An Eerie Efficiency

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I. Introduction

More and more prosecutors are adopting so-called ''fast track'' plea bargaining programs. Although such programs vary from jurisdiction to jurisdiction, the basic idea is this: If the person who has been accused of a crime will agree to forgo his right to a trial and an appeal, the government will agree to impose a lighter prison sentence. Should the person who has been accused of a crime decline the government's offer and invoke his constitutional right to trial by jury, the government promises to impose a harsher prison sentence if the person is convicted. More recently, some prosecutors have been trying to further economize their time and resources by having criminal defendants waive their right to receive exculpatory information from the government before entering into binding plea agreements. Such plea bargain arrangements have come under fire from criminal defense attorneys and civil libertarians who have condemned such deals as ''adhesive, unconscionable, and unconstitutional.''[1]

This article scrutinizes the constitutionality of fast track plea bargaining programs, summarizes the Supreme Court's unanimous ruling in *United States v. Ruiz*,[2] critiques the Court's treatment of the subject by placing the constitutional controversy in the broader context of plea bargaining in general, and concludes that fast track plea bargaining agreements violate the Constitution because plea bargaining violates the Constitution.

[1] Larry Kupers and John T. Philipsborn, *Mephistophelian Deals: The Newest in Standard Plea Agreements*, CHAMPION, Aug. 1999.

[2] 70 U.S.L.W. 4677 (June 24, 2002).

II. The *Ruiz* Case: The Supreme Court Signs Off on Fast Track Deals

The United States Attorney's Office for the Southern District of California adopted a ''fast track'' plea bargaining program to minimize the expenditure of government resources and expedite the processing of routine cases. Thus, when Angela Ruiz was arrested on charges of importing marijuana from Mexico into the United States, the federal prosecutor offered Ruiz a typical fast track plea bargain. The essence of the proposed ''deal'' was this: If Ruiz would agree to plead guilty to the charge and waive (a) her right to a trial by jury, (b) her right to file an appeal, (c) her right to file pretrial motions, and (d) her right to receive exculpatory and impeachment evidence, the prosecutor would agree to recommend a lighter prison sentence to the sentencing judge. The propriety of that arrangement would subsequently form the basis of Ruiz's legal appeal.

By way of background, plea bargaining has been widely practiced for many years, but prosecutors have only recently begun to incorporate additional waivers relating to the receipt of exculpatory and impeachment information into their ''standard'' plea bargaining contracts.[3] The prosecutorial duty to disclose exculpatory and impeachment evidence arose from a line of Supreme Court rulings, beginning with *Brady v. Maryland*, which held that the government violates the constitutional guarantee of ''due process of law'' whenever it withholds material exculpatory information from the accused and his attorney.[4] The fast track plea bargaining contracts are based on the idea that the accused can waive his *Brady* right to receive such information by virtue of his acceptance of the government's plea bargaining offer.

Ruiz objected to the ''*Brady* waiver'' portion of the proposed plea agreement, but the government would not yield on that point. From the government's perspective, negotiating the central features of the ''standard'' plea agreement on a case-by-case basis would defeat the principal purpose of the fast track program. Thus, when Ruiz balked on the inclusion of the *Brady* waiver, the prosecution broke off the discussion and withdrew its offer.

[3] *See* David E. Rovella, *Federal Plea Bargains Draw Fire*, NAT. L.J., Jan. 17, 2000.

[4] *See* Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

Ruiz nevertheless chose to forgo a trial and entered a guilty plea to the charges of marijuana importation. Even though Ruiz had no plea bargain, her legal team sought leniency from the sentencing court because she had substantially complied with all of the other fast track eligibility requirements. The prosecution nonetheless formally opposed Ruiz's motion for leniency. The sentencing judge ultimately denied the motion for leniency because the government provided no fast track recommendation and because no plea agreement required the prosecutor to do otherwise.

On appeal, Ruiz argued that the right to receive undisclosed *Brady* evidence cannot be waived with plea agreements. According to Ruiz, the sentencing court mistakenly concluded that there was nothing untoward in the government's handling of her case and thus mistakenly concluded that it had no legal discretion to remedy the unconstitutional conduct of the prosecutor by exercising leniency under the federal sentencing guidelines. The essence of Ruiz's argument was that the prosecution withheld a fast track sentencing recommendation because Ruiz refused to waive her unwaivable *Brady* rights. In other words, it is unconstitutional for the government to condition the benefits of a plea bargain on the waiver of such rights.

