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Prosecutorial Disclosure of Exculpatory Information in the Guilty Plea Context: Current Law

A variety of factors have contributed to the erroneous convictions revealed by DNA in recent years. These include inadequate defense representation, escalation of commitment by police and prosecutors, eyewitness error, coerced confessions, and the failure of police and prosecutors to reveal exculpatory information to the defense as required by *Brady v. Maryland*. Although trials produced most of these erroneous convictions, guilty pleas were responsible for some. The corrupting influence of inadequate representation, escalation of commitment, eyewitness error, and coerced confessions extends to guilty pleas. In our last column we explained how disclosure of exculpatory information mandated by *Brady v. Maryland* reduces the risk of wrongful conviction through guilty pleas just as it reduces such risk at trial. In this column we address the troubled state of current law on whether prosecutors must disclose exculpatory information in the guilty plea context.

Treatment by lower courts and commentators

Two decades ago, the issue of whether *Brady v. Maryland*'s prosecutorial duty to disclose exculpatory evidence applies to guilty pleas had just begun to attract the attention of practitioners, judges, and commentators. Few courts, for example, had addressed the issue and the courts that had addressed it had come to different conclusions.

By 2002, when a case dealing with *Brady* and guilty pleas first came before the U.S. Supreme Court, that situation had changed. By then a large number of federal and state cases had confronted the issue, with the overwhelming majority recognizing that prosecutors do have a duty to disclose *Brady* material prior to a guilty plea. Federal courts of appeal in the Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits adopted this view, along with federal district courts in the First and Fourth Circuits. State appellate courts in, Missouri, New Jersey, South Carolina, and Tennessee also had held that *Brady* applies in the plea bargaining context. Federal courts of appeal in the Fifth and Seventh Circuits had held that *Brady* does not apply in the guilty plea context. Lower courts in some states had divided on the question.

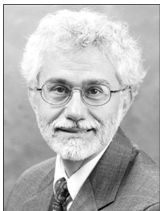
In the past two decades, the academic literature has given greater attention to *Brady* and guilty pleas. The first article we can find discussing *Brady* and guilty pleas was published in 1981. In the intervening 26 years, several professors and practitioners, along with a host of student authors, have written on the issue. As with judges, the overwhelming majority of commentators support requiring *Brady* disclosure prior to guilty pleas.

United States v. Ruiz

In 2002, the Supreme Court finally addressed *Brady* in the guilty plea context. In *United States v. Ruiz*, 536 U.S. 622 (2002), the Court severely restricted, and left open the possibility of entirely rejecting, application of *Brady* to guilty pleas. Though the scope of the *Ruiz* decision is ambiguous, there is little question that the case marks a significant restriction of *Brady* rights in the guilty plea context and runs counter to the trend in lower federal and state courts prior to *Ruiz*.

The context in which *Ruiz* arose is critical to evaluating the Supreme Court's decision in the case. During the 1990s, lower federal courts showed a strong trend toward applying *Brady* to guilty pleas. In a 1995 case, *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995), the Ninth Circuit joined this trend.

Following *Sanchez*'s holding that a defendant pleading guilty retains *Brady* rights—that such rights are not implicitly waived by entry of a guilty plea—federal prosecutors in the Southern District of California incorporated an *express* waiver of *Brady* rights in what were termed "fast-track" plea agreements. These agreements includ-



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ed express waiver of *Brady* as a condition. The express waiver, though, was not a complete waiver. The defendant waived the right to receive *Brady* material that constituted impeachment information or was relevant to an affirmative defense. But the prosecution agreed to turn over "any [known] information establishing the factual innocence of the defendant."

The defendant in *Ruiz* challenged the validity of this express *Brady* waiver as a condition to a plea agreement, and the Ninth Circuit found the express waiver unconstitutional. Despite the fact that a circuit split had developed on whether a guilty plea implicitly waives *Brady* rights, the Supreme Court did not grant certiorari in a case directly addressing that issue. Rather, the Court granted certiorari in *Ruiz,* a case presenting the more unusual issue of an express waiver of *Brady* rights prior to a guilty plea. The Supreme Court overruled the Ninth Circuit and approved the express partial waiver found in the fast-track plea agreement at issue in *Ruiz*.

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

The second way in which the express waiver in *Ruiz* restricted *Brady* disclosure was by raising the persuasiveness threshold required for disclosure of information bearing on "factual innocence." Under the *Brady* rule, information must be turned over only if it is *material*. The Supreme Court's most recent iterations of the *Brady* rule define material as creating "a reasonable probability that the government's suppression [of the information] affected the outcome of the case." (*United States v. Bagley*, 473 U.S. 667, 675 (1985).) To be *Brady* material the information "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles v. Whitley*, 514 U.S. 419, 435 (1995).) In other words, information in the trial context must be disclosed if it is likely to create reasonable doubt in the mind of a juror.

