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Appellate Review of Double Jeopardy Claims in the Guilty Plea Context

Augustine V. Cheng

APPELLATE REVIEW OF DOUBLE JEOPARDY CLAIMS IN THE GUILTY PLEA CONTEXT

> [C]onstitutional defenses in criminal procedure, like other constitutional rights, are defined by a balance between the interest of the individual and the interest of the state: in this case, we balance the interest of the defendant in asserting the values protected by the particular constitutional defense at issue against the interest of the state in preserving its opportunity to obtain a conviction at trial.*

INTRODUCTION

In a series of cases known as the *Brady* trilogy,[1] the Supreme Court recognized the state's interest in the finality of criminal convictions,[2] holding that a plea of guilty by a defendant waives his right to collaterally attack his conviction on the ground that it was constitutionally tainted.[3] In subsequent decisions, however, the Court indicated that despite the state's interest in finality, a defendant retains the right to assert certain constitutional defenses following his plea of guilty.[4]

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* Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1238 (1977).

1. Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). These three companion cases, which affirmed the practice of plea bargaining, *see infra* note 20 and accompanying text, are commonly referred to as the "*Brady* trilogy."

2. *See infra* note 19 and accompanying text.

3. *See, e.g.*, *Brady*, 397 U.S. at 756-57 (knowing and voluntary plea of guilty "does not become vulnerable because later judicial decisions indicate that the plea rested on [an unconstitutional death penalty statute]"); *McMann*, 397 U.S. at 771 ("[A] defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus."); *Parker*, 397 U.S. at 794-95 (guilty plea valid even though the plea was induced by an unconstitutional death penalty statute and resulted from a prior coerced confession). For discussion of the *Brady* trilogy, see *infra* note 15.

A plea of guilty to an offense waives several fundamental constitutional rights, including the right to be tried by a jury, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond a reasonable doubt. *See* Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J., concurring); Bishop, *Waivers In Pleas of Guilty*, 60 F.R.D. 513, 524 (1974). A plea of guilty also waives all nonjurisdictional defects in the criminal proceeding. *See, e.g.*, United States v. Wray, 608 F.2d 722, 724 (8th Cir. 1979) (denial of jury trial), *cert. denied*, 444 U.S. 1048 (1980); Stanley v. Wainwright, 604 F.2d 379, 380 n.1 (5th Cir. 1979) (constitutional violations relating to events that occurred prior to the entry of plea), *cert. denied*, 447 U.S. 925 (1980); Wallace v. Heinze, 351 F.2d 39, 40 (9th Cir. 1965) (unreasonable searches), *cert. denied*, 384 U.S. 954 (1966); United States *ex rel.* Glenn v. McMann, 349 F.2d 1018, 1019 (2d Cir. 1965) (coerced confession), *cert. denied*, 383 U.S. 915 (1966).

Before a court can accept a plea of guilty, the judge must determine that the plea is knowing, voluntary, and intelligent. *See* Fed. R. Crim. P. 11(d); *see also* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (record in a guilty plea case must contain "an affirmative showing that [the plea] was intelligent and voluntary"). The judge, however, need not accept the plea of guilty. *See* Santobello v. New York, 404 U.S. 257, 262-63 (1971); North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970).

4. *See, e.g.*, Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam) (double

One such defense is the constitutional right not to be placed in double jeopardy.[5] Although most courts agree that double jeopardy is a constitutional right that can be waived,[6] the Supreme Court held in *Menna v. New York*[7] that a waiver of a double jeopardy claim cannot be effected merely by a plea of guilty.[8] The *Menna* Court, however, left open the question how an appellate court should review a double jeopardy claim when the defendant has pleaded guilty to the indictment that he later claims placed him in double jeopardy.[9] This issue often arises in cases in which the defendant pleads guilty to two indictments charging him with conspiracy and subsequently attacks the second conviction on double jeopardy grounds.[10]

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jeopardy); Blackledge v. Perry, 417 U.S. 21, 30 (1974) (due process); *see also infra* notes 23-37 and accompanying text.

5. *See infra* notes 30-34 and accompanying text. The double jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The clause provides three categories of protection: it "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165 (1977) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). The clause's protections have been extended to state proceedings. *See* Benton v. Maryland, 395 U.S. 784, 787 (1969)).

6. *See, e.g.*, United States v. Herzog, 644 F.2d 713, 716 (8th Cir.), *cert. denied*, 451 U.S. 1018 (1981); Brown v. Maryland, 618 F.2d 1057, 1059 (4th Cir.), *cert. denied*, 449 U.S. 878 (1980); Launius v. United States, 575 F.2d 770, 772 (9th Cir. 1978); United States v. Perez, 565 F.2d 1227, 1232 (2d Cir. 1977); United States v. Wild, 551 F.2d 418, 424-25 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977); United States v. Young, 503 F.2d 1072, 1074-75 (3d Cir. 1974); United States v. Buonomo, 441 F.2d 922, 924 (7th Cir.), *cert. denied*, 404 U.S. 845 (1971). The Supreme Court has declined to hold that a double jeopardy claim may never be waived. Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam). Moreover, in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court suggested that double jeopardy can be waived by a knowing and voluntary waiver. *Id.* at 237-38; *see also* Blackledge v. Perry, 417 U.S. 21, 35 (1974) (Rehnquist, J., dissenting) (double jeopardy may be waived).

7. 423 U.S. 61 (1975) (per curiam).

8. *Id.* at 62-63 n.2.

9. *See infra* notes 54-59 and accompanying text.

10. *See, e.g.*, United States v. Atkins, 834 F.2d 426 (5th Cir. 1987); United States v. Broce, 781 F.2d 792 (10th Cir. 1986) (en banc), *cert. granted*, 108 S. Ct. 1073 (1988); Kerrigan v. United States, 644 F.2d 47 (1st Cir. 1981). Due to its "peculiar characteristics," the offense of conspiracy presents "special [double jeopardy] problems." United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988). Using "artful pleading," *id.* at 1190, the state can bring successive prosecutions against the defendant "for what is in reality the same criminal conspiracy, simply by selecting a different set of overt acts for each indictment." *Id.* at 1188. "[T]he essence of [conspiracy] is an agreement to commit an unlawful act." Iannelli v. United States, 420 U.S. 770, 777 (1975). The precise bounds of the conspiracy are determined by reference to the agreement and its objectives. *See* United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1978). Assessing the validity of a double jeopardy claim in a conspiracy case is much like putting together a "jigsaw puzzle." *Atkins*, 834 F.2d at 432. A single conspiracy "may be established by different aggregations of proof . . . [and] may continue for an extended period of time and involve the commission of numerous criminal acts." *Ragins*, 840 F.2d at 1188. In the conspiracy context, most circuits adopt flexible, multiprong "totality of the circumstances" tests to determine the number of agreements, and, thus, the number of conspiracies, involved in a

When the defendant raises his double jeopardy claim before commencement of the second trial, an appellate court's review of that claim is not limited to the four corners of the indictment.[11] When the defendant raises his double jeopardy claim after he has pleaded guilty to a second indictment, however, the circuit courts of appeals disagree over the effect of the guilty plea on the scope of a court's review of the double jeopardy claim. The Court of Appeals for the First Circuit limits review to the facts and theories stated in the government's indictment,[12] while the Courts of Appeals for the Fifth and Tenth Circuits hold that a court, in assessing the merits of a double jeopardy claim, may look beyond the contents of the second indictment.[13]

This Note examines the standard for reviewing a double jeopardy claim in the guilty plea context. Part I of this Note traces the development of the waiver doctrine in the context of the Supreme Court's guilty plea cases and identifies the two underlying concerns expressed in those cases: the state's interest in the finality of criminal convictions and the defendant's interest in asserting constitutional claims. Part II recommends a standard of review that balances the policies enunciated in the Supreme Court's guilty plea cases. This Part argues that none of the circuit courts of appeals that have considered the effect of a plea of guilty on review of a double jeopardy claim offer a satisfactory rationale and holding given the Supreme Court's policies. In addressing these con-

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given case. *See, e.g.*, United States v. Rivera, 844 F.2d 916, 925 (2d Cir. 1988); *Atkins*, 834 F.2d at 432-33; United States v. MacDougall, 790 F.2d 1135, 1144 (4th Cir. 1986); *Kerrigan*, 644 F.2d at 49. The Court of Appeals for the Second Circuit, for example, focuses on eight factors in determining whether the two offenses charged are the same offense:

> (1) The criminal offenses charged in successive indictments; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies.