The U.S. Court of Appeals for the Ninth Circuit began its analysis by noting that for a guilty plea to meet the due process requirement, it must be intelligent, knowing, and voluntary.[5] Prior circuit precedent held that guilty pleas could not be deemed intelligent and voluntary if they were entered into ''without knowledge of material information withheld by the prosecution.''[6] That conclusion was, in turn, driven by the court's observation that a defendant's decision whether or not to plead guilty ''is often heavily influenced by his appraisal of the prosecution's case.''[7]

The Court of Appeals saw no reason to draw a distinction between its criterion for valid guilty pleas and valid plea agreements. To comport with due process, the accused must intelligently and voluntarily forgo his constitutional rights.[8] The court further noted that

[5] United States v. Ruiz, 241 F.3d 1157, 1164 (2001).

[6] *Id.* at 1164.

[7] *Id.*

[8] The Court also declined to draw a distinction between the prosecutorial duty to disclose exculpatory evidence and its duty to disclose impeachment evidence. The Justice Department argued that even if the court found a constitutional objection with waivers of exculpatory evidence, that issue should be addressed in another case. The only evidence withheld from Ruiz involved impeachment evidence. *Id.* at 1165.

in situations in which there is not going to be a trial, *Brady* evidence is only valuable to the accused if it is disclosed before the acceptance of the plea agreement. Thus, the court rejected the government's contention that the disclosure of exculpatory evidence was only necessary in the event of a trial. The court declared *Brady* waivers to be invalid, vacated Ruiz's sentence, and remanded the case to the district court for resentencing. The appellate court instructed the district judge to hold an evidentiary hearing to determine whether or not the prosecution withheld its fast track recommendation for the reasons alleged by Ruiz. Because the Ninth Circuit ruling undermined a key aspect of the fast track plea bargaining program, the prosecution appealed the case to the Supreme Court, which agreed to review the case.

The Supreme Court overturned the Ninth Circuit decision with a unanimous ruling that was authored by Justice Stephen Breyer. The Court's conclusion that the Constitution does not require pre-guilty plea disclosure of impeachment information rested on three arguments:

First, the Court agreed with the government's argument that although disclosure of impeachment information is necessary to ensure a fair trial, it is not necessary to ensure the ''voluntary'' nature of a guilty plea.[9] Although the Court acknowledged that more information in the possession of the accused will likely improve the wisdom of his decision, it noted that the prosecutor has never been legally required to share all useful information with the defense.[10]

Second, the Court could not find ''significant support'' for the Ninth Circuit's ruling in case law.[11] Instead, Justice Breyer found that the case law hewed to the proposition that so long as the accused understood the general nature of the rights he was waiving, it mattered not if he suffered from ''various forms of misapprehension,'' concerning such matters as the actual strength of the government's case, or ignorance concerning viable legal defenses.[12]

Third, and most disturbing, the Court said its due process analysis had to weigh the constitutional benefit that would redound to the

[9] *Ruiz*, 70 U.S.L.W. 4677, 4679 (June 24, 2002).

[10] *Id.*

[11] *Id.* at 4679–4680.

[12] *Id.* at 4680.

accused against the ''adverse impact'' on the ''Government's interests.''[13] In the words of Justice Breyer, ''a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.''[14]

Fast track plea bargaining programs indisputably help to secure a more efficient system of caseload disposition. What is disputable, however, is whether the fast track programs can truly be reconciled with the constitutional rights of the accused. To show that the Supreme Court did indeed reach an erroneous conclusion in *Ruiz*, it will be necessary to broaden the discussion and to critically examine prior Supreme Court precedents that have fostered a jurisprudence that is now far removed from the system of criminal justice contemplated by the text of the Constitution.

III. The Rise and Fall of Adversarial Trials

Because any person who is accused of violating the criminal law can lose his liberty, and perhaps his life, depending on the offense and the prescribed penalty, the Framers of the Constitution took pains to put explicit limits on the awesome powers of government. Here are a few of the safeguards that are explicitly guaranteed by the Bill of Rights:

- The accused has the right to be informed of the charges.
- The accused cannot be compelled to incriminate himself.
- The accused has a right to a speedy and public trial.
- The accused has a right to an impartial jury trial in the state and district where the offense allegedly took place.
- The accused has the right to cross-examine the state's witnesses and has the right to call witnesses on his own behalf.
- The accused has the right to the assistance of counsel.

