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A MURKY DOCTRINE GETS A LITTLE PUSHBACK: THE FOURTH CIRCUIT'S REBUFF OF GUILTY PLEAS IN *UNITED STATES v. FISHER*

Abstract: On April 1, 2013, in *United States v. Fisher*, the U.S. Court of Appeals for the Fourth Circuit vacated a defendant's guilty plea post-sentencing because of an officer's impermissible conduct during the preceding investigation. In doing so, the court expanded on the "voluntariness" prerequisite outlined in the seminal 1970 U.S. Supreme Court case of *Brady v. United States* that governs the guilty plea process in federal court. This Comment argues that this was a prudent expansion given the troubling nature of guilty pleas in general. This Comment outlines the basic contours of guilty pleas in the U.S. criminal justice system and finds that the protection extended by the Fourth Circuit in *Fisher* is needed.

INTRODUCTION

Choosing to plead guilty in open court is a solemn and grave decision.[1] Defendants who choose to do so subject themselves to the state's full arsenal of punitive power and strip themselves of many core constitutional rights.[2] Yet, the government achieves most of its convictions in just this way.[3] Moreover, not only are most convictions achieved through guilty pleas, the plea process requires defendants to relinquish much of their right to appeal, thereby exacerbating the enormity of such a decision.[4]

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[1] Brady v. United States, 397 U.S. 742, 748 (1970) (noting that "a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized").

[2] United States v. Ruiz, 536 U.S. 622, 628–29 (2002) (stating that "[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees").

[3] *See* John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV 88, 89 (1977) (stating that "it is estimated that between eight-five to ninety-five percent of all criminal convictions result from guilty pleas"); *see also* Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 311 (1975) (contextualizing the high rate of guilty pleas in criminal proceedings by statistical analysis, and concluding that a significant percentage—perhaps even one third—of defendants who plead guilty would have been acquitted at trial); Kirke D. Weaver, *A Change of Heart or a Change of Law? Withdrawing a Guilty Plea Under Federal Rule of Criminal Procedure 32(e)*, 92 J. CRIM. L. & CRIMINOLOGY 273, 273 (2002) (noting the near ubiquitous use of plea bargaining to secure convictions).

[4] *See* Blackledge v. Perry, 417 U.S. 21, 29–30 (1974) (demonstrating the profundity of a guilty plea by stating that a defendant may not claim deprivation of his constitutional rights after he has pled guilty, but instead may only challenge the plea itself); United States v. Moussaoui, 591

Because of the consequences and gravity of such a potentially irreversible choice, the U.S. Supreme Court in 1970, in *Brady v. United States*, held that defendants wishing to plead guilty must do so intelligently, knowingly, and voluntarily.[5] The *Brady* Court further elucidated the voluntariness standard:

> A plea of guilty entered by one fully aware . . . must stand unless induced by threats (or promises to discontinue improper harassment), *misrepresentation* (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).[6]

In 2013, in *United States v. Fisher*, the U.S. Court of Appeals for the Fourth Circuit expanded on the "misrepresentation" aspect of this voluntariness standard.[7] Extending the Court's reasoning in *Brady*, the majority found that an officer's misconduct during an investigation was so egregious as to render the defendant's subsequent guilty plea involuntary—even though the defendant never actually claimed to be innocent.[8]

Part I of this Comment provides the basic framework of the criminal pleading process, specifically the mechanisms by which guilty pleas are withdrawn or vacated, and further outlines the procedural posture of *Fisher*.[9] Part II analyzes the court's reasoning in *Fisher*, particularly its extension of *Brady* and its progressive conception of legal voluntariness.[10] Finally, Part III argues that this extension is prudent and necessary given the extremely high rate at which prosecutors secure convictions by consent.[11] Part III concludes that in our system of justice, preventing the harms of government abuse and wrongful conviction should take precedence over promoting judicial and prosecutorial economy.[12]

F.3d 263, 279 (4th Cir. 2010) (limiting attacks on judgments subsequent to guilty pleas to jurisdictional defects).

[5] *See Brady*, 397 U.S. at 748. *See generally* Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757 (1988) (providing an extensive history of the Supreme Court's guilty plea jurisprudence).

[6] *Brady*, 397 U.S. at 755 (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)).

[7] *See* United States v. Fisher, 711 F.3d 460, 465, 469 (4th Cir. 2013).

[8] *See id.* at 467, 469.

