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CRIMINAL LAW

STRUCTURING PRE-PLEA CRIMINAL DISCOVERY

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Ninety-seven percent of federal defendants plead guilty,[1] and they rely on prosecutors for much of the information about the government's case on which the decision to plead is based. Although federal prosecutors routinely turn over most necessary discovery to the defense, the law does not generally require them to turn over any discovery before the guilty plea. This can lead to innocent defendants pleading guilty and to guilty defendants pleading guilty without information that could have affected the agreed-upon sentence.

This Article argues that the lack of a judicially enforceable pre-plea discovery regime flouts structural protections that due process is supposed to provide. Defendants who plead not guilty and go to trial get a jury to adjudicate guilt and a judge to preside over the proceedings and pronounce sentence. The judge and jury hear an adversarial presentation of the evidence, and the judge at sentencing can consider an even broader spectrum of information about the defendant and the crime. But defendants who plead guilty effectively act as their own judge and jury. Unfortunately, because prosecutors are not required to provide any pre-plea discovery, the

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[1] U.S. SENTENCING COMM'N, 2012 ANNUAL REPORT 42 (2012), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/2012_Annual_Report_Chap5.pdf.

defendant who pleads guilty may not have nearly as much information as the judge and jury would have had at trial and sentencing.

The Supreme Court has employed a balancing test to determine whether a particular procedure comports with due process. This Article proposes tailoring that test to the pre-plea discovery context. The proposed test would ask (1) whether the defense is getting sufficient information before the guilty plea to promote accurate sorting of the innocent from the guilty and reasonably informed and consistent sentencing; (2) whether there are clear rules that allow judges, before a guilty plea, to regulate prosecutors' decisions not to disclose; and (3) whether the production of pre-plea discovery in a given case imposes undue costs on society.

One hopeful development is that several district courts, pursuant to congressionally-granted authority, have promulgated local rules for pre-plea discovery. I argue that these time-tested local rule innovations should be incorporated into the Federal Rules of Criminal Procedure, to give clear standards to prosecutors and authority to judges to enforce expansive pre-plea discovery.

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INTRODUCTION

Consider the unusual case of a federal criminal defendant who is tried by a jury. That defendant has constitutional and statutory rights to discovery, which are necessary for him to prepare a defense. The jury adjudicates guilt based on an adversarial presentation of evidence presided over by a neutral judge. If the jury convicts, the judge can consider an even broader quantity of information to determine a just sentence.

Now, consider the more typical defendant who pleads guilty. Instead of extended proceedings before a judge and jury, that defendant adjudicates

his own case by declaring himself guilty. He also agrees to his own sentence, or at least to its principal terms. No jury hears the evidence, and the plea agreement may leave little or no room for the judge to exercise much sentencing discretion. In effect, that defendant acts as his own judge and jury. Another key feature of the guilty plea is that the defendant may plead guilty with much less information than the judge and jury had in the trial scenario. True, federal prosecutors routinely provide pre-plea discovery as they see fit, but federal defendants have no statutory or constitutional rights defining the appropriate scope of such disclosures.

In the trial example, a conviction requires structural protections consistent with separation of powers principles. First, there needs to be a concurrence of the tri-partite branches: the prosecutor (executive) brings charges according to the law (passed by the legislature), and the pre-trial proceedings, trial, and sentencing are presided over by a judge. Next, the jury serves as a non-governmental check on the power of the state to deprive its citizens—consistent with due process—of life, liberty, or property. In contrast, in the guilty plea example, there is no trial jury, and the judge may do little more than accept the guilty plea and pronounce sentence according to the terms of the plea agreement. The prosecutor is the dominant player, choosing her charges and her defendants and leveraging guilty pleas with the threat of a trial penalty (the differential between the sentence offered as part of the plea deal and the sentence imposed after trial).

Another key difference between the two examples is the flow of information to the decision-maker. In the trial example, the defendant has statutory and constitutional rights to pre-trial discovery. He can seek judicial enforcement of his statutory rights at any stage in the case, although his constitutional discovery rights are generally only enforceable after the trial. But in the guilty plea example, the defendant has no such rights. He pleads guilty based on his own independent knowledge of the case and the information that the prosecution, in its sole discretion, chooses to provide.

This flow of information is critical to the proper disposition of criminal cases. Innocent defendants need evidence in the prosecution's possession that tends to demonstrate their innocence. Without that information, they may plead guilty to cut their losses. Even guilty defendants need information from the prosecution to rationally plea bargain and to be sentenced consistently with other cases. For example, a drug trafficker's sentence depends in large part on the quantity of drugs trafficked. But without access to lab reports, the trafficker may not be aware of the quantity and purity involved. Likewise, members of a large fraud ring may not even know of each other's existence, but evidence that inculpates one defendant

may exculpate another. These two examples illustrate how inculpatory evidence is relevant not only to guilt, but also to sentencing. Because plea deals routinely decide both the charges of conviction and the sentencing consequences, even guilty defendants need enough information about the government's evidence against them to make an informed decision about whether to waive their constitutional rights. And if prosecutorial discretion is not regulated by consistent, enforceable rules for pre-plea discovery, similarly situated defendants may strike different plea bargains based solely on differing amounts of criminal discovery that they happen to receive from the prosecutor assigned to the case.

There is a strong connection between the justice system's structural protections and the flow of information from the prosecution necessary for proper adjudication and sentencing. As a practical matter, prosecutors generally have access to the entire contents of the criminal investigation and the case against the defendant. Congress and the Supreme Court have formulated discovery rules for a trial-based procedure. Judges have enforced these rules, thereby greatly increasing the flow of information to the defense, benefitting defendants (especially innocent ones) and society. In contrast, for the vast majority of defendants who plead guilty, federal prosecutors give up only as much pre-plea discovery as they feel is appropriate, according to agency policies, ethical rules, and their own individual discretion. They have no statutory or constitutional obligation before a guilty plea to turn over discovery that helps the defendant ("exculpatory evidence"), although the Department of Justice generally requires prosecutors to turn over exculpatory evidence (but not evidence that could impeach a government witness) before a guilty plea. They routinely turn over enough evidence that hurts the defendant ("inculpatory evidence") to incentivize the guilty plea, but prosecutors may not recognize when evidence could help the defendant, and without any real possibility that a judge will force them to hand over certain categories of pre-plea discovery, prosecutors are not likely to do so. On the other hand, too much pre-plea discovery threatens the efficient operation of plea bargaining and other public interests, such as the safety of witnesses.

The Supreme Court has not decided whether plea bargaining defendants have a general right to discovery of exculpatory evidence.[2] The Court has already decided that such defendants have no right to discovery of inculpatory evidence.[3] But that holding is in tension with an oft-repeated

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[2] The Supreme Court has concluded that plea bargaining defendants have no right to impeachment evidence, but that is only one category of exculpatory evidence. See discussion of United States v. Ruiz, *infra* Part III(B).

[3] Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

principle running through the Court's due process and compulsory process jurisprudence: providing defendants with information relevant to the preparation of their defense enables the adversary system to properly function so that juries can adjudicate accurately and judges can sentence fairly.

