

2013

## Plea-Bargaining Law after *Lafler* and *Frye*

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### Recommended Citation

Russell D. Covey, *Plea-Bargaining Law after Lafler and Frye*, 51 Duq. L. Rev. 595 (2013).

Available at: <https://dsc.duq.edu/dlr/vol51/iss3/6>

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# Plea-Bargaining Law After *Lafler* and *Frye*

Russell D. Covey\*

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## I. INTRODUCTION

In the spring of 2012, the U.S. Supreme Court decided two cases that threw the phenomena of plea bargaining into high relief. In *Lafler v. Cooper*<sup>1</sup> and *Missouri v. Frye*,<sup>2</sup> the Court was asked to

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\* Professor of Law, Georgia State University. Special thanks are due to my research assistant, Max Compton, for his hard work on this article.

1. 132 S. Ct. 1376 (2012).

2. 132 S. Ct. 1399 (2012).

decide whether a defendant's Sixth Amendment right to counsel had been violated when the defendant received deficient advice from his lawyer during plea bargaining and as a result either proceeded to trial and was convicted, or was forced to enter a later guilty plea on worse terms, in either event causing him to receive a more punitive sentence than he would have had he accepted the plea offer. In answering this question in the affirmative, the Court clarified two important points. First, plea bargaining represents a "critical stage" of a prosecution in which defendants are fully entitled to effective legal representation. Second, provision of a fair process—either an error-free trial or entry of a voluntary guilty plea—does not wipe the constitutional slate clean. Prejudice, in other words, includes the loss of a tangible chance to minimize punishment, not merely the entry of an unreliable conviction.

Notwithstanding the seeming narrowness of the issues before it, in the course of its analysis the Court was forced to look broadly at the role plea bargaining plays in the criminal justice system. With uncharacteristic frankness, the Court "called it like it is," acknowledging and citing academic assessments of plea bargaining that have long been accepted as truisms by commentators but that until recently have been ignored by the Court. After acknowledging that guilty pleas account for 97% of federal felony convictions and 94% of state felony convictions, the Court explained why plea bargaining must be subject to constitutional regulation:

Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent . . . horse trading [between prosecutor and defense counsel] determine who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system."<sup>3</sup>

These observations provided the basis for the Court's conclusion that poor lawyering that leads defendants to forgo plea offers to their detriment contravenes the Sixth Amendment right to counsel.

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3. *Frye*, 132 S. Ct. at 1407 (alterations in original) (citations omitted) (quoting *Lafler*, 132 S. Ct. at 1388; Robert Scott & William Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)).

The Court's frank recognition of the central role of plea bargaining in the criminal justice system, and the accompanying need to establish constitutional baselines to regulate it, suggest a potential jurisprudential turning point. This fact was not lost on Justice Scalia. In dissenting opinions in *Frye* and *Lafler*, Justice Scalia scoffed at the Court's acknowledgement of plea bargaining's central role in criminal justice and prophesied the emergence of a "whole new field of constitutionalized criminal procedure: plea-bargaining law."<sup>4</sup> According to Justice Scalia, "[t]oday's opinions deal with only two aspects of counsel's plea-bargaining inadequacy, and leave other aspects (who knows what they might be?) to be worked out in further constitutional litigation that will burden the criminal process."<sup>5</sup>

At first blush, Justice Scalia's warnings about the emergence of a new constitutional law of plea-bargaining seem a little strange. After all, plea bargaining has been the subject of constitutional regulation at least since *Brady v. United States* definitively established that the practice does not violate the constitution.<sup>6</sup> Moreover, the parameters of that law have been fixed for decades. *Brady*, along with several other decisions,<sup>7</sup> established a constitutional framework within which plea bargaining can be conducted. At the center of that framework is the requirement that, to pass constitutional muster, guilty pleas must be voluntary and intelligent.<sup>8</sup> The Court in *Brady* identified two reasons for the requirement. First, because a guilty plea was an "admission in open court that he committed the acts charged in the indictment," the defendant's plea would violate the self-incrimination clause of the Fifth Amendment if the plea was not voluntary.<sup>9</sup> Accordingly, criminal defendants may not be physically or mentally coerced into pleading guilty and prosecutors may not materially misrepresent the terms of bargains. At the same time, a guilty plea provides the "defendant's consent that judgment of conviction may be entered without a trial" and thus is "a waiver of his right to trial

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4. *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting); see also *Frye*, 132 S. Ct. at 1413 (Scalia, J., dissenting) (predicting the "constitutionalization of the plea-bargaining process").

5. *Lafler*, 132 S. Ct. at 1392 (Scalia, J., dissenting).

6. 397 U.S. 742 (1970).

7. See, e.g., *Boykin v. Alabama*, 395 U.S. 238 (1969).

8. See *id.* at 242 (stating that guilty pleas are valid if both "voluntary" and "intelligent").

9. *Brady*, 397 U.S. at 748.

before a jury or a judge."<sup>10</sup> As the Court long has held, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."<sup>11</sup> Defendants are thus constitutionally entitled, before pleading guilty, to be informed of certain critical information necessary to make informed plea-bargaining choices, including the nature of the charges, the rights waived by pleading guilty, and the potential sentence that can lawfully be imposed. Although plea bargains are less than fully-enforceable executory agreements,<sup>12</sup> promises upon which a defendant relies in pleading guilty are enforceable and provide a minimum floor of constitutional protection in the plea-bargaining process.<sup>13</sup>

The Court added another important girder to its regulatory plea-bargaining framework by making clear that the right to the effective assistance of counsel extends to the plea process. In *McMann v. Richardson*,<sup>14</sup> and then more fully in *Hill v. Lockhart*,<sup>15</sup> the Court held that defendants have a Sixth Amendment right to competent legal advice regarding guilty pleas. *Hill* specifically clarified that the two-pronged test set forth in *Strickland v. Washington* governs in the context of guilty pleas as well. Until recently, this body of rules established the general parameters of what might be considered "constitutional plea-bargaining law." What then, could Scalia have meant when he warned of the impending creation of a new constitutional field of plea-bargaining law?

Here, I think Scalia had two things in mind. By and large, the constitutional standards recognized by the Court to date are overwhelmingly formalistic. As noted above, the heartland of plea-bargaining law as it now stands is the requirement that guilty pleas be entered into "voluntarily" and "intelligently." The voluntariness requirement ensures that criminal defendants are not tricked or physically coerced into pleading guilty and that defendants know what they are doing and make a conscious decision, given the options available, to forgo their trial rights and accept conviction and punishment. The intelligence requirement bolsters

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10. *Id.*

11. *Id.*

12. See *Mabry v. Johnson*, 467 U.S. 504 (1984).

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

14. 397 U.S. 759, 771 (1970).

15. 474 U.S. 52, 58 (1985).

the voluntariness requirement by ensuring that a defendant is fully informed of the charges to which he is pleading guilty and the rights that he waives by doing so.

But consider what the voluntary and intelligent standards elide. A guilty plea is voluntary notwithstanding its being compelled by threat of enhanced punishment, as long as the threatened punishment itself can lawfully be imposed.<sup>16</sup> And a guilty plea is intelligent notwithstanding that it may be entered with little knowledge of the evidence admissible at trial or the likelihood that trial will result in conviction.<sup>17</sup> Guilty pleas that are the product of coercive bargaining tactics, or predicated on threats of penal consequences that fail to correspond with any rational penal objectives apart from encouraging quick pleas are thus entirely exempted from constitutional scrutiny under the Court's voluntariness standards. Similarly, although defendants are entitled to receive certain information about the legal charges against them, the Court has never insisted that defendants receive what is, in reality, the most important information needed to assess a plea offer: information about the strength of the state's case and the likelihood that a trial might result in an acquittal. This aspect of plea bargaining has remained, until *Lafler* and *Frye*, almost entirely unregulated.