Rivera, 844 F.2d at 925.

11. Consider the following hypothetical. Suppose that on January 1, 1988, the defendant is charged with conspiracy to sell heroin with A, B, and C throughout 1987. He is tried and convicted. On June 1, 1988, the defendant is charged with conspiracy to sell heroin with E, F, and G in April, 1987. If the defendant raises a double jeopardy claim at this point, before the trial, then he bears the initial burden of proving a nonfrivolous claim while the government bears the ultimate burden of proving that the indictment charged separate conspiracies. *See, e.g.*, United States v. Atkins, 834 F.2d 426, 434 (5th Cir. 1987); United States v. Jabara, 644 F.2d 574, 576 (6th Cir. 1981); United States v. Inmon, 568 F.2d 326, 331-32 (3d Cir. 1977), *aff'd on reh'g.*, 594 F.2d 352 (3d Cir.) (per curiam), *cert. denied*, 444 U.S. 859 (1979). In such a case, a court may look beyond the indictment in its review of the defendant's double jeopardy claim. *See, e.g.*, United States v. Persico, 832 F.2d 705, 712 (2d Cir. 1987) (courts may conduct evidentiary hearings); *Atkins*, 834 F.2d at 433 (courts may turn to the indictment, trial testimony, live testimony, investigative documents, signed pretrial statements, transcripts of telephone calls, assorted business records).

12. *See* Kerrigan v. United States, 644 F.2d 47, 49 (1st Cir. 1981).

13. *See* United States v. Atkins, 834 F.2d 426, 439 (5th Cir. 1987); United States v. Broce, 781 F.2d 792, 796 (10th Cir. 1986) (en banc), *cert. granted*, 108 S. Ct. 1073 (1988).

cerns, the circuit courts fail to balance properly the state's interest in finality against the defendant's right in asserting his double jeopardy claim notwithstanding his plea of guilty. This Note argues that unless the state has relied on the defendant's guilty plea to its detriment, a court should look beyond the second indictment in its review of a double jeopardy claim.

I. WAIVER OF CONSTITUTIONAL RIGHTS BY A PLEA OF GUILTY

A. *The* Brady *Trilogy*

In the *Brady* trilogy,[14] the Supreme Court held that a defendant's guilty plea may operate to waive his right to raise constitutional defenses to his conviction, even though the defendant was unaware of these defenses at the time of his plea.[15] In a subsequent case, *Tollett v. Henderson*,[16] the Court explained that "a guilty plea represents a break in the

14. Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). For scholarly criticism and analysis of the *Brady* trilogy, see Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. Colo. L. Rev. 1 (1975), and Note, *The Guilty Plea as a Waiver of "Present But Unknowable" Constitutional Rights: The Aftermath of the* Brady *Trilogy*, 74 Colum. L. Rev. 1435 (1974).

15. The *Brady* trilogy essentially involved two issues: the validity of a guilty plea induced by an unconstitutional death penalty statute and the validity of a guilty plea induced by a coerced confession. In *Brady* and *Parker*, the defendants had pleaded guilty in part to avoid the possibility of a death sentence. Brady v. United States, 397 U.S. 742, 758 (1970); Parker v. North Carolina, 397 U.S. 790, 792-93 (1970). The *Brady* Court held that although such a death penalty provision might "needlessly penalize the assertion of a constitutional right," 397 U.S. at 746 (quoting United States v. Jackson, 390 U.S. 570, 583 (1968)), and is therefore unconstitutional, *id.*, a plea of guilty precludes a collateral attack upon the conviction. *Id.* at 757 (a knowing and voluntary plea of guilty "does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise"); *see also Parker*, 397 U.S. at 795 ("an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial").

McMann addressed whether a defendant may challenge the validity of his guilty plea on the ground that it was induced by a prior coerced confession. McMann v. Richardson, 397 U.S. 759, 760 (1970). The Court concluded that when a defendant's plea of guilty is based on "reasonably competent advice," a defendant is precluded from attacking his plea on the ground that his counsel misjudged the admissibility of the confession. *Id.* at 770-71; *see also Parker*, 397 U.S. at 797-98.

Although a defendant, after entering a voluntary and intelligent plea of guilty, may not collaterally attack his conviction on the ground that the conviction was constitutionally tainted, he may attack the voluntary and intelligent nature of the plea. *McMann*, 397 U.S. at 772; *see also* Tollett v. Henderson, 411 U.S. 258, 267 (1973). In addition, states may legislate that certain constitutional claims survive a plea of guilty. Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975) (upholding New York statute that allowed some constitutional claims to survive a guilty plea); *see, e.g.*, Cal. Penal Code § 1538.5 (m) (West Supp. 1988).

16. 411 U.S. 258 (1973). In *Tollett*, the defendant, a black man, pleaded guilty to first degree murder. *Id.* at 259. Twenty-five years later, he petitioned for habeas corpus, claiming that he was indicted by an unconstitutionally composed grand jury. *Id.* at 259-60. Although it conceded this constitutional infirmity, the Supreme Court, relying on the

chain of events which has preceded it in the criminal process."[17] Thus, where a criminal defendant solemnly has admitted his guilt in open court, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."[18]

The *Brady* trilogy founds the waiver-by-guilty plea doctrine on concerns about the finality of criminal convictions and efficiency in the criminal process.[19] These decisions affirm the plea bargaining process,[20] recognizing that the plea bargain advances the state's interest in the finality of criminal convictions and conserves prosecutorial resources, in exchange for which the defendant receives less than the maximum penalty.[21] Thus, a defendant who pleads guilty is precluded from undermining the "mutuality of advantage" by raising constitutional claims in collateral attacks upon his conviction.[22]

B. Blackledge v. Perry: *The "Haling" Limitation*

Despite the state's interest in finality, however, *Blackledge v. Perry*[23] holds that the Constitution mandates that some constitutional claims

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Brady trilogy, held that a voluntary and intelligent plea of guilty forecloses any inquiry into the defendant's grand jury defense. *Id.* at 266-67.

17. *Id.* at 267. A guilty plea waives the right to challenge a conviction based on constitutional infirmities in the proceeding, even if the case would have been decided differently had the defendant gone to trial. *Compare Tollett*, 411 U.S. at 266 (guilty plea waives claim of discrimination in grand jury selection process) *with* Rose v. Mitchell, 443 U.S. 545, 551 (1979) (exclusion of racial groups from grand jury invalidates conviction).

18. *Tollett*, 411 U.S. at 267.

19. *See* McMann v. Richardson, 397 U.S. 759, 773 (1970); *id.* at 786 (Brennan, J., dissenting); Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1070 (1977); Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193, 195 (1977); Saltzburg, *Pleas of Guilty and The Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 Mich. L. Rev. 1265, 1274 (1978); Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1235 (1977); Note, *supra* note 14, at 1439; *see also* Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("advantages [of the plea bargaining system] can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality"); Simons, *Rescinding a Waiver of a Consitutional Right*, 68 Geo. L.J. 919, 940 (1980) ("guilty plea marks the point after which the government is *entitled* to rely on the defendant's waiver").