Although scholars have written extensively about how plea bargaining has consolidated power in the prosecution generally, no one has critiqued this consolidation of power in pre-plea discovery.[4] In fact, the failure of Congress and the Supreme Court to regulate pre-plea discovery has likely reduced the accuracy of adjudication and increased unwarranted disparities in sentencing.

Part I discusses the importance of checks and balances in the criminal justice system between prosecutors, trial judges, and the trial jury. Plea bargaining has consolidated too much power in prosecutors, and the absence of constraints on prosecutors in pre-plea discovery is a good example. Factually innocent defendants need pre-plea discovery because, if they are unaware of hard evidence in the government's possession that would exonerate them, they might rationally decide to plead guilty. But even factually guilty defendants need inculpatory evidence against them for several reasons: the adversary system cannot function unless the defense is adequately informed; evidence that appears inculpatory might, in the hands of the defense, prove to be exculpatory or mitigating; and sentencing across cases may be inconsistent unless prosecutors are guided by clear, judicially enforceable rules.

In Part II, I discuss how due process is closely related to separation of powers principles: the executive should not enforce the law except through a courtroom procedure presided over by neutral decision-makers (judges and juries). The *Brady* rule restrains executive discretion in discovery for exculpatory evidence but not for apparently inculpatory evidence that might be relevant and helpful to the defense at trial.[5] But in other discovery cases decided outside of the *Brady v. Maryland* line, the Supreme Court has applied a pre-trial materiality test that measures the potential use of the information to the defense. Such a test, if applied to the plea-bargaining context, would result in broader pre-plea discovery. A novel contribution of my article is that it highlights the tension between Supreme Court cases that acknowledge the importance of adequate discovery in preparing a defense and other cases in which the Supreme Court has refused to extend discovery

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[4] *See infra* note 8. This Article does not address the discovery that the defense owes the prosecution, because the information deficit in criminal cases disadvantages the defense much more than the prosecution.

[5] *See infra* Part II(B).

rights to pre-plea discovery.

In Part III, I describe how criminal due process has come to favor balancing tests (based on *Mathews v. Eldridge*)[6] that are flexible enough to accommodate modern procedural problems, like pre-plea discovery. Unfortunately, when the Supreme Court had the opportunity in 2002 to apply such a test to pre-plea discovery in *United States v. Ruiz*, it failed to recognize that plea bargaining defendants need enforceable discovery rights to potentially exculpatory information. I propose taking the *Eldridge* test and tailoring it to the pre-plea discovery context. My proposed test—a novel contribution itself to the literature and a blueprint for future reforms—asks (1) whether the defense (acting as its own judge and jury) is getting sufficient information before the guilty plea to promote both accurate sorting of the innocent from the guilty and reasonably informed and consistent sentencing; (2) whether there are there clear judicial standards to review the prosecutor's decision not to disclose that can be enforced before the guilty plea; and (3) whether the production of pre-plea discovery imposes undue costs on society.

My claim is modest: I do not argue that due process necessarily requires general discovery of both exculpatory and inculpatory evidence. The Supreme Court has rejected such a requirement in many cases, and it may not be practical for the Court to make fine-grained, constitutional discovery rules that balance the relevant interests without spawning litigation that would impede the efficient operation of plea bargaining, which the Court has consistently endorsed.

Instead, my balancing test—rooted in both a structural critique and sound public policy principles—can provide guidance for good discovery rule-making. In Part IV, I argue that the Federal Rules of Criminal Procedure should be amended to create a consistent national regime of liberal pre-plea discovery. Prosecutors' discretion to withhold discovery needs to be checked, and judges are the ones to do it. But judges cannot do so efficiently and consistently without clear procedural rules regulating pre-plea discovery.

Because amendments to Rule 16 do not appear to be forthcoming, I examine how district courts have used congressionally delegated authority to promulgate local rules regulating pre-plea discovery. Such rules often create a rebuttable presumption that the prosecution will provide most of the discovery that Rule 16 requires, and often a good deal more, including exculpatory evidence, soon after the arraignment. Although defendants who plead guilty will never have full knowledge of the government's case, such

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[6] *See infra* Part III(A).

local rules at least aim to provide a comparable amount of information to defendants who plead guilty as to those defendants who go to trial. My structural critique makes an original contribution to the literature in providing a constitutional rationale for these local rules by showing how they are consistent with my proposed due process balancing test. And, although this Article focuses on the federal criminal justice system, much of its analysis is also applicable to state systems with weak pre-plea discovery regimes.[7]

I. THE UNCHECKED POWER OF PROSECUTORS TO DENY PRE-PLEA DISCOVERY

The criminal justice system has historically had its own system of checks and balances between the legislature, prosecutors, trial judges, and the trial jury. Plea bargaining has upset the old balance by consolidating too much power in prosecutors. The lack of a consistent federal pre-plea discovery regime is a good example of this phenomenon. Plea bargaining defendants need expansive information about their case to make intelligent decisions about whether and on what terms to plead guilty. Unfortunately, since federal prosecutors have unchecked discretion to decide what pre-plea discovery to provide, defendants do not always get enough information to do so.

A. PLEA BARGAINING PROSECUTORS HAVE TOO MUCH DISCRETION TO WITHHOLD DISCOVERY

As numerous scholars have noted, plea bargaining procedure has consolidated too much power into the hands of prosecutors.[8] Briefly, this is because prosecutors choose their defendants and the criminal charges. Those charges carry sentencing consequences, either through mandatory minimums or advisory guidelines that judges widely follow. Judges, who lack the resources to provide many jury trials, rarely reject plea agreements, even though those agreements effectively remove the judge from the adjudication of the case. Instead, the real adjudication happens in private

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[7] Some states, like Texas and North Carolina, have strong pre-plea discovery rules; others, like Virginia, do not. *See* Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV 285, 293–94 (2016).

[8] For a sampling of the vast academic literature on this point, see, e.g., GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 205–30 (2003); *see also* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52–53 (1968); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1061–76 (1976); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987–88 (1992).

negotiations between the prosecutor and the defense attorney, finalized in one brief guilty plea hearing on the record. The in-court proceedings before the guilty plea are shortened to minimize the resources expended on the case and maximize the sentencing discount for the defendant. To assure the defendant that he will receive the benefit of his bargain, the plea agreement usually limits the judge's discretion at sentencing to impose a more severe sentence.[9] And because the defendant waives his right to a jury trial, no jury will ever be summoned as a populist check on the government's case. The Supreme Court has placed few limits on plea bargaining prosecutors.[10]

Plea bargaining prosecutors likewise have very broad discretion to withhold pre-plea discovery. The Supreme Court has principally regulated criminal discovery through the rule of *Brady* and its progeny. But by its own terms, *Brady* is a trial-related rule that does not apply to pre-plea discovery.[11] (The Supreme Court has declined to extend the *Brady* rule to pre-plea discovery of impeachment evidence,[12] but has not yet decided whether to extend *Brady* to pre-plea discovery of other categories of exculpatory evidence.)[13] Only in rare cases will trial judges order pre-trial discovery under *Brady*, such as where the defense can describe specific exculpatory evidence that the prosecution has withheld.[14]

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[9] The Federal Rules of Criminal Procedure allow the parties to specify the sentence on a guilty plea, with the judge's permission. FED. R. CRIM. P. 11(c)(1)(C). More frequently, the parties reach agreements as to certain Sentencing Guideline variables that largely determine the sentence (such as drug quantity or fraud loss amount). At a minimum, defendants who plead guilty almost always qualify for the "acceptance of responsibility" reduction under the United States Sentencing Guidelines, which usually results in about a one-third reduction of the sentence in serious cases. *See* U.S.S.G. § 3E1.1 (2004); *see also* G. NICHOLAS HERMAN, PLEA BARGAINING 99 (3d ed. 2012); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1011 & n.4, 1012, 1017 & n.21 (2005) (collecting citations); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REVIEW OF BOOKS, Nov. 20, 2014 ("[T]he plea bargains usually determine the sentences, sometimes as a matter of law and otherwise as a matter of practice.").