Justice Hugo Black once noted that, in America, the defendant ''has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince

[13] *Id.*

[14] *Id.*

the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: 'Prove it!' ''[15] By limiting the powers of the police and prosecutors, the Bill of Rights safeguards freedom.

Given the Fifth Amendment's prohibition of compelled self-incrimination and the Sixth Amendment's guarantee of impartial juries, one would think that the administration of criminal justice in America would be marked by adversarial trials—and yet the opposite is true. Less than 10 percent of the criminal cases brought by the federal government each year are actually tried before juries with all of the accompanying procedural safeguards noted earlier.[16] More than 90 percent of the criminal cases in America are never tried, much less proven, to juries.[17] The overwhelming majority of individuals who are accused of crime forgo their constitutional rights and plead guilty. The rarity of jury trials is not the result of criminals who come into court to relieve a guilty conscience or to save the taxpayers the costs of a trial. Nor is it simply a matter of happenstance. The truth is that government officials have deliberately engineered the system to ''assure that the jury trial system established by the Constitution is seldom utilized.''[18] And plea bargaining is the primary technique used by the government to bypass the institutional safeguards in trials.

Plea bargaining consists of an agreement (formal or informal) between the defendant and the prosecutor. The prosecutor typically agrees to a reduced prison sentence in return for the defendant's waiver of his constitutional right against self-incrimination and his right to trial. As one critic has written, ''the leniency is payment to a defendant to induce him or her not to go to trial. The guilty plea or no contest plea is the quid pro quo for the concession; there is no other reason.''[19] Plea bargaining unquestionably alleviates the workload of judges, prosecutors, and defense lawyers, but the key question is this: Is it proper for a government that is constitutionally

[15] Williams v. Florida, 399 U.S. 78, 112 (1970) (Black, J., dissenting).

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

[17] *Id.*

[18] Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1389 (1970).

[19] Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, *in* CRIMINAL JUSTICE? THE LEGAL SYSTEM V. INDIVIDUAL RESPONSIBILITY 85 (Robert James Bidinotto ed., 1994).

required to respect the right to trial by jury to use its charging and sentencing powers to pressure an individual to waive that right?

IV. Can Plea Bargaining Be Justified?

There is no doubt about the fact that government officials deliberately use their power to pressure people who have been accused of crime, and who are presumed innocent, to confess their guilt and to waive their right to a formal trial. We know this to be true because prosecutors freely admit that this is what they do.

Paul Hayes, for example, was indicted for attempting to pass a forged check in the amount of $88.30, an offense that was punishable by a prison term of 2 to 10 years.[20] The prosecutor offered to recommend a sentence of 5 years if Hayes would waive his right to trial and plead guilty to the charge. The prosecutor also made it clear to Hayes that if he did not plead guilty and ''save the court the inconvenience and necessity of a trial,'' that the state would seek a new indictment from a grand jury under Kentucky's ''Habitual Criminal Act.''[21] Under the provisions of that statute, Hayes would face a mandatory sentence of life imprisonment because of his prior criminal record. Despite the enormous pressure exerted upon him by the state, Hayes insisted on his right to jury trial. He was subsequently convicted and then sentenced to life imprisonment.

On appeal, Hayes argued that the prosecutor violated the Constitution by threatening to punish him for simply invoking his right to a trial. In response, the government freely admitted that the only reason a new indictment was filed against Hayes was to deter him from exercising his right to a trial. Because the indictment was supported by the evidence, the government maintained that the prosecutor had done nothing improper. The case ultimately reached the Supreme Court for a resolution. In a landmark 5–4 ruling, *Bordenkircher v. Hayes*, the Court approved the prosecutor's handling of the case and upheld the draconian sentence of life imprisonment. Because the *Hayes* case is considered to be the watershed precedent for plea bargaining, it deserves careful attention.