20. Brady v. United States, 397 U.S. 742, 749-53 (1970); Cover and Aleinikoff, *supra* note 19, at 1069; Spritzer, *Criminal Waiver, Procedural Defaults, and the Burger Court*, 126 U. Pa. L. Rev. 473, 491 (1978); Westen, *supra* note 19, at 1216 n.2. The *Brady* Court pointed out that the "State to some degree encourages pleas of guilty." 397 U.S. at 750.

21. *Brady*, 397 U.S. at 752-53. *Brady* states that "both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law." *Id.* at 752. The defendant limits his exposure to the maximum penalty while avoiding the practical burdens of a trial. *Id.* The State achieves the objectives of punishment while conserving "scarce judicial and prosecutorial resources." *Id.* The opinion acknowledges that this "mutuality of advantage" is the reason the majority of "convictions in this country rest on pleas of guilty." *Id.*

22. *Id.* at 752-53.

23. 417 U.S. 21 (1974).

survive a plea of guilty.[24] *Blackledge* limits the *Brady* trilogy principle by holding that claims that go "to the very power of the State to bring the defendant into court" survive a plea of guilty.[25] The Court explained that "the nature of the underlying constitutional infirmity" in *Blackledge* differed from those in the *Brady* trilogy and the *Tollett* case.[26] In *Blackledge*, the defendant was asserting "the right not to be haled into court at all."[27] In other words, "[t]he very initiation of the proceedings . . . operated to deny him due process of law."[28] Thus, the Constitution mandated that Perry's right to raise in a collateral attack constitutional defenses to his conviction was not waived by his plea of guilty.[29]

The Supreme Court, in *Menna v. New York*,[30] extended the *Blackledge* rule to double jeopardy claims,[31] permitting a defendant to assert a double jeopardy claim on appeal, despite his guilty plea.[32] It held that where the Constitution prohibits a state from "haling a defendant into court on a charge,"[33] a conviction on that charge must be overturned, "even if the conviction was entered pursuant to a counseled plea of guilty."[34]

The *Menna* Court pointed out that the *Brady* trilogy and *Tollett* case

24. *Id.* at 31 (holding that due process defense survives a plea of guilty).

25. 417 U.S. at 30. In *Blackledge*, an inferior court in North Carolina convicted the defendant, Perry, of the misdemeanor of assault with a deadly weapon. *Id.* at 22. Perry filed an appeal in a court of general jurisdiction for a trial de novo. *Id.* Under North Carolina law, N.C. Gen. Stat. §§ 7A-290, 15-177.1 (1969), Perry, who was convicted in the state district court, had an absolute right to a trial de novo in the state superior court. *Blackledge*, 417 U.S. at 22. Before the trial de novo, the state " 'upp[ed] the ante,' " *id.* at 28, charging Perry with the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury. *Id.* at 23. Perry pleaded guilty and subsequently attacked his felony indictment on double jeopardy and due process grounds. *Id.* The Supreme Court held that the state, in response to Perry's appeal, had violated his due process rights by vindictively bringing a more serious charge against him. *Id.* at 28-29; *see also* North Carolina v. Pearce, 395 U.S. 711, 724 (1969) ("imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law"). Moreover, the Court held that Perry's guilty plea did not waive his right to attack collaterally his conviction on due process grounds through a writ of habeas corpus. *Blackledge*, 417 U.S. at 31. The Court explained that, like the double jeopardy clause, the due process clause at times "prevent[s] a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." *Id.* (quoting Robinson v. Neil, 409 U.S. 505, 509 (1973)). The *Blackledge* Court, in deciding the case on due process grounds, however, did not reach the defendant's double jeopardy claim. *Id.*

26. *Id.* at 30. The *Brady* trilogy and *Tollett* case involved what the Court calls "antecedent constitutional violations" or "deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* at 29-30 (quoting Tollett v. Henderson, 411 U.S. 258, 266-67 (1973)).

27. 417 U.S. at 30.

28. *Id.* at 30-31.

29. *Id.* at 31.

30. 423 U.S. 61 (1975) (per curiam).

31. *Id.* at 62 (citing *Blackledge*).

32. *Id.*

33. *Id.*

34. *Id.*

do not hold that counseled pleas of guilty waive all constitutional infirmities in the proceeding.[35] Instead, these cases merely stand for the proposition that a voluntary and intelligent plea of guilty is a conclusive admission of factual guilt that renders "irrelevant" those constitutional violations that relate to the establishment of factual guilt.[36] The guilty plea does not bar, however, those claims that prevent the state from obtaining a valid conviction regardless of the defendant's factual guilt.[37]

C. *The* Blackledge *Standard: The Concern with Putting the State to its Proof*

The *Blackledge* decision is difficult to reconcile with the Supreme Court's guilty plea cases. It has puzzled many commentators who struggle to understand the policy justifying the proposition that some constitutional claims survive guilty pleas while others do not.[38] One possible

35. *Id.* at 62-63 n.2.

36. The Court explained in a footnote that

> [t]he point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.

Id. at 62-63 n.2 (emphasis in original). The Court obviously meant "consistent" rather than "inconsistent," since a plea of guilty, which is a conclusive admission of factual guilt, renders "irrelevant" constitutional violations that conflict with the valid establishment of factual guilt. Westen, *supra* note 19, at 1223 n.21; *see also* Saltzburg, *supra* note 19, at 1278 n.69. For a discussion of the problems with the *Menna* Court's attempt to explain the *Brady* trilogy in its footnote, see *infra* note 38.

37. Menna v. New York, 423 U.S. 61, 62-63 n.2 (1975) (per curiam); *see* Abney v. United States, 431 U.S. 651, 659 (1977) ("[T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue . . . [of] whether or not the accused is guilty of the offense charged.").

38. *See, e.g.*, Alschuler, *supra* note 14, at 13-21; Saltzburg, *supra* note 19, at 1266; Westen, *supra* note 19, at 1219-26. Indeed, the Court itself has trouble applying the *Blackledge* standard. *See* Alschuler, *supra* note 14, at 19 (pointing out that the Court "has not found a meaningful device for separating claims that should survive a guilty plea from claims that should not").

The Supreme Court's own attempt to distinguish *Blackledge* from the *Brady* trilogy and *Tollett* case fails. *See* Alschuler, *supra* note 14, at 14-16; Saltzburg, *supra* note 19, at 1276-79; Westen, *supra* note 19, at 1227-35. For example, the *Blackledge* Court explained that none of the underlying claims in *Tollett* and the *Brady* trilogy concerned the power of the state to "hale" a defendant into court. Blackledge v. Perry, 417 U.S. 21, 30 (1974). This explanation is unsatisfactory, however, for as Justice Rehnquist correctly pointed out in his *Blackledge* dissent, the state in *Tollett* also had no "power" to bring a defendant into court without a valid grand jury indictment. *Id.* at 35 (Rehnquist, J., dissenting); *see* Westen, *supra* note 19, at 1221 (pointing out that "*every* constitutional defense should survive forfeiture because every defense that is asserted in a timely fashion and left uncorrected denies the state the 'power' to convict"); *see also* Saltzburg, *supra* note 19, at 1276.

The *Menna* Court's attempt to explain the *Blackledge* decision by distinguishing between constitutional defenses that relate to the establishment of factual guilt and those that do not also fails. *See* Saltzburg, *supra* note 19, at 1279; Westen, *supra* note 19, at

explanation for the disparate treatment of these claims is that the *Blackledge* decision attempts to balance the state's interest in finality with the defendant's interest in asserting certain constitutional defenses notwithstanding his plea of guilty.[39] *Blackledge* effects this balance by identifying "those cases in which to set aside a conviction based on a guilty plea places the state in no worse a position with respect to its ability to obtain a valid conviction against the defendant at trial than it occupied before entry of the plea."[40] In other words, the test of whether a defendant loses his constitutional claims by pleading guilty is whether the state has relied to its detriment on the finality of the defendant's plea.[41]

1223, 1232. In *Tollett*, for example, the defendant asserted a constitutional claim independent of his factual guilt. *See* Westen, *supra* note 19, at 1223 ("the right of the accused to be charged by a process that is free from racial discrimination is a right that exists without regard to whether the defendant himself is guilty").