[10] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) (decision whether to prosecute may not be based on race, religion, or other arbitrary classification).

[11] *See* United States v. Ruiz, 536 U.S. 622, 630 (2002); *infra* Part III(B).

[12] *Ruiz*, 536 U.S. at 633.

[13] *See id.* At least one appellate court has found that it likely does. *See* McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) (stating that it is likely a due process violation for a prosecutor who is aware of defendant's innocence to withhold exculpatory evidence before the guilty plea); *see also* Daniel Conte, Note, *Swept Under the Rug: The Brady Disclosure Obligation in a Pre-Plea Context*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 74, 90–92 (2012).

[14] *See* Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987) ("In the typical case where a defendant makes only a general request for exculpatory material under *Brady v. Maryland*[], it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's

Congress, through the Federal Rules of Criminal Procedure, has mandated far more discovery than *Brady* requires. Rule 16 requires prosecutors to produce statements of the defendant, documents and objects relevant to the case, the defendant's criminal history, reports of examinations and tests, and expert witness reports. It requires the defense to produce some reciprocal discovery.[15] Trial judges have broad discretion to enforce violations of the rule.[16] If there are witness safety concerns, prosecutors can seek a protective order from the court excusing compliance with discovery requirements.[17] Rule 16 does not prescribe time limits on any of the discovery but implies that the required disclosures are to be made before trial. Critically, it does not, by its own terms, require any discovery to be produced before a guilty plea.[18]

Outside of Rule 16, the Jencks Act specifies that the parties shall not be required to produce witness statements (except for those of expert witnesses[19]), until after those witnesses have testified on direct examination at trial.[20] Obviously, such a rule does not apply to pre-plea discovery.

Other Rules of Criminal Procedure also serve to augment Rule 16 discovery. Rule 17 governs the issuance of defense subpoenas, which can be issued at any point in the case. Such subpoenas help the defense to obtain critical evidence.[21] Rule 11(d) allows the defendant to withdraw a guilty plea after the court has accepted it but before the imposition of sentence for a "fair and just reason." Many federal courts have adjudicated *Brady* claims pursuant to this rule.[22]

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attention, the prosecutor's decision on disclosure is final."); *see also* United States v. Caro-Muñiz, 406 F.3d 22, 30 (1st Cir. 2005) (rejecting a *Brady*/*Ritchie* claim for failure to specify exculpatory evidence).

[15] FED R. CRIM. P. 16(b).

[16] FED R. CRIM. P. 16(d)(2).

[17] FED R. CRIM. P. 16(d)(1).

[18] *See, e.g.*, United States v. Brewster, 1 F.3d 51, 53 (1st Cir. 1993) ("Absent bad faith[,] . . . the critical time for disclosure of sentence-related information is not prior to the taking of a plea, but prior to sentencing."); *see also* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 211 & n.46 (2006).

[19] FED R. CRIM. P. 16.

[20] 18 U.S.C. § 3500 (2012); *see also* FED. R. CRIM. P. 26.2 (codifying Jencks Act and extending it to other contexts, like suppression motions). Federal Rule of Criminal Procedure 6 excepts grand jury transcripts from discovery. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

[21] See discussion of United States v. Nixon, *infra* Part II(D)(1).

[22] Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 17 & n.79 (2002) (collecting cases). Unfortunately, the "fair and just" standard is amorphous. *See generally id.* at 18.

The Department of Justice has its own internal discovery guidelines for federal prosecutors.[23] Although Department policy sometimes requires federal prosecutors to provide more discovery than the law requires,[24] it does not always provide bright-line rules for pre-plea discovery. Instead, the Department requires line prosecutors to carefully evaluate their discovery obligations in each case, keeping the broader aims of justice in mind.[25] One important exception is that federal prosecutors must turn over exculpatory evidence "reasonably promptly" after it is discovered.[26]

The Department also has an internal division, the Office of Professional Responsibility, which is charged with administering internal discipline to prosecutors who violate the law or Department policy. However, instances of such discipline are few.[27] Federal prosecutors are also required to abide by the ethical rules of the state in which they practice and are subject to discipline by state bar associations.[28] But state bars are notorious for under-enforcing their rules of conduct, especially for federal

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[23] *See* Memorandum from David W. Ogden, Deputy Att'y Gen., on Guidance for Prosecutors Regarding Criminal Discovery for Department Prosecutors (Jan. 4, 2010), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm; Memorandum from David W. Ogden, Deputy Att'y Gen., on Requirement for Office Discovery Policies in Criminal Matters for the Heads of Department Litigating Components Handling Criminal Matters (Jan. 4, 2010), http://www.justice.gov/dag/dag-to-usas-component-heads.pdf; Memorandum from David W. Ogden, Deputy Att'y Gen., on Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group for Department Prosecutors (Jan. 4, 2010), http://www.justice.gov/dag/dag-memo.pdf; Memorandum from David W. Ogden, Deputy Att'y Gen., on Guidance for Prosecutors Regarding Criminal Discovery for Department Prosecutors (Jan. 4, 2010), http://www.justice.gov/dag/discovery-guidance.pdf; Memorandum from Eric H. Holder, Jr., Att'y Gen., on Department Policy on Charging and Sentencing to all Federal Prosecutors (May 19, 2010), http://lawprofessors.typepad.com/files/holdermemo.pdf.

[24] Ellen S. Podgor, *Pleading Blindly*, 80 MISS. L.J. 1633, 1636–37 (2011).

[25] Berger v. United States, 295 U.S. 78, 88 (1935).

[26] Podgor, *supra* note 24, at 1638–39; *see also* OFFICE OF THE U.S. ATT'YS, CRIMINAL RESOURCE MANUAL § 165 (2010), https://www.justice.gov/usam/criminal-resource-manual-165-guidance-prosecutors-regarding-criminal-discovery; Colloquy, *Criminal Discovery*, ASSISTANT U.S. ATT'YS BULL., Sept. 2012 (whole issue devoted to criminal discovery). The Department has given further guidance to prosecutors in a treatise published as part of the Office of Legal Education's "Bluebook" series of training manuals. Unfortunately, the Criminal Discovery Bluebook is not available to the public.

[27] *See* Nick Schwellenbach, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards*, PROJECT ON GOVERNMENT OVERSIGHT (Mar. 13, 2014), http://www.pogo.org/our-work/reports/2014/hundreds-of-justice-attorneys-violated-standards.html.