The new constitutional plea-bargaining law foreseen by Justice Scalia, I believe, might finally put substantive brick and mortar on the formalistic skeleton of law that currently regulates—or fails to regulate—what the Court now plainly concedes to be the very essence of the criminal justice system. What may be looming—and what may have gotten Scalia's goat—in other words, is a reconsideration of the substantive preconditions for truly voluntary and intelligent guilty pleas.

Justice Scalia's forebodings notwithstanding, such a reconsideration is long overdue. As numerous scholars have noted, a combination of laissez-faire judicial attitudes towards plea-bargaining tactics, combined with virtually unchecked prosecutorial charging discretion, and aided and abetted by all-too-compliant legislatures, has fundamentally altered American criminal justice.<sup>18</sup> It is past

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16. *Brady*, 397 U.S. at 751.

17. *See id.* at 757 (“A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.”).

18. *See, e.g.*, William Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in *CRIMINAL PROCEDURE STORIES* 351, 379 (Carol S. Steiker 2006).

time for the pendulum to swing in the opposite direction. Pursuing this course may require a sweeping reevaluation of plea-bargaining tactics and procedures in ways still unforeseen, but the need to set off on this path is clear. The task for the Court is to begin to take plea bargaining, and the guilty plea process that accounts for upwards of 95% of all state and federal felony convictions, with the degree of seriousness that such a prominent feature of the criminal justice system deserves.

*Lafler* and *Frye* reflect the Court's emerging recognition of the need to bring plea-bargaining processes more securely within the ambit of constitutional regulation. Along with another recent plea-bargaining case, *Padilla v. Kentucky*,<sup>19</sup> *Lafler* and *Frye* indicate the Court's increasing abandonment of the concept of plea-bargaining as an uninhibited free-for-all in which prosecutors have carte blanche to offer criminal defendants whatever deals they think convenient to dispose of cases, and defendants must accept or reject those deals without a very good idea of the wisdom of doing so, or any real alternative to pleading guilty on the terms offered.<sup>20</sup>

The question that the *Lafler* and *Frye* cases squarely tee up, then, is how voluntariness and intelligence should be constitutionally construed. The answer to that question, I think, will point us toward what this new constitutional plea-bargaining law should look like. In this symposium contribution, I suggest two initial steps. First, the Court should finally resolve the uncertainty surrounding the application of *Brady v. Maryland* to plea bargaining. Second, the Court should reassess prior plea-bargaining precedents and seek to place meaningful boundaries on prosecutorial bargaining coercion.

## II. *BRADY* AND INTELLIGENT GUILTY PLEAS

### A. *Brady and Guilty Pleas*

In *Brady v. Maryland*, the Supreme Court recognized that prosecutors have an obligation under the due process clause to turn over exculpatory evidence in their possession.<sup>21</sup> The principle upon which its ruling was based, the Court explained, "is not pun-

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19. 559 U.S. 356 (2010).

20. *Lafler v. Cooper*, 132 S. Ct. 1376, 1389-91 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1410-11 (2012).

21. 373 U.S. at 87.

ishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."<sup>22</sup>

In the years since *Brady* was decided, the Court has clarified the scope of the prosecutor's duty to disclose exculpatory evidence. Under current law, a prosecutor is obligated to produce exculpatory evidence regardless of whether the defendant requests its production. The good faith claim by the prosecutor that she was unaware of the existence of the evidence is no excuse as the prosecutor assumes responsibility for knowing, not only what is in her own files, but what evidence has been gathered by government agents in general.<sup>23</sup> The prosecutor is not, however, obligated to open up her files for criminal defendants, nor must she turn over all evidence that is favorable to the defendant. Rather, the duty to disclose only applies to exculpatory evidence that is material to conviction or punishment.<sup>24</sup> As the Court clarified in *United States v. Bagley*, exculpatory evidence meets the materiality standard "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."<sup>25</sup>

Just *when* the prosecutor must deliver *Brady* material to criminal defendants, however, has never been resolved by the Court. Although it is clear that prosecutors have a duty to produce material exculpatory evidence in advance of trial, the Supreme Court has never stated whether exculpatory evidence need be produced at an earlier stage. It is thus unclear whether a prosecutor has a constitutional duty to produce exculpatory evidence to a criminal defendant before a guilty plea is entered.

Among lower courts, there is widespread disagreement about the scope of a prosecutor's disclosure obligations at the plea stage. Four Federal Circuits—the Second,<sup>26</sup> Eighth,<sup>27</sup> Ninth<sup>28</sup>, and

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22. *Id.*

23. *See* *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (observing the prosecutor's "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," and that failure to disclose such material is a violation regardless of good or bad faith).

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

25. 473 U.S. 667, 682 (1985).

26. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir.1998).

27. *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988).

28. *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir.1995).



Tenth<sup>29</sup>—have held that *Brady* applies at the guilty plea stage. The Seventh Circuit has “strongly suggest[ed]” in dicta that *Brady* applies at guilty pleas.<sup>30</sup> Although the First Circuit has not taken a definitive position on the precise issue, in *Ferrara v. United States* it held that under certain circumstances “the prosecution’s failure to disclose evidence may be sufficiently outrageous to constitute the sort of impermissible conduct that is needed to ground a challenge to the validity of a guilty plea.”<sup>31</sup> Most state courts reaching the issue have held that *Brady* applies to guilty pleas.<sup>32</sup>

In contrast, although support for the proposition that *Brady* does not apply at the guilty plea stage is thin, the Fifth Circuit has held that “*Brady* requires a prosecutor to disclose exculpatory evidence for purposes of ensuring a fair trial, a concern that is absent when a defendant waives trial and pleads guilty,”<sup>33</sup> and that *Brady* therefore does not apply to guilty pleas.<sup>34</sup> The Fourth Circuit came close to so holding in the *Moussaoui* case.<sup>35</sup> Several district courts likewise have dismissed *Brady* challenges to guilty pleas in habeas proceedings on the ground that there is no clearly established federal law holding that *Brady* applies to guilty pleas.<sup>36</sup> Other circuits thus far have avoided taking sides on the matter.<sup>37</sup>

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29. *United States v. Ohiri*, 133 F. App’x 555, 562 (10th Cir. 2005).

30. *McCann v. Mangialardi*, 337 F.3d 782, 787–88 (7th Cir.2003).

31. 456 F.3d 278, 291 (1st Cir. 2006).

32. *See, e.g.*, *Carroll v. State*, 474 S.E.2d 737 (Ga. Ct. App. 1996); *State v. Gardner*, 885 P.2d 1144 (Idaho Ct. App. 1994); *Lee v. State*, 573 S.W.2d 131 (Mo. Ct. App. 1978); *State v. Parsons*, 775 A.2d 576 (N.J. Super. Ct. App. Div. 2001); *State v. Huebler*, 275 P.3d 91 (Nev. 2012); *Gibson v. State*, 514 S.E.2d 320 (S.C. 1999); *State v. Davis*, 823 S.W.2d 217 (Tenn. Crim. App. 1991); *Ex parte Lewis*, 587 S.W.2d 697 (Tx. Crim. App. 1979); *State v. Sturgeon*, 605 N.W.2d 589 (Wis. Ct. App. 1999).

33. *Orman v. Cain*, 228 F.3d 616, 617 (5th Cir. 2000) (citing *Matthew v. Johnson*, 201 F.3d 353, 361-62 (5th Cir. 2000)).

34. *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009) (holding that guilty plea waives *Brady* claim); *Matthew v. Johnson*, 201 F.3d 353, 360-62 (5th Cir. 2000) (same).