One theory suggests that the Court in *Blackledge* established a "jurisdictional" standard to explain the distinction between waivable and nonwaivable claims. *See* United States v. Broce, 781 F.2d 792, 801-02 (10th Cir. 1986) (en banc) (Seymour, J., concurring in part and dissenting in part), *cert. granted*, 108 S. Ct. 1073 (1988); Alschuler, *supra* note 14, at 19; Rubin, *Toward a General Theory of Waiver*, 28 U.C.L.A. L. Rev. 478, 501 (1981); Uviller, *Pleading Guilty: A Critique of Four Models*, 41 Law & Contemp. Probs. 102, 112-13 (Winter 1977). As most commentators point out, however, a "jurisdictional" standard does not adequately explain the *Blackledge* decision. *See, e.g.*, Alschuler, *supra* note 14, at 19; Westen, *Forfeiture by Guilty Plea—A Reply*, 76 Mich. L. Rev. 1308, 1330-34 (1978) [hereinafter Westen, *A Reply*]. The obvious problem with characterizing a claim as "jurisdictional" is that it merely begs the question; such a characterization "is a conclusion, not an explanation: it does nothing to explain why the defense should be deemed to survive a guilty plea." Westen, *supra* note 19, at 1232 n.36.

39. Westen, *supra* note 19, at 1235-38 (proposing the "reliance theory"); *see also* Westen, *A Reply*, *supra* note 38, at 1321-22. For a critical analysis of Professor Westen's theory, see Dix, *Waiver as an Independent Aspect of Criminal Procedure: Some Comments on Professor Westen's Suggestion*, 1979 Ariz. St. L.J. 67. *See also* Saltzburg, *supra* note 19, at 1280-85. Professor Saltzburg suggests a different theory, stressing the defendant's interest in constitutional protections that are designed to relieve criminal defendants of the burdens and costs of litigation. *See* Saltzburg, *supra* note 19, at 1285-89. This Note, however, adopts Professor Westen's analysis of the Court's guilty plea cases as offering a more persuasive explanation of the *Blackledge* standard.

40. Westen, *supra* note 19, at 1235.

41. *Id.* at 1237 (state "must be able to claim that by pleading guilty, the defendant caused the state to change its position to its actual disadvantage"); *see also* Simons, *supra* note 19, at 940 ("guilty plea marks the point after which the government is *entitled* to rely on the defendant's waiver"). Detrimental reliance occurs when the state, resting on the finality of the defendant's plea of guilty, loses the opportunity to present a successful case against the defendant at trial. Westen, *supra* note 19, at 1237. For further discussion of reliance by the state, see *infra* notes 42-49, 71-73, 77-79 and accompanying text. The state, relying on the guilty plea, may believe that it need not gather evidence or prepare its case as thoroughly as it would have if the case were going to trial. Westen, *supra* note 19, at 1235; *see also* Simons, *supra* note 19, at 924-26 (discussing the types of prejudice that affect the state's interest in the finality of the guilty plea). Moreover, "[e]ven if [the state] prepares a guilty plea case as thoroughly [as those destined for trial], it does not preserve the case in a form that is readily admissible against the defendant should he now choose to go to trial." Westen, *supra* note 19, at 1235. Thus, the state may be unable to prove the defendant's guilt at trial should the defendant's original conviction be set aside. *Id.* at 1236.

This "reliance theory," as Professor Westen calls it, would explain why a defendant who has pleaded guilty retains the right to raise a double jeopardy claim, as opposed to other claims.[42] When the defendant asserts double jeopardy, no valid claim of prejudicial reliance upon the defendant's plea of guilty can exist, because the state's case was fatally flawed from the beginning and a plea of guilty could not have worsened the case.[43] A double jeopardy claim, once asserted, "would stand as an impassable and insurmountable hurdle between the state and its objective of obtaining a valid conviction."[44]

With other constitutional claims, however, the court or prosecutor could have "cured" the violation if given notice.[45] A claim that the grand jury was unconstitutionally composed provides an example.[46] Had this issue been raised and litigated prior to the defendant's conviction, the state could have selected a new grand jury and perhaps ultimately have obtained a valid conviction against the defendant at trial.[47] When the defendant waits and raises the claim in a habeas proceeding after the plea of guilty has been entered, however, he probably has lulled the state into relying on the guilty plea and not preparing its case as thoroughly as if it had gone to trial.[48] Thus, the nature of the constitutional defect,[49] in terms of the ability of the state to correct it, is dispositive in determining whether the defendant will be allowed to raise a given claim.

Although the Supreme Court acknowledged the state's interest in finality,[50] it is clear that the mere expectation of the state "in the finality of

42. "The Reliance Theory expresses a very simple idea: A criminal defendant should not lose the freedom to assert a constitutional right except for a good reason." Simons, *supra* note 19, at 958; *id.* at 920 (extending Professor Westen's Reliance Theory to the rescission of a waiver of a constitutional right). In this instance, the state's detrimental reliance on the defendant's plea of guilty provides such a reason.

43. Double jeopardy is an incurable defect; "no matter how the state might try to reconstitute its evidence or reinitiate the charges, it ha[s] no 'power' to [retry] the defendant for the felony over his objection." Westen, *supra* note 19, at 1226. As Professor Westen explains, with respect to a double jeopardy claim, "the state can never honestly allege that it relied to its detriment on the defendant's plea, because an incurable error invalidates the state's case from the outset: when a state's litigating position is hopeless from the beginning, there is nothing a plea of guilty can do to worsen it." *Id.* at 1237. In addition to the *Blackledge* due process defect and the *Menna* double jeopardy defect, a speedy trial claim also should survive a plea of guilty as an incurable defect. *See* Westen, *A Reply*, *supra* note 38, at 1327 n.67 (no detrimental reliance on guilty plea possible when defendant asserts speedy trial violation); *see also* Alschuler, *supra* note 14, at 15; Saltzburg, *supra* note 19, at 1267.

44. Westen, *supra* note 19, at 1226; *see supra* note 43.

45. For example, the constitutional defects in the *Brady* trilogy were curable and would not have precluded the state "from ever obtaining a valid conviction at trial." Westen, *supra* note 19, at 1226 n.29; *see also* Blackledge v. Perry, 417 U.S. 21, 30 (1974) (pointing out that "[t]he defendants in *McMann v. Richardson* . . . could surely have been brought to trial without the use of the allegedly coerced confessions.").

46. *See* Tollett v. Henderson, 411 U.S. 258 (1973).

47. *See Blackledge*, 417 U.S. at 30; Westen, *supra* note 19, at 1226.

48. Westen, *supra* note 19, at 1226; *see supra* note 41.

49. *See supra* notes 43-48 and accompanying text.

50. *See* Brady v. United States, 397 U.S. 742, 750-53 (1970); Cover and Aleinikoff,

the conviction is insufficient, by itself, to override the defendant's interest in asserting constitutional defenses."[51] For a defendant to lose his right to assert a constitutional defense, the state must prove that it relied to its detriment on the finality of the defendant's plea of guilty.[52]

D. Menna *and Its Effect on the Standard of Review of Double Jeopardy Claims in the Guilty Plea Context*

Although the Supreme Court has addressed the right of the defendant to raise certain constitutional claims in the guilty plea context,[53] it has not provided a standard for reviewing a defendant's claim of double jeopardy when the defendant raises his claim after he has pleaded guilty.[54] In such a standard, a comparison of the facts in both indictments constitutes a crucial step in determining whether double jeopardy exists.[55]

In holding that a double jeopardy claim is not waived by a plea of guilty,[56] the *Menna* Court explained that "[w]e do not hold that a double

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supra note 19, at 1070; Dix, *supra* note 19, at 195; Saltzburg, *supra* note 19, at 1274; Westen, *supra* note 19, at 1235; Note, *supra* note 14, at 1439; *supra* note 19.