The *Hayes* ruling acknowledged that it would be ''patently unconstitutional'' for any agent of the government ''to pursue a course of

[20] Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[21] *Id.* at 358.

action whose objective is to penalize a person's reliance on his legal rights.''[22] The Court, however, declined to overturn Hayes's sentence because he could have completely avoided the risk of life imprisonment by admitting his guilt and accepting a prison term of 5 years. At bottom, the constitutional rationale for plea bargaining comes down to the following contention: There is ''no element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.''[23] On first blush, the proposition seems plausible because criminal defendants have always been allowed to waive their right to a trial and because the executive and legislative branches have always had discretion with respect to their charging and sentencing policies. But a closer inspection will show that the constitutional rationale underlying plea bargaining cannot withstand scrutiny.[24]

First, it is important to note that the existence of some element of choice has never been thought to justify otherwise wrongful conduct. As the Supreme Court itself observed in another context, ''It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.''[25]

The courts have employed similar reasoning in tort disputes between private parties. For example, a woman brought a false imprisonment action against a male acquaintance after he allegedly forced her to travel with him in his automobile when it was her desire to travel by train.[26] According to the complaint, the man boarded the train, seized the woman's purse, and then disembarked and proceeded to his car. The woman then left the train to retrieve her purse. While arguing with the man in the parking lot, the train

[22] *Id.* at 363–364.

[23] *Id.* at 364.

[24] This article rejects the idea that the label attached to time spent in jail resolves the constitutional question. To paraphrase Professor Elizabeth Lear, whether one calls it ''retaliation,'' ''punishment,'' or ''denial of leniency,'' a longer prison sentence remains a serious restriction on a person's actual freedom. This article is concerned with jail time that is directly attributable to the invocation of a person's constitutional rights. *See* Elizabeth Lear, *Is Conviction Irrelevant?* 40 UCLA L. REV. 1179, 1185 (1993).

[25] Union Pac. R.R. Co. v. Pub. Serv. Comm'n, 248 U.S. 67, 70 (1918).

[26] Griffin v. Clark, 42 P.2d 297 (1935).

left the station. Reluctantly, the woman got into the vehicle to travel to her destination. The man maintained that the false imprisonment claim lacked merit because he exercised no physical force against the woman and because she was at liberty to remain on the train or to go her own way. The court rejected that defense and ruled that the false imprisonment theory had merit because the woman did not wish to leave the train and she did not wish to depart without her purse. The man unlawfully interfered with the woman's liberty to be where she wished to be. The fact that the man had given the woman some choices that she could ''accept or reject'' did not alter the fact that the man was a tortfeasor.[27]

Second, the Supreme Court has repeatedly invalidated certain governmental actions that were purposely designed to coerce individuals and organizations into surrendering their constitutional rights. In *Marshall v. Barlow's Inc.*, the Court ruled that a businessman was within his rights when he refused to allow an OSHA inspector into his establishment without a search warrant.[28] The Secretary of Labor filed a legal brief arguing that when people make the decision to go into business they essentially ''consent'' to governmental inspections of their property.[29] Even though the owner of the premises could have avoided such inspections by shutting down his business, the Court recognized that the OSHA regulations penalized commercial property owners for exercising their right under the Fourth Amendment to insist that government inspectors obtain search warrants before demanding access to the premises.[30]

In *Nollan v. California Coastal Commission*, the Court ruled that the State of California could not grant a development permit subject to the condition that the landowners allow the public an easement across a portion of their property.[31] Even though the landowners had the option of ''accepting or rejecting'' the Coastal Commission's

[27] *Id. See also* Ashland Dry Goods v. Wages, 195 S.W.2d 312 (1946); Nat'l Bond & Inv. Co. v. Whithorn, 123 S.W.2d 263 (1938).

[28] Marshall v. Barlow's Inc., 436 U.S. 307 (1978).

[29] In response, the Court observed that only ''the most fictional sense of voluntary consent'' could be discerned from the ''single fact that one conducts business affecting interstate commerce.'' *Id.*, at 314.

[30] *Id.* at 325. *See also* Miller v. United States, 230 F. 2d 486 (1956); District of Columbia v. Little, 178 F.2d 13 (1949).

