean to make. Contract theory would support this position. *See* Scott & Stuntz, *supra* note 2, at 1957-60 (applying the contract notion of unilateral mistake to the plea bargaining context); Ostrow, *supra* note 20, at 1609-10 (considering the contract law doctrines of mistake and duress in making a case for pre-plea disclosure). This explanation, however, brings us back to the notion of a truly consensual (i.e., voluntary and intelligent) plea, which the Supreme Court has not found necessary to sustain a plea-based conviction. *See supra* text accompanying notes 38-39.

220. *See supra* notes 178-79 and accompanying text.

221. *See supra* notes 207-11 and accompanying text.

222. *See supra* notes 202-04 and accompanying text.

223. *See supra* note 134.

224. *See supra* notes 154-55 and accompanying text.

225. Technically, there is no right to plead guilty, *see* North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970), so a court on remand could simply refuse to accept the defendant's guilty plea, thereby

Similarly, defendants who win on a post-plea *Brady* claim have no obligation to insist upon trial as the materiality standard currently used suggests they will, assuming on remand that the government is even interested in re-prosecuting the case.[227] Given these considerations, at least the "reject the plea" materiality standard is realistic in accounting for the fact that plea bargaining can make a defendant (even if innocent) better off, matching the materiality requirement for post-plea *Brady* claims with the remedy defendants prevailing on those claims would actually receive.[228] Because the whole point of *Brady*'s materiality standard is to tell us when the problem of suppressed favorable evidence is serious enough to remedy, harmonizing the two concepts is, under any scenario, the clearly preferable choice.[229]

In all fairness, it may not matter to prosecutors which materiality standard courts choose to judge post-guilty plea *Brady* claims. Because they are well-practiced in complying with *Brady* at trial, prosecutors may just continue to ask themselves whether disclosing certain information could have made a difference there.[230] For the defendant who asserts a post-guilty plea *Brady* claim, however, the difference is an important one, and that difference has equally important implications for the accuracy of convictions supported by a

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forcing a trial. As a practical matter, though, courts have no reason to do that; their the over-crowded trial docket makes resolving cases by plea bargain just as attractive to judges as it is to the parties themselves. *See* Sheppard, *supra* note 43, at 172.

226. Unfortunately, there appears to be no information as to what percentage of *Brady* violations following trial (or a plea, for that matter) ultimately result in guilty pleas. There is, however, anecdotal evidence that it happens. *See, e.g.*, United States v. Griffin, 856 F. Supp. 1293, 1294 (N.D. Ill. 1994) (noting that the government entered into plea agreements with the defendants after their trial convictions were overturned due to *Brady* violations). Given the added costs and uncertainties of a trial on remand, *see supra* note 150 and accompanying text, the incentives to plea bargain *Brady* cases the second time around are considerable, suggesting that the practice occurs more often than the cases might indicate. *See supra* notes 104-06 and accompanying text.

227. *See supra* note 150 and accompanying text. I have found no case forcing a defendant who can meet the "insist upon trial" materiality standard to actually do so on remand, and the same practical considerations that would prevent a judge from forcing a trial on remand after a trial-based conviction is reversed would apply when a conviction that rests on a plea is reversed. *See supra* note 225. *See also supra* notes 212-14 and accompanying text (discussing incentives to plea bargain even after *Brady* disclosure has been made).

228. Invalidating a defendant's conviction based on a plea negates both the conviction and the plea so that defendants on remand are in their pre-plea positions—exactly where they would be if they had rejected the plea they actually pleaded to.

229. Thus, if we really believe the "insist upon trial" materiality standard is appropriate for post-plea *Brady* claims, we should force defendants on remand to either stick with the original plea or take their case to trial. Doing so, however, would prevent the parties from making themselves better off, a result that may be particularly harsh for the government. *See supra* note 150 and accompanying text.

230. *See* Douglass, *supra* note 14, at 494 (noting that in the pretrial context, many prosecutors just ask whether the information is favorable to the defendant). After all, until a defendant actually pleads guilty, a prosecutor cannot entirely rule out the possibility of going to trial. *See supra* note 28 and accompanying text.

plea. Of course, even if *Brady*'s post-plea materiality standard is destined to require defendants to show they would have insisted upon trial, all is not lost; even limited protection is better than none.[231] Still, it is important to recognize that, were we writing on a clean slate, the "insist upon trial" standard is not the ideal choice for maximizing the accuracy interests that justify *Brady*'s application in the plea bargaining context in the first place.

IV. CONCLUSION

Using modern choice theory to examine the plea bargaining defendant's decision-making dynamics elucidates at least two truths. First, innocent defendants sometimes plead guilty even though they could contest their guilt at trial, and they do so because pleading guilty is in their best interest. Second, *Brady* plays a crucial role in preventing guilty pleas by innocent defendants, just as *Brady* plays a crucial role in preventing the conviction of innocent defendants at trial. Should the Supreme Court ultimately recognize these truths, however, it will not likely choose a materiality standard for post-guilty plea *Brady* claims that maximizes *Brady*'s accuracy-enhancing potential. Assuming doctrinal consistency would lead the Court to employ *Hill v. Lockhart*'s "insist upon trial" standard instead, post-plea *Brady* claims will continue to provide little more than illusory protection for the plea bargaining defendant.

Protecting the defendant who plea bargains, however, is just as important—if not more so—as protecting the defendant who contests guilt at trial. In the plea bargaining context, there is no neutral arbiter to ensure that the government negotiates fairly, no array of trial rights to protect the innocent, and no showing of the government's cards to assure us that the conviction was a "sure-thing" anyway.[232] Indeed, *Brady*'s importance in the plea bargaining context is clear in part just because so many cases are resolved there.[233] After all, the accuracy that our formal criminal justice system endeavors to secure is of limited practical import—ninety percent of the time, the plea bargaining context is the only context that matters.[234]

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231. *See* Douglass, *supra* note 14, at 493.

232. *See* Ostrow, *supra* note 20, at 1581 (recognizing the lack of constitutional and statutory protections surrounding a defendant's decision to bargain or stand trial); Sheppard, *supra* note 43, at 201 (noting the unstructured and unsupervised nature of plea bargaining).

233. *See supra* note 2 and accompanying text. This point is especially strong given the incentives prosecutors have to funnel weak cases—those we most expect to have *Brady* information—to the plea bargaining context. *See supra* text accompanying note 147.

234. *See supra* note 2.