[9] *See infra* notes 13–49 and accompanying text.

[10] *See infra* notes 50–69 and accompanying text.

[11] *See infra* notes 70–88 and accompanying text.

[12] *See infra* notes 74–88 and accompanying text.

I. THE UNDOING OF A GUILTY PLEA IN FEDERAL COURT

A. *The High Standard of Post-Sentence Plea Withdrawal*

A guilty plea is essentially a bargain struck between a defendant and the government.[13] The bargain allows the defendant to consent to his own conviction in exchange for a lesser sentence, and allows the government to preserve prosecutorial and judicial resources.[14] Given the government's goal of efficiency, the government depends on the finality of a guilty plea: resources are not preserved if a defendant may simply appeal his conviction in the hope of an acquittal.[15]

To guarantee finality, defendants waive—both explicitly and implicitly—many of their core constitutional rights.[16] Explicitly, defendants waive their right to a jury trial, their right not to incriminate themselves, and their right to confront their accusers.[17] Implicitly, defendants waive almost all means to appeal their own conviction, thereby establishing the permanence of their decision.[18]

This finality, however, is established only once a sentence is imposed.[19] Alternatively, before sentencing, Rule 11 of the Federal Rules of Criminal Procedure allows for a more liberal process of plea withdrawal.[20] This lenien-

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[13] *See Brady*, 397 U.S. at 752 (explaining the mutual benefits enjoyed by defendants and the state in the plea bargaining process). This "bargaining" aspect of the plea process is governed by contract law principles, which illuminates the relevance of reliance and finality. *See* Brian R. Shipley & Kimberly A. Cleaveland, *Guilty Pleas*, 87 GEO. L. J. 1433, 1435–38 (1999) (extrapolating contract law principles in the guilty plea context); Weaver, *supra* note 3, at 290–91 (noting that contract law is "deeply embedded in the jurisprudence surrounding plea agreements").

[14] *See Brady*, 397 U.S. at 752; Alexandra Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 874–75 (2010).

[15] *See* Augustine V. Cheng, *Appellate Review of Double Jeopardy Claims in the Guilty Plea Process*, 56 FORDHAM L. REV. 983, 986–87 (1988) (articulating the state's interest in the guilty plea process as reasoned in the famous *Brady* trilogy—a series of cases in which the Supreme Court constitutionally validated and set basic parameters for the guilty plea process in criminal trials).

[16] Shipley & Cleaveland, *supra* note 13, at 1442 (outlining the basic consequences of a guilty plea).

[17] *Id.*; *see* U.S. CONST. amend. V ("[N]or shall any person . . . be compelled in any criminal case to be a witness against himself[.]"); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]"); *id.* ("In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . . .").

[18] *See Moussaoui*, 591 F.3d at 279; Shipley & Cleaveland, *supra* note 13, at 1442.

[19] FED. R. CRIM. P. 11.

[20] *See id.*; 2 CRIMINAL PRACTICE MANUAL, POST-SENTENCE STANDARD, § 48:4 (2013). If a defendant wishes to withdraw his plea before the court accepts it, the defendant may do so freely. FED. R. CRIM. P. 11. If the court has accepted the plea but has not imposed a sentence, the defendant may request permission to withdraw his plea. *See id.*; Weaver, *supra* note 3, at 274–75. Rule 11 allows for this withdrawal if the court either rejects the plea agreement under Rule 11(c)(5), or if the defendant can show a fair and just reason for requesting the withdrawal. *See* FED. R. CRIM. P. 11; Weaver, *supra* note 3, at 274–75. To determine whether a "fair and just" reason exists, the

cy ends after sentencing, as Rule 11 establishes that after a court imposes a sentence, "the defendant may not withdraw a plea of guilty . . . and the plea may be set aside only on direct appeal or collateral attack."[21]

Thus, to withdraw a guilty plea after a sentence is imposed, the only avenue under the Federal Rules of Criminal Procedure is to attack the validity of the plea itself.[22] Given the extensive colloquy mandated by Rule 11—which has the effect of making the pleas extremely thorough and is designed to unequivocally establish a defendant's guilt and competence—attacking the validity of the plea itself is exceedingly difficult.[23]

Following the Court's decision in *Brady*—where the Court explicitly interpreted the Due Process Clause to require that guilty pleas be made voluntarily, intelligently, and knowingly—it is increasingly more common for defendants to challenge their pleas as violating these basic requirements.[24] Moreover, prisoners' challenges to their pleas have been diverse and have expanded on the original conceptions established by the Court's holding in *Brady*.[25] For example, prisoners have successfully challenged the validity of their guilty pleas in cases where there was a complete constitutional bar on the conviction of the offense,[26] where the court or the prosecutor improperly

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court will often balance four factors: 1) whether the defendant established a fair and just reason; 2) whether the defendant declares his own innocence; 3) the time between the guilty plea and the motion; and 4) any potential prejudice to the government. Weaver, *supra* note 3, at 274–75.