51. Westen, *supra* note 19, at 1237. In the closely analogous area of presentence withdrawal of guilty pleas, various Justices of the Supreme Court have stated that unless the state has relied to its detriment on the defendant's plea of guilty, a defendant should be permitted to rescind his plea. Justice Marshall, for example, points out that "[w]here the government *can* show specific and substantial harm, the defendant may be held to his plea. But, ordinarily, the government can claim only disappointed expectations. In such a case, the balance of interests must favor vindication of the individual's most basic constitutional rights." Dukes v. Warden, 406 U.S. 250, 266 (1972) (Marshall, J., dissenting); *see also* Neely v. Pennsylvania, 411 U.S. 954, 957-59 (1973) (Douglas, J., with Stewart & Marshall, JJ., dissenting from denial of certiorari) (refusing to accept a concept of irrevocable waiver when the state has not suffered substantial prejudice); Santobello v. New York, 404 U.S. 257, 267-68 (1971) (Marshall, J., concurring in part and dissenting in part) (finding that absent detrimental reliance, defendant may withdraw his guilty plea). *See generally* Simons, *supra* note 19, at 922-24.

52. *See supra* notes 41, 51; *cf.* Simons, *supra* note 19, at 924 ("prejudice to the government's ability to prove the guilt of the defendant . . . provides the strongest ground for prohibiting withdrawal [of a guilty plea]").

53. *See, e.g.*, Menna v. New York, 423 U.S. 61 (1975) (per curiam); Blackledge v. Perry, 417 U.S. 21 (1974); Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).

54. *See* United States v. Atkins, 834 F.2d 426, 436-37 (5th Cir. 1987) (*Menna* Court left open the question whether a court reviewing a postconviction double jeopardy claim is limited to the indictment); *see also* United States v. Broce, 781 F.2d 792, 822 (10th Cir. 1986) (en banc) (Doyle, J., dissenting) ("*Menna* left unanswered the question . . . whether or not a plea of guilty to a charge which is not multiplicious on its face constitutes a waiver of the double jeopardy claim."), *cert. granted*, 108 S. Ct. 1073 (1988); United States v. Broce, 753 F.2d 811, 818-19 (10th Cir. 1985) (discussing the "loophole" in the *Menna* decision that raises the question whether a guilty plea bars defendant from proving double jeopardy claim based on version of facts differing from those stated in the indictments against him), *vacated and reh'g granted*, 781 F.2d 792 (10th Cir. 1986) (en banc).

55. *See, e.g.*, United States v. Atkins, 834 F.2d 426, 440-41 (5th Cir. 1987); United States v. Jones, 816 F.2d 1483, 1486 (10th Cir. 1987); United States v. Broce, 781 F.2d 792, 797 (10th Cir. 1986) (en banc), *cert. granted*, 108 S. Ct. 1073 (1988).

56. Menna v. New York, 423 U.S. 61, 62-63 n.2. (1975) (per curiam).

jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute."[57] *Menna* left open the question whether a plea of guilty to a charge that is not duplicative of a prior charge on its face constitutes a waiver of a double jeopardy claim.[58] In other words, the question left open after *Menna* is whether the Court meant to hold that the defendant does waive his claim by pleading guilty unless a double jeopardy claim is apparent when "judged on its face."[59] If this holding is the correct one, then review of a double jeopardy claim is limited to the facts and theories of the second indictment to determine whether a defendant has been charged again for an earlier crime.[60]

The circuit courts of appeals currently dispute whether an appellate court, in assessing the merits of a double jeopardy claim, is limited to the facts and theories stated in the government's second indictment. The Courts of Appeals for the First, Fifth, and Tenth Circuits, reaching different conclusions as to the effect of a guilty plea on a court's review of a double jeopardy claim, however, failed to address fully the Supreme Court's concerns as articulated in its guilty plea cases.[61]

II. A Recommended Standard of Review: A Balancing Approach

The *Brady* trilogy recognizes the state's interest in the finality of criminal convictions and upholds the plea bargaining system.[62] Other Supreme Court decisions, however, recognize that the state's interest in preserving its opportunity to obtain a conviction at trial must be balanced against the defendant's interest in asserting constitutional defenses notwithstanding his plea of guilty.[63] Thus, unless the state has "relied to its detriment on the finality of the defendant's plea," the defendant may challenge his conviction on any constitutional ground.[64] This Note argues that courts also should apply a reliance analysis when reviewing postconviction double jeopardy claims because such claims involve state and individual interests similar to those implicated in the broader guilty

57. *Id.* (emphasis added).
58. *See id.*; *supra* note 54.
59. *See Atkins*, 834 F.2d at 436 (discussing the implications of the *Menna* footnote).
60. *See id.*
61. *See infra* notes 80-96 and accompanying text.
62. *See supra* notes 19-22 and accompanying text.
63. *See supra* notes 39-41 and accompanying text. As Professor Westen has stated:
> [C]onstitutional defenses in criminal procedure . . . are defined by a balance between the interest of the individual and the interest of the state: in this case, we balance the interest of the defendant in asserting the values protected by the particular constitutional defense at issue against the interest of the state in preserving its opportunity to obtain a conviction at trial.

Westen, *supra* note 19, at 1238.
64. Westen, *supra* note 19, at 1237.

plea context.[65] Absent detrimental reliance by the state on defendant's plea of guilty, no legitimate reason exists, in terms of a state interest, to restrict review of postconviction double jeopardy claims to the contents of the second indictment.[66]

The standard for reviewing a double jeopardy claim in the guilty plea context clearly implicates the state's interest in the finality of criminal convictions.[67] Although a state cannot bar a defendant's *right* to raise a double jeopardy claim,[68] the state has interests to protect in the adjudication of the defendant's claim; arguably, the defendant's plea of guilty and method of proving his claim may affect the state's ability to disprove the claim[69] and secure a valid conviction on the second indictment.[70] For example, the state, relying on the defendant's plea of guilty, may release witnesses before obtaining depositions from them,[71] or witnesses may leave the jurisdiction[72] or may forget important events by the time the defendant raises a double jeopardy claim.[73]

The standard for reviewing a double jeopardy claim in the guilty plea context, however, also implicates the defendant's right to assert his double jeopardy claim despite his plea of guilty. If a court were to re-

65. *See infra* notes 67-74 and accompanying text.

66. *Cf.* Simons, *supra* note 19, at 923 ("state's prohibition of the assertion of a right by reason of waiver or forfeiture need only be justified by significant detrimental reliance"); Westen, *supra* note 19, at 1237 ("the state's *mere expectation* in the finality of the conviction is insufficient, by itself, to override the defendant's interest in asserting constitutional defenses"); *supra* note 51.

67. By raising his claim after he had pleaded guilty, the defendant made review of his double jeopardy claim more complicated, foreclosing "development at the time of the incident of additional facts which would either prove or *disprove* his claim." United States v. Atkins, 834 F.2d 426, 434 (5th Cir. 1987) (emphasis added).

68. *See* Menna v. New York, 423 U.S. 61, 62-63 n.2 (1975).

69. *See Atkins*, 834 F.2d at 434.

70. *See* Westen, *supra* note 19, at 1237 (The *Blackledge* standard was "designed . . . to preserve the state's *opportunity to obtain* valid convictions at trial."); *see also supra* note 41.