35. *See United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010) (stating that whether *Moussaoui*’s *Brady* claim was foreclosed by circuit precedent holding that prosecutors have no duty to disclose mitigating evidence that would be relevant during penalty phase of capital trial prior to entry of guilty plea was “close,” but declining ultimately to reach issue).

36. *See, e.g.*, *Rosiere v. United States*, Slip Copy, No. 11–4404(JBS), 2012 WL 4463876 (D.N.J. Sept. 25, 2012); *Burley v. Prelesnik*, Slip Copy, No. 11–CV–11258, 2012 WL 3887204 (E.D. Mich. Sept. 7, 2012); *Ankeney v. Jones*, Slip Copy, No. 12–cv–00808–LTB, 2012 WL 4378215 (D. Colo. July 17, 2012); *Remedios v. United States*, Nos. 10–23524–Civ–Moreno, 09–20337–Cr–Moreno, 2011 WL 1598843, \*11 (S.D. Fla. Mar. 28, 2011).

37. *See, e.g.*, *United States v. Brown*, 250 F.3d 811, 816 n.1 (3d Cir. 2001) (assuming, but not deciding, that *Brady* requires disclosure of material exculpatory evidence prior to entry of guilty plea).

Whatever tentative consensus the lower courts had reached by 2002, moreover, was thrown into doubt by the Supreme Court's decision in *United States v. Ruiz*.<sup>38</sup> In the *Ruiz* case, the defendant Angela Ruiz was found in possession of thirty kilograms of marijuana.<sup>39</sup> Following standard practice in Southern California, federal prosecutors offered Ruiz a "fast track" plea agreement.<sup>40</sup> Per the agreement, in exchange for a substantial sentence concession, Ruiz had to forgo certain rights.<sup>41</sup> Although the agreement expressly stipulated that the government would turn over "any [known] information establishing the factual innocence of the defendant," it required Ruiz to 'waiv[e] the right' to receive 'impeachment information relating to any informants or other witnesses' as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial.<sup>42</sup> Ruiz refused to sign the agreement without removal of these terms and, in response, the government withdrew the offer.<sup>43</sup> Ruiz nonetheless decided that she was better off pleading guilty than contesting her case at trial.<sup>44</sup> As a result, Ruiz entered an open plea, that is, a plea not tied to any offer, and thus forfeited the sentencing benefit that she would have gotten had she accepted the bargain.<sup>45</sup> Ruiz appealed.<sup>46</sup> Although the Ninth Circuit agreed that the prosecutor had an obligation to produce material exculpatory impeachment evidence prior to entry of a guilty plea,<sup>47</sup> the Supreme Court reversed.<sup>48</sup>

According to the Court, the Constitution does not require "preguilty plea disclosure of impeachment information."<sup>49</sup> Information that might be useful to impeach witnesses, the Court reasoned, might help inform a defendant's decision to accept or reject a plea offer but is not "critical information of which the defendant must always be aware prior to pleading guilty."<sup>50</sup> After all, the

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38. 536 U.S. 622 (2002).

39. *Id.* at 625.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 626.

45. *Id.*

46. *Id.*

47. *United States v. Ruiz*, 241 F.3d 1157, 1166 (9th Cir. 2001), *rev'd*, 536 U.S. 622 (2002).

48. *Ruiz*, 536 U.S. at 633.

49. *Id.* at 629.

50. *Id.* at 630.

Court observed, “[t]here is no general constitutional right to discovery in a criminal case.”<sup>51</sup> The Court’s cases construing the voluntary and intelligent standard for valid plea bargains, it noted, have never required that a defendant be accurately informed of all relevant circumstances that might impact the decision to enter a plea.<sup>52</sup> Such information, the Court reasoned, was “more closely related to the *fairness* of a trial than to the *voluntariness* of the plea.”<sup>53</sup>

Significantly, the Court carefully limited its holding to exculpatory *impeachment* evidence and evidence relating to affirmative defenses. Because the plea agreement at issue in *Ruiz* required the prosecutors to turn over “any information establishing the factual innocence of the defendant,” the force of *Ruiz*’s argument that innocent defendants might plead guilty in the absence of disclosure was, the Court noted, “diminishe[d].”<sup>54</sup> The Court thus expressly declined to consider whether the same analysis applies to substantive evidence of factual innocence.

*Ruiz* further muddied the waters about whether *Brady* applies at the guilty plea stage. The Court’s distinction in *Ruiz* between information relevant to impeachment on one hand and information relevant to the “factual innocence” of the defendant on the other is particularly confusing given that the Court long ago ruled that impeachment evidence should be treated no differently than other types of exculpatory evidence for *Brady* purposes.<sup>55</sup> Because of its emphasis on *Brady*’s purpose of ensuring fair trials, some lower courts have interpreted *Ruiz* to mean that the assumption that *Brady* applies generally at the guilty plea stage was incorrect. The Second Circuit, for instance, recently indicated that, in light of *Ruiz*, it might reconsider its prior decisions holding that *Brady* applies to guilty pleas.<sup>56</sup> Other courts, however, have read the tea leaves differently and taken *Ruiz* as a confirmation that, at least as to non-impeachment exculpatory evidence, *Brady* does

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51. *Id.* at 629 (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)).

52. *Id.* at 629-30.

53. *Id.* at 633 (discussing, specifically, the application of *Ruiz*’s holding to information pertinent to affirmative defenses).

54. *Id.* at 631.

55. See *Giglio v. United States*, 405 U.S. 150, 154 (1972) (“When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within [*Brady*’s] rule requiring disclosure exculpatory evidence.”).

56. See *Friedman v. Rehal*, 618 F.3d 142 (2d Cir. 2010).

apply to guilty pleas.<sup>57</sup> In short, the courts continue to struggle with this issue.

### B. Lafler, Frye, Brady, and Plea Bargaining

Although the Court has permitted doubts about the prosecutor's *Brady* obligations at the plea stage to fester, *Lafler* and *Frye* should trigger resolution of this important issue. To be sure, *Lafler* and *Frye* are firmly grounded in the Sixth Amendment right to counsel, while *Brady*'s disclosure requirement stems from basic due process concerns. Concern about the voluntary and intelligent nature of guilty pleas is likewise an element of due process. Nonetheless, as this section discusses, the concerns about the integrity of plea bargaining reflected in *Lafler* and *Frye* transcend the specific requirements of the Sixth Amendment right to counsel. They are, ultimately, due process concerns that necessarily spill over into other facets of the guilty plea proceeding, as Justice Scalia's sarcastic asides concerning new plea-bargaining law rightly acknowledge.

To set the stage for the following discussion, I first set forth a more detailed account of the *Lafler* and *Frye* cases. In *Lafler*, Blaine Cooper was charged with several offenses, including, *inter alia*, assault with intent to murder after shooting the victim in the buttock, hip, and abdomen.<sup>58</sup> While the case was pending, the prosecuting attorney twice offered to dismiss two of the charges and to recommend a sentence on the remaining counts of 51 to 85 months.<sup>59</sup> Cooper's attorney, however, told Cooper that "the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist."<sup>60</sup> Relying on this patently shoddy advice, Cooper rejected the plea offers and stood trial on the charges, where he was convicted on all counts.<sup>61</sup> Cooper then received a mandatory minimum sentence of 185 to 360 months imprisonment.<sup>62</sup> On appeal, Cooper argued that his attorney's advice to reject the plea offers constituted ineffective

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57. See, e.g., *McCann v. Mangialardi*, 337 F.3d 782, 787–88 (7th Cir. 2003) (suggesting that dicta in *Ruiz* "strongly suggests" a due process violation would exist if the prosecution withheld exculpatory evidence, and not merely impeachment evidence, prior to entry of a guilty plea).

