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The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland

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THE RIGHT TO DEFENSE DISCOVERY IN PLEA
BARGAINING FIFTY YEARS AFTER *BRADY V.*
MARYLAND

CYNTHIA ALKON[∞]

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“Here’s how it went. [A] client would hire me for a DWI or weed case. I’d go to court and ask for a copy of the police report. I’d be told that they could read it to me (no seriously, they would say this), or sometimes even let me read it. But if I wanted a copy then I would have to file a discovery motion and then they would withdraw all plea offers and force my client to trial. So basically they set up a closed file system to bully defendants into pleading guilty without looking at the evidence.”¹

I.
INTRODUCTION

Fifty years after *Brady v. Maryland*,² defense attorneys around the United States continue to struggle to get basic information from prosecutors. This is even more of an issue in the ninety-four to ninety-seven percent of criminal cases that are resolved by guilty pleas.³ As the quote above illustrates, prosecutors can use discovery as leverage in the plea negotiation process.

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1. Robert Guest, *Michael Morton Act Becomes Law – No More Closed Files in Texas*, DALLAS CRIM. DEF. LAWYER BLOG (May 16, 2013), <http://www.dallascriminaldefenselawyerblog.com/2013/05/michael-morton-act-becomes-law-no-more-closed-files-in-texas.html>.

2. 373 U.S. 83 (1963).

3. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (stating that ninety-four percent of state convictions and ninety-seven percent of federal convictions are the result of guilty pleas).

Unfortunately, the rule the Supreme Court established in *Brady* does little to prevent this kind of gamesmanship.

In *Brady*, the Court required the prosecution to turn over “evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment.”⁴ The *Brady* standard developed, however, in the context of a case that went to trial; thus far the Court has not shown an understanding of the discovery concerns specific to plea bargaining.⁵ This failure persists despite the fact that our criminal justice system depends on plea bargaining and routinely penalizes defendants who either do not plead guilty or who do not plead guilty early in the process.⁶ As long as prosecutors do not withhold exculpatory information, *Brady* provides no protection against prosecutors who want to link plea offers to discovery.

Fifty years later, *Brady* fails to protect defendants’ rights in the context of a system that routinely pressures them to plead guilty before they know the full extent of the prosecution case against them and in circumstances under which this inadequate information may mean that their lawyers are at a disadvantage in trying to negotiate better deals. Equally troubling is the possibility that, in the absence of good information, lawyers will be unable to fully explain to their clients why they should accept that early “good deal.” As a result, defendants may ultimately plead out later in the process to a worse deal.⁷

Following the U.S. Supreme Court’s recent decisions on plea bargaining, the time has come to reexamine the *Brady* standard in the specific and predominate context of plea bargaining. *Lafler v. Cooper*⁸ and *Missouri v. Frye*,⁹ were companion cases in which the Supreme Court recognized the right to effective assistance of counsel in plea bargaining. These cases are noteworthy as

4. *Brady*, 373 U.S. at 87.

5. See Russell D. Covey, *Plea-Bargaining Law after Lafler and Frye*, 51 DUQ. L. REV. 595, 601–05 (2013). For a discussion describing *Brady* disclosures as they relate to the way plea bargaining works in practice, see John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 452–57 (2001). For an earlier critique see Lee Sheppard, *Disclosure to the Guilty Pleading Defendant: Brady v. Maryland and the Brady Trilogy*, 72 J. CRIM. L. & CRIMINOLOGY 165, 168–74 (1981) (discussing how plea bargaining works in practice and the Supreme Court’s incorrect assumptions about the process).

6. Various programs and individual prosecutors incentivize early pleas. See, e.g., Joseph P. Fried, *More Queens Drug Defendants are Pleading Guilty*, N.Y. TIMES, May 5, 1988, at B8 (describing a special narcotics court unit that encourages earlier guilty pleas in Queens, New York). For a study of the trial penalty, see, for example, Nancy J. King, David A. Soul, Sara Steen & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 992 (2005), which reports trial penalties ranging from 13% to 461%, depending on the state and the offense.

7. *United States v. Ruiz*, 536 U.S. 622 (2002), is a good example of what happens when a defendant fails to take an early plea and ultimately gets a worse sentence. The defendant refused a “fast track” plea deal because it required her to waive her right to receive impeachment information about witnesses or informants; when the defendant ultimately pled guilty anyway, she was denied the benefit of the earlier deal. *Id.* at 625–26.

8. 132 S. Ct. 1376, 1391 (2012).

9. 132 S. Ct. 1399, 1410 (2012).

signaling that the Court is moving beyond viewing trials as the “touchstone” of criminal cases.¹⁰ As this article will discuss, it is time for the Court to recognize that effective assistance of counsel in plea bargaining requires that defense lawyers have basic information about the case, both to fully advise their clients and to effectively negotiate on behalf of their clients.