[21] FED. R. CRIM. P. 11. Prior to 1983, Rule 32 allowed for the withdrawal of a guilty plea after sentencing to correct a "manifest injustice." *See* 2 CRIMINAL PRACTICE MANUAL, *supra* note 20, at § 48:3. In 1983, an amendment to Rule 32 struck the right to withdraw, but noted that a plea can be set aside "only on direct appeal or by motion under 28 U.S.C.A. § 2255." *Id.* The current Rule 11 adopts much of this language but drops specific reference to 28 U.S.C. § 2255 (2006 & Supp. V 2012). *See* FED. R. CRIM. P. 11; 2 CRIMINAL PRACTICE MANUAL, *supra* note 20, at § 48:3.

[22] *See Moussaoui*, 591 F.3d at 279 ("When a defendant pleads guilty, he waives all nonjurisdictional defects in the proceedings conducted prior to entry of the plea [and] has no nonjurisdictional ground upon which to attack that judgment except the inadequacy of the plea." (quoting United States v. Bundy, 392 F.3d 641, 644–45 (4th Cir. 2004)) (internal quotation marks omitted)). The statutory mechanism that allows for such a withdrawal is 28 U.S.C. § 2255, which allows prisoners in federal prisons to file motions challenging the legality of their sentences. *See* 28 U.S.C. § 2255; 2 CRIMINAL PRACTICE MANUAL, *supra* note 20, at § 48:3.

[23] *See* FED. R. CRIM. P. 11. The term "colloquy" in the legal context references a formal and procedural conversation, often having legal effect. BLACK'S LAW DICTIONARY 300 (9th ed. 2009) (defining "colloquy").

[24] *Brady*, 397 U.S. at 748; *see infra* notes 26–29 and accompanying text.

[25] *See infra* notes 26–29 (providing examples of such challenges).

[26] *E.g.*, Brooks v. United States, 424 F.2d 426, 426 (5th Cir. 1970) (holding that a violation of the constitutional right against self-incrimination is a full defense to a guilty plea). Another interesting example of such a bar is the constitutional prohibition of double jeopardy. *See generally* Cheng, *supra* note 15 (discussing the categorical bar on accepting guilty pleas that violate the Double Jeopardy Clause).

induced the plea,[27] where the sentence was not authorized by law,[28] or where a defendant has been denied effective assistance of counsel.[29]

In *Brady*, however, the Court also referenced the potential involuntariness—and thus invalidity—of guilty pleas that are a result of impermissible state conduct.[30] Although the Court ultimately upheld the defendants' guilty pleas in *Brady*, the Court still recognized the potential risk that the government might abuse the plea-bargaining process and the government isolation the abuse would afford thereunder.[31]

B. *Extraordinary Circumstances:* United States v. Fisher

In 2008, Cortez Fisher pled guilty to one count of possession with intent to distribute cocaine and one count of possession of a firearm by a convicted felon.[32] Fisher was sentenced to ten years in prison.[33] The principal officer involved in Fisher's investigation was Mark Lunsford, a Baltimore City Drug Enforcement Agency Task Officer.[34]

In the course of Lunsford's investigation, he applied for a search warrant to search Fisher's residence and vehicle.[35] To support this application, Lunsford submitted a sworn affidavit—which served as the sole basis for the application—in which he averred that a confidential informant had told him that Fisher distributed drugs from his apartment and possessed a gun.[36] Lunsford further averred that the informant provided him with a physical description of

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[27] *E.g.*, United States v. Hawthorne, 502 F.2d 1183, 1188–89 (3d Cir. 1974) (overruling the trial court's denial of a hearing for a defendant that was seeking to withdraw his plea based on the false promises he received during the pleading process, and holding that trial courts should place defendants under oath before accepting guilty pleas).