58. *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

assistance of counsel.<sup>63</sup> The trial court, and the Michigan Court of Appeals, rejected the claim.<sup>64</sup> A federal district court, however, found merit in the claim and issued a conditional writ of habeas corpus, concluding that the proper remedy for the violation was specific performance, and that Michigan was obliged to reinstate its original plea offers.<sup>65</sup> After the Sixth Circuit affirmed,<sup>66</sup> the United States Supreme Court granted certiorari.<sup>67</sup> The Court too agreed that Cooper's right to the effective assistance of counsel had been violated.<sup>68</sup> Michigan conceded that the advice given by Cooper's attorney was constitutionally deficient,<sup>69</sup> but contended that since Cooper had received a fair trial, he had suffered no prejudice within the meaning of *Strickland v. Washington*<sup>70</sup> and *Hill v. Lockhart*.<sup>71</sup> The key issue before the Court, therefore, was whether deficient representation that deprives a defendant of the potential benefits of plea bargaining constitutes a constitutionally cognizable harm.<sup>72</sup> The Court concluded that it does:

If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.<sup>73</sup>

In reaching this conclusion, the Court clarified several important points. First, the Court reiterated that the Sixth Amendment right to counsel applies, not just to guilty pleas generally, but specifically to plea bargaining.<sup>74</sup> Second, the Court explained that a narrow construction of the Sixth Amendment as protecting

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63. *Id.*

64. *Id.*

65. *Cooper v. Lafler*, No. 06-11068, 2009 WL 817712, at \*9-10 (E.D. Mich. Mar. 26, 2009), *vacated*, 132 S. Ct. 1376 (2012).

66. *Cooper v. Lafler*, 376 F. App'x 563, 575 (6th Cir. 2010), *vacated*, 132 S. Ct. 1376 (2012).

67. *Lafler v. Cooper*, 131 S. Ct. 856 (2011).

68. *Lafler*, 132 S. Ct. at 1390-91.

69. *Id.* at 1384.

70. 466 U.S. 668 (1984), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in* *United States v. Matthews*, 68 M.J. 29, 38 (C.A.A.F. 2009).

71. 474 U.S. 52 (1985).

72. *Lafler*, 132 S. Ct. at 1384.

73. *Lafler*, 132 S. Ct. at 1387.

74. *Id.* at 1384.

solely “the right to a fair trial” was inappropriate.<sup>75</sup> The Sixth Amendment safeguards defendants at all critical stages of a criminal prosecution, of which plea-bargaining is one.<sup>76</sup> Third, the Court emphasized the Sixth Amendment’s concerns extended beyond merely safeguarding the accuracy of criminal convictions.<sup>77</sup> That Cooper was ultimately convicted in a fair trial of the charged offense did not mean that counsel’s ineffective advice was not prejudicial.<sup>78</sup> The loss of a punishment minimizing plea opportunity dramatically worsened Cooper’s ultimate sentence, causing him “to lose benefits he would have received in the ordinary course but for counsel’s ineffective assistance.”<sup>79</sup>

*Missouri v. Frye*<sup>80</sup> involved similar concerns about incompetent representation in plea-bargaining. Galin Frye was arrested after having been stopped while driving with a revoked license.<sup>81</sup> Because this was Frye’s fourth such offense, he was charged with a class D felony carrying with it a maximum sentence of four years imprisonment.<sup>82</sup> Some months later, the prosecutor presented Frye’s attorney a written plea offer, in which the prosecutor offered Frye the opportunity to plead guilty to a misdemeanor, for which the prosecutor would recommend a 90-day sentence.<sup>83</sup> Frye’s lawyer, however, never transmitted the offer to his client and it expired.<sup>84</sup> Frye subsequently entered an “open” guilty plea to the felony charge.<sup>85</sup> Days prior to the sentencing hearing, however, Frye was once again caught driving with a revoked license.<sup>86</sup> The sentencing judge sentenced Frye to three years in prison.<sup>87</sup>

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75. *Id.* at 1385.

76. *Id.* at 1385-86.

77. *Id.* at 1386.

78. *Id.* at 1388.

79. *Id.*

80. 132 S. Ct. 1399 (2012).

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

82. *Id.* at 1399, 1404.

83. *Id.* at 1404. The prosecutor also alternatively offered to permit Frye to plead guilty to a felony in exchange for a sentence recommendation of 3-years, no recommendation on probation, and a recommendation that Frye “serve 10 days in jail as so-called ‘shock’ time.” *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1404-05. Although there was no plea agreement, the prosecutor’s sentencing recommendations conformed to one of the plea offers that had been made: the prosecutor recommended a three-year sentence, made no recommendation as to probation, and asked for 10-days of jail shock time. *Id.* at 1404.

Frye then sought post-conviction relief in state court, claiming that his lawyer's failure to communicate the plea offers in a timely fashion constituted ineffective assistance of counsel.<sup>88</sup> The lower court rejected Frye's petition, but the Missouri Court of Appeals found that Frye received incompetent advice and reversed.<sup>89</sup> The United States Supreme Court agreed with the court of appeals that Frye had received incompetent advice.<sup>90</sup> According to the Court, "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."<sup>91</sup> Because Frye's lawyer failed to perform that basic duty, the Court held that Frye did not receive the effective assistance of counsel that the Sixth Amendment guarantees.<sup>92</sup> However, because there was some question, given the intervening offense, regarding whether the prosecutor would have revoked the offer to plead guilty to a misdemeanor offense or whether the trial court would have accepted a misdemeanor plea, the Court remanded the case to the Missouri Court of Appeals to determine whether Frye could establish prejudice under the second prong of the *Strickland* test.<sup>93</sup>

In one sense, the *Lafler* and *Frye* cases are "no big deal."<sup>94</sup> Neither *Lafler* nor *Frye* heralds a change in constitutional criminal procedure, and there will be no *Lafler-Frye* revolution like that which followed in the wake of *Apprendi v. New Jersey* with respect to sentencing, or *Crawford v. Washington* with respect to the Confrontation Clause.<sup>95</sup> Rather, *Lafler* and *Frye* settle a minor issue regarding application of the right to effective assistance of counsel in plea-bargaining in a manner consistent with the established practices of most of the lower courts. And yet, in another sense, as Justice Scalia's dissent suggests, these cases potentially foretell a transformational evolution of criminal procedure.

*Frye* and *Lafler* make clear, if there was ever any doubt, that plea-bargaining constitutes a "critical stage" of a criminal prosecu-

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88. *Id.* at 1405.

89. *Frye v. State*, 311 S.W.3d 350, 361 (Mo. Ct. App. 2010) *vacated*, 132 S. Ct. 1399 (2012).

90. *Frye*, 132 S. Ct. at 1408.

91. *Id.* at 1408.

92. *Id.* at 1410.

93. *Id.* at 1411.