This article will first briefly examine how the *Brady* standard applies and fails to protect defendants in plea bargaining. Next, this article will explain why the recent Supreme Court decisions in *Lafler* and *Frye* demand that the Court revisit *Brady* and consider defense rights to discovery in the specific context of plea negotiations. The article will also offer specific suggestions for defense lawyers to better protect the record on appeal for discovery issues for plea bargaining cases post-*Lafler* and *Frye*. Finally, this article will argue for legislative reform that would require open-file discovery as a remedial approach in addition to waiting for the Supreme Court to more fully guarantee defense rights to discovery in plea bargaining. In concluding that legislative action is necessary, this article will use a recent change in Texas law as an example of useful improvements while also illustrating specific problems that can occur when policy-makers and legislators write a discovery law focused on trials and thereby fail to protect defense rights to discovery during the more common process of plea bargaining.

II.

THE SUPREME COURT’S FAILURE TO UNDERSTAND HOW DISCOVERY MATTERS IN PLEA BARGAINING

The Supreme Court has left both plea bargaining and the defense right to discovery largely unregulated.¹¹ The basic requirements for valid guilty pleas are that the defendant should knowingly, intelligently, and voluntarily accept the plea deal and that this acceptance should not be due to improper threats or coercion.¹² The Court has allowed what might be considered hard bargaining tactics, such as prosecutors threatening to seek the death penalty¹³ or adding an enhanced penalty if the defendant refuses the plea offer¹⁴ as long as such threats can be lawfully imposed.¹⁵ “[F]undamental fairness remains the principle

10. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1120 (2011). Arguably, this shift began with *Padilla v. Kentucky*, 559 U.S. 356, 366–69 (2010), when the Supreme Court held that effective assistance of counsel requires a lawyer to advise her client of collateral immigration consequences to a guilty plea.

11. See Bibas, *supra* note 10, at 1124–27 (criticizing the lack of regulation in plea bargaining).

12. See, e.g., *Brady v. United States*, 397 U.S. 742, 748, 750 (1970).

13. *Id.* at 751.

14. *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978).

15. See *Brady v. United States*, 397 U.S. at 751 (“We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant’s desire to accept the certainty or probability of a lesser penalty rather than face a wider range of

approach” that the Court uses in evaluating the constitutionality of plea bargaining practices, including whether the plea is voluntary.¹⁶ However, the Court has limited its definition of fairness to preventing “unfair surprise.”¹⁷ Under this narrow concept of fundamental fairness in plea bargaining, defendants have prevailed by arguing that they were surprised by the prosecutor’s breach of a previous agreement¹⁸ or by their defense lawyer failing to advise them of the immigration consequences of the guilty plea.¹⁹

The discovery that prosecutors must give to the defense is similarly broad and, as stated above, not specific to plea bargaining. *Brady* simply requires the prosecution to disclose “evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment.”²⁰ The *Brady* Court expressed doubt about whether a trial could be fair if a prosecutor failed to disclose exculpatory evidence, stating that “our system of the administration of justice suffers when any accused is treated unfairly.”²¹ Nevertheless, the Court has not specifically required prosecutors to disclose exculpatory evidence to a defendant before entering a guilty plea.²² Moreover, the Court has not yet clearly examined whether failure to turn over discovery to the defense during plea negotiations violates the plea bargain’s fundamental fairness.²³

In the 2002 case *United States v. Ruiz*,²⁴ the Supreme Court examined the question of a defense right to discovery in plea bargaining, but ultimately found this right had not been violated.²⁵ Instead, the Court decided, in part, that a defendant did not have a constitutional right to impeachment information before

possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.”).

16. Josh Bowers, *Fundamental Fairness and the Path from Santobello to Padilla: A Response to Professor Bibas*, 2 CALIF. L. REV. 52, 54–55, 56–58 (2011) (arguing that fundamental fairness is the predominate standard for evaluating the constitutionality of guilty pleas because the other standard applied to constitutional criminal procedure, accuracy is less applicable in a context in which most defendants are guilty (i.e., the “results” are accurate); the better question, therefore, is whether the process was fair).

17. *Id.* at 54.

18. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

19. *Padilla v. Kentucky*, 559 U.S. 356, 373–74 (2010).

20. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

21. *Id.*

22. *See, e.g., Covey, supra* note 5, at 601–02 (explaining the circuit split regarding whether *Brady* applies at the guilty plea phase and noting that most state courts have held *Brady* applies to guilty pleas).

23. The Court has focused its analysis of fundamental fairness in plea bargaining in the limited area of unfair surprise. *See Bowers, supra* note 16, at 58–59 (2011) (discussing *Santobello v. New York*, 404 U.S. 257 (1971), *Brady v. United States*, 397 U.S. 742 (1970), and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) and noting that only in *Santobello* did the Court find unfair surprise).

24. 536 U.S. 622 (2002).