[28] *See* 28 U.S.C. § 530B (1998) (also known as the McDade Amendment).

prosecutors.[29]

In short, federal prosecutors have no legal obligation to provide pre-plea discovery unless a judge orders it. As I demonstrate in the next section, this can leave some plea-bargaining defendants in the dark.

B. WHY DEFENDANTS NEED BROAD PRE-PLEA DISCOVERY

In the same way that a trial jury needs expansive information to properly adjudicate guilt and a trial judge needs even more information to pronounce a reasonable sentence, defendants need expansive information to intelligently plead guilty and agree to a sentence, or at least the contours of a sentence. Before they plead guilty, they need access to both exculpatory and inculpatory evidence in the prosecutor's possession.

1. Exculpatory Evidence

The case for exculpatory evidence is straightforward. For factually innocent defendants (that is, those defendants who did not commit the charged crimes), broad pre-plea discovery is especially important. Factually innocent persons are not inclined to plead guilty. Indeed, they may know nothing about the crime at all, as in cases of misidentification. However, even factually innocent defendants will plead guilty if it appears to them that their chance of conviction at trial, which carries a much higher sentence, is high.[30] Thus, a correct understanding of the weaknesses of the prosecution's case is critical to them[31] so they can bargain for a reduced sentence.[32]

Even factually guilty[33] defendants for whom there is exculpatory evidence should have the opportunity to realistically gauge their chances of conviction at trial in light of the exculpatory evidence. This is because those

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[29] *See* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(a) & n.12.6 (3d ed. 2007) (in over two hundred cases between 1997 and 2010 in which federal judges had found serious prosecutorial misconduct, only six federal prosecutors were disciplined) (citing Brad Heath & Kevin McCoy, *States can discipline federal prosecutors, rarely do*, USA TODAY, Dec. 8, 2010, http://usatoday30.usatoday.com/news/washington/judicial/2010-12-09-RW_prosecutorbar09_ST_N.htm).

[30] *See* North Carolina v. Alford, 400 U.S. 25 (1970) (allowing defendants to plead guilty while still maintaining their innocence).

[31] Lain, *supra* note 22, at 29.

[32] For a list of articles explaining why pre-plea discovery is necessary for fair plea bargaining, see John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 441 n.17 (2001).

[33] Defined as those defendants who committed the charged crimes and for whom the prosecution apparently possesses sufficient evidence to prove the case beyond a reasonable doubt.

defendants are still being asked to waive their constitutional rights to avoid an enhanced post-trial sentence. At trial, due process requires that the jury hear an adversarial presentation of the evidence to render a verdict—independent of the prosecutor—of guilt beyond a reasonable doubt.[34] Plea bargaining defendants who are acting as their own jury need that same information to develop a defense that is independent of the prosecution's narrative; otherwise, they may plead guilty under the false impression that the prosecution's case is stronger than it really is.[35]

Evidence necessary for litigation of dispositive pre-trial motions, such as motions to suppress evidence because of police conduct that violates the Fourth Amendment, can also be termed "exculpatory." Mandating early pre-plea discovery of evidence related to such claims can help ensure that it is taken into account at the bargaining table, which in turn can deter official misconduct.[36]

2. Inculpatory Evidence

The case for giving defendants exculpatory evidence is fairly intuitive, but the reasons for giving factually guilty defendants inculpatory evidence are less obvious.

The single best reason to mandate broad disclosure of inculpatory evidence is to help ensure that defendants get the exculpatory evidence they need. It is not always easy for prosecutors to tell the difference between the two categories. The Supreme Court's *Brady* test for judging whether exculpatory evidence was improperly withheld asks, after the trial, whether the withheld evidence would have been "material," meaning reasonably likely to change the verdict or sentence in the defendant's favor. Unfortunately, it is impossible for prosecutors to make this determination before trial, because they cannot predict what evidence the jury might

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[34] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[35] "Since the defendant bases his choice of plea ultimately on a subjective assessment of his chances of conviction, the state can make the bargain appear more attractive to him by encouraging him to overestimate his chance of conviction at trial. Thus, manipulation of the defendant's perception of his chance of conviction can create a substantial risk of incremental inaccuracy. Procedural due process requires that defendants be given the information and assistance necessary to make a reasonably reliable assessment of their chance of conviction at trial." Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 933 (1980); *see also* R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1465–66 (2011); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 959 (1989).

[36] See *infra* Part II(D)(2) for a discussion of defendants' rights to discovery for such motions.

eventually hear and they are not privy to the defense's case.[37] The Supreme Court's invitation for prosecutors to err on the side of disclosure[38] is not enough to save an unworkable rule, which the Court itself has recognized as "inevitably imprecise."[39] Furthermore, prosecutors work in an adversary system; they do battle against the defense to obtain convictions. It takes difficult mental gymnastics, even for scrupulous prosecutors, to believe in the defendant's guilt but also "put on the defense attorney's hat" to think about how certain evidence could help the defendant.[40] All this weighs in favor of a pre-plea discovery regime that casts a wide enough net over even apparently inculpatory evidence to ensure that the requisite exculpatory evidence makes it into the hands of the defense.[41]

A second reason why plea bargaining defendants need broad pre-plea discovery has to do with the role such defendants play in the system. If judges and juries need broad information relating to guilt and sentencing to adequately perform their Article III functions, defendants who plead guilty—effectively acting as their own jury and judge—should, to the extent possible, get the same amount of information.

Of course, plea bargaining defendants may still decide to waive their right to such information as part of a plea agreement. To prohibit such waivers, except as to *Brady* material, would probably wring too much efficiency out of plea bargaining for the system to bear. Still, such waivers could at least be minimized with pre-plea discovery rules requiring prosecutors to provide most discovery soon after the arraignment unless the court excused compliance on a showing of good cause. Such waivers could also be made more intelligent by insisting that the defense be informed of the nature of the evidence that the prosecution would not disclose.[42] And such waivers should be construed narrowly and accepted only if also in the

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[37] United States v. Bagley, 473 U.S. 667, 701 (1985) (Marshall, J., dissenting).

[38] Kyles v. Whitley, 514 U.S. 419, 439 (1995) (advising prosecutors not to tack too closely to the wind); *see also Bagley*, 473 U.S. at 699 (Marshall, J., dissenting).

[39] United States v. Agurs, 427 U.S. 97, 108 (1976).

[40] *Bagley*, 473 U.S. at 696–97 (Marshall, J., dissenting) (discussing how difficult it is for prosecutors to appreciate how evidence in their own files might be helpful to the accused).

[41] *Id.*; *see also* Douglass, *supra* note 32, at 495–96.

[42] For example, prosecutors can disclose the general nature of impeachment evidence against a confidential informant without revealing the confidential informant's identity. Some scholars have argued that *Brady* rights should not be waivable at all, and that all *Brady* evidence (including impeachment evidence) should be turned over before a guilty plea. *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2045 (2000) (describing limits to plea bargaining waivers).

public interest.