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

The *Ruiz* opinion has a number of serious flaws. First, the Court's analysis fails even to acknowledge much less consider the substantial body of case law from both the federal circuits and the state courts applying *Brady* in the context of guilty pleas, the primary thrust of which runs counter to the Court's analysis and conclusion. Nor did the Court acknowledge the academic commentary or address the arguments advanced therein, the primary thrust of which, again, was contrary to the *Ruiz* Court's reasoning and result. The Court's failure to acknowledge or address both prior authority and academic commentary contrary to the Court's position seriously undermines the persuasiveness of its analysis.

Second, the Court grossly overstated the burdens that disclosure of *Brady* material in the guilty plea context would impose on the government. The Court treats mandating *Brady* disclosure in the guilty plea context as the functional equivalent of open file discovery. In doing so, Justice Breyer ignores the materiality limitation on *Brady* disclosure that severely restricts what the government must produce and thus lessens the burden of producing it.

A third serious flaw in *Ruiz* is the Court's summary dismissal of any possible connection between *Brady* disclosure and wrongful conviction through guilty plea. As we discussed in our last column, 22 (No. 3) CRIM. JUST. 42-44 (2007), there is a very plausible connection between failure to disclose *Brady* material and wrongful conviction through a guilty plea.

Justice Breyer, for example, devotes one short paragraph to exculpatory information relating to affirmative defenses, and a single sentence to dismissing any need for disclosure of such information. In doing so, he appears to accept without examination a view of innocence that excludes consideration of widely accepted criminal law principles of justification and excuse. A defendant

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with a valid affirmative defense, in other words, appears not to qualify as "factually innocent" in Justice Breyer's view, despite the fact that substantive criminal law views such a person as not properly subject to criminal liability. The prosecutors who drafted the waiver at issue in *Ruiz* and the Supreme Court seem to view the criminal law of affirmative defenses as unworthy of enforcement in the context of a guilty plea.

Cases from lower courts as well as academic commentary show how disclosure of information relating to an affirmative defense can contribute to avoiding inaccuracy in guilty pleas. Without *Brady* disclosure in the guilty plea context, for example, a defendant may fail to raise an otherwise valid entrapment defense because the defense may not know that the person who enticed the defendant to commit the crime was an agent of the government, either an undercover law enforcement officer or a government informant. Similarly, the prosecution might have in its file records showing that the defendant suffers from a mental illness that creates the basis for a credible insanity defense. The defendant might be incapable of or unwilling to convey this information to his or her lawyer.

Provocation provides a third example of a defense that could unwittingly be ignored in the guilty plea context without prosecutorial disclosure of *Brady* material. Some jurisdictions limit the provocation defense to certain victims. Maryland, for example, requires that "the victim was the person who provoked the rage." (*Dennis v. State*, 105 Md. App. 687 (1995).) A defendant in a situation such as a bar fight among strangers involving multiple participants might not know after the fact whether the person killed was in fact one of the provokers. (*See State v. Lawton*, 298 N.J. Super. 27 (1997).) If the prosecution has evidence unknown to the defendant showing that the victim *was* one of the provokers, such disclosure would be critical for a defendant and his or her lawyer accurately to determine the applicability of a provocation defense. Each of the affirmative defense examples just discussed illustrates that the prosecution may have critical information of which the defendant should be aware to ensure a factually accurate guilty plea. Justice Breyer similarly devotes a single sentence to the possible connection between disclosure of impeachment information and the factual accuracy of guilty pleas. He concludes that the prosecution's obligation to turn over "information establishing the factual innocence of the defendant," along with Rule 11's provisions on entry of a guilty plea, "diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty." (*Id*. at 631.) But when a defendant during a guilty plea hearing relies on information provided by the prosecution, rather than the defendant's independent knowledge, to establish an element of an offense or eliminate an affirmative defense, revealing key impeachment information advances accuracy in precisely the same way it does at trial—by alerting the person relying on the information provided by the government to potential weaknesses in that information.

Implicit waiver

The Court's approval in *Ruiz* of an express partial waiver of *Brady* rights as a condition to a plea bargain is clear. But what happens to *Brady* rights in the guilty plea context when the plea bargain does not contain such an express waiver? Does the very act of pleading guilty implicitly waive all or some *Brady* rights? The answer to this key question depends on how one interprets *Ruiz*.

Most commentators have argued that a guilty plea *should not* and most lower courts have found that a guilty plea *does not* constitute such an implicit waiver. This implicit waiver issue was not before the *Ruiz* Court and Justice Breyer did not explicitly state a conclusion about what, if any, rights to *Brady* disclosure a defendant pleading guilty retains absent an express waiver. Also, Justice Breyer did not address the academic commentary, the arguments advanced in that commentary, or the lower court authority on implicit waiver. Nonetheless, much of the language of Justice Breyer's opinion is troublingly broad and might, unwisely in our view, be read as entirely extinguishing *Brady* rights in the context of guilty pleas.

Conclusion

In response to the Supreme Court's decision in *Ruiz*, the American College of Trial Lawyers proposed modifying Federal Rule of Criminal Procedure 11 to impose a duty to disclose exculpatory information in the guilty plea context. This proposal was recently rejected by the Federal Rules Advisory Committee. Unless such a rule is adopted, the scope of *Brady* disclosure in the guilty plea context will continue to be contested and will depend on how lower courts and the Supreme Court itself interpret *Ruiz*. ■

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