[28] *E.g.*, Lanier v. State, 635 So. 2d 813, 819 (Miss. Ct. App. 1994) (invalidating a guilty plea "contract" for life in prison without parole before the specific sentence imposed for murder was not authorized by the Mississippi legislature).

[29] *E.g.*, United States v. Bennett, 716 F. Supp. 1137, 1145–47 (N.D. Ind. 1989) (accepting defense attorneys' claims of their own ineffective assistance of counsel due to their inability to predict the probation office's sentencing guideline, and consequently accepting applications for plea withdrawal).

[30] *Brady*, 397 U.S. at 755 (holding that informed and voluntary guilty please must stand unless they are induced by threats, misrepresentations, or improper promises that have no proper relationship to the prosecutor's business).

[31] *See id.*

[32] *Fisher*, 711 F.3d at 463 (noting that the defendant was charged under 21 U.S.C. § 841 (2006 & Supp. V 2012) for his cocaine offense and 18 U.S.C. § 922(g) (2012) for his firearm offense).

[33] *Id.*

[34] *Id.* at 462.

[35] *Id.*

[36] *Id.*

Fisher, his address, and the make and model of Fisher's car, and that this informant confirmed Fisher's identity when shown his photograph.[37]

Based on this affidavit, Lunsford obtained a warrant and executed it on October 29, 2007.[38] During this search, detectives found crack cocaine and a loaded handgun; these findings were the foundation for the charges to which Fisher later pled guilty and received a decade in federal prison.[39]

The problem, however, was that the confidential informant that Lunsford referenced in his affidavit had no relation to Lunsford's case against Fisher.[40] In reality, the "informant" that Lunsford refers to never identified Fisher, never alleged that Fisher was breaking any law, and never described Fisher.[41] Instead, Lunsford intentionally fabricated the source of the information that the court ultimately relied on in its decision to grant the warrant to search Fisher's home.[42] Lunsford provided this false information in order to split the reward money that the "informant" would receive for "helping" the police arrest Fisher.[43] Lunsford later pled guilty to charges related to this behavior, doing so over a year after Fisher had begun his ten-year sentence.[44]

Based on Lunsford's misconduct, Fisher filed a motion to vacate his guilty plea.[45] The U.S. District Court for the District of Maryland—while noting that Fisher may have been deprived of a potentially successful motion to suppress—denied Fisher's motion because Fisher pled guilty to the crime and the prosecution did not breach any obligation owed to Fisher.[46] Fisher appealed, arguing that his plea was invalid under both *Brady v. United States* and another landmark 1970 U.S. Supreme Court case, *Brady v. Maryland*.[47]

In *Fisher*, the Fourth Circuit found that Detective Lunsford's misconduct was egregious enough to warrant vacating Fisher's plea under *Brady*.[48]

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[37] *Id.* at 462–63.

[38] *Id.* at 463.

[39] *Id.*

[40] *Id.* Lunsford claimed that another informant existed, who was not mentioned in the affidavit, that actually provided this information to Lunsford. *Id.*

[41] *Id.* at 468. Lunsford later identified a different person as the "real informant," but never actually claimed that this "real informant" provided all the information in the affidavit. *Id.*

[42] *See id.* at 468–69.

[43] *See id.* at 463.

[44] *Id.*

[45] *Id.* at 463–64; Motion to Alter or Amend Order, United States v. Fisher, No. 1:07-CR-00518 (D. Md. July 28, 2010), ECF No. 18.

[46] United States v. Fisher, No. 1:07-CR-00518, 2010 WL 3000005, at *1 (D. Md. July 28, 2010), *rev'd*, 711 F.3d 460 (4th Cir. 2013). A motion to suppress is a motion to exclude evidence from entering a trial because of some defect either in the evidence itself or in the manner in which the evidence was obtained. *See* FED. R. CRIM. P. 12.

[47] *Fisher*, 711 F.3d at 464. *See generally* Brady v. Maryland, 373 U.S. 83 (1970) (holding that the suppression of exculpatory evidence by the prosecution violates the Due Process Clause).

[48] *Fisher*, 711 F.3d at 465.