There is a common objection to granting broad defense discovery of the prosecution's case: if factually guilty defendants know what they did, don't they already know the government's case against them? The matter is not so simple. The government's pre-trial case against a defendant may consist of official reports, documents, witness interviews, and items of evidence. Without access to those documents and items, the defense may not be aware of the nature or strength of the government's case. Although the defendant may have a subjective recollection of events, that recollection may not be accurate (as where the defendant was intoxicated or suffered from a mental infirmity) and will be limited to the defendant's personal perspective. The defendant may not cooperate with appointed defense counsel due to fear or mistrust.[43] Furthermore, crimes commonly require proof of facts that even guilty defendants may not know, such as the actions of co-conspirators, the value of stolen goods, an action's effect on interstate commerce, and the presence or purity of certain drugs.[44]

Defendants' need to understand the strength of the government's case goes even further. Plea bargaining cannot result in similar outcomes across similar cases unless defendants have a reasonably equal opportunity to assess their likely chance of conviction. Two similarly situated defendants with different amounts of information about their case will calculate their chances of conviction differently. That difference is arbitrary to the extent that it arises from two different prosecutors who exercise their standardless discretion over discovery differently.[45]

A third reason to inform the defense of the prosecution's case is to make the adversary system work.[46] That system should allow the defense to prepare to test the admissibility and strength of the prosecution's evidence. A common objection is that defendants know their own trial defense and are in large measure not required to disclose it to the prosecution. Why should the prosecution have to reveal its hand to the defense and not the

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[43] Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 531 (1998).

[44] *See, e.g.*, 18 U.S.C. § 641 (2004) (enhanced penalties for embezzling goods worth over $1,000); 21 U.S.C. § 841(b) (2010) (mandatory minimum penalties for specified quantities and purities of specified drugs); U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2013).

[45] Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 69 (2015).

[46] *See* Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 875 & n.219 (1995) (discussing the place of the adversary system in constitutional law).

other way around? The response is, without some advance knowledge of the case, the defense cannot adequately prepare to do this job. The government conducts the investigation and usually has most of the trial evidence. Defense attorneys are, in general, underfunded and under-resourced.[47] In general, liberal pre-plea discovery is necessary to let the defense put up a fair fight.[48] To the extent that the defense has asymmetrical discovery obligations, that asymmetry is rooted in the defendant's right against self-incrimination, a structural check itself on executive power.

Rule 16 does a reasonably good job in the trial context of fulfilling the foremost purpose of our criminal procedure—to get at the truth of the matter through adversary litigation,[49] although other interests (such as privileges and efficiency) occasionally trump. The defense needs ample discovery for there to be a real clash of ideas leading to the truth. The Supreme Court endorsed this notion in *Wardius v. Oregon*.[50] There, the Court approved of an Oregon rule requiring defendants to give notice to the prosecution of an alibi defense.[51] The Court commended the rule, although due process did not require it, because it was "based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial."[52] Plea bargaining eliminates the jury trial, but the parties' adversarial plea negotiations perform a similar function. Although the Supreme Court has held that there is no general right to discovery, Justice Douglas, joined by two other Justices dissenting from a denial of certiorari, wrote in 1973 that due process at trial required a "full and fair presentation of all the relevant evidence which bears upon the guilt of the defendant."[53]

A fourth reason to allow broad pre-plea discovery is that defendants need enough inculpatory information to understand the likely sentencing

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[47] NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 2 (2009), http://www.constitutionproject.org/manage/file/139.pdf.

[48] Of course this is not true in all cases. For this reason, I advocate a regime of presumptive early discovery, but the prosecution could in appropriate cases make a showing of good cause for a court order delaying such discovery, such as where it would give the defense an undue strategic advantage or cause an undue administrative drag.

[49] AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1998).

[50] 412 U.S. 470 (1973).

[51] *Id.* at 473–74.

[52] *Id.* at 473.

[53] Neely v. Pennsylvania, 411 U.S. 954, 958 (1973) (Douglas, J., dissenting from denial of cert.) (citing Brady v. Maryland, 373 U.S. 83, 87–88 (1963)).

consequences of a plea. Sentencing information, including expert reports, scientific tests, and documentation of criminal history, is often within the prosecutor's exclusive control. Without it, the defense may not be able to calculate the possible sentencing consequences of a guilty plea. The Sentencing Guidelines are rife with facts that, although not necessarily within the defendant's ken, make a huge difference at sentencing.[54]

I now deal with three more common objections to broad pre-plea discovery of inculpatory evidence. First, if defendants who go to trial face substantial uncertainty regarding the strength of the government's case, why should plea bargaining defendants be entitled to more certainty? True, defendants who go to trial take a substantial risk as to who will actually testify, how those witnesses will perform, and how the jury will consider that evidence. They likewise take their chances as to how the judge will exercise her discretion at sentencing. And plea bargaining defendants will always face uncertainty as they try to weigh a plea offer against their best guess as to the likely trial outcome.[55]

However, this criticism assumes that jury trials are the baseline against which plea bargaining should be measured. That assumption is wrong: given the fact that nearly all convictions result from plea bargains (which are to some extent coerced by the threat of a trial penalty), the new baseline is not trial outcomes. Rather, it is bargained-for convictions.[56] A key goal of sentencing is to treat like defendants alike,[57] and one way to do that is to make sure that similarly situated defendants are protected by uniform rules of pre-plea discovery. The more informed they are about their cases, the more likely they will be to bargain for similar plea deals. Unavoidable randomness in trial outcomes does not excuse avoidable randomness in the plea process. The public benefits from distributively just sentencing because it promotes confidence in the system.[58]

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[54] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2013) (drug quantity); U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b) (2012) (fraud loss amount); U.S. SENTENCING GUIDELINES MANUAL § 2L1.1(b)(2) (2011) (number of aliens smuggled); U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(B) (2013) (in jointly undertaken activity, defendant liable for "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity").

[55] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2528–29 (2004).

[56] When every customer at the car dealership gets a "discount," nobody thinks that the full sticker price is the true price of the car. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011).

[57] 18 U.S.C. § 3553(a)(6) (2012) (there should be no "unwarranted sentence disparities" in sentencing).

[58] 28 U.S.C. § 991 (2012) (Sentencing Commission should seek to avoid unwarranted

A second objection to broad pre-plea discovery is that the social cost of providing it is too high. There are several bases for this objection: prosecutors are wasting their time by putting together extensive disclosures for cases that will not be going to trial; broad discovery helps guilty defendants manufacture more convincing alibis; and the disclosures may give the defense the opportunity to improperly influence or even threaten government witnesses. Although there is little empirical data concerning the effect of broad discovery on guilty plea rates, anecdotal evidence suggests the following benefits of broad pre-plea discovery: it allows defendants to better understand the strength of the government's case against them and results in them pleading guilty earlier in the case; it reduces the need for formal discovery motions; it eliminates disagreements over what evidence is subject to disclosure; it reduces costs throughout the system of prolonged pre-trial litigation over cases that ultimately result in guilty pleas; it reduces the likelihood of wrongful convictions.[59]

A third objection is that prosecutors already have an incentive to share

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disparities among similarly situated defendants); Koon v. United States, 518 U.S. 81, 113 (1996) (guidelines should "reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice"); Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 750 (2006) (discussing importance of uniform sentencing); Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post*-Booker, 37 WM. MITCHELL L. REV. 469, 474 (2011) (discussing importance of evenhanded sentencing); Mosi Secret, *Wide Sentencing Disparity Found Among U.S. Judges*, N.Y. TIMES, Mar. 6, 2012, at A23 (wide sentencing disparities discredit the system), http://www.nytimes.com/2012/03/06/nyregion/wide-sentencing-disparity-found-among-us-judges.html?pagewanted=all&_r=0; *Sentencing Bias*, EQUAL JUSTICE INITIATIVE, http://www.eji.org/raceandpoverty/sentencingbias (sentencing disparities tend to disfavor minorities).