94. Gerard E. Lynch, *Frye and Lafler: No Big Deal*, 122 YALE L.J. ONLINE 39 (June 21, 2012).

95. A Westlaw search, for example, turns up 230 law review articles mentioning *Apprendi* or *Crawford* in the title.

tion. Because plea-bargaining “is” the criminal justice system, basic due process rules must apply to “the negotiation of a plea bargain.” The implications of that clarification may take years to play out, but the Court expressly recognized at least two of those implications. The first implication, of course, is that criminal defendants are entitled to constitutionally competent representation by their attorneys in plea-bargaining. The second clear implication of *Frye* and *Lafler* is that prosecutorial conduct of plea-bargaining is itself subject to due process constraints. As Justice Scalia warned in dissent: “it would be foolish to think that ‘constitutional’ rules governing *counsel’s* behavior will not be followed by rules governing the *prosecution’s* behavior in the plea-bargaining process that the Court today announces ‘is the criminal justice system.’”<sup>96</sup> Scalia, of course, is precisely correct. The recognition of plea-bargaining as a critical stage in the criminal justice process necessarily means that both prosecutors and defense counsel must conduct bargaining within minimum constitutional parameters. The prosecutor’s obligation to disclose material *Brady* evidence prior to negotiating a plea agreement should be the first, albeit not the last, obligation formally recognized by the Court in a post-*Lafler-Frye* world. Such an obligation has already been recognized as an ethical responsibility.<sup>97</sup>

At minimum, then, these cases set the stage for resolution of the issue of *Brady’s* applicability to guilty pleas.<sup>98</sup> They do so in three main ways. First, they suggest a more robust conception of what an intelligent guilty plea entails. Second, they reflect a recognition that prejudice must be measured against the range of outcomes that are typically produced through plea-bargaining, and not solely against rarely triggered trial outcomes. Third, they make clear that entry of a valid guilty plea does not waive consti-

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96. *Lafler*, 132 S. Ct. at 1392 (Scalia, J., dissenting) (emphasis in original).

97. See MODEL RULES OF PROF’L CONDUCT R. 3.8(D) (2012) (requiring prosecutors to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense”); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 09-454 (2009) (clarifying that disclosure must be made pre-plea to satisfy “significant purpose” of assisting defendants in making intelligent plea-bargaining decisions); see generally Daniel Conte, *Swept Under the Rug: The Brady Disclosure Obligation in a Pre-Plea Context*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 74, 80-82 (2012) (discussing MODEL RULES OF PROF’L CONDUCT R. 3.8(D) (2012) and ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 09-454 (2009)).

98. Some courts have already begun to make this connection. See, e.g., *Gladwell v. Decamp*, No. 3:10-cv-00061-BR, 2012 WL 5182804, at \*7 n.5 (D. Or. Oct. 16, 2012) (recognizing, but not reaching the issue, of whether *Frye* and *Lafler* might strengthen conclusion that *Brady* applies at the guilty plea stage).



tutional claims regarding the state's failure to ensure that a defendant was provided with the means to make a rational, minimal assessment of the practical value of a plea offer.

1. *Lawyers Require Disclosure of Brady Material to Counsel Their Clients Effectively Regarding Whether to Enter a Guilty Plea*

A lawyer's duty to provide effective assistance of counsel encompasses a wide range of duties, the specific content of which depends on the local practices and conventions that dictate what counts as reasonable under "prevailing professional norms."<sup>99</sup> Although the Court in *Strickland* stated that the purpose of the right was to "ensure a fair trial,"<sup>100</sup> it has subsequently made clear—as was underscored in *Lafler* and *Frye*—that the right to the effective assistance of counsel extends beyond ensuring a fair trial and encompasses all stages of the criminal process, including the guilty-plea process.<sup>101</sup>

At minimum, effective assistance imposes upon counsel duties of loyalty, an obligation to consult with clients regarding important decisions, to advocate for the defendant, and to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."<sup>102</sup> To perform such duties, the Court has repeatedly recognized that counsel must provide accurate legal advice to clients, and to do so, must make a reasonable investigation of the law and facts or, absent that, proffer a reasonable justification for failing to do so.<sup>103</sup> In formulating and applying these principles, the Court has repeatedly looked to the ABA Standards for Criminal Justice ("ABA Standards") for guidance while acknowledging that those standards do not represent a performance floor for effective assistance under the Sixth Amendment.<sup>104</sup> Indeed, the Court's opinion in *Frye* cited the ABA Standards in support of the conclusion that, "as a general rule, defense counsel has the duty to communicate formal offers from the prose-

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99. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

100. *Strickland*, 466 U.S. at 686.

101. *Lafler*, 132 S. Ct. at 1384; *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012).

102. *Strickland*, 466 U.S. at 688 (citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

103. *Id.* at 681 (noting that decisions not to investigate deserve deference "commensurate with the reasonableness of the professional judgments on which they are based").

104. See, e.g., *Frye*, 132 S. Ct. at 1408 (citing ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 14-3.2(a) (3d ed. 1999)); *Strickland*, 466 U.S. at 688.

cution to accept a plea on terms and conditions that may be favorable to the accused.”<sup>105</sup>

Similarly, the ABA Standards make clear that competent advice in plea-bargaining must be predicated on adequate investigation. ABA Standard 14-3.2(b), for instance, provides that to proffer the competent advice to which defendants considering a plea of guilty are entitled, defense counsel should make an “appropriate investigation” of the relevant facts and law.<sup>106</sup> Specifically, the Standard states that “[d]efense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.”<sup>107</sup> In addition, ABA Standard 4-6.1(b) on the defense function warns that “[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, *including an analysis of controlling law and the evidence likely to be introduced at trial.*”<sup>108</sup> Given the Court’s repeated emphasis on the importance of adequate investigation, at least in capital cases, as a component of effective assistance, counsel’s duty to make some minimally sufficient investigation prior to advising a client to plead guilty is both consistent with the Court’s Sixth Amendment case law and logically apparent. Accordingly, it seems plain after *Lafler* and *Frye* that competent advice in plea-bargaining not only requires knowledge of the nature of the charges lodged and the consequences of conviction, but also reasonable awareness of the evidence upon which the state would rely were the case to proceed to trial. Indeed, in a recent decision, the Sixth Circuit concluded that a lawyer’s failure to investigate the facts of his client’s case before advising the client to her detriment to withdraw her guilty plea plainly constituted ineffective assistance in the wake of *Lafler* and *Frye*.<sup>109</sup> It follows from this that a competent lawyer is obligated to investigate, at minimum and to the extent reasonably possible, the extant exculpatory evidence, both through independent means and by making timely discovery requests from the state. Indeed, in *Hill v. Lock-*

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105. *Frye*, 132 S. Ct. at 1408.

106. ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 14-3.2(b) (3d ed. 1999).

107. *Id.*

108. ABA STANDARDS FOR CRIMINAL JUSTICE, DUTY TO EXPLORE DISPOSITION WITHOUT TRIAL § 4-6.1(b) (3d ed. 1999) (emphasis added).

109. See *Titlow v. Burt*, 680 F.3d 577, 590 (6th Cir. 2012) (concluding that the lawyer “had no way to adequately advise [the client] on her sentencing exposure at trial or on the reasonableness of the plea offer without first examining the evidence that the State had against her.”).

hart the Supreme Court said as much. In clarifying the application of the *Strickland* prejudice prong to a challenge to a guilty plea based on ineffective assistance of counsel, the Court used as an example a claim "where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence."<sup>110</sup> According to the Court, such a claim would prevail upon a showing that "the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial."<sup>111</sup>

It is, therefore, clear that defense counsel's failure to discover exculpatory evidence that an appropriate investigation would have revealed constitutes a prima facie case of ineffective assistance. Although the kind of investigation needed to discover critical exculpatory evidence might not always be apparent to a competent lawyer, where such evidence could be had merely by making a timely request of exculpatory evidence from the prosecutor, the obligation to discover such evidence would surely apply, and, *Hill* makes clear, failure to do so would be grounds for an ineffective assistance claim.

If a lawyer's culpable failure to discover material exculpatory evidence undermines the reliability of a guilty plea, it ineluctably follows that so does the prosecutor's failure to disclose that evidence even in the absence of any deficient performance by a criminal defendant's lawyer. Indeed, as *United States v. Bagley* established, the duty to disclose material exculpatory evidence does not turn on whether the defendant's lawyer has made a discovery request for such evidence, nor even whether the prosecutor is personally aware of the existence of such evidence, because the *Brady* rule is not a culpability-based standard.<sup>112</sup> Rather, as the Court explained, "[t]he *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."<sup>113</sup>

*Lafler* and *Frye* likewise stand as an acknowledgment that miscarriages of justice may occur as a result of plea-bargaining as well as at trial. In short then, because competent counsel has a constitutional obligation to provide competent advice to clients at the plea-bargaining stage, and because the provision of such ad-

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110. 474 U.S. 52, 59 (1985).