If the double jeopardy issue is raised pretrial, the defendant merely has to show a nonfrivolous double jeopardy claim, while the government bears the ultimate burden of proving the absence of double jeopardy. *See supra* note 11. When a defendant chooses to raise his claim after he has pleaded guilty to the indictment, however, courts generally recognize that the defendant, rather than the state, should bear the burden of proving his double jeopardy claim by a preponderance of the evidence. *Atkins*, 834 F.2d at 442; *see also, e.g.*, Hawk v. Olson, 326 U.S. 271, 279 (1945) ("Petitioner carries the burden in a collateral attack on a judgment."); Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938) (same); Bruce v. Estelle, 536 F.2d 1051, 1058-59 (5th Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977) (same). By pleading guilty, a defendant has "foreclosed development at the time of the incident of additional facts which would either prove or disprove his claim." *Atkins*, 834 F.2d at 434. In addition, "[t]he lack of a record, the passage of time, and the effect on memory which attends the passage of time" further complicate a court's review of the defendant's claim. *Id.* Thus, where the defendant raises his double jeopardy claim in a habeas proceeding after he has pleaded guilty, a shift in the burden of proof from the state to the defendant is justified.

71. *See supra* note 41.

72. *See id.*

73. United States v. Atkins, 834 F.2d 426, 434 (5th Cir. 1987).

strict its review of a double jeopardy claim to the facts alleged in the second indictment, then the court effectively might foreclose the defendant's ability to prove his claim.[74]

A. *The Detrimental Reliance Test*

To balance the respective interests of the state and the defendant, courts should consider whether the state has relied to its detriment on the defendant's plea of guilty and thereby lost valuable opportunities to disprove the double jeopardy claim and ultimately to obtain a conviction. Because the state controls the particularity of an indictment, it must bear the responsibility for any ambiguities it may contain;[75] otherwise, the right not to be placed in double jeopardy may be undermined by "the mere forms of criminal pleading."[76] Thus, two components make up the detrimental reliance test. First, the method by which a defendant attempts to prove his double jeopardy claim will determine the burden placed on the government. Second, the particularity with which the government has drafted the indictments will determine whether in good faith it could have relied on the plea of guilty.

1. Proof of Double Jeopardy by Offering a Version of the Facts Inconsistent with Those Alleged in the Indictment

When the defendant attempts to prove his double jeopardy claim by offering a version of the facts inconsistent with those alleged in the second indictment,[77] the state, to prevent the defendant from offering this proof, must establish that in good faith it relied to its detriment on the finality of the defendant's guilty plea.[78] By relying on the facts in the second indictment to which the defendant pleaded guilty, the state's ability to disprove the defendant's double jeopardy claim may be reduced: in other words, the state no longer may have the capacity to reconstruct its case against the defendant, which it must do to rebut the defendant's

74. *See* Kerrigan v. United States, 644 F.2d 47, 49 (1st Cir. 1981). The Court of Appeals for the First Circuit restricted its review of the defendant's double jeopardy claim to the version of facts stated in the second indictment. *Id.* Thus, the defendant, by pleading guilty, was deemed to have accepted the government's allegations of two separate conspiracies and could not prove that there was only one conspiracy by offering an alternative version of the facts. *Id.*

75. *See Atkins*, 834 F.2d at 439 & n.11 (quoting United States v. Stricklin, 591 F.2d 1112, 1119 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979)); *see also* United States v. Baugh, 787 F.2d 1131, 1132-33 (7th Cir. 1986) (government's responsibility for drafting a proper criminal complaint does not shift to defendant when he pleads guilty); United States v. Broce, 781 F.2d 792, 799 (10th Cir. 1986) (en banc) (McKay, J., concurring) (government cannot undermine the double jeopardy clause using vague indictments), *cert. granted*, 108 S. Ct. 1073 (1988); Short v. United States, 91 F.2d 614, 624 (4th Cir. 1937) (vague indictments cannot be used to contravene constitutional guarantees).

76. *Atkins*, 834 F.2d at 439 (quoting Short v. United States, 91 F.2d 614, 624 (4th Cir. 1937)).

77. *See, e.g.*, Kerrigan v. United States, 644 F.2d 47, 49 (1st Cir. 1981).

78. *See supra* note 66 and accompanying text.

version of the facts.[79]

In apparent recognition of the state's interest in preserving convictions,[80] the Court of Appeals for the First Circuit, however, has held that a "[defendant's] claim of double jeopardy *must* be evaluated under the version of facts stated in the indictment, not against an alternative version of events which [defendant] now claims is more accurate."[81] In other words, by restricting a defendant's proof of his claim to the facts of the indictment that, on its face, sufficiently charges two separate conspiracies, the court determines that the guilty plea effectively has waived the defendant's right to assert his double jeopardy claim.[82]

The First Circuit fails to recognize, however, that the mere expectation of the state "in the finality of conviction is insufficient, by itself, to override the defendant's interest in asserting constitutional defenses."[83] The

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79. *See supra* notes 41, 71-73 and accompanying text.

80. The *Kerrigan* court, citing Brady v. United States, stated that "[b]y pleading guilty appellants admitted the facts alleged in the information." *Kerrigan*, 644 F.2d at 49. Presumably, the circuit court implicitly acknowledged the *Brady* Court's concern with the state's interest in finality. *See supra* notes 19-22 and accompanying text.

81. Kerrigan v. United States, 644 F.2d 47, 49 (1st Cir. 1981) (emphasis added). In *Kerrigan*, the defendant, as part of a plea bargaining agreement, pleaded guilty to "two indictments, both charging conspiracy to transport stolen goods in interstate commerce." *Id.* at 47-48. The defendant later claimed that the two indictments in fact described only one conspiracy and that the second indictment placed him in double jeopardy. *Id.* at 48. The *Kerrigan* court stated that

> [b]y pleading guilty, [the defendant] accepted the government's two-conspiracy allegations, and it is too late for him to try to establish something else. The factual allegations of the indictments sufficiently charge two separate conspiracies; [defendant] is bound by these facts because of his guilty pleas; and [he] has therefore not been twice placed in jeopardy for the same offense.

Id. at 49.

82. *Id.*; *see* United States v. Atkins, 834 F.2d 426, 436 & n.8 (5th Cir. 1987) (discussing the *Kerrigan* case); United States v. Broce, 781 F.2d 792, 796 n.4 (10th Cir. 1986) (en banc) (dismissing the waiver implications of *Kerrigan* as dictum), *cert. granted*, 108 S. Ct. 1073 (1988). The First Circuit's holding seems to be based on a literal interpretation of the *Menna* Court's "judged on its face" language. *See Atkins*, 834 F.2d at 436 & n.8. The court thus limited the *Menna* decision, pointing out that although

> *Menna* . . . [does] indeed indicate that a double jeopardy claim may lie notwithstanding a guilty plea . . . [the case does] not hold . . . that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single offense.

Kerrigan, 644 F.2d at 49.

83. Westen, *supra* note 19, at 1237; *see also supra* note 51 and accompanying text.

The Court of Appeals for the First Circuit, in holding that a defendant is limited to the facts alleged in the indictment in proving his double jeopardy claim, may have placed unjustified reliance on the Supreme Court's ambiguous footnote. *See Atkins*, 834 F.2d at 438 (discussing the *Menna* footnote); *see also* Westen, *supra* note 19, at 1225 ("[I]n disposing of *Menna* summarily, the Court did not give the footnote the attention it deserved and . . . on further reflection, the Court will reject or ignore it."). It is unlikely that the Court would use a negative implication to hold that a defendant waives his double jeopardy claim unless the claim is apparent from the face of the indictment. *Atkins*, 834 F.2d at 437. The *Kerrigan* court's failure to consider properly the defendant's interest may derive from the fact that the court failed to consider the *Blackledge* decision in its analy-

state should not be allowed to assert its interest in finality until it can show that it relied to its detriment on the guilty plea.[84] To hold otherwise effectively eliminates the defendant's right to raise constitutional defenses without compelling reason.