[59] *See, e.g.*, CENTER FOR PROSECUTORIAL INTEGRITY, ROADMAP FOR PROSECUTOR REFORM 11 (2013) ("Prosecutors in jurisdictions with open-file discovery have found that cases can be resolved earlier in the process because defendants can see the strength of the state's case."); TEXAS APPLESEED & TEXAS DEFENDER SERVICE, IMPROVING DISCOVERY IN CRIMINAL CASES IN TEXAS: HOW BEST PRACTICES CONTRIBUTE TO GREATER JUSTICE 1–5 (2013); Don DeGabrielle & Mitch Neurock, *Federal Criminal Prosecutions: A View from the Inside of the U.S. Attorney's Office*, 43 HOUS. LAW. 32 (Dec. 2005) (modified open-file discovery policy in the United States Attorney's Office for the Southern District of Texas results in more guilty pleas); Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1558 (2010); *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 CARDOZO L. REV. 2037, 2074–77 (2010) (anecdotal experiences with open-file discovery policies suggest that they make the plea bargaining process more efficient); Ellen Yaroshefsky, *Foreword: New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1951 (2010) ("Contrary to fears and expectations of individual prosecutors in his office, the [open-file discovery] policy has enhanced effective guilty pleas and improved relationships among counsel.").

inculpatory information with the defense to incentivize a guilty plea.[60] Unfortunately, the prosecutor's incentives in plea bargaining do not necessarily coincide with the defense's need for adequate discovery. Prosecutors do have an enormous incentive to obtain guilty pleas in most of their cases simply because it would be impossible to try very many of those cases. To obtain those pleas, prosecutors routinely give over a great deal of discovery. Nevertheless, that discovery is often insufficient to ensure that the adversary system functions well and consistently. As stated above, prosecutors are not always good at identifying exculpatory evidence. Although the safest way to avoid a *Brady* violation is to turn over broad discovery, this approach entails higher administrative costs and may even jeopardize witnesses. Thus, prosecutors may elect to turn over only that information that they think necessary to incentivize a guilty plea.[61] Unfortunately, if disclosures of exculpatory evidence are not complete, factually innocent defendants may feel forced to plead guilty. Even if inculpatory evidence is not turned over in a timely manner, problems at sentencing can arise. If the prosecution puts previously undisclosed inculpatory evidence before the sentencing court in an attempt to increase the sentence, the defendant may attempt to withdraw his guilty plea or argue that the court should reject the plea agreement.[62]

C. STRUCTURAL CRITERIA FOR CRIMINAL PROCEDURE: CHECKING THE EXECUTIVE BY PROVIDING INFORMATION TO ARTICLE III DECISION-MAKERS

This section builds on the prior two to consider the structure of pre-plea criminal discovery: why criminal procedure should ensure that Article III decision-makers—the judge and jury—have sufficient information. This is accomplished by providing adequate information to the defense, which inherently constrains the executive. In trial-based procedure, the defense prepares for trial based on discovery provided by the prosecution and presents favorable information to the jury and sentencing judge, who are aided in their task by competing prosecution and defense narratives.[63]

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[60] Douglass, *supra* note 32, at 505–06.

[61] *Cf.* Francis v. State, 428 S.W.3d 850, 856–59 (Tex. Crim. App. 2014) (affirming trial court's decision not to exclude machete that prosecutor failed to disclose before trial, but suggesting in dicta that, had the defendant foregone a favorable plea bargain because he lacked knowledge of the machete, there might have been a due process violation).

[62] FED R. CRIM. P. 11(c) and (d).

[63] Of course, the need for a defense "narrative" does not shift the burden of proof; the defense may simply explain to the jury that the prosecution has failed to prove its case beyond a reasonable doubt.

Likewise, in plea bargaining procedure, the defendant cannot intelligently decide whether to convict himself without adequate information upon which to formulate a defense. In the following two sub-sections I consider the constitutional, structural reasons for constraining prosecutorial discretion and providing adequate information to the defense.

1. Constraining Prosecutorial Discretion

The Constitution's structure and several of its provisions suggest the importance of separation of powers for the criminal justice system. First, Articles I, II, and III describe the tripartite branches: legislative, executive, and judicial. Modern criminal procedure evinces a "street-level" version of separation of powers: a conviction requires prosecutors (the executive branch) to charge a violation of law (defined by the legislature) to initiate proceedings presided over by a judge (the judicial branch).[64] Thus, as explained in Professor Rachel E. Barkow's seminal article *Separation of Powers and the Criminal Law* (cited by the Supreme Court), a concurrence of each governmental branch is required for a conviction.[65]

The trial jury provides a populist structural check on this concurrence of the tripartite branches.[66] Both the Sixth Amendment and Article III[67] require that a criminal conviction have the trial jury's judgment of guilt. (Thus, whether the jury is considered to be an Article III body or an extra-governmental body—or both—it must be considered as a structural constitutional institution that checks the tripartite branches.)[68]

Two opposing, yet complementary, principles underlie our separation of powers scheme: inefficiency and efficiency. Efficiency is necessary for

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[64] The office of federal prosecutor was created in the Judiciary Act of 1789. Private parties have at times had authority to bring prosecutions, but in practice rarely exercise this right.

[65] Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012–20 (2006) (cited in Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012)).

[66] *Frye*, 132 S. Ct. at 1015. I leave the grand jury aside in this Article because pre-plea discovery is typically a post-indictment issue. However, for defendants that plead guilty pre-indictment, the same analysis applies: in waiving the structural protection of the grand jury, they effectively act as their own grand jury and therefore need, all things being equal, as much information as a grand jury would have had in making a probable cause determination.

[67] U.S. CONST. amend. VI; *id.* art. III, § 2, cl. 3. ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .").

[68] Arguably, the public and press are a fifth structure, an additional check on the tripartite branches. The Sixth Amendment requires that the jury trial be public, and the First Amendment provides for freedom of the press. One principle behind this seems to be transparency in criminal justice, but I leave this structural argument for future scholarly work. *See generally* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014).

the operation of government and calls for allocating power to government actors in the criminal justice system most institutionally fit to exercise that power, and preventing coordinate branches from intruding upon that domain.[69] For example, the executive branch has broad discretion about what discovery to provide to the defense. This is because the prosecution possesses the contents of the investigation in the first place and is most familiar with it. Therefore, efficiency seemingly dictates that the prosecution should make discovery determinations.