111. *Id.*

112. 473 U.S. 667, 675 (1985).

113. *Bagley*, 473 U.S. at 675.

vice, under widely-accepted ethical canons and as recognized in prior Supreme Court cases, is impossible without an adequate investigation into available material exculpatory evidence, there is no question that a lawyer has a constitutional duty to seek out such evidence from the prosecutor before advising his or her client to enter a guilty plea. Because what is at issue here is the due process concern that defendants will be railroaded into entering guilty pleas unintelligently—that is, without the minimum information necessary to make a truly voluntary choice to waive essential constitutional rights—the duty extends to prosecutors as well as defense counsel. In short, because prosecutors have an independent duty to provide material exculpatory evidence regardless of whether defense counsel requests it, it seems to follow that prosecutors are obligated to turn over such information to the same extent that defense lawyers are obligated to seek it out.

## 2. *The Prosecutor's Ethical and Constitutional Obligations in Plea Bargaining Include Disclosure of Brady Material*

Opposition to requiring disclosure of *Brady* material at the plea stage is often justified on the ground that defendants are aware of their guilt or innocence and thus do not require a full understanding of the evidence prior to entering a plea.<sup>114</sup> As the following section argues, this view is misguided for several reasons. First, although it is likely true that criminal defendants commonly know whether they are, in fact, guilty of the offenses for which they have been charged, it is also virtually certain that some defendants do not know the critical facts needed to assess their own guilt or innocence. Second, knowledge of innocence, even when available, is not, in practical terms, the primary consideration in plea-bargaining. Because there are substantial penal discounts available through plea-bargaining that would be unavailable upon conviction at trial, rational criminal defendants, regardless of guilt or innocence, will base their decisions on whether to plead guilty on the size of the plea discount offered, the probability of conviction at trial, and the costs of contesting the case. In making this as-

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114. As Justice Scalia asserted during the oral argument of the Ruiz case, it's unnecessary to provide discovery to defendants who want to assert, say, self-defense, because "it's impossible for [the defendant] not to know whether he was acting in self-defense." See Transcript of Oral Argument at 32-33, *United States v. Ruiz*, 536 U.S. 622 (2002) (No. 01-595), quoted and discussed in Stephanos Bibas, *Regulating The Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1183 n.83 (2011).

assessment, knowledge of what evidence will be admissible at trial is critical. Knowledge that one is innocent, unaccompanied by the ability to prove it, is a cause for depression but absolutely irrelevant to the rational decision to plead guilty.<sup>115</sup> Third, there is now substantial empirical evidence that demonstrates that innocent defendants do, in fact, plead guilty. That evidence confirms that false guilty pleas are a problem that the legal system has an obligation to address.

*i. It Is Simply Not True That All Defendants Know the Key Facts Determining Their Criminal Liability When They Enter a Plea*

Lack of knowledge of one's own guilt or innocence can arise in a variety of circumstances. Some criminal defendants, because of mental illness or intellectual disability, may simply not remember precisely what transpired during an alleged crime, or exactly what role they played during complex, emotionally-charged, and fast-unfolding events. Such individuals, moreover, are often especially susceptible to suggestion and may be led to believe by investigators or overzealous interrogators that they engaged in conduct in which, in fact, they did not engage.

Problems with personal recollection of allegedly criminal conduct may arise from other causes as well. Indeed, the passage of time alone might cloud otherwise sound memories and make it difficult for a defendant to remember with the necessary degree of clarity where he or she was, or what his or her role had been, during a particular transaction. Difficulty in accurately remembering events, moreover, may often be exacerbated by the use of intoxicants. It would not be surprising to discover that many criminal defendants simply cannot recall with certainty events that took place while they were stoned, drunk, or high. Given the documented large percentage of prisoners with mental illness and substance abuse problems and the extraordinarily high percentage of convictions obtained through guilty pleas, it would be surprising if substantial numbers of criminal defendants did not plead guilty despite a basic lack of personal knowledge about the facts determining their actual guilt. Failure to apply *Brady* to guilty pleas means that innocent defendants will more often enter false guilty

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115. This is true at least if one assumes that minimization of punishment is the primary objective. There may be other non-instrumental reasons for innocent defendants to forgo favorable plea offers.

pleas due to lack of understanding of evidence or their role in the criminal transaction.

ii. *Guilty Pleas as Tactical Choices Rather than Confessions*

The notion that the decision to plead guilty should be divorced from any meaningful assessment of the strength of the evidence in the case and based solely on the defendant's honest assessment of his or her personal culpability reflects a naïve and unrealistic understanding of the modern criminal justice system. The Supreme Court long ago rejected this view in *North Carolina v. Alford*, holding that a criminal defendant's guilty plea was valid notwithstanding accompanying claims of innocence as long as there was a "factual basis" for the plea.<sup>116</sup> Disallowing such pleas would force defendants who believe themselves innocent to lie or forgo the substantial benefits of plea-bargaining. The implausibility of interpreting a guilty plea as an honest confession, moreover, was reinforced in the *Lafler* and *Frye* decisions. As the Court noted, the reason that criminal defendants are entitled to competent advice during plea-bargaining, and the reason that a fair trial of a defendant who received incompetent plea-bargaining advice from his or her lawyer does not wash the slate clean, is that the plea process constitutes the primary mechanism for assessing culpability and distributing punishment.<sup>117</sup> "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is."<sup>118</sup> Defendants need access to exculpatory evidence in order to make intelligent decisions about plea offers and to ensure that any plea offer accepted adequately discounts punishment in light of weaknesses in the state's case.

iii. *Exonerees and Guilty Pleas: The Evidence of a False Guilty Plea Problem*

Finally, and perhaps most significantly, it has become increasingly apparent that actually innocent defendants do plead guilty. Innocence, while a relevant consideration for a defendant charged

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116. 400 U.S. 25, 37-38 (1970).

117. *Missouri v. Frye*, 132 S. Ct.1399, 1407 (2012); *Lafler v. Cooper*, 132 S. Ct.1376, 1384 (2012).

118. *Frye*, 132 S. Ct. at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (emphasis in original)).

with a criminal offense who is considering whether or not to enter a guilty plea, is not a dispositive consideration and does not prevent criminal defendants from pleading guilty.<sup>119</sup>

The fact that innocent individuals plead guilty has been empirically documented. According to current data in the National Registry of Exonerations (“Registry”), nine percent of exonerated defendants were convicted by guilty plea.<sup>120</sup> As the Registry’s compilers acknowledge, this figure almost certainly vastly undercounts the number of innocent individuals who plead guilty, as the practical barriers to exoneration following guilty pleas, including the lack of a trial record and the routine waiver of appellate and collateral review, make it far harder to obtain post-conviction relief.<sup>121</sup>

My own research on exonerees in the Rampart and Tulia scandals indicates that, at least under certain conditions, wrongly accused innocent defendants routinely plead guilty. In both Rampart and Tulia, large numbers of prisoners were exonerated after it was discovered that law enforcement officials had engaged in large-scale misconduct causing the wrongful conviction of scores of innocent persons. Police misconduct ranged from the planting of false evidence to police perjury.<sup>122</sup> In those two scandals, of sixty four actually innocent exonerees, 81%, or 52 out of 64, pled guilty after having been falsely accused of engaging in criminal conduct by untruthful police officers.<sup>123</sup> Only 19% of the Rampart and Tulia exonerees initially opted to contest the charges at trial.<sup>124</sup>

The experience of innocent exonerees in the Rampart and Tulia incidents suggests that innocent defendants plead guilty for at least three important reasons. First, they plead guilty because the evidence they expect the state to offer at trial—which they know to be false—nonetheless would likely be compelling to neutral jurors and judges. Where innocent defendants are convinced that

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119. See Gregory Gilchrist, *Plea Bargains, Convictions, and Legitimacy*, 48 AM. CRIM. L. REV. 143, 171 (observing that the “reasons people plead guilty after plea bargaining are numerous, and actual guilt has little bearing on the calculus.”).

