

DEBRA ANN LIVINGSTON, *Circuit Judge*, dissenting:

Until today, *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny represented a safeguard against the miscarriage of justice. In this Circuit – at least until such time as today’s error is corrected – *Brady* now includes, with our imprimatur, the right to recompense for a denial of the opportunity to commit perjury more successfully.

I concur fully in Judge Jacobs’s powerful dissent, which explains how the majority effectively (but unjustifiably) interjects *Heck v. Humphrey*, 512 U.S. 477 (1994), as it relates to convictions obtained after an earlier verdict is set aside for *Brady* error. I write separately to make the point that Poventud’s claim, apart from undermining the basic premises of *Heck v. Humphrey*, also simultaneously distorts *Brady v. Maryland* and its progeny beyond recognition. Disregarding the Supreme Court’s recognition that *Brady* claims “have ranked within the traditional core of habeas corpus and outside the province of § 1983,” *Skinner v. Switzer*, 131 S. Ct. 1289, 1300 (2011), the majority ignores the single fact that Poventud’s guilty plea necessarily defeats his *Brady* claim on the merits by rendering implausible any contention that the undisclosed impeachment evidence is material. The undisclosed evidence (as Poventud’s guilty plea now establishes) could only have been used at trial to

support a perjurious defense. Today's startling conclusion – that in such circumstances, a defendant can nevertheless state a claim for recompense arising from *Brady v. Maryland* – spells serious trouble for future applications of *Brady* in this Circuit.

* * *

The relevant facts are simple, albeit elided in the majority's presentation. First, Poventud's 2006 guilty plea admits Poventud's presence and armed participation in a crime that left Younis Duopo deprived of his money and shot in the neck. Second, this plea, *as the majority acknowledges*, is wholly and diametrically "at odds with [the] alibi" Poventud presented at his 1998 trial, *Maj. Op., ante*, at 29 – a trial in which Poventud took the stand and introduced witnesses falsely to attest that he was elsewhere on the date in question, playing video games. Third, Poventud's § 1983 action, premised on *Brady*, presses but *one* complaint: that Poventud at his 1998 trial was deprived of impeachment evidence he could have used to support his alibi defense by suggesting Duopo was mistaken in identifying him as the robber. Finally, in permitting this § 1983 claim to proceed, the majority concludes that Poventud's guilty plea – notwithstanding that this plea is fundamentally at odds with his alibi defense – poses no obstacle to his *Brady* claim.

This is, indeed, a startling result. A “counseled plea of guilty is an admission of factual guilt so reliable,” the Supreme Court has said, “that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case.” *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) (emphasis in original). The Supreme Court’s *Brady* jurisprudence makes clear, moreover, that constitutional error for *Brady* purposes is *only present* when, considering the undisclosed evidence in light of the record as a whole, there is reasonable doubt.¹ Thus, the Supreme Court said in *United States v. Agurs*, 427 U.S. 97, 112 (1976), that, “if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.” But if this is not the case – “[i]f there is not reasonable doubt about guilt whether or not the additional evidence is considered,” *id.* at 112-13 – no

¹ To be clear, the question in assessing *Brady* materiality is not whether it is more likely than not that a defendant would have been acquitted if the undisclosed evidence had been revealed (or whether, considering this evidence, the proof would have been sufficient). Rather, the question is whether, considering the record as a whole, the undisclosed evidence “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (internal quotation marks omitted); see also *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)) (defining a “reasonable probability” of a different result in terms of “a probability sufficient to undermine confidence in the outcome”). Such is not the case for information that might simply “affect the jury’s verdict,” without sapping confidence in the result. *United States v. Agurs*, 427 U.S. 97, 108 (1976).

constitutional error has occurred. The majority determines, contrary to this authority, that Poventud can make out a *Brady* claim arising from the failure to provide him with impeachment evidence at his 1998 trial even though this undisclosed evidence (as Poventud's guilty plea now establishes) could only have been used to support a perjurious defense. The lack of significant authority in favor of such a surprising result is an indication (and should have been a caution) that something in the majority's analysis is amiss.