25. For a brief history of lower court decisions before *Ruiz*, see Daniel Conte, *Swept Under the Rug: The Brady Disclosure Obligation in a Pre-Plea Context*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 74, 86–88 (2012). For a discussion of *Brady* and guilty pleas, including circuit conflicts and *Ruiz*, see *Covey, supra* note 5, at 600–05.

pleading guilty.²⁶ Pursuant to a “fast track” plea agreement, the defendant in *Ruiz* would have had the right to receive any information relating to her “factual innocence” but would have also been required to waive the right to impeachment information about any witnesses and any information that might support an affirmative defense at trial.²⁷ The defendant turned down that deal, as she was unwilling to waive the right to impeachment information, but ultimately pled guilty without the benefit of any deal.²⁸ The Court specifically rejected the lower court’s finding that failure to disclose impeachment evidence violated the requirement that the plea be voluntary, holding instead that “impeachment information is special in relation to the *fairness of the trial*, not in respect to whether a plea is *voluntary*.”²⁹ The Court further stated that “the Constitution does not require the prosecutor to share all useful information with the defendant.”³⁰ The Court did not question whether the failure to turn over impeachment evidence was a violation of the fundamental fairness required for constitutional plea bargains. Indeed, the Court failed to understand that impeachment information is useful not only at trial and in evaluating the chances of success at trial, but also in plea bargaining because it gives the defense leverage in the negotiation process.

The *Ruiz* case illustrates the overall attitude the Court holds towards plea bargaining. The Court was concerned that requiring disclosure of impeachment information would “seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.”³¹ Through this statement, the Court made it clear that its main concern, in addition to efficiency, was the “accuracy” of the plea, which means that the Court was satisfied of the defendant’s guilt and considered pleading guilty an acceptable outcome.³²

In *Ruiz*, the Court applied the *Brady* standard but failed to see that impeachment evidence, even under the limited standards of *Brady*, is exactly the kind of evidence to which the defense should be entitled. As stated above, *Brady* held that the prosecution must turn over evidence that is “material . . . to punishment.”³³ In *Brady*, the defendant was convicted of first degree murder and sentenced to death.³⁴ The prosecution turned over many statements but failed to turn over the one statement in which Brady’s friend (and co-arrestee) Boblit

26. *Ruiz*, 536 U.S. at 625.

27. *Id.*

28. *Id.* at 625–26.

29. *Id.* at 629 (emphasis in the original).

30. *Id.*

31. *Id.* at 631.

32. See Bowers, *supra* note 16, at 54 (“There are two dominant measures of constitutional criminal procedure: accuracy and fairness.”).

33. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

34. *Id.* at 84.

stated that he, not Brady, did the actual killing.³⁵ If this evidence had been disclosed at trial, the jury might have agreed to a lesser punishment and not returned a death sentence.³⁶ In *Ruiz*, however, the Court was quick to dismiss the potential importance of impeachment information in the negotiation process despite its potential to similarly impact the defendant's punishment.³⁷ This problem stems from the Court analyzing the relevance of discovery using a trial model instead of a plea bargaining model.³⁸ As a result, the Court failed to ask what discovery might be needed during plea negotiations to reduce the risk of an innocent person pleading guilty and the risk of a defendant getting a worse deal.³⁹ The Court stated that "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant."⁴⁰ The Court does not understand that impeachment evidence can impact punishment by giving the defendant leverage in the plea negotiation process to persuade the prosecutor to offer a better deal.

Ruiz illustrates how little the Court understands the plea negotiation process and the potential value of impeachment information to ensure a more just outcome. Plea bargaining is not simply a zero sum game in which the defendant either accepts or rejects the deal; instead, plea bargaining is more often about what the deal will be. Plea bargaining is often a fast and simple process, with both felony and misdemeanor cases frequently pleading out on the day of arraignment. In this fast-moving environment, as in every negotiation, information is crucial.⁴¹ The more a defense attorney knows about her client's case and the prosecutor's case, the more likely she is to be able to work out a deal that more accurately reflects the weight of the evidence.⁴² While a plea negotiation might involve the prosecutor simply making an offer and the defense accepting it without further negotiation, this is not the only way that plea negotiations happen.⁴³ Instead, plea negotiations regularly involve offers and

35. *Id.*

36. See Stephanos Bibas, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in CRIMINAL PROCEDURE STORIES 129, 139 (Carol Steiker ed., 2006) ("Brady was not innocent of murder, but he could plausibly claim to be innocent of a murder bad enough to deserve the death penalty.").

37. *Ruiz*, 536 U.S. at 629 ("Of course, the more information the defendant has, the more aware he is of the likely consequence of a plea, waiver, or decision, and the wiser that decision will likely be. But the Constitution does not require the prosecutor to share all useful information with the defendant.").

38. See Bibas, *supra* note 10, at 1132–34.

39. See *id.* at 1134–35.

40. *Ruiz*, 536 U.S. at 630.

41. See, e.g., Douglass, *supra* note 5, at 450 ("In negotiation, information often is the key to bargaining power. Plea negotiation is no exception to that rule.").

42. See G. NICHOLAS HERMAN, PLEA BARGAINING 47–50 (2d ed. 2004) (listing the wide variety of information that both sides should collect in preparations for plea bargaining).