120. See National Registry of Exonerations, available at <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P#> (reporting that 93 of 1022 exonerations involved guilty pleas).

121. *Id.*

122. See Russell D. Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. (2013) (forthcoming) (detailing circumstances in both Rampart and Tulia scandals).

123. *Id.* at \*36.

124. *Id.*

their claims of innocence are likely to go unheeded, guilty pleas look like rational behavior.

Second, innocent defendants likely plead guilty in many cases for the same reason that guilty defendants plead guilty: because the offer is too good to refuse. Routine and systematic use of large trial penalties compel all defendants, including innocent ones, to accept plea offers in order to limit their penal exposure. Compared with trial sentences, the costs of pleading guilty are often relatively small, particularly for defendants who are incarcerated pretrial and expect to serve a substantial portion of their expected plea sentences before their cases get to trial in any event. In addition, the disincentive to pleading guilty to a felony charge is substantially reduced for defendants with previous criminal convictions, given that they already have absorbed many of the collateral costs of felony conviction.

A third reason many innocent defendants plead guilty is that they perceive, often correctly, that they will not receive a fair and unbiased hearing in the local courts. These concerns are especially pronounced for members of ethnic minorities who must appear before racially-biased judges and juries, for defendants with criminal records concerned that revelation of their records will bias factfinders against them, and for indigents represented by underfunded and overburdened defense lawyers. Such defendants are simply not in a position to demand a jury trial, even when they are in fact innocent, because they reasonably fear that their lawyers will not have the resources or interest to undertake the kind of full-throttle defense necessary to undermine a facially-plausible government case, and that even if they did, the decision makers in their cases might well hold one thumb on the scales of justice.

Extending *Brady* disclosure to guilty plea proceedings would help to counter these factors and thereby reduce the likelihood of a plea-stage miscarriage of justice. Disclosure of exculpatory evidence would help to counteract defendant resignation in the face of misleading inculpatory evidence. Such evidence exists in a wide variety of forms but commonly includes victim or eyewitness misidentifications, false confessions, faulty forensic evidence, false accusations of criminal misconduct, and occasionally, police wrongdoing. Where material exculpatory evidence exists, defendants need access to that evidence to make reasoned, accurate decisions about whether to contest the criminal charges against them.

Given the often enormous trial penalties that defendants confront, access to material exculpatory evidence will not always pre-



vent a defendant – even an innocent one – from pleading guilty. However, knowledge of the existence of that evidence will assist counsel to negotiate plea agreements that properly reflect the true probabilities of conviction and acquittal at trial. Having disclosed material exculpatory evidence, prosecutors will be under pressure to offer, and defense lawyers empowered to demand, more significant plea discounts to entice defendants to forgo their right to trial. Risk-averse defendants might well prefer to accept more lenient plea offers rather than roll the dice at trial, and these lenient plea-offers, from an economic perspective, offer a more accurate valuation of the defendant's plea-waiver than an uninformed guilty plea would have, and thus a fairer and more just resolution of the criminal accusation.

In addition, disclosure of material exculpatory evidence would impact the receptivity of the forum to the defendant's innocence claims in important ways. Upon disclosure of exculpatory evidence, overburdened defense lawyers might well choose to reallocate their resources from other cases in recognition of the enhanced likelihood that the defendant is innocent or at least can proffer a more plausible defense at trial. That information might prompt further pre-plea investigation, which might impact not only the terms of settlement but also the decision whether or not to enter a plea at all. Second, secure in the knowledge that the judge and jury will learn about favorable evidence, defendants might feel more confident about declining plea offers and more willing to contest criminal charges at trial.

"Intelligent" guilty pleas are those made not only with an awareness of the consequences of the guilty plea, but of the opportunity costs of foregoing trial. Ideally, defense counsel would have full access to all of the evidence available to prosecutors prior to advising clients to plead guilty. Long-recognized limits on the prosecutor's discovery obligations make that goal impractical, but by ensuring that *Brady* material, at the least, is made available to defendants before they enter guilty pleas, the Court can add critical substance to the requirement that pleas be made "intelligently."

### III. ENHANCING THE VOLUNTARINESS REQUIREMENT

An intelligent plea is not always, however, enough. After all, the choice to hand over the money to the robber rather than be shot in the head also represents a perfectly intelligent choice, just not a fair one. For plea-bargaining law to do justice to criminal

defendants, it must ensure that guilty pleas are voluntary in a more robust sense than is currently recognized. The Court has never established any substantive rules regarding how bargains are reached. In essence, virtually anything and everything can be a bargaining chip. More importantly, the Court has largely taken a hands-off approach to prosecutorial bargaining tactics in the shadow of unconstrained prosecutorial discretion over charging decisions. Having treated prosecutorial charging discretion as sacrosanct, the Court has permitted prosecutors to make charging decisions, not based on a prosecutor's honest assessment of what an appropriate penalty might be, but for the express purpose of inducing defendants to plead guilty to avoid heightened, and in some cases truly egregious, sanctions.

That, of course, was what was at issue in *Bordenkircher v. Hayes*.<sup>125</sup> In *Bordenkircher*, the defendant, Hayes, a two-time prior offender, was charged with uttering a forged check for \$88.30.<sup>126</sup> Although initially he could have been charged under the state's habitual criminal statute, the prosecutor instead made a plea offer in which Hayes could plead guilty to a count of forgery and a prosecutorial recommendation of a five-year term.<sup>127</sup> Perhaps believing five-years for forging an \$88 check to be unduly harsh, Hayes refused the offer.<sup>128</sup> He lived to regret it. The prosecutor filed a superseding indictment charging Hayes as a habitual criminal, Hayes lost at trial, and the judge had no choice but to sentence Hayes to a mandatory life term.<sup>129</sup>

Hayes sought on appeal to get his conviction reversed on grounds that the prosecutor's bargaining tactics were either coercive or punitive,<sup>130</sup> but the United States Supreme Court upheld the conviction and sentence.<sup>131</sup> In the Court's view, "in the 'give-and-take' of plea-bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."<sup>132</sup> According to the Court, as long as the prosecutor selects charges from among those duly made available by the legislature, and for which probable cause exists, he or she

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125. 434 U.S. 357 (1978).

126. 434 U.S. at 358.

127. *Id.*

128. *Id.* at 359.

129. *Id.*

130. *Id.*

131. *Id.* at 365.

132. *Id.* at 363.

has the discretion to charge as he or she sees fit and to bargain without restriction within that range.<sup>133</sup> The Court downplayed the danger that hard bargaining tactics might compel innocent defendants to plead guilty.<sup>134</sup> According to the Court, “[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.”<sup>135</sup> By sanctioning these prosecutorial tactics, the Court signaled its unwillingness to step into the plea-bargaining fray, and in so doing, significantly weakened defendants’ bargaining power. As Scott and Stuntz observed, as long as prosecutors can penalize a defendant’s refusal to plead guilty by seeking substantially harsher penalties, defendants will have little choice but to accept offers on prosecutors’ terms.<sup>136</sup>

*Bordenkircher* has been roundly condemned by commentators.<sup>137</sup> Nonetheless, the Court has never wavered from the path on which it set off there. *Lafler* and *Frye*’s recognition of the dynamic interplay between discretion and constitutional regulation in the plea-bargaining process, however, suggests that there may be a different direction open to the Court.