That something is a basic fidelity to *Brady*. The majority charges that it is the district court that "misunderstands *Brady*" by "incorrectly presum[ing] that, on the facts of this case, the State could violate Poventud's *Brady* rights only if Poventud is an innocent man." Maj. Op., *ante*, at 29. To be sure, *Brady* can work in favor of the guilty, as well as those wrongly accused, but it is the majority (and not the district court) that misapplies the *Brady* rule. Fashioned as a safeguard against the miscarriage of justice, *see United States v. Bagley*, 473 U.S. 667, 675 (1985), *Brady* imposes a fundamental obligation on the prosecution to disclose evidence for use at trial that is "favorable to [the] accused" and "material either to guilt or to punishment," *Brady*, 373 U.S. at 87. Where nondisclosure of such evidence occurs, regardless whether the undisclosed evidence was intentionally or negligently

withheld (or, indeed, withheld in the absence of *any* fault on the part of the prosecution team), there is constitutional error: as the Supreme Court has said, such error occurs “because of the character of the evidence, not the character of the prosecutor.” *Agurs*, 427 U.S. at 110. The constitutional concern is thus with a guilty verdict at trial in a circumstance in which the nondisclosure of favorable, material evidence “undermines confidence in the outcome,” *Bagley*, 473 U.S. at 678, raising the concern of a possible miscarriage of justice, *see United States v. Coppa*, 267 F.3d 132, 139 (2d Cir. 2001) (noting that the “essential purpose” of *Brady* and its progeny “is to protect a defendant’s right to a fair trial by ensuring the reliability of any criminal verdict against him”).

The majority thus errs, and badly so, in addressing the question whether Poventud may proceed with his § 1983 *Brady* claim without regard to an essential element that Poventud must prove at his civil trial: namely, the materiality of the undisclosed evidence. For as the Supreme Court has repeatedly said, a *Brady* claim is not made out by showing “any breach of the broad obligation to disclose exculpatory evidence.” *See Strickler v. Greene*, 527 U.S. 263, 281 (1999); *see also United States v. Ruiz*, 536 U.S. 622, 628 (2002) (noting that “the Constitution does not require the prosecutor to share all useful information with the defendant”). *Brady* error

occurs only when favorable undisclosed evidence is *material* when considered in light of the record as a whole. For “[i]f there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial,” and *there is no constitutional error*. *Agurs*, 427 U.S. at 112-13; *see also Bagley*, 473 U.S. at 678 (noting that “a constitutional error occurs . . . only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial”).

At least until now, the character of the *Brady* right, focused as it is on the central question of whether the nondisclosure of favorable, material evidence saps confidence in the ultimate determination of guilt at trial, has placed most *Brady* claims “within the traditional core of habeas corpus and outside the province of § 1983.” *Skinner*, 131 S. Ct. at 1300.² The majority’s analysis, however, suggests that § 1983 will hereinafter be available to *any* defendant whose initial conviction is

² The majority states, erroneously, that I argue “that *Skinner v. Switzer*, 131 S. Ct. 1289, 1300 (2011), comprises a general prohibition on *Brady*-based § 1983 claims.” Maj. Op., *ante*, at 28 n.14. I do not. *Skinner* simply recognizes, accurately, that because *Brady* evidence “is, by definition, always favorable to the defendant and material to his guilt or punishment,” and because parties asserting *Brady* violations “generally do seek a judgment qualifying them” for immediate or speedier release, 131 S. Ct. at 1300, *Brady* claims have most often sounded in habeas. My point is merely that the majority’s reformulation of the *Brady* right – a reformulation that dispenses with Poventud’s obligation to prove materiality at his civil trial – changes this calculus for a not insignificant set of cases.

vacated for *Brady* error but who awaits retrial; or pleads guilty after vacatur; or is even convicted of the very same crime *upon* retrial. For in none of these cases, as the majority puts it, would “a favorable judgment in [the] § 1983 action . . . render invalid” any subsequent state court judgment. Maj. Op., *ante*, at 34. And favorable termination, in the majority’s view, is a hoary old requirement associated with malicious prosecution and not *Brady* claims, despite the fact that *Heck* itself involved a *Brady* claim. *See Heck*, 512 U.S. at 479 (stating that Heck’s *pro se* complaint alleged, *inter alia*, that the defendants had “knowingly destroyed evidence which was exculpatory in nature and could have proved [Heck’s] innocence” (internal quotation marks omitted)).

The Supreme Court has held that “impeachment information is special in relation to the *fairness of a trial*,” so that “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.” *Ruiz*, 536 U.S. at 629, 633 (emphasis in original). But the Court has not yet considered a case like this one – where a § 1983 plaintiff seeks *Brady* damages after being convicted at trial, having his conviction vacated for the nondisclosure of impeachment evidence, and then pleading guilty, now solemnly admitting to the very proposition that the undisclosed trial evidence

could have been used to impeach. It has long been understood, however, that “the scope of the government’s constitutional duty” pursuant to *Brady* – “and, concomitantly, the scope of a defendant’s constitutional right – is ultimately defined retrospectively.” *Coppa*, 267 F.3d at 140. And this is enough to doom Poventud’s § 1983 claim.