43. See, e.g., JILL PAPERNO, REPRESENTING THE ACCUSED: A PRACTICAL GUIDE TO CRIMINAL

counter-offers⁴⁴ that may be exchanged quickly at arraignment or extend over days, weeks, or, in some cases, months.⁴⁵ Prosecutors will reduce charges, time in custody, or both if there are “bad facts” in their case.⁴⁶ Impeachment information is exactly the kind of bad fact that can help a defense lawyer negotiate a better deal.⁴⁷ The final offer may change as the defense lawyer points out to the prosecutor why such information could weaken their case, a conclusion the prosecutor may not have reached without discussions with the defense.⁴⁸ Impeachment information is just one example of evidence to which defendants have no constitutional entitlement. Yet, such important evidence can be the difference between a defense lawyer’s ability to negotiate a better deal and defendants being stuck with no option but to “take or leave” the original prosecution offer.⁴⁹

The Court in *Ruiz* also did not consider that plea negotiations are multi-party negotiations and are therefore a more complex type of negotiation.⁵⁰ Plea bargains are commonly a “three-way” negotiation (between the prosecutor, defense attorney, and the defendant) and often a “four-way negotiation” (adding in the prosecutor’s boss).⁵¹ In some situations it may become a “five-way” negotiation if the judge who needs to accept the plea deal is, for whatever reason,

DEFENSE 222–24 (2012) (“If it seems the facts and circumstances warrant a better disposition, you should make a counteroffer.”).

44. See, e.g., HERMAN, *supra* note 42, at 83 (“As each side obtains information from the other . . . the parties will make offers, counteroffers, and concessions toward fashioning a mutually agreeable bargain.”).

45. See PAPERNO, *supra* note 43, at 215.

46. See HERMAN, *supra* note 42, at 5–6, 17, 54 (advising defense lawyers to use weaknesses in the prosecution’s case as leverage in plea bargaining).

47. *Id.* at 92–94 (listing various defense arguments that can be used as a form of persuasion in the plea bargaining process, and noting that the defense could use impeachment evidence to question the motives of the complaining witness and argue that “the circumstances of the case warrant a departure from the prosecutor’s usual plea policies.”).

48. See, e.g., Brian Gregory, *Brady is the Problem: Wrongful Convictions and the Case for “Open File” Criminal Discovery*, 46 U.S.F. L. REV. 819, 845–46 (2012) (noting how prosecutors can fail to appreciate the exculpatory power of evidence due to “confirmation bias” and “tunnel vision”). See also Fred Klein, *A View from Inside the Ropes: A Prosecutor’s Viewpoint on Disclosing Exculpatory Evidence*, 38 HOFSTRA L. REV. 867, 876 (2010) (“[T]he prosecutor who has already become convinced of the defendant’s guilt and who has little time to devote to further investigation, ignores the importance of affirmatively looking for exculpatory evidence in his own files, or those of the police, or fails to recognize the significance of such evidence of which he is aware.”).

49. For a discussion of how to handle take-it-or-leave-it offers or threats from the prosecution see HERMAN, *supra* note 42, at 75.

50. Dispute resolution literature recognizes that multi-party negotiations are more complex and multi-party disputes may be more difficult to resolve. See, e.g., Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 4 (2003) (“A requirement of unanimity in multilateral negotiation, however, creates potential holdout problems that may pose severe strategic barriers to resolution.”). See also LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 208–14 (3d ed. 2005) (describing challenges in multi-party negotiations, including the problem of coalitions of a sub-group of individuals).

51. See PAPERNO, *supra* note 43, at 210–12.

reluctant to do so.⁵² As with a two-party negotiation, information is key⁵³ to successful negotiations between multiple parties and the lack of information can impede settlement.⁵⁴ This can be a concern that goes to the fundamental fairness of the process, particularly during the negotiation between the defendant and his lawyer.⁵⁵ In *Ruiz*, the Court barely mentioned that the defendant turned down the “fast track” deal and later pled guilty without any deal (after unsuccessfully asking the court to honor the earlier plea offer from the prosecution).⁵⁶ The Court failed to consider how the defendant’s lack of information influenced her decision-making, leading her to reject an earlier and better offer only to realize later in the process that she wanted the original deal.⁵⁷

Ruiz is an example of the Court failing to see that information can be material to the decision-making process of the parties during plea bargaining.⁵⁸ Defendants often do not trust their lawyers or believe that they are getting the best deal when it is the first offer they have heard, and they generally do not understand how the criminal justice system works.⁵⁹ Some defendants are also in denial about the strength of the case against them.⁶⁰ The more information the defense lawyer has, the more they can work through those issues with their clients and assist them to make informed decisions that often may mean agreeing to take the “good deal” early in the case.⁶¹ For the negotiation with the prosecutor and his chain of command, the more information a defense lawyer has, the more she may be able to convince the prosecutor, or more importantly,

52. See *id.* at 211; HERMAN, *supra* note 42, at 95–96.

53. See, e.g., Douglass, *supra* note 5, at 450.

54. For a discussion of communication failures in the context of multi-party disputes, see THOMPSON, *supra* note 50, at 212–14. For an interesting discussion of why people may follow the group or polarize as a group, including due to limited information, see Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71, 77–84 (2000).

55. See, e.g., HERMAN, *supra* note 42, at 62–64 (discussing the role of the client in plea negotiations and how to advise the client).

56. *United States v. Ruiz*, 536 U.S. 622, 625–26 (2002). See also Bibas, *supra* note 10, at 1132 (noting that fast-track plea deals involve waiving more rights in exchange for “steep discounts”).

57. *Ruiz*, 536 U.S. at 625–26.

58. Bibas, *supra* note 10, at 1133–34 (discussing the Court’s views of why defendants were not entitled to impeachment and other types of evidence during plea bargaining).