The district court decision was therefore reversed, and the case was remanded for further proceedings.[49]

II. THE FOURTH CIRCUIT'S EXPANSION OF VOLUNTARINESS UNDER *BRADY*

In 2013, in *United States v. Fisher*, the U.S. Court of Appeals for the Fourth Circuit held that a defendant's guilty plea may be vacated post-sentencing if a government officer behaved egregiously during the course of the defendant's investigation.[50] To reach this conclusion the court relied on the 1970 U.S. Supreme Court decision *Brady v. United States*, where the Court established the constitutionality—and certain parameters—of the criminal pleading process.[51] Specifically, the *Fisher* court expanded the *Brady* Court's holding that guilty pleas must be voluntary but that "absent misrepresentation or other impermissible conduct by state agents," guilty pleas must stand.[52]

The court's expansion in *Fisher* relies upon the nexus between the voluntariness of a defendant's guilty plea and the "impermissible conduct" by government agents.[53] Citing to the U.S. Court of Appeals for the First Circuit's 2006 decision *Ferrara v. United States*, the Fourth Circuit distilled this nexus into a two-part test to determine if impermissible government conduct rendered a plea involuntary.[54] First, a defendant must show "some egregiously impermissible conduct (say, threats, *blatant misrepresentations*, or untoward blandishments by government agents) antedated the entry of his plea."[55] Second, a defendant must show that "the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice."[56]

Applying its two-part test to the facts before it, the *Fisher* court concluded that Lunsford's affirmative misrepresentations—in this case, blatant lies—in his affidavit amounted to egregiously impermissible conduct.[57] Further, the court held that this misconduct, having led to obtaining incriminating

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[49] *Id.* at 462.

[50] United States v. Fisher, 711 F.3d 460, 469 (4th Cir. 2013).

[51] *Id. See generally* Brady v. United States, 397 U.S. 742 (1970) (establishing the analytical framework of modern pleading procedures). In the 1970 U.S. Supreme Court decision *Brady v. United States*, a defendant pled guilty to kidnapping charges in order to avoid a potential death sentence that could result from a jury trial. 397 U.S. at 743–44. The defendant later argued that his guilty plea was not valid because—fearing for his life—he was compelled to forgo his constitutional right to a jury trial. *Id.* The Court disagreed. *Id.* at 745.

[52] *Brady*, 397 U.S. at 757; *see Fisher*, 711 F.3d at 464–65 (citing *Brady*, 397 U.S. at 757).

[53] *See Brady*, 397 U.S. at 755; *Fisher*, 711 F.3d at 466, 469; *see also* Ferrara v. United States, 456 F.3d 278, 293 (1st Cir. 2006) (elucidating critical review of governmental behavior in the guilty plea context).

[54] *Fisher*, 711 F.3d at 465 (quoting *Ferrara*, 456 F.3d at 290).

[55] *Id.* (quoting *Ferrara*, 456 F.3d at 290) (internal quotation marks omitted).

[56] *Id.* (quoting *Ferrara*, 456 F.3d at 290) (internal quotation marks omitted).

[57] *Id.* at 467.

evidence, influenced Fisher's decision to plead guilty.[58] Accordingly, the court set aside Fisher's guilty plea as involuntary and remanded the case for further proceedings.[59]

In so holding, the Fourth Circuit used a state-centered approach to voluntariness—unlike other courts that utilize a defendant-centered approach—that declined to focus on prosecutorial behavior and exculpatory evidence.[60] Rather than assessing the prosecutor's conduct in a vacuum, the *Fisher* court diminished the distinction between different government actors, particularly, the investigating officer and the prosecutor.[61] Instead, the court attributed the investigating officer's egregious behavior to the prosecution as a whole, even though the prosecutor, in fact, disclosed the officer's behavior as soon as it became known.[62] Accordingly, the plea was vacated despite the absence any evidence of *prosecutorial* misconduct.[63]

Further, the court found the question of Fisher's innocence, or at least Fisher's claim of innocence, to be substantially irrelevant.[64] Instead of looking to whether the prosecution misled the defendant or suppressed exculpatory evidence, the court sidestepped the issue of innocence and focused almost exclusively on Lunsford's conduct.[65]

This unprecedented rebuff of governmental action and expansion of the voluntariness standard makes for a simpler—though still difficult—process

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[58] *Id.* at 469.

[59] *Id.*

[60] *Compare Fisher*, 711 F.3d at 469–70 (state-centered approach), *with* United States v. Ruiz, 536 U.S. 622, 628 (2002) (defendant-centered approach focusing on innocence), *and* Matthew v. Johnson, 201 F.3d 353, 365 (5th Cir. 2000) (defendant-centered approach also focusing on defendant's factual guilt).