Poventud’s guilty plea, establishing (as it does) that the undisclosed impeachment evidence about which Poventud complains could only have been used by him at trial to impeach Duopo’s *accurate* identification of Poventud as his assailant, forecloses the possibility that Poventud’s *Brady* claim can succeed. This is not to excuse the conduct of police in failing to provide Poventud with the information at trial that Duopo, from his hospital bed, first identified Poventud’s brother as the assailant, before Poventud was a suspect at all.³ Poventud’s trial conviction was vacated on this ground, and properly so. But Poventud has now solemnly admitted that he committed the crime that on March 6, 1997, at about 8:40 in the evening, left Younis Duopo in the area of Oliver Place and Marion Avenue in

³ As Judge Jacobs’s dissent accurately states, Poventud’s brother became a suspect when police recovered his photo identification from a wallet found in Duopo’s cab. Suspicion focused on Poventud when police learned that his brother was in prison on the day of the crime.

the Bronx, bleeding from a gunshot wound. Poventud's guilty plea establishes, as a matter of law, that he was the armed assailant and that Duopo was not mistaken in identifying him – in short, that the undisclosed impeachment evidence is utterly immaterial. Thus, even if Poventud's § 1983 claim were not barred by *Heck* – and it is – it should have been dismissed on the pleadings. For Poventud, having admitted in his guilty plea to the truth of what the undisclosed evidence *could only have helped him falsely deny*, cannot possibly allege the elements of a cognizable *Brady* claim under *any* pleading standard. *See* Fed. R. Civ. P. 12(b)(6); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (stating that a complaint should be dismissed if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (rejecting *Conley* in favor of the plausibility standard).

The majority avoids this conclusion by reading materiality out of a *Brady* claim – by suggesting, inexplicably, that whenever favorable evidence goes undisclosed, and the defendant is convicted at trial, the State has *ipso facto* failed to prove guilt beyond a reasonable doubt and a *Brady* violation has been established.⁴

⁴ The majority also obliquely suggests, without explanation, that materiality might be shown here by virtue of the fact that Poventud pled guilty to a lesser included offense and not to the same charges on which he was convicted at trial. *See* Maj. Op., *ante*, at 30

The elements of a *Brady* claim, however, are well settled and require *both* the nondisclosure of favorable evidence and a showing that the undisclosed evidence is *material* – that *the undisclosed evidence* creates a reasonable doubt as to guilt or punishment, considering the record as a whole. *See, e.g., Alexander v. McKinney*, 692 F.3d 553, 556 (7th Cir. 2012) (“In order to bring a *Brady* claim [under § 1983], a plaintiff must demonstrate that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material, that is, there was a reasonable probability that prejudice ensued.”); *accord Smith v. Almada*, 640 F.3d 931, 939 (9th Cir. 2011); *Ambrose v. City of New York*, 623 F. Supp. 2d 454, 467 (S.D.N.Y. 2009). Poventud, having admitted in his guilty plea that he *was* present and that he participated in the crime, cannot at his § 1983 trial contend that the undisclosed impeachment evidence raises a question as to these very propositions. In short, he cannot establish materiality as a matter of law.

Judge Lynch, in his concurrence, similarly disregards the element of *Brady* materiality, asserting that *Brady* damages should be awarded to Poventud “for the

n.17. The majority is correct that the nondisclosure of favorable evidence *material to punishment* constitutes *Brady* error. *See Brady*, 373 U.S. at 87. But here, the undisclosed impeachment evidence is not material to punishment: it goes solely to the question whether Duopo’s identification of Poventud as one of the robbers was accurate – in short, to the question whether Poventud committed the crime at all.

fact that Poventud lost the opportunity to be acquitted of a crime that he may very well have committed because the rules were not followed” at the trial that preceded his guilty plea. Concurring Op. of Judge Lynch, *ante*, at 12. Poventud’s plea, he argues, should not preclude such damages because “humankind lacks the capacity to obtain absolute knowledge of the truth about past events.” *Id.* at 13. The truth, he notes (in an observation perhaps made once or twice before), “is elusive, and can never be known with certainty.” *Id.* at 18. Judge Lynch charges that the dissenters, apparently forgetting “the limited scope of human knowledge,” “appear to insist that [Poventud’s] guilty plea represents not just a legal truth, but an existential one.” *Id.* at 13, 18.