59. See, e.g., PAPERNO, *supra* note 43, at 226–30 (discussing how to convince the “reluctant client”).

60. One of the reasons defendants suffer from denial is due to biases such as the overconfidence bias which can exist even when a defendant has full information, as they will see that information from the view most favorable to them. This problem can be even more acute when defendants suffer from a lack of full information regarding the strength of the prosecution case against them. See, e.g., Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 217–19 (2007).

61. Defendants need to know how strong the prosecution case is, but under *Brady* they do not have a right to this information. Covey, *supra* note 5, at 599. See also Covey, *supra* note 60, at 235 (“Increasing the defendants’ understanding of the evidence, and thus the accuracy of their estimates of the likelihood of conviction, facilitates plea bargaining . . .”).

his boss, that this particular case deserves a better deal.⁶² Information can also contribute to convincing a judge to accept a plea that she might otherwise reject.⁶³

Information helps at every level of every negotiation that is part of the plea bargaining process. Conversely, a lack of information can affect the fundamental fairness of the plea bargaining process by, in part, having a direct impact on the punishment the defendant ultimately receives or by preventing the defendant from understanding the reasons to accept or reject a particular plea offer. Defense lawyers need access to information, such as impeachment evidence, that could be used to negotiate a better deal. In addition, defense lawyers need more complete information to adequately advise their clients regarding whether to accept the plea offer and to protect defendants from accepting or rejecting deals without adequate information for informed decision-making.

III.

LAFLETER AND FRYE'S CALL FOR CHANGE

The Supreme Court has slowly moved forward in recognizing at least some realities of plea bargaining. Ten years after *Ruiz*, the Court decided the companion cases of *Lafler v. Cooper*⁶⁴ and *Missouri v. Frye*,⁶⁵ holding that defendants have a right to the effective assistance of counsel in plea negotiations.⁶⁶ These cases, while not revolutionary, indicate at least a shift in the Court's thinking about issues surrounding plea bargaining and suggest that it is time for the Court to re-evaluate what information prosecutors should be required to turn over to the defense prior to any plea.⁶⁷

The Court is no longer looking at plea bargaining as merely a procedure necessary to "secure the efficient administration of justice."⁶⁸ In *Lafler*, the Court explicitly stated what every lawyer and judge working in the criminal justice system in the United States already knew: "criminal justice today is for the most

62. For a discussion of the hierarchical nature of prosecutorial decision-making see PAPERNO, *supra* note 43, at 211–12. For recommendations to deal with the "plea policies excuse" see HERMAN, *supra* note 42, at 72.

63. See, e.g., HERMAN, *supra* note 42, at 96 (recommending a strategy to ensure the judge will accept the deal).

64. 132 S. Ct. 1376 (2012).

65. 132 S. Ct. 1399 (2012).

66. For a more substantive analysis of these cases see Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 573–76 (2014).

67. Arguably this shift began with *Padilla v. Kentucky*, 559 U.S. 356 (2010). For a thoughtful analysis of why *Lafler* and *Frye* demand rethinking what discovery defendants have a right to receive, see generally Covey, *supra* note 5. For a more general discussion regarding how *Lafler* and *Frye* will open the door to a broader range of successful ineffective assistance of counsel cases see Richard E. Myers II, *The Future of Effective Assistance of Counsel: Rereading Cronic and Strickland in Light of Padilla, Frye and Lafler*, 45 TEX. TECH L. REV. 229, 238–43 (2012).

68. *United States v. Ruiz*, 536 U.S. 622, 631 (2002).

part a system of pleas, not a system of trials.”⁶⁹ It is therefore “insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pre-trial process.”⁷⁰ The defendant in *Lafler* rejected the plea offer due to his lawyer’s bad advice and after a jury trial ended up with a significantly higher sentence.⁷¹ The Court rejected the argument that Lafler’s fair trial cured ineffective assistance of counsel in the plea bargaining phase.⁷² In *Frye*, the defendant never had the opportunity to reject the deal as his lawyer failed to convey the offer before it expired.⁷³ The Court recognized that in these circumstances the defendant was harmed by not getting the better deal due to his lawyer’s incompetence.⁷⁴ The Court recognized the importance of plea bargaining and stated that “the negotiation of a plea bargain . . . is almost always the critical point for a defendant.”⁷⁵

Through *Lafler* and *Frye*, the Court now clearly acknowledges both the importance of plea bargaining in the criminal justice system and that a fair trial after a failed plea bargain is not a complete cure. This recognition opens the door to reconsidering *Brady* in the specific context of plea bargaining. As stated above, successful negotiation depends on information. Defendants who do not have full information about their cases are likely to either get a worse deal, or not fully understand why they should take the deal that the prosecutor is offering. *Lafler* and *Frye* focused exclusively on specific instances of defense attorneys failing to provide effective assistance of counsel.⁷⁶ And while ineffective assistance of counsel remains a difficult claim for a defendant to win on appeal, these cases indicate that the Court is more willing to look critically at the defense attorney’s conduct during plea bargaining.⁷⁷ In doing so, the Court must also recognize that a defense lawyer who is not given full information about the case can neither competently negotiate the best deal nor capably counsel their client about whether he or she should accept the plea offer. And, as the above discussion of impeachment evidence suggests, information that might be

69. *Lafler*, 132 S. Ct. at 1388.