[61] *See Fisher*, 711 F.3d at 466; *id.* at 476 (Agee, J., dissenting).

[62] *Id.* at 466 (majority opinion); *id.* at 476 (Agee, J., dissenting). The dissent, in the traditional manner, anchors its analysis in an inquiry into potential *prosecutorial* conduct prior to trial—an analysis that has been popular in other courts. *See id.* at 471–72. Accordingly, its citations focus almost exclusively on the absence of some any of *prosecutorial* malfeasance. *See id.* The dissent reasons that the imputation of police misconduct to the prosecution in the pleading context is a novel development. *See id.*

[63] *See id.* at 476 (Agee, J., dissenting).

[64] *Id.* at 467 (majority opinion). The dissent emphatically notes that the U.S. Court of Appeals for the First Circuit's 2006 decision *Ferrara v. United States*, a major pillar of support for the majority's decision, involved the suppression of exculpatory evidence that went directly to the defendant's innocence. *Id.* at 476 (Agee, J., dissenting); *Ferrara*, 456 F.3d at 280 (noting the exculpatory nature of withheld evidence in that case). This highlights a fundamental difference in the court's reasoning in *Fisher* and the authority it relied upon: that in *Fisher* the withdrawal of a guilty plea may be premised purely on state action regardless of the question of whether that state action potentially incorrectly inculpated the defendant. *See Fisher*, 711 F.3d at 476 (Agee, J., dissenting). This reflects a shift from a defendant-centered approach to a state-centered approach. *See id.* at 469 (majority opinion); *id.* at 476 (Agee, J., dissenting); *see also Ferrara*, 456 F.3d at 280 (focusing on state action and noting the court's role in scrupulously holding the government to high standards in the pleading context).

[65] *See Fisher*, 711 F.3d at 466–67, 469–470 (majority opinion).

for defendants seeking to withdraw guilty pleas in the wake of government misconduct.[66] Put another way, the Fourth Circuit scrutinized the government action more extensively, thus expanding upon the *Brady* Court's analysis.[67] Indeed, the *Fisher* court indicated that its decision is intended to rebuff overzealous investigators and to deter egregious police activity.[68] As the dissent emphatically argued, however, the Fourth Circuit, in expanding the voluntariness concept, is standing without much precedential support.[69]

III. AN IMPORTANT DEVELOPMENT IN A TROUBLESOME FIELD: THE FOURTH CIRCUIT'S ADVANCEMENT OF JUSTICE

Expanding the concept of legal voluntariness in the guilty plea context—beyond the traditional focus on prosecutorial misconduct and exculpatory evidence—is necessary to critically address the troubling means by which most convictions are achieved.[70] This expansion will allow courts to rebuff impermissible government conduct that, in effect, unduly pressures defendants to incriminate themselves and submit to punishment.[71] Holding otherwise would enable the government to use impermissible means—such as utilizing illegally obtained information—to induce guilty pleas.[72] Although plea bargaining is essential for the criminal justice system to operate efficiently, expanding the voluntariness requirement is necessary to ensure that the plea bargaining procedures are fair for defendants.[73]

Because it would be impossible to simply abolish the plea bargaining process, it is crucial that courts strive to ensure its fairness.[74] Whatever pres-

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[66] *Compare id.* at 469 (reasoning that a defendant that could point only to government misconduct—and any direct pressure or any exculpatory evidence—was sufficient to vacate a guilty plea), *with* Mark. S. Rhodes, *Relief After Sentencing is Exceptional*, *in* 5 ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 32:43 (2012) (describing the rarity of relief from guilty pleas post-sentencing).

[67] *See Fisher*, 711 F.3d at 469.

[68] *See id.*

[69] *See id.* at 478 (Agee, J., dissenting).

[70] *See* Becker, *supra* note 5, at 760 (describing the guilty plea jurisprudence as a "constitutional black hole," and opining that Supreme Court cases on the issue "move irregularly in different directions, like drunks scattering from a bar"); Priscilla Budeiri, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV. C.R.-C.L. L. REV. 157, 159 (1981) (highlighting the troubling nature of the guilty plea process); Finkelstein, *supra* note 3, at 293–95 (noting the troubling probability of innocent defendants pleading guilty).

[71] *See* United States v. Fisher, 711 F.3d 460, 469–70 (4th Cir. 2013).