With respect, it is the majority that refuses to give Poventud’s guilty plea its ordinary, *legal* effect. Perhaps *because* cognizant of the limits of human knowledge, the Supreme Court has cautioned that a guilty plea “is a grave and solemn act to be accepted only with care and discernment.” *Brady v. United States*, 397 U.S. 742, 748 (1970). “Central to the plea,” the Court has said, “and the foundation for entering judgment against the defendant is the defendant’s admission in open court that he committed the [charged] acts He thus stands as a witness against himself.” *Id.*; *see also Tollet v. Henderson*, 411 U.S. 258, 267 (1973) (noting that a criminal defendant

who has solemnly admitted his guilt in open court “may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea”).

Judge Lynch argues that Poventud’s guilty plea is no more reliable than his alibi testimony at trial. But he cites no authority (and there is none) for the proposition that judges may pick and choose which guilty pleas should be afforded their ordinary legal effect.⁵ As a *legal* matter, moreover (and without any need to claim omniscience), only one of Poventud’s conflicting accounts of where he was and what he was doing on the night of March 6, 1997, is part of an outstanding criminal judgment that is binding upon him in other proceedings – including for purposes of collateral estoppel in a civil suit such as this. *See Allen v. McCurry*, 449 U.S. 90, 102-04 (1980) (holding that collateral estoppel precludes a § 1983 plaintiff from relitigating facts established in a prior criminal conviction).

In the circumstances of this case, in which Poventud’s guilty plea affirms the truth of what the impeachment evidence could only have helped him deny at trial,

⁵ Ironically, Judge Lynch’s concurrence also makes apparent what the majority refuses to admit in its disavowal of the *Heck v. Humphrey* bar: namely, that Poventud’s effort to prove materiality at his § 1983 trial will, of necessity, involve the impugning of his extant conviction.

Poventud's plea renders him unable to prove materiality at his § 1983 trial. Because a counseled guilty plea, where voluntary and intelligent, "removes the issue of factual guilt from the case," *Menna*, 423 U.S. at 62 n.2, the omitted evidence no longer creates a reasonable doubt that did not otherwise exist. *See Agurs*, 427 U.S. at 112-13 (noting that omitted evidence "must be evaluated in the context of the entire record" and observing that where such evidence raises no reasonable doubt, constitutional error has not occurred). Poventud cannot establish materiality as a matter of law. And the majority avoids this conclusion only by dispensing with this element of a *Brady* claim.

Judge Lynch argues that "simple justice" requires the "common sense, rough justice" result the majority reaches here. Concurring Op. of Judge Lynch, *ante*, at 9, 11. Poventud obtained his rough justice, however, when the state court, on a record that did not include Poventud's subsequent admission to participation in the crime, properly determined that the nondisclosure of Duopo's initial misidentification of Poventud's brother required vacatur of Poventud's trial conviction and remand for a new trial. Poventud's indeterminate sentence of 10 to 20 years was set aside. Poventud, however, has now solemnly admitted that he was the robber – that Duopo's trial identification was accurate and, in effect, that Poventud's alibi defense

was perjurious. It is neither “common sense” nor “justice” to conclude that a counseled defendant who negotiates a guilty plea after the vacatur of a trial conviction for *Brady* error, admitting the truth of what the undisclosed evidence could only have been used at trial to deny, may thereafter impugn that negotiated plea in a § 1983 suit in which he stridently asserts both his innocence and his right to substantial compensation. By refusing to afford Poventud’s plea its ordinary *legal* effect, the majority, contrary to *Brady* and its progeny, adopts “a constitutional standard of materiality [that] approaches the ‘sporting theory of justice’ which the Court expressly rejected in *Brady*.” *Agurs*, 427 U.S. at 108.

The majority charges that the dissenters “misunderstand” *Lockhart v. Fretwell*, 506 U.S. 364 (1993). Maj. Op., *ante*, at 29 n.16. In fact, it is the majority that refuses to take the wise counsel of that case, which makes apparent that materiality must be assessed retrospectively – and here, requires taking Poventud’s guilty plea into account. *Fretwell* involved an ineffective assistance claim. As Judge Jacobs points out, the prejudice component of such claims, as first articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), requires courts, in determining whether a defense lawyer’s conduct has deprived a defendant of his Sixth Amendment rights, to undertake a retrospective inquiry – as with *Brady* – into whether an asserted error

has produced an unreliable result at trial. In *Fretwell*, the Supreme Court declined to find constitutional error in trial counsel's failure to raise an objection that, as Justice O'Connor said in her concurrence, "very well may have been sustained had it been raised at trial" but which, by the time the Court took up the question, was "wholly meritless under current governing law." *Fretwell*, 506 U.S. at 374. The Court determined that it was not appropriate to assess the effectiveness of counsel "under the laws existing at the time of trial" because such an approach would "grant the defendant a windfall to which the law does not entitle him" and be inconsistent with the focus of *Strickland*'s prejudice component on the reliability and fairness of the ultimate result. *Id.* at 369-71 (majority opinion).