Numerous commentators have criticized plea-bargaining offers involving enormous trial penalties or plea discounts as inherently coercive.<sup>138</sup> Where defendants are asked to choose between going to trial and thereby risking heavy sanctions and entering guilty pleas in exchange for only minor penalties, contrary to the Court’s disclaimer, the choice may indeed be so coercive as to undermine the accuracy of the resulting conviction. Likewise, a plea offer accompanied by a threat to file enhanced charges, as occurred in *Bordenkircher*, may be so coercive as to undermine both the voluntariness of the waiver of the defendant’s right to trial and the reliability of the conviction.

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133. *Id.* at 364.

134. *Id.*

135. *Id.* at 363.

136. Scott, *supra* note 117, at 1964 (“Hayes might not have accepted that deal, but every future defendant is likely to do so and do so quickly.”).

137. See, e.g., Michael M. O’Hear, *The End of Bordenkircher: Extending the Logic of Apprendi Plea Bargaining*, 84 WASH. U. L. REV. 835, 837 (2006).

138. See, e.g., Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey Of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1174 (2005) (arguing that the “shocking thing about *Bordenkircher* is not the existence of a trial penalty but the coercive size of that penalty”); Stephen J. Schulhofer, *Due Process Of Sentencing*, 128 U. PA. L. REV. 733, 784-85 (1980) (observing that large trial penalties and prosecutorial concessions “can be unfairly coercive”).

As I have argued elsewhere, the fact of unconstrained prosecutorial charge discretion means that the solution to this problem cannot simply be to limit the acceptable size of plea discounts.<sup>139</sup> There are too many ways in which prosecutors can evade such rules. The key is to recognize that plea offers are not purely insubstantial events about which the law cannot take cognizance. Rather, a prosecutor's plea offer represents the prosecutor's substantive assessment of what constitutes an appropriate resolution of the alleged criminal incident. The momentous nature of a plea offer was expressly observed in *Lafler*. As the Court there noted, a plea offer embodies, and thereby identifies, "a sentence the prosecution evidently deem[s] consistent with the sound administration of criminal justice," and one that approximates "the sentence he or others in his position would have received in the ordinary course."<sup>140</sup> It is thus perfectly fair to make a comparative assessment of the sentence that a prosecutor was willing to offer to resolve the case and the punishment that ultimately was sought at trial. While resolution by plea necessarily entails awarding defendants appropriate plea discounts to compensate them for forgoing their costly trial rights and encouraging their acceptance of responsibility, and for conserving prosecutorial resources, protecting victims and witnesses from the burden and trauma of testifying, and the like, voluntariness and accuracy concerns require limits on the acceptable magnitude of those discounts.

In addition, *Frye's* recognition that defense attorneys have a constitutional duty to transmit plea offers to their clients acknowledges the important role that plea offers play in modern criminal process. The communication of a plea offer is a "critical stage" of a criminal prosecution, representing as it does the terms upon which the state is at least tentatively prepared to resolve the criminal matter and which, in the vast majority of cases, does in fact lead to its resolution. The constitutional import of the plea offer, moreover, is not undermined by the fact that prosecutors retain the power to revoke plea offers until the guilty plea is accepted by a court. The existence of prosecutorial discretion to make, withhold, and retract plea offers does not detract from their import, nor negate counsel's obligation to communicate them to their clients.

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139. See Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237 (2008).

140. *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012).

A defendant's right to be informed of a plea offer, notwithstanding the defendant's lack of any right to receive one, is but one example of the contingent quality of many legal rights. A wide variety of rights come into existence only upon the doing of some discretionary act by another party. The right to trial depends on a prosecutor's discretionary decision to file charges. The right to cross-examine a witness depends on the other party's discretionary decision to call the witness in the first place and so on. That legal rights are contingent on the circumstances in which they operate simply does not undermine their force when the prerequisites for their attachment are satisfied.

If the extension of a plea offer can trigger a constitutional right to be informed of the offer, as *Frye* held, it might also trigger other binding consequences. One such consequence could be to shield defendants from onerous trial penalties should they decline the offer. By placing constitutional limits on both the size of plea discounts permitted and the size of trial penalties applied, prosecutors' ability to coerce defendants to plead guilty will be reduced. Such a limitation would go far to ensure that guilty pleas are voluntary in substance and not merely in form. It would also enhance the accuracy of the criminal justice process by discouraging guilty pleas in weak cases that prosecutors would otherwise attempt to resolve through generous plea offers. As a result, weaker cases would either be dismissed or tried, and where they were tried, more defendants would be acquitted as a result, ensuring that more innocent defendants were acquitted. Some innocent defendants, undoubtedly, would go to trial and be convicted, but the limitations on trial penalties would ensure that such defendants did not suffer onerous punishment as a penalty for exercising their right to trial.

Paul Hayes was offered a chance to resolve the criminal charges against him in exchange for what most likely would have amounted to a five-year prison sentence. This offer plainly reflected the prosecutor's estimation that five years in jail was sufficient to satisfy the deterrent, retributive, and incapacitative purposes of criminal punishment. The prosecutor's threat to charge Hayes under an alternative statute that carried far more draconian penalties quite clearly was intended to coerce Hayes into relinquishing his right to trial. The career criminal statute, in essence, functioned little differently than a gun to Hayes' head. Such blatantly coercive bargaining tactics overtly undermine any reasonable opportunity for defendants to make voluntary choices about the ex-

ercise of their right to trial. These tactics undermine the system's ability to separate guilty and innocent defendants and drastically shift the balance of power to prosecutors. *Bordenkircher* should be overruled, and a more nuanced understanding of the scope of trial penalties/plea discounts that may constitutionally be offered to criminal defendants developed.

#### IV. CONCLUSION

Justice Scalia's prediction of the emergence of a new constitutional law of plea-bargaining is, one can only hope, correct. *Lafler* and *Frye* frankly acknowledged, in a way no Supreme Court case has to date, that plea-bargaining is the central mechanism for resolving criminal accusations in the American criminal justice system. In so doing, the Court has upped the ante regarding what constitutes due process at the guilty plea stage. *Lafler* and *Frye* recognize that defendants are entitled to accurate information and advice, provided in timely fashion, in order to make critical decisions regarding whether to accept plea bargains. The justification for demanding effective legal assistance of counsel at the plea-bargaining stage is predicated on the values that effective lawyering advances: accurate assessment of the costs and benefits of accepting a plea offer, an educated evaluation of the strength of the state's case and of any affirmative defenses that might be available, and a grounded estimate of the respective sentencing consequences of pleading guilty versus a trial conviction. These values are grounded in the fundamental idea that a plea of guilty and waiver of the constitutional right to trial is consistent with due process only if it is entered voluntarily and intelligently. None of these values are advanced by withholding material exculpatory evidence from defendants, or their lawyers, at the guilty plea stage. Nor are these values advanced by permitting prosecutors to make coercive plea-bargaining offers, the types of offers that criminal defendants simply "can't refuse." Accordingly, *Lafler* and *Frye* have set the Court on a path, the end point of which remains unclear, but which clearly leads along the way to a finding that *Brady* material is owed to all defendants prior to pleading guilty and that there are substantive limits to plea discounts a prosecutor may offer, or the trial penalties he or she may threaten, beyond the wide range of penalties lawfully available to prosecutors and the probable cause needed to prove them, to induce criminal defendants to enter guilty pleas.