In recognition of the defendant's constitutional right to raise a double jeopardy claim, the Court of Appeals for the Tenth Circuit expressly has rejected the First Circuit's restrictive standard for reviewing double jeopardy claims in the guilty plea context.[85] The Tenth Circuit has held that the admissions of factual guilt subsumed in the pleas of guilty go only to commission of particular acts and not to whether one or more conspiracies exist.[86]

The decision suggests that the defendant, in support of his double jeopardy claim, not only may offer an alternative version of the facts alleged in the indictment, but that the defendant also may offer facts that contradict those alleged in the second indictment.[87] The Tenth Circuit, however, may have placed too much emphasis on the "jurisdictional" language of the *Blackledge* and *Menna* decisions.[88] Its view clearly con-

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sis. *See Broce*, 781 F.2d at 796 ("Since *Blackledge* is the keystone in the issue of waiver under consideration . . . *Kerrigan* cannot be regarded as persuasive authority."). Moreover, it neglected to recognize that "admissions of factual guilt subsumed in the pleas of guilty go only to the acts constituting the conspiracy and not to whether one or more conspiracies existed." *Atkins*, 834 F.2d at 436-37 n.8 (quoting United States v. Broce, 781 F.2d 792, 796 (10th Cir. 1986) (en banc), *cert. granted*, 108 S. Ct. 1073 (1988)). Thus, a court should not restrict its review of a double jeopardy claim to the contents of the second indictment.

84. *See supra* notes 41, 66 and accompanying text.

85. United States v. Broce, 781 F.2d 792, 796 (10th Cir. 1986) (en banc).

86. *Id.* (citing Launius v. United States, 575 F.2d 770 (9th Cir. 1978)). In *Broce*, defendants pleaded guilty to two indictments charging conspiracy to violate the Sherman Antitrust Act. *Id.* at 793-94. One year later, the defendants claimed that the second indictment duplicated the first, placing them in double jeopardy. *Id.*

The *Broce* court dismissed the *Kerrigan* holding that "a defendant who pled guilty cannot be permitted to make arguments 'inconsistent with the factual and theoretical foundations of the indictment' " as unpersuasive and inapposite. *Id.* at 796. The *Broce* court construed the *Menna* decision much more broadly than did the *Kerrigan* court:

> As already noted in *Menna* . . . the Fifth Amendment's Double Jeopardy Clause stands as an inhibition upon the government's right to institute charges. This inhibition is absolute, and even though the bar works as a protection of individuals, it does not constitute an individual right which is subject to waiver. If the absence of constitutional authority prevents the government from instituting charges in the first instance, a defendant's guilty plea cannot confer authority upon the government to do what the Constitution prohibits. In light of this fundamental constitutional concept, the doctrine of waiver has no significance.

Id. at 795.

87. *See id.* ("In light of [the double jeopardy clause], the doctrine of waiver has no significance."); *see also id.* at 796 ("[T]he government was without power to institute one of the charges upon which the plea agreement was based. In effect, that agreement was partially founded upon a nullity.").

88. The *Broce* court, for example, noted that "the essential right" in this case was the "right not to be haled into court at all." 781 F.2d at 795 (citing Blackledge v. Perry, 417 U.S. 21, 30 (1974)). In addition, the court stated "that the government was without *power* to institute one of the charges upon which the plea bargain was based [and that] the

tradicts Supreme Court precedent, which recognizes the state's legitimate interest in the finality of criminal convictions.[89]

The Court of Appeals for the Fifth Circuit has adopted a case-by-case approach to determine whether a court should look beyond the indictment in assessing a defendant's postconviction double jeopardy claim.[90] It has held that, although "*Menna* does not limit a court's examination to the indictment," it will not always be necessary or appropriate to look beyond the indictment.[91] The court's principal concern was that "the freedom which the government has in drafting an indictment"[92] might be used to undermine constitutional rights.[93]

When the state drafts an indictment with vague allegations, the Fifth Circuit resorts to extrinsic evidence to help "flesh-out" the charges in the indictment.[94] When the indictment is sufficiently detailed and specific, however, the Fifth Circuit does not allow the defendant to present any evidence outside that contained in the indictment.[95] The approach adopted by the Fifth Circuit fails to vindicate any legitimate state interest, however, when the state has not suffered a reduction in its ability to

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agreement was partially founded upon a nullity." *Id.* at 796 (emphasis added). As noted earlier, a "jurisdictional" standard is inadequate as an explanation of the Supreme Court's policies in the guilty plea cases. *See supra* note 38.

89. *See supra* note 19 and accompanying text. The court's reading of *Menna* as placing an absolute bar against waiver of double jeopardy claims clearly is overbroad. *See* United States v. Broce, 781 F.2d 792, 799-805 (10th Cir. 1986) (en banc) (Seymour, J., concurring in part and dissenting in part) (pointing out that the Supreme Court consistently has approved of knowing and voluntary waivers of constitutional rights), *cert. granted*, 108 S. Ct. 1073 (1988). The Supreme Court itself has declined to hold that a double jeopardy claim may never be waived. Menna v. New York, 423 U.S. 61, 63 n.2. Moreover, the majority of the circuit courts addressing this issue have concluded that a double jeopardy claim may be waived. *See supra* note 6 and accompanying text.

The *Broce* court, in protecting the defendant's right to assert his double jeopardy claim does not acknowledge the legitimate interest of the state in the finality of a defendant's conviction. *See Broce*, 781 F.2d at 795. Indeed, it rejects the argument that allowing defendants collaterally to attack their conviction " 'long after their guilty pleas are entered . . . [would undermine] the finality of convictions and [increase] the already heavy workload of the federal courts.' " *Id.*; *see also id.* at 796 ("As a matter of immutable principle, the government's constitutional inability to charge in the first instance is not diminished simply because it bargained away a prosecutorial advantage.").

90. *See* United States v. Atkins, 834 F.2d 426, 439-40 (5th Cir. 1987). In *Atkins*, the defendant pleaded guilty to an Oklahoma indictment that charged conspiracy to manufacture amphetamine and phenylacetone. *Id.* at 427-29. A few months later, the defendant pleaded guilty to a Texas indictment that charged conspiracy to manufacture amphetamine. *Id.* at 428-29. The defendant subsequently attacked his sentence for the Texas conviction on double jeopardy grounds. *Id.* at 429. In considering the effect of the defendant's guilty plea on a court's review of his double jeopardy claim, the *Atkins* court held "that *Menna* does not require us to look only to the indictment when reviewing a double jeopardy claim which follows a guilty plea." *Id.* at 439.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 440.

95. *Id.* at 442.

prove the commission of the offenses.[96] Until the state establishes detrimental reliance, there is no good reason to limit a defendant's proof of his double jeopardy claim to the four corners of the indictment.

2. Particularity of Factual Pleadings in an Indictment

The possibility that the state relied to its detriment is even more likely in cases where the state drafts a detailed indictment to which the defendant pleads guilty. In such a case, the state can claim in good faith that the guilty plea prejudiced its ability to disprove the defendant's double jeopardy claim. If the admitted facts in both indictments "paint separate and distinct pictures which rule out the reasonable possibility of a double jeopardy problem,"[97] then a court should rely solely on such facts alleged in the second indictment when reviewing the defendant's double jeopardy claim.[98]

When the government pleads an indictment with vague allegations,

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96. *See* Westen, *supra* note 19, at 1237 (mere interest of the state in finality is not enough to override defendant's right to assert constitutional defenses); *see also supra* note 51 and accompanying text.

97. United States v. Atkins, 834 F.2d 426, 439 (5th Cir. 1987).

98. *Id.* at 440 ("Resort to evidence outside the indictment . . . will be both unnecessary and inappropiate."). An example of such indictments can be found in Kerrigan v. United States, 644 F.2d 47 (1st Cir. 1981).