Similarly here, Poventud's guilty plea, attesting to the accuracy of Duopo's identification of Poventud as his assailant, forecloses Poventud's *Brady*-based § 1983 claim by establishing the immateriality of the undisclosed evidence as a matter of law. Vacatur of Poventud's trial conviction was required because, prior to Poventud's plea, the nondisclosure of the impeachment material created a reasonable doubt as to the accuracy of Duopo's identification. *See Agurs*, 427 U.S. at 112 ("[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."). Poventud's subsequent guilty

plea, however, establishes the immateriality of the nondisclosure categorically. And contrary to the majority's position, there is no constitutional error from the nondisclosure of immaterial evidence – evidence that does nothing more than increase a defendant's odds at trial, irrespective of "our overriding concern with the justice of the finding of guilt." *Id.* For, once again, "[t]hat statement of a constitutional standard of materiality approaches the 'sporting theory of justice' which the Court expressly rejected in *Brady*." *Id.* at 108.

* * *

As Judge Jacobs's principal dissent makes clear, this case is easily resolved with a faithful application of *Heck*. For while the majority assures us that *Heck* does not apply because "a favorable judgment in this § 1983 action would not render invalid" Poventud's "plea-based judgment," Maj. Op., *ante*, at 34, this is wholly beside the point. *Heck* does not bar § 1983 actions that invalidate state convictions, but those where success in a plaintiff's damages suit would necessarily *impugn* his extant state conviction, *implying* its invalidity. *See Wallace v. Kato*, 549 U.S. 384, 393 (2007) (noting that the *Heck* bar applies where § 1983 claim would necessarily "impugn" an extant conviction). Poventud cannot prove the elements of his § 1983 claim – cannot prove, in Judge Lynch's words, that the failure to provide Poventud

with the omitted impeachment material *corrupted* the trial's fact-finding process – without establishing that the nondisclosed impeachment evidence is *material*. To do this, Poventud must establish that considering the record as a whole, the omitted impeachment material creates a reasonable doubt as to whether he was Duopo's assailant. *See Agurs*, 427 U.S. at 112 (noting that materiality has been established “if the omitted evidence creates a reasonable doubt that did not otherwise exist,” considering the record as a whole). In other words, he must draw into question – impugn – the veracity of his own plea. In such circumstances, the *Heck* bar clearly applies.

Even if this were not the case, however (and it certainly is), Poventud's *Brady* claim still fails on the merits. Judge Lynch says that “[n]o one who was not there will ever know for certain whether Marcos Poventud participated in the robbery of Younis Duopo.” Concurring Op. of Judge Lynch, *ante*, at 12-13. But affording Poventud's guilty plea its ordinary legal effect requires no such certitude (existential or otherwise), but only that we take Poventud himself at his solemn word. Poventud has stated, in entering a guilty plea, that he committed the crime. He could have continued to deny it and, if successful in his state court proceeding, thereafter sued for damages pursuant to § 1983. Having chosen to plead guilty,

however, Poventud has also pled himself out of his *Brady*-based § 1983 claim by establishing the utter immateriality of the impeachment evidence that was not produced at trial. In holding otherwise – in permitting Poventud to have it both ways – the majority adopts a “sporting chance” approach to *Brady* materiality that the Supreme Court has expressly rejected. *See Brady*, 373 U.S. at 90 (rejecting such an approach as beneath “the dignity of a constitutional right”).

As the majority acknowledges, this Court convened *en banc* to decide a different issue from the one it reaches today. With regret, I concur in Judge Jacobs’s forecast that the majority’s effort here with respect to the issue we *do* decide will prove nearly impossible for district courts faithfully to apply. Our *Heck* jurisprudence will suffer. So will our efforts to identify – and rectify – *Brady* error.

Until today, *Brady* and its progeny represented a safeguard, however imperfect, against the miscarriage of justice. *See Bagley*, 473 U.S. at 675 (noting that *Brady*’s purpose is “to ensure that a miscarriage of justice does not occur”); *accord Agurs*, 427 U.S. at 112 (observing that materiality standard “must reflect our overriding concern with the justice of the finding of guilt”). In this Circuit – at least until such time as today’s error is corrected – *Brady* is instead the right to recompense for being denied the opportunity to commit perjury more successfully.