Of course, this conception of efficiency is limited: the "efficient" operation of prosecutors does not necessarily result in the socially optimal outcome. In fact, "inefficiency" (again, in the separation of powers sense) with its slow pace and complicated procedures, often improves social outcomes. In criminal justice matters, the principle of inefficiency seeks to curb the consolidation and abuse of official power by separating powers. For example, there cannot in theory be a conviction without the concurrence of the tripartite branches and the jury. Of course, no workable system of government can result from completely separated powers; the Constitution is instead based on checks and balances.[70] Under checks and balances, each branch should perform only its assigned functions, subject to checks from the other branches.

An important corollary is, because the executive's duty is especially susceptible to abuse, the legislature and courts should exercise special oversight. For example, in *Brady*, the Supreme Court held that due process requires prosecutors to provide the defense with material exculpatory evidence in time to make use of that evidence at the jury trial and sentencing.[71] Structurally, such a rule checks prosecutors by taking the narrative out of their hands and, through the defense, empowering the jury and judge with necessary information to arrive at a result more independent from the prosecutor's version of events.

Another principle of inefficiency related to separation of powers is separation of personnel.[72] No one actor should perform the work assigned to two or more branches (e.g., an executive officer may not perform legislative

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[69] *See, e.g.*, Loving v. United States, 517 U.S. 748, 756–58 (1996) (discussing principal rationales for separation of powers).

[70] M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 607–08 (2001); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1167–68 (2000).

[71] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[72] Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1048 n.11, 1090 (1994).

or judicial functions).[73] This curbs partiality and self-interest. This is one of the principle ethical difficulties that prosecutors face. Their role is quasi-judicial in that they must even-handedly enforce the law. Doing so requires them to think like judges or defense attorneys, such as when they determine what information in their possession could be exculpatory. At the same time, their role is adversarial, in that they can't enforce the law without pushing back on the defense.[74]

Separation of powers is a useful criterion for evaluating criminal procedure. A criminal justice system without separation of powers protections would violate our notions of fundamental fairness, in part because the separation of powers is baked into our constitutional order and because we are suspicious of putting too much power in any one governmental actor or institution.[75] Although separation of powers principles alone are not sufficient to help us to strike the right balance of power in pre-plea discovery, these principles strongly suggest that prosecutors should not have unchecked discretion to withhold pre-plea discovery. Judges need clear pre-plea discovery rules that are enforceable before defendants plead guilty. This is an important element of the balancing test discussed in Part III(C) below.

2. Informing Article III Decision-Makers

A second key principle of this structural critique is that Article III decision-makers cannot perform their functions effectively without adequate information. A jury cannot properly adjudicate without hearing adequate evidence through the adversary procedure. And a judge cannot preside over the case and pronounce a just sentence without access to information that goes beyond even what the jury hears. The structural implication of uninformed judges and juries is clear: if they cannot properly

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[73] Montesquieu famously argued for both separation of powers and persons. *See* Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 534 & n.39 (2012).

[74] *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

[75] Separation of powers can be viewed as a necessary component of due process, but that doctrinal argument is beyond the scope of this Article.

perform their roles, they cannot restrain executive discretion. This is important to pre-plea discovery because defendants who plead guilty effectively act as their own judges and juries, and they need to be properly informed in order to carry out those roles.

Of course, in an important sense, prosecutors themselves are acting as the judge and jury when they use the trial penalty to pressure defendants into waiving the structural protections of an involved judge and a trial jury. But even defendants who plead guilty under pressure are ultimately exercising some degree of agency, albeit a reduced one. To the extent that defendants have any agency in the decision, it makes sense to refer to them as their own judge and jury and to consider whether they have adequate information to act as such.

Juries need adequate evidence upon which to perform their Article III function of deciding between innocence and guilt. They have no investigative function and thus rely on the prosecution and the defense for a complete adversarial presentation.[76] The breath of that presentation allows them to adjudicate "on the basis of all the evidence which exposes the truth."[77]

The sentencing judge needs even more information than the jury.[78] The Federal Rules of Evidence place no limits on the information that a judge considers at sentencing.[79] For example, federal sentencing is a "real offense" regime, which permits judges to look beyond the facts of the crime of conviction to consider all "relevant conduct" in sentencing, as well as broad information about the defendant's own background and characteristics.[80] Federal judges must consider a broad variety of

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[76] Christopher Deal, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to A Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1810 (2007).

[77] United States v. Leon, 468 U.S. 897, 900–01 (1984) (quoting Alderman v. United States, 394 U.S. 165, 175 (1969)); *see also* Estes v. Texas, 381 U.S. 532, 540 (1965) ("Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial."). The process by which juries adjudicate must comport with due process, both for the defendant's and the public's sake, because the public has a strong interest in accurate and fair adjudication. "[T]he sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion).

[78] *See* Williams v. New York, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

[79] 18 U.S.C. § 3661 (2012); FED. R. EVID. 1101(d).

[80] *Williams*, 337 U.S. at 249–51; 6 LAFAVE ET AL., *supra* note 29, § 26.4(b); *cf.* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2013).

information at sentencing consistent with the broad considerations inherent in sentencing.[81] Federal probation reports must reflect this broad variety of sentencing information.[82] Defendants have due process rights to receive notice of the information to be considered,[83] and also that the information received be accurate.[84]

Again, to the extent that plea bargains do away with jury trials and largely determine sentences, the structural principle of restraining the executive by providing sufficient information to plea bargaining defendants

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[81] 18 U.S.C. § 3553(a) (2012) (The court must consider "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; (D) and to provide the defendant with needed . . . training . . . [and] treatment[.]").

[82] FED. R. CRIM. P. 32(d).

[83] The probation report must be disclosed to the defendant. FED. R. CRIM. P. 32(e)(2). Certain information must be excluded from the report, FED. R. CRIM. P. 32(d)(3), but the defendant must be given notice of such information and reasonable opportunity to comment before sentence is pronounced. FED. R. CRIM. P. 32(i)(1)(B); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING, Standard 18-5.7 (3d ed. 1994). Courts must state the reasons for imposing a particular sentence. 18 U.S.C. § 3553(c) (2012). "We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality opinion). The Supreme Court has not made clear whether due process or some other constitutional principle (like Eighth Amendment protections against cruel and unusual punishment) require that the defendant receive notice of all information used against him in sentencing. *Compare id.* at 351 (plurality opinion) (relying on due process) *with id.* at 364 (White, J., concurring) (relying on Eighth Amendment's prohibition on cruel and unusual punishments); *see also* 6 LAFAVE ET AL., *supra* note 29, § 26.4(d). Defendants in capital cases have no right to receive discovery of sentencing information in advance of sentencing. Gray v. Netherland, 518 U.S. 152, 167–68 (1996) (citing Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (no general right of discovery in criminal cases)) (noting that the *Gray* defendant had opportunity at sentencing to confront and cross-examine); 6 LAFAVE ET AL., *supra* note 29, § 26.4(d).