70. *Frye*, 132 S. Ct. at 1407.

71. *Lafler*, 132 S. Ct. at 1383–84. The defendant rejected an offer of fifty-one to eighty-five months in prison after his lawyer advised him that he could not be convicted of “intent to murder” because the four gunshots to the victim all landed below the waist. *Id.* at 1383. On appeal the parties agreed that this advice was “deficient” as it was clearly incorrect. *Id.* at 1384. After trial the defendant was sentenced to 185–360 months in prison. *Id.* at 1383.

72. *Id.* at 1388.

73. *Frye*, 132 S. Ct. at 1404.

74. *Id.* at 1410.

75. *Id.* at 1407.

76. *Lafler*, 132 S. Ct. at 1383–84; *Frye*, 132 S. Ct. at 1405. See also *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010).

77. For a discussion of the Court’s failure to look more broadly at the problems defendants face during plea bargaining, see generally Alkon, *supra* note 66 (discussing problems with plea bargaining in three categories—prosecutorial power structures, legal framework structures, and indigent defense structures—and arguing that the Court has only addressed problems in the legal framework structures, leaving the rest untouched).

material and relevant to plea negotiations can be different from that which might be required for trial, making *Brady's* narrow focus inadequate.

IV.

THE DEFENSE LAWYER'S DILEMMA AND SOME RECOMMENDATIONS

Following *Lafler* and *Frye*, judges and prosecutors in many jurisdictions are taking steps to make better records to prevent plea bargains from being overturned on appeal.⁷⁸ Such steps include making statements on the record about the plea offer⁷⁹ and providing forms that defense lawyers must sign stating that offers have been conveyed to their clients.⁸⁰ These jurisdictions seem to recognize that at least some information flow between the defendant and his lawyer is important to protect the integrity of the guilty plea.⁸¹

Jurisdictions that take steps to protect the record to prevent guilty pleas from being overturned on appeal are exactly the kind of jurisdictions where defense attorneys could successfully argue for basic discovery to assist in protecting those pleas. In these jurisdictions, defense lawyers should frame the discovery request as a way to prevent cases from being overturned on appeal, which could happen if the lawyer failed to get basic evidence from the prosecutor showing that the state can prove its case. For example, if a defendant pleads guilty to a drug possession charge, the defense lawyer should see the test results confirming the illegal nature of the item (for example, that the item was, in fact, heroin). Failing to do so could bolster a defendant's subsequent ineffective assistance of counsel in plea bargaining claim.

Defense lawyers may still face a dilemma moving forward. On the one hand, they need to protect the record and establish when they do not have access to the information they need for competent plea bargaining. On the other hand, they need to avoid hurting their clients by insisting on this information when prosecutors link discovery to plea offers and, for example, agree to give basic discovery on condition that the defendant understands they are waiving the offered plea deal. Until the Supreme Court decides a case specifically linking the right to discovery with the right to effective assistance of counsel, defense lawyers need to determine if they can clearly state on the record that the prosecutor made such a threat without risking losing a deal the client wants. Strategically, it might make better sense to fully document, in the defense file, that discovery was not sought due to a prosecution threat to withdraw the plea

78. For a more extensive discussion, including some specific examples, see *id.* at 615–20.

79. Ellen Podgor, *DOJ's Lafler/Frye Motion Goes Too Far*, WHITE COLLAR CRIME PROF BLOG (Apr. 4, 2012), http://lawprofessors.typepad.com/whitecollarcrime_blog/2012/04/dojs-laflerfrye-motion-goes-too-far.html (discussing Mot. Pursuant to *Lafler v. Cooper* and *Missouri v. Frye* (W.D. Tenn.)), available at <http://lawprofessors.typepad.com/files/motion-pursuant-to-lafler-and-frye-1.pdf> (party names and date of filing redacted)).

80. See, e.g., Nancy J. King, *Enforcing Effective Assistance After Martinez*, 122 YALE L. J. 2428, 2436 (2013).

81. Podgor, *supra* note 79.

offer, but not put anything on the record in court. Another approach, after *Lafler* and *Frye*, is for defense lawyers to state on the record what discovery they received in advance of their client accepting the plea deal.⁸² Again, this should only be done if doing so would not risk causing the plea deal to fall apart or be withdrawn. Regardless of what defense counsel places on the record, as they did before *Lafler* and *Frye*, defense lawyers should be careful to fully advise their clients about the discovery issues and their options in the context of the particular case, and they should fully document those conversations.

V.

AN ARGUMENT FOR LEGISLATIVE REFORM

Beyond waiting for appellate relief, one recommendation is to change existing legislation to require open-file discovery.⁸³ Legislation may provide for quicker and better protection of defense rights than waiting for decisions from the Supreme Court. It will likely take many years before the Court connects effective assistance of counsel to the right to discovery during the plea process, a link that will require a much more nuanced understanding of the plea bargaining negotiation process than the Court currently seems to have. Legislation requiring open-file discovery on the first court date (or earlier) could be a more immediate improvement for the defense.