[72] *See id.*

[73] *See id.* (taking a holistic approach to the voluntariness standard to ensure integrity in the pleading process); Budeiri, *supra* note 70, at 162 (highlighting the impossibility of eliminating the plea bargaining process).

[74] *See* Barkai, *supra* note 3, at 89–90 (overviewing the importance of judicial oversight of the plea bargaining process); Budeiri, *supra* note 70, at 162 (noting the impossibility of abolishing the plea-bargaining process, given both its ubiquitous use and scarce judicial resources).

sure the government seeks to put on defendants to plead must be lawful and calibrated to respect both the defendant's constitutional rights and the profundity of the incarcerating—and sometimes killing—of autonomous human beings.[75] Although this is certainly already the case in theory, the facts before the U.S. Court of Appeals for the Fourth Circuit in its 2013 *United States v. Fisher* decision demonstrate that there is little actual recourse for defendants who plead guilty as a result of impermissible government behavior.[76] Even though government officials guilty of such conduct may well be punished, defendants still remain beholden to calculations made under the false assumption of lawful government activity.[77] Indeed, in *Fisher*, it was the court's oversight that rebuffed impermissible government conduct that, in effect, unduly pressured a defendant to incriminate himself.[78] Without this judicial oversight, the government would have successfully used illegally obtained information to pressure an individual to plead to crimes of which he was otherwise likely to be acquitted.[79]

Moreover, expanding the voluntariness requirement will help remedy the manner in which plea bargaining is currently carried out in weaker cases—that is, those cases where the government's case is less certain, and the defendant's innocence is more likely.[80] Expanding the requirement is vital because, in fact, plea bargaining can potentially lead to innocent people pleading guilty to avert the risk of more severe punishment.[81]

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[75] *See* Becker, *supra* note 5, at 837 ("However, a genuine concern for innocent defendants requires that there be at least *some* scrutiny of the degree of inducement offered for a guilty plea."). Of particular concern, and highlighted in the 1970 U.S. Supreme Court decision *Brady v. United States*, is the possibility of the death sentence. 397 U.S. 742, 743 (1970).

[76] *See Fisher*, 711 F.3d at 474–75 (Agee, J., dissenting). As the dissent emphatically notes, and the majority seems to tacitly admit, there is no caselaw directly on point with facts substantially similar to *Fisher*. *Id.*; *see also id.* at 462 (majority opinion) (referring to the facts of the case as "extraordinary"). Thus, it would seem that either the police act perfectly every time they investigate, or that little recourse on these grounds is available. *See id.* at 474–75 (Agee, J., dissenting). Accordingly, although the court under the Federal Rules of Criminal Procedure has the discretion to not accept a guilty plea, oversight by way of retroactive correction is rare. Rhodes, *supra* note 66, § 32:43.

[77] *See* FED. R. CRIM. P. 11 (permitting a defendant to attack the validity of a plea); *see also* United States v. Ferrara, 456 F.3d 278, 293 (1st Cir. 2006) (stating that "the petitioner should have been able to trust the government to turn square corners").

[78] *See Fisher*, 711 F.3d at 469–70.

[79] *See id.*at 467; *see also* Finkelstein, *supra* note 3, at 295 (analyzing the likelihood of conviction in cases where defendants plead guilty, concluding that substantial number of defendants who plead guilty would have been acquitted at trial).

[80] *See Fisher*, 711 F.3d at 469–70 (demonstrating a procedurally weak case wherein a guilty plea was improperly extracted); Barkai, *supra* note 3, at 89–94 (summarizing the importance and efficacy of heightened judicial oversight and inquiry).

[81] *See* Budeiri, *supra* note 70, at 160, 162 (noting that the "mutually beneficial" nature of guilty pleas is often unfulfilled, and noting the permanence of the pleading process); Finkelstein, *supra* note 3, at 295 (concluding via statistical analysis that legally innocent people do in fact plead guilty and unnecessarily convict themselves); *see also* Becker, *supra* note 5, at 779–80 (ana-

The U.S. Supreme Court's jurisprudence concerning criminal pleading procedures, which assumes the guilt of properly represented and informed defendants who plead guilty, exacerbates this problem.[82] In reality, however, even properly informed and represented defendants, though innocent, may nonetheless admit guilt.[83] In this way, the Court's assumption is thus inconsistent with the presumption of innocence, as defendants should not be forced to gamble with their freedom.[84]

This expanded inquiry into the question of "voluntariness" will ensure that the government's actions when it seeks to punish someone will be held to the highest standard.[85] As the court recognized in *Fisher*, the current process of conviction is unfair and should not be allowed.[86] The entirety of the government's case against an individual is inherently tainted when officials lie and manipulate the courts to achieve convictions.[87] Expanding the voluntari-

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lyzing the concept of "voluntariness" in the context of the external pressure present in the plea bargaining process).