[31] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

deal, the Court recognized that the permit condition, in the circumstances of that case, amounted to an ''out-and-out plan of extortion.''[32]

Similarly, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court invalidated a so-called ''right of reply'' statute.[33] The Florida legislature made it a crime for a newspaper to criticize a politician and then to deny that politician a ''right to equal space'' in the paper to defend himself against such criticism. Even though Florida newspapers remained free to say whatever they wished, the Court recognized that the statute exacted a ''penalty'' for the simple exercise of free speech about political affairs.[34]

Finally, the ad hoc nature of the *Hayes* plea bargaining precedent becomes apparent when one extends its logic to other rights involving criminal procedure. The Court has never proffered a satisfactory explanation with respect to why the government should not be able to use its sentencing powers to leverage the waiver of constitutional rights pertaining to the trial itself. Can a federal prosecutor enter into ''negotiations'' with criminal defendants with respect to the exercise of his trial rights? For example, when a person is accused of a crime, he has the option of hiring an experienced attorney to prepare a legal defense on his behalf or representing himself without the aid of counsel.[35] Can a prosecutor induce a defendant into waiving his right to the assistance of counsel with a recommendation for leniency in the event of a conviction? Such prosecutorial tactics are presently unheard of. And yet, under the rationale of the *Hayes* case, it is not obvious why such tactics should be constitutionally barred. After all, under *Hayes*, there is no element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer.

Plea bargaining rests on the constitutional fiction that our government does not retaliate against individuals who wish to exercise their constitutional right to trial by jury. Although the fictional nature

[32] *Id.* at 837.

[33] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[34] *Id.* at 256. *See also* Mahoney v. Babbitt, 105 F.3d 1452 (1997), where government officials attempted to give a citizen the following ''choice'': He could carry a sign along the inaugural parade route that complimented the president, but would be arrested for carrying a sign that was critical of the president!

[35] *See* Faretta v. California, 422 U.S. 806 (1975).

of that proposition has been apparent to many for some time now, what is new is that more and more people are reaching the conclusion that that fiction is intolerable.[36] Chief Judge William G. Young of the Federal District Court in Massachusetts, for example, recently filed an opinion that was refreshingly candid about what is happening in the modern criminal justice system:

> Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible. . . . Today, under the Sentencing Guidelines regime with its vast shift of power to the Executive, that disparity has widened to an incredible 500%. As a practical matter this means, as between two similarly situated defendants, that if the one who pleads and cooperates gets a four-year sentence, then the guideline sentence for the one who exercises his right to trial by jury and is convicted will be twenty years. Not surprisingly, such a disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one's peers. Criminal trial rates in the United States and in this District are plummeting due to the simple fact that today we punish people—punish them severely—simply for going to trial. It is the sheerest sophistry to pretend otherwise.[37]

Like a lovely old home that is steadily sliding into disrepair because of neglectful owners, the American criminal justice system has been undergoing a steady regression—so much so that it would no longer be recognizible to the Framers of the Constitution.

V. A Proper Analysis of *Ruiz* and Fast Track Bargains

If plea bargaining amounts to an unconstitutional burden on the rights of the accused, how should the Supreme Court have decided the *Ruiz* case? The short answer is that the Court should have affirmed, not reversed, the ruling of the Ninth Circuit Court of Appeals.

The constitutional analysis of the Court of Appeals was fundamentally sound. No one can dispute the idea that a criminal defendant can forgo his or her right to trial. Because of the potentially dire

[36] Fine, *supra* note 19.; Stephen J. Shulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

[37] Berthoff v. United States, 140 F. Supp. 2d 50, 67–69 (2001).

implications of such a move, however, the courts take the time, quite properly, to ensure that the accused is acting voluntarily and intelligently. A conscientious trial court should assure itself that the person who is waiving his constitutional rights is not pleading guilty to a crime that he did not commit and that he is not being railroaded into a prison cell.

The Court of Appeals was much more sensitive to the fact that the courtroom is the crucial way station between freedom and incarceration. And that is true not only with respect to the person who goes to trial but equally so with the person who has decided, for whatever reason, to enter a guilty plea. Whereas the Supreme Court stressed that the disclosure of exculpatory and impeachment evidence was important ''trial-related rights,'' the Court of Appeals recognized that such information was no less important to the person who comes before the trial court and claims that he is prepared to ''knowingly'' forgo his constitutional rights. The question that comes to the fore in the latter situation is this: With fast track *Brady* waivers in place, how can any person *knowingly* waive his right to trial when he is unaware of material exculpatory and impeachment evidence held by the prosecution?