Most criminal cases are not factually complex. A large percentage of criminal cases involve driving under the influence of alcohol or possession or sales of drugs.⁸⁴ In these cases the prosecutor's information generally consists of a police report, a lab report, and the defendant's rap sheet. Police investigation of these kinds of criminal cases begins and ends on the day of the arrest. Turning over this information is not difficult, particularly since much of it exists electronically. In Tarrant County, Texas, for example, there is a long-standing

82. Though not required by *Lafler* and *Frye*, some courts have started to create more complete records post-*Lafler* and *Frye* to prevent plea bargains from being overturned on appeal. See Alkon, *supra* note 66, at 617–18. The recently-amended criminal procedure code in Texas now states that before a guilty plea “each party shall acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under this article.” TEX. CODE CRIM. PROC. ANN. art. 39.14(j) (West 2014). See also Section IV, *supra*.

83. For articles recommending open-file discovery see, for example, Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008); Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010); Gregory, *supra* note 48, at 845–46. For articles discussing the proposed federal Fairness in Disclosure of Evidence Act, see Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639 (2013); Peter A. Joy, *The Criminal Discovery Problem: Is Legislation a Solution?* 52 WASHBURN L.J. 37 (2012).

84. For example, in Texas at the district court level in 2012, 27% of all criminal cases were drug cases and a total of 47.8% were drug cases, misdemeanors, felony driving under the influence of alcohol, or non-violent theft cases. TEX. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2012, at 37 (2013), available at <http://www.courts.state.tx.us/pubs/AR2012/AR12.pdf>.

open-file discovery policy.⁸⁵ Implemented in the 1970s, this policy requires the District Attorney to give defense lawyers all information except “attorney work product and victim’s and witnesses’ personal information.”⁸⁶ No lawyer should ever have to negotiate a plea deal for their client without this basic information.

In the spring of 2013, the Texas Legislature passed, and Governor Perry signed into law, the Michael Morton Act, which entered into force January 2014 and established open-file discovery state-wide.⁸⁷ As this section will discuss, this legislation changes the discovery rules in criminal cases and represents a step forward for defense rights; nonetheless, the legislation has shortcomings that future policymakers and legislators should consider before drafting open-file legislation in other states or in the federal system.⁸⁸

Michael Morton, the law’s namesake, was wrongly convicted of his wife’s murder after the prosecutor in his case withheld exculpatory evidence.⁸⁹ Mr. Morton served twenty-five years in prison before a DNA test helped to free him and to identify the man who committed the murder.⁹⁰ Mr. Morton’s trial was in 1986, well after the Supreme Court decided *Brady*, yet the prosecutor, Ken Anderson, failed to turn over two pieces of exculpatory evidence.⁹¹ The misconduct was so serious that Anderson was criminally prosecuted and ultimately resigned from his position as a judge. Anderson pled guilty to criminal contempt for withholding exculpatory evidence, and gave up his law license.⁹² He was sentenced to ten days in jail, a \$500 fine, and 500 hours of community service.⁹³ The Morton case illustrates one of the key shortcomings of *Brady*: even when prosecutors are required to turn over exculpatory evidence, they may fail to do so. *Brady* depends on prosecutors’ judgment in deciding

85. See Brandi Grissom, *Inmate’s Release Brings Call for New Evidence Law*, N.Y. TIMES, Oct. 9, 2011, at A31.

86. John Council, *New Open-File Policy Includes Appellate Info*, TEXAS LAWYER (Oct. 6, 2008, 12:00 AM), <http://www.law.com/jsp/tx/PubArticleFriendlyTX.jsp?id=1202425008168>.

87. Michael Morton Act, S. B. 1611, ch. 49, 2013 Tex. Gen. Laws 106 (codified at TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2014)).

88. For an interesting analysis of the proposed federal Fairness in Disclosure of Evidence Act of 2012, see Green, *supra* note 83.

89. See, e.g., Brandi Grissom, *Morton’s Murder Conviction Comes to Define Anderson*, N.Y. TIMES, Feb. 3, 2013, at A27.

90. See, e.g., *Texas Man Found Guilty in Wrongful Conviction Case*, CBSNEWS.COM (Mar. 27, 2013), http://www.cbsnews.com/8301-201_162-57576657/texas-man-found-guilty-in-wrongful-conviction-case/.

91. For a longer description of the case, see Pamela Colloff, *The Innocent Man: Part 1*, TEX. MONTHLY (Nov. 2012), <http://www.texasmonthly.com/story/innocent-man-part-one>; Pamela Colloff, *The Innocent Man: Part 2*, TEX. MONTHLY (Dec. 2012), <http://www.texasmonthly.com/story/innocent-man-part-two>.