[82] *Brady*, 397 U.S. at 758 ("We *would* have serious doubts . . . *if* the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations . . . that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged." (emphasis added)).

[83] *See* Becker, *supra* note 5, at 834–37 (outlining general principles underlying an innocent person's decision to plead guilty). The inducements available to a prosecutor seeking to solidify a plea are varied and almost limitlessly extensive, even including inducements involving less severe treatment of third parties, such as a defendant's spouse. *Id.* at 835. Such inducements call very much into the question the "voluntariness" of such a decision; further, the inherent fallibility of the trial system may not exactly inspire the utmost hope of acquittal in innocent, but unfortunate, defendants. *Id.* at 835–37; *see* Barkai, *supra* note 3, at 96–97.

[84] *See* Barkai, *supra* note 3, at 95–96 (explaining the "protectionist" rationale in the pleading process, whereby the courts are to protect innocent defendants who might still plead guilty for an array of compelling reasons); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L. J. 957, 958 (1989) (illuminating the ambiguity in the guilty plea procedure and confusion practically inherent in the process).

[85] *See* Becker, *supra* note 5, at 841.

[86] *See Fisher*, 711 F.3d at 469 (summing up the general policy concerns underlying the court's decision to vacate Fisher's plea); *Ferrara*, 456 F.3d at 293 (emphasizing the importance of proper government behavior).

[87] *See Fisher*, 711 F.3d at 466. The government cannot claim any prejudice against it if, from the moment Detective Lunsford lied in his affidavit, it had no case against Mr. Fisher; one cannot lose what one never had. *See id.* at 468–69; *cf.* Cheng, *supra* note 15, at 986–87 (positing that when a constitutional bar exists as to a conviction, the government never had a case and, therefore, suffers no cognizable harm when a guilty plea is vacated). At the same time, however, the dissent correctly observed that precedent does not necessitate an expansion of the voluntariness requirement. *See Fisher*, 711 F.3d at 470–71 (Agee, J., dissenting) ("Indeed while the majority avers that its holding is based on *Brady v. United States*, its application of the 'material misrepresentation' standard in this case lacks support in any published case from any court."). Given the current abuses in the system, however, this precedent should now be established. *See* Finkelstein, *supra* note 3, at 311 ("[I]t appears that . . . practices have been used to induce convictions by 'consent' in a significant number of cases in which the protections of the formal system would have precluded

ness requirement beyond prosecutorial misconduct and exculpatory evidence will better achieve justice for defendants, discourage improper police behavior, and preserve the public's faith in the justice system.[88]

CONCLUSION

The Fourth Circuit's reasoning in *United States v. Fisher* is not a mere application of existing precedent. It is, as the court admitted, an "extraordinary" set of facts that led to an extraordinary result: the withdrawal of an otherwise valid guilty plea post-sentencing because of impermissible police conduct. The *Fisher* court illuminates and implicates many long-standing strongholds of the pleading process: the insulation that the government enjoys throughout the pleading process, the difficulty of plea withdrawal, and the uncertainty regarding the implications that result from using the guilty plea as the primary means of conviction. The Fourth Circuit was right not to simply uphold the defendant's plea and instead take a more critical stance. Particularly, the Fourth Circuit was right to critically address the impermissible behavior on the part of the previously insulated investigating officers—an expansion of the long-established precedent that focused only on prosecutorial misconduct. In doing so, the Fourth Circuit expanded the scope of justice and strove to ensure fairness at every level of the criminal procedure process. The Fourth Circuit's criticism and willingness to revise long-established principles will help to shed light into what is otherwise a very murky area of the law.

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a condemnation."); *cf.* Barkai, *supra* note 3, at 145 (arguing for an extension of "accuracy inquiries" to non-felony cases to insure consistently fair pleading processes).

[88] *See Fisher*, 711 F.3d at 466, 470 (noting the possible relevance, but ultimate superflousness, of a defendant's innocence in this context, and emphasizing the importance of public faith in the criminal justice system).