The first indictment, No. 77-398, read in part as follows:

> 'During the period beginning on or about August 25, 1977, and continuing through on or about September 1, 1977, in the District of Massachusetts, defendants JOHN PAUL KERRIGAN, RICHARD KIRKWOOD, and BENJAMIN A. LAMBERT, did unlawfully, willfully, and knowingly combine, conspire, confederate and agree with each other and amongst themselves to commit offenses against the United States, as follows:
>
> 'To transport and cause to be transported in interstate commerce goods and merchandise, to wit: lithographs with a value in excess of $5,000, which had been stolen from the Pucker-Safrai Gallery, Newbury Street, Boston, Massachusetts, knowing the same to have been stolen: in violation of Title 18, United States Code, Section 2314.'

Id. at 48 n.1. The second indictment, No. 77-399, read in part as follows:

> 'During the period beginning on or about September 1, 1977, and continuing through on or about September 22, 1977, in the Districts of Massachusetts and New Hampshire, defendants JOHN PAUL KERRIGAN and RICHARD JOHN KIRKWOOD, did unlawfully, willfully, and knowingly combine, conspire, confederate, and agree with each other and amongst themselves to commit offenses against the United States, as follows:
>
> 'To transport and cause to be transported in interstate commerce goods and merchandise, to wit: Indian jewelry with a value in excess of $5,000, which had been stolen from the shop of Etta Goodstein, West Dennis, Massachusetts, knowing the same to have been stolen; in violation of Title 18, United States Code, Section 2314.'

Id. at 48 n.2. Although the *Kerrigan* holding, restricting review of the double jeopardy claim to the version of the facts in the second indictment, *id.* at 49, is erroneous, *see supra* note 83 and accompanying text, the result in the case is correct, assuming that the State had relied detrimentally on the defendant's plea of guilty. The indictments were specifically drafted, charging two distinct offenses. *See Kerrigan*, 644 F.2d at 49; *see also* United States v. Broce, 781 F.2d 792, 796 (10th Cir. 1986) (en banc) (court distinguishes the *Broce* case from the *Kerrigan* case, pointing out that in *Kerrigan*, the indictments specifi-

however, the state cannot claim in good faith that it relied to its detriment on defendant's plea because it controls the particularity of an indictment.[99] In such a case, there should be a presumption against prejudicial reliance. Moreover, when the indictment is vague and blurs the factual elements of the crimes,[100] then the defendant cannot be said to have admitted the commission of two different crimes.[101] Thus, the defendant, in proving his double jeopardy claim, may offer an alternative version of the facts to color the version alleged in the second indictment.[102]

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cally alleged separate conspiracies), *cert. granted*, 108 S. Ct. 1073 (1988). The *Kerrigan* court, however, did not expressly address the issue of reliance by the state.

99. *See supra* note 75 and accompanying text; *cf.* United States v. Baugh, 787 F.2d 1131, 1132-33 (7th Cir. 1986) (court rejected government's argument that even though indictment was deficient, it relied to its detriment on the defendant's guilty plea because "it 'might' have discovered or adduced the missing proof"); McFarland v. Pickett, 469 F.2d 1277, 1279 (7th Cir. 1972) (where the government alleged one offense, the defendant's plea of guilty did not constitute an admission of two offenses, even though the government asserted that evidence proving separate offenses could have been found but for defendant's plea).

100. An example of vague indictments is found in United States v. Atkins, 834 F.2d 426 (5th Cir. 1987).

The first indictment charged:

> That from on or about April, 1982, and continuously thereafter up to and including April 13, 1983, in the Western District of Oklahoma, the Northern District of Texas, and elsewhere
>
> Richard Lee Atkins;
> Joe Dewayne [sic] Snyder;
> Roger Ray Helvy;
> Leiann Lynda Gill;
> and Kenneth Randle Gill;
>
> the defendants herein, willfully and knowingly did combine, conspire, confederate and agree together, with each other, and with diverse other persons whose names are to the Grand Jury unknown, to manufacture Phenylacetone and Amphetamine, Schedule II non-narcotic controlled substances, in violation of Title 21, United States Code, Section 841(a)(1).

Id. at 428. The second indictment charged:

> That beginning on or before March 30, 1983, and continuing until April 12, 1983, in the Western District of Texas and divers [sic] other places to the grand jurors unknown, Defendant,
>
> Richard Lee Atkins,
>
> and other persons to the grand jurors known and unknown, unlawfully, willfully, and knowingly did combine, conspire, confederate and agree together and with each other [to] manufacture amphetamine, a Schedule II Controlled Substance, contrary to Title 21, United States Code, Section 841(a)(1) and in violation of Title 21, United States Code, Section 846.

Id.

101. *See* United States v. Broce, 781 F.2d 792, 804 (10th Cir. 1986) (en banc) (Seymour, J., concurring in part and dissenting in part), *cert. granted*, 108 S. Ct. 1073 (1988); *cf.* McFarland v. Pickett, 469 F.2d 1277, 1279 (7th Cir. 1972) (where government had the responsibility of drafting the indictment and alleges that only one offense occurred, "[d]efendant's plea of guilty . . . could not, therefore, constitute an admission of guilt of two offenses").

102. *See* United States v. Atkins, 834 F.2d 426, 440 (5th Cir. 1987) (when vague indictments overlap, suggesting a double jeopardy problem, extrinsic evidence should be used to "flesh-out the charges in the indictments").

Courts correctly have acknowledged the implicit danger in pleading "indictments which vaguely refer to agreements 'beginning on or before' or 'continuing from' a certain time, made in one or two named jurisdictions and 'elsewhere,' between the person indicted and 'other persons to the grand jury known and unknown.' "[103] Such vague pleadings may nullify the constitutional proscription against double jeopardy.[104] Thus, the state, and not the defendant, "should bear the responsibility for any ambiguities" in the indictment.[105] When the indictment is vague, the defendant should be allowed to present a fuller and more developed version of the facts alleged therein.[106]

CONCLUSION

In reviewing a double jeopardy claim that follows a plea of guilty, courts should consider the effect of the plea of guilty on the state's ability to disprove the double jeopardy claim and ultimately obtain a valid conviction. They also should keep in mind the freedom that the state exercises in drafting an indictment and the possibility that such freedom may nullify the constitutional right not to be placed in double jeopardy.

This Note suggests a standard that balances the state's interest in finality against the defendant's interest in asserting his double jeopardy claim. Unless the state has relied to its detriment on the defendant's plea of guilty, a court should look beyond the indictment in assessing the merits of a double jeopardy claim. When the state drafts a detailed indictment, it can always show in good faith that a guilty plea has prejudiced its ability to prove the commission of two crimes. When the state drafts a vague indictment, however, there can be no good faith claim of detrimental reliance. By adopting the approach recommended in this Note, courts will insure that the respective interests of the state and the defendant will be protected and advanced.

Augustine V. Cheng

103. *Atkins*, 834 F.2d at 439; *see, e.g.*, *Broce*, 781 F.2d at 804; United States v. Mallah, 503 F.2d 971, 985 (2d Cir.), *cert. denied*, 420 U.S. 995 (1974); Short v. United States, 91 F.2d 614, 624 (4th Cir. 1937).

104. *See Short*, 91 F.2d at 624; *see also* United States v. Ragins, 840 F.2d 1184, 1190 (4th Cir. 1988); *Atkins*, 834 F.2d at 440. For example, the state might indict the defendant for a second conspiracy "by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes." *Short*, 91 F.2d at 624. *See supra* note 10 (discussing double jeopardy problems presented by charge of conspiracy).

105. *Atkins*, 834 F.2d at 439 n.11 (quoting United States v. Stricklin, 591 F.2d 1112, 1119 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979)); *see supra* note 75 and accompanying text.

106. *Atkins*, 834 F.2d at 440.