92. See, e.g., Jordan Smith, *Former DA Anderson Pleads Guilty to Withholding Evidence in Morton Case*, AUSTIN CHRON. (Nov. 8, 2013), <http://www.austinchronicle.com/daily/news/2013-11-08/former-da-anderson-pleads-guilty-to-withholding-evidence-in-morton-case/>. Before charges were filed, a Court of Inquiry held there was probable cause to issue arrest warrants for the prosecutor, Ken Anderson, on charges of tampering with or fabricating physical evidence and tampering with government records. See *id.*

93. *Id.*

whether a particular piece of evidence is exculpatory and should be disclosed.⁹⁴

As the legislative summary analysis prepared for the Michael Morton Act explains, *Brady* was inadequate to protect against such problems because the decision is “vague and open to interpretation, resulting in different levels of discovery across different counties in Texas.”⁹⁵ The new law, which amends Article 39.14 of the Texas Code of Criminal Procedure, no longer allows for prosecutorial discretion about whether to turn over exculpatory evidence. Instead, the law requires prosecutors to disclose evidence that the state has in its possession, such as offense reports or recorded statements of the defendant or witnesses.⁹⁶ The defense has to first make a “timely request” but is no longer required to “show good cause” as to why it needs particular pieces of information.⁹⁷ The law, however, makes only one specific reference to plea bargaining: “Before accepting a plea of guilty or nolo contendere . . . each party shall acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under this article.”⁹⁸ This provision is helpful as it makes clear, and preserves for the record, what information the prosecutor turned over before the plea.

Although this law is an improvement, it fails to adequately focus on open-file discovery in the context of plea bargaining. The three basic problems with this law are, (1) it requires a defense motion before the prosecutor is required to turn over discovery; (2) it does not require prosecutors to turn over discovery at arraignment; and (3) it does not require prosecutors to advise the defense of anything that it may learn about the case after the guilty plea has been taken.

One problem with requiring discovery only after a defense motion is that prosecutors retain the ability to condition pleas on a defense waiver of discovery. The better approach would require prosecutors to turn over all discovery at arraignment and put them under a continuing obligation to turn over newly obtained discovery in a timely manner after arraignment. What “timely” may mean could differ by state depending on how criminal cases proceed through the system. For example, in a state like California, which has a preliminary hearing for felony cases within ten days of arraignment, the obligation to provide discovery could be tied to the preliminary hearing date or other specific dates embedded into the criminal process.⁹⁹ The goal should be to provide specific

94. Others have written about factors, such as cognitive bias, that cause prosecutors to make good faith, but serious, errors in judgment and fail to recognize evidence is exculpatory. See, e.g., Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1609–12 (2006).

95. ELLIS ET AL., TEX. S. RESEARCH CENTER, S.B. 1611 BILL ANALYSIS, Reg. Sess., at 1 (2013).

96. TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West 2014).

97. *Id.*

98. TEX. CODE CRIM. PROC. ANN. art. 39.14(j).

99. CAL. PENAL CODE §§ 738, 859a (West 2008).

requirements that apply without requiring defense action, thereby preventing prosecutors from threatening adverse consequences, such as withdrawing plea offers, if defendants exercise the right to request discovery.

The second problem is that the Michael Morton Act does not require the prosecution to turn over any specific information at arraignment. Discovery at arraignment is crucial since so many defendants enter a guilty plea on that date. As has been stated above, full information disclosure is paramount to parties seeking to successfully reach a settlement.¹⁰⁰ The goal of an open-file law should be to ensure that defendants receive as much information as possible from the prosecution about the case as early as possible. The law's requirement of a clear statement in writing, or on the record, of what information was turned over before the plea could help to encourage full discovery before guilty pleas at arraignment.¹⁰¹ However, the law does not specifically require disclosure of information at this early (and often final) stage of the process.

The third problem is that the Michael Morton Act does not require disclosure of exculpatory information after a defendant pleads guilty. Instead, it only requires that “[i]f at any time before, during, or after *trial* the state discovers any additional document, item, or information required to be disclosed . . . the state shall promptly disclose the existence of the document, item, or information to the defendant or the court.”¹⁰² Consequently, defendants who plead guilty may not later learn of evidence that could help them withdraw their plea. As a simple point of policy, there should be no provisions written into a law that give a defendant convicted at trial a greater right to learn of potentially exculpatory information discovered after that conviction than for those convicted due to a plea bargain. This provision illustrates the continuing misconception that trials are the dominant process for resolving criminal cases instead of the exception.

VI. CONCLUSION

The decision in *Brady* provides little protection for the vast majority of defendants who plead guilty every year. Defense lawyers continue to struggle to get basic information and, in the absence of that information, to negotiate better deals and to explain to their clients why it is in their best interest to plead guilty early in the process. The Supreme Court, as illustrated in the *Lafler* and *Frye* decisions, is slowly starting to recognize that plea bargaining is different and that going to trial may not fix violations of defense rights in the plea bargaining process. Defense lawyers should be conscious of the Court's change. They should be sure to document their files regarding discovery issues. And, if it won't result in prosecutors withdrawing plea offers, defense lawyers should state

100. See Section II, *supra*.

101. See TEX. CODE CRIM. PROC. ANN. art. 39.14(j).

102. TEX. CODE CRIM. PROC. ANN. art. 39.14(k) (emphasis added).

on the record the discovery they did or did not receive to better protect the record for appeal.

Legislative reform, however, may offer more immediate protection to defendants. New legislation should be written with the awareness that most criminal cases are resolved through plea bargaining. This legislation should require prosecutors to disclose information at arraignment, without a defense motion. Open-file discovery legislation should also include a continuing requirement that prosecutors turn over newly acquired discovery and that requirement should apply even after the guilty plea.