Further, whereas the Supreme Court seemed to be preoccupied with the ''Government's interest'' in avoiding ''burdensome'' trial-related preparation and disclosure responsibilities (e.g., its constitutionally mandated duties), the Court of Appeals locus of attention was where it belonged, namely, on how this newfangled procedure would affect the rights of the individual. That is, in the absence of exculpatory and impeachment information, the appeals court was deeply concerned that poor and unsophisticated, but innocent, individuals accused of crimes might make the dreadful mistake of pleading guilty.

A concrete example can perhaps illuminate how these constitutional principles can affect the lives of people. On the evening of September 28, 1987, Jose Antonio Rivera was murdered.[38] Rivera was chased through a New York City park by a group of teens with whom he had been feuding. Rivera was stabbed and hit repeatedly with sticks. Jose Morales, age 17, and another youth were arrested

[38] *See* Jim Dwyer, *Testimony of Priest and Lawyer Frees Man Jailed for '87 Murder*, N.Y. TIMES, July 26, 2001.

in connection with the incident. Morales maintained his innocence, but he did not deny that he was in the park. The only witness to the crime was Rivera's girlfriend—and she was prepared to identify Morales as one of the culprits.

The prosecutor offered Morales a plea bargain. If he waived his right to trial and confessed to the crime of ''reckless endangerment,'' the prosecutor would recommend a prison sentence of 2 years. However, if Morales insisted on his innocence and invoked his right to a jury trial, the prosecutor would charge him with second degree murder and seek a 15–20 year sentence.

It is easy for some people to breezily proclaim that they would never plead guilty to a crime if they were truly innocent, but when one is confronted with the choice of 2 years in jail or quite possibly 20 years' imprisonment, the decision is not so easy. Now consider Morales' dilemma in light of a potentially important piece of impeachment information. The sole witness to the crime, Rivera's girlfriend, had been drinking that evening. Under *all* of the circumstances, the prosecution had a fairly weak case against Morales. The crime occurred at night, the park was crowded with young people running around, and the one eye witness was very likely impaired from liquor consumption.

If Morales went to trial, the prosecutor would have a legal duty to disclose the impeachment information to the defense. Under the fast track plea bargaining program, however, the prosecutor would have no duty to disclose that his only witness was drunk. Instead, because he presumably believed Morales was a thug, the prosecutor would likely try to bluff Morales into a plea bargain with a statement like, ''You had better take a deal because I've got an eye witness who is prepared to identify you as the killer.''[39] The point here is to show how the disclosure or nondisclosure of impeachment information, working in combination with plea bargaining pressures, can affect the decision of the accused regarding whether to go to trial.

Returning to the *Ruiz* case, the Court of Appeals was certainly on the mark when it noted that for a guilty plea to be valid, it must be both intelligent and voluntary. And because a defendant's decision

[39] This article does not claim that such a bluff was actually made in the Morales case. Rather, the point is to show how *Brady* waivers might have impacted the case of an innocent man who was targeted for prosecution. The only way that one can minimize future miscarriages of justice is to learn from experience.

is heavily influenced by his appraisal of the prosecution's case, the disclosure of exculpatory and impeachment evidence is necessary to ensure that the waiver is not only voluntary, but knowing and intelligent. As the court correctly noted, ''a defendant's abstract awareness of his rights under *Brady* is a pale substitute for the receipt of concrete *Brady* material that, for example, may include evidence that the arresting officer was twice convicted of perjury or that another suspect confessed to the crime. Without disclosure of the *Brady* evidence itself, the plea agreement and the *Brady* waiver contained therein cannot be intelligent and voluntary.''[40]

Of course, the Court of Appeals was bound by precedent and was not at liberty to challenge the constitutionality of plea bargaining per se. And because that fundamental issue was not properly before the Supreme Court, a proper disposition of the case would have been to affirm the Ninth Circuit's holding invalidating the *Brady* waiver contracts, vacate Angela Ruiz's sentence, and remand the case to the district court for resentencing. However, instead of expressing satisfaction with the federal government's ''heavy reliance upon plea bargaining,'' as Justice Breyer did in his majority opinion, the Supreme Court should have expressed alarm about the rarity of jury trials in America and invited a more broad-based challenge to plea bargaining and to the precedents that undergird that odious practice.[41]

[40] *Ruiz*, 241 F. 3d at 1165. The Court of Appeals was also keenly sensitive to the potentially perverse incentives created by the *Brady* waivers. The court observed that ''prosecutors could be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas.'' *Id.* at 1164. The Supreme Court, on the other hand, seemed to naively regard such an abuse of power as remotely possible, at best. *But see* Michelle Mittelstadt, *Federal Marshals Secure Waco Evidence From FBI Headquarters*, ASSOCIATED PRESS, Sept. 2, 1999; Bill Moushey, *Hiding the Facts*, PITTSBURGH POST-GAZETTE, Nov. 24, 1998. *See also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

[41] There is, of course, an extensive literature on the merits and demerits of plea bargaining. Although policy related arguments are beyond the scope of this article, one understandable concern that is invariably raised is that the system would ''grind to a halt'' if the practice were ever abandoned. The short answer to that claim is that it misstates the issue. The invocation of the constitutional right to jury trial should not be scapegoated because government officials have created an overly expansive criminal code and have concomitantly declined to devote sufficient resources to the criminal justice system so that the constitutionally mandated procedures can be complied with. As Justice Antonin Scalia observed in another context, ''Formal requirements are [too] often scorned when they stand in the way of expediency.'' Neder v. United States, 527 U.S. 1, 40 (1999) (Scalia, J., dissenting).

VI. Conclusion

Thomas Jefferson famously observed that ''the natural progress of things is for liberty to yield and government to gain ground.''[42] The American experience with plea bargaining is yet another confirmation of that truth. The Supreme Court unleashed a runaway train when it sanctioned plea bargaining in *Bordenkircher v. Hayes* in 1978. Despite a steady media diet of titillating criminal trials in recent years, there is an increasing recognition that jury trials are now a rarity in America—and that something, somewhere, is seriously amiss.[43] That ''something'' is plea bargaining.

The *Brady* waiver controversy tells us that the government is no longer content with the surrender of the right to trial and the right to an appeal. In *Ruiz*, the government demanded that defendants surrender their right to receive exculpatory information before signing binding plea agreements. It is a safe bet that the government will be making further demands down the road—undoubtedly under the banner of securing ''a more efficient administration of justice.'' Some prosecutors have already boldly conditioned the release of prisoners who have been exonerated by DNA evidence on the written promise that the innocent man will not bring a lawsuit against the government for prosecutorial misconduct or otherwise wrongful imprisonment.[44] With such pernicious tactics condoned by the courts, it is not inconceivable to anticipate more plea bargaining ''waivers'' in the future. Perhaps the government will attempt to get people to waive their right to sue the state about the prison conditions, however awful such conditions may eventually turn out to be. Such a waiver will be defended on the ground that the person remains free to ''accept or reject'' the prosecutor's offer—and that such waivers

[42] Letter from Thomas Jefferson to Edward Carrington (May 27, 1788).

[43] *See* Craig Horowitz, *The Defense Rests—Permanently*, N.Y. MAG., Mar. 8, 2002; William Glaberson, *Juries, Their Powers Under Siege, Find Their Role Is Being Eroded*, N.Y. TIMES, March 2, 2001. See also Ring v. Arizona, 70 U.S.L.W. 4666, 4674 (June 24, 2002) (Scalia and Thomas, JJ., concurring) (''The right of trial by jury is in perilous decline.'')

[44] *See* Richard Willing, *Exonerated Prisoners Are Rarely Paid For Lost Time*, USA TODAY, June 18, 2002; Michael Klein, *With Murder Case Dismissed, S. Phila. Man Finally Is Freed*, PHILADELPHIA INQUIRER, Feb. 12, 2002. *See also* the Public Broadcasting Service (PBS) documentary, *Frontline: The Case for Innocence* (PBS television broadcast, Jan. 2000) (The Case of Clyde Charles).

will help to preserve scarce governmental resources related to trial preparation.[45]

As with so many other areas of constitutional law, the Court must stop tinkering around the edges of the issue and return to first principles. The Framers of the Constitution were aware of more ''efficient'' trial procedures when they wrote the Bill of Rights, but chose not to adopt them. The Framers believed that the Bill of Rights, and the freedom that it secured, was well worth any loss in efficiency that resulted. If that vision is to endure, the Supreme Court must come to its defense.

[45] *See* Hudson v. Palmer, 468 U.S. 517, 533–534 (1984); Newton v. Rumery, 480 U.S. 386 (1987).