[84] In *Townsend v. Burke*, the defendant pleaded guilty to serious felony charges without the benefit of counsel and received a stiff sentence based in part on "materially untrue" information about the defendant's criminal history. The Supreme Court found a violation of due process. 334 U.S. 736, 740–41 (1948). Without properly informed defense counsel, the adversarial process failed, and the resulting sentence was based on misinformation. Likewise, in *United States v. Tucker*, the judge had enhanced the defendant's sentence based on two prior convictions that proved to have been unconstitutionally obtained. 404 U.S. 443, 447 (1972). Relying on *Townsend*, the Supreme Court affirmed the appellate court's order that the defendant be resentenced without reference to the infirm convictions, because the original sentence had been "founded at least in part upon misinformation of constitutional magnitude." *Id*. Taken together, *Townsend* and *Tucker* "stand for the general proposition that a criminal defendant has the due process right to be sentenced on the basis of accurate information." Ben-Yisrayl v. Buss, 540 F.3d 542, 554 (7th Cir. 2008).

is necessary in designing any fair and effective pre-plea discovery regime. This is accounted for in the balancing test discussed below in Part III(C).

In summary, prosecutors should provide the defense with broad pre-plea discovery of both exculpatory and inculpatory evidence. If Article III decision-makers need such information for trial, then the defendant needs it for plea bargaining. Moreover, federal prosecutors should not be required or trusted to turn over all of this discovery on their own. They need to be regulated by courts and Congress. In Part II, I argue that the Supreme Court's discovery cases have not recognized the structural problems in a system where prosecutors are too powerful and plea bargaining defendants are often under-informed.

II. A STRUCTURAL ANALYSIS OF THE SUPREME COURT'S CRIMINAL DISCOVERY JURISPRUDENCE

The intellectual roots of due process are intertwined with separation of powers ideas: the state (executive) should not adjudicate and punish except by neutral decision-makers (judge and juries) applying the settled law of the land. This Article's structural critique highlights two key aspects of this idea. First, such an arrangement is intended in part to curb the abuse of executive power. Second, the decision-maker cannot render an appropriate judgment and sentence without adequate information. That information typically reaches the decision-maker through the adversary process, coming from both the prosecution and the defense. I call this the due process principle of adequate information to the decision-maker ("information principle" or "information right"). Although this information principle is usually framed as a due process right of defendants, the public also has a compelling interest in adequately informed Article III decision-makers.

The *Brady* rule, discussed in Part II(B), *infra*, is consistent with these principles. First, although it limits prosecutors' discretion to withhold material, exculpatory evidence, that limitation is weak because *Brady* violations can only be assessed from a post-trial point of view. Second, *Brady*'s rationale of providing a fair trial through the proper functioning of the adversary system is consistent with the principle of providing adequate information to the jury and sentencing judge. However, *Brady* does not extend to apparently inculpatory evidence that might be relevant and helpful to the defense at trial.

The Supreme Court has decided many due process cases relating to criminal discovery but outside of *Brady*'s direct progeny. Part II(C), *infra*, discusses how, in many instances, those cases have done better at restraining executive authority and providing adequate information to the decision-maker.

As shown in Part II(D), *infra*, due process is not the only constitutional source of discovery rights. The Supreme Court has also considered discovery issues under the Compulsory Process Clause.[85] In fact, discovery issues have arisen under several other trial-related Sixth Amendment rights. This Article's structural critique is applicable to all discovery cases, regardless of their constitutional "hook." In fact, the Supreme Court has sometimes paid more attention to the structural implications of its discovery rules in its compulsory process cases than in its due process cases.

A. SEPARATION OF POWERS AND DUE PROCESS

The Supreme Court's discovery jurisprudence has been largely rooted in due process, a concept with historical ties to separation of powers.[86] Under the Magna Charta, the king (executive) could not deprive his subjects of life, liberty, or property unless the jury assented and the sanction followed from the settled law of the land and the common law.[87] The Fifth Amendment's Due Process Clause, at the time of its passage, required the same procedural protections.[88] Thus, an important meaning of due process was a series of restraints on the executive in law enforcement: generalized law (either through the legislature or the common law), a neutral judge, and a jury.[89]

Due process and separation of powers are so closely related that due process principles can occasionally be used to decide cases that appear to raise only separation of powers questions. For example, in *Mistretta v. United States*, the Supreme Court considered whether, *inter alia*, the President's removal power of members of the United States Sentencing Commission, an agency independent of the judicial branch, violated separation of powers.[90] The Court held that separation of powers was not violated, because the removal power did not risk violating the impartiality of the Article III judges on the Commission. Thus, the Court invoked a due process principle (the idea of an impartial adjudicator) to decide a

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[85] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .").

[86] Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1681 (2012).

[87] *Id.*

[88] *Id.* at 1679.

[89] In fact, several features of due process relate to the separation of powers: fundamental fairness in procedures, impartial decision-makers, transparency and accessibility of government processes, and respect for separation of powers as a structural limit on government authority. E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 218–19 (2013).

[90] 488 U.S. 361, 380 (1989).

separation of powers question.[91]

Unfortunately, the Supreme Court has not always acknowledged the close relationship between due process and separation of powers.[92] As several scholars have already noted, this oversight has resulted in due process jurisprudence that fails to adequately restrain the executive.[93] For example, in *Bordenkircher v. Hayes*, the Supreme Court acknowledged that broad prosecutorial charging discretion "carries with it the potential for both individual and institutional abuse."[94] But where prosecutors threatened to bring charges carrying long mandatory minimum penalties for defendants who did not plead guilty to lesser charges, the Court found no due process violation.[95] *Bordenkircher* stands for a narrow conception of due process that is not offended when the executive threatens a trial penalty to incentivize and even coerce defendants to waive a jury trial, even though that very trial is supposed to check the executive's power.[96] Deciding the case on these separation of powers principles would have led to a more just result.

B. THE *BRADY* RULE

This section describes how the *Brady* rule provides defendants with limited structural protections by forcing prosecutors to put key information in the hands of the defense. But these protections do not go far enough, because *Brady* only applies to evidence that might have changed the outcome of the proceedings from a post-trial (as opposed to a pre-trial) perspective, and it applies only to exculpatory evidence, not inculpatory evidence.

In *Brady*, the prosecutor failed to disclose to Brady his co-defendant's

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[91] *Id.*; *see also* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1544 (1991).

[92] *But see* Young v. United States *ex rel.* Vuitton, 481 U.S. 787, 815–25 (1987) (Scalia, J., concurring in the judgment) (due process violated where judges promulgated rule, prosecuted its violation, and decided guilt); Tumey v. Ohio, 273 U.S. 510, 522–26, 531–33 (1927) (due process violated where mayor adjudicated prohibition violations and received the fines from those violations).

[93] *See supra* Part I(A).

[94] 434 U.S. 357, 365 (1978).

[95] *Id.* at 363. Some scholars have asked whether plea bargaining violates the doctrine of unconstitutional conditions. *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 879 (2009).

[96] Barkow, *supra* note 65, at 1046; *see also* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1907 (2014) (describing due process as adherence to law).

statement taking principal responsibility for a murder.[97] The Court found a due process violation.[98] The rule that has emerged from *Brady* and subsequent cases requires prosecutors to turn over evidence to the defense that is "material" and exculpatory in time for its use at the jury trial.[99] The defense need not request the evidence.[100] Materiality is measured from a post-trial point of view: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,"[101] meaning, the jury would not have convicted. This same test applies to sentencing: a *Brady* violation occurs if, had the judge known of the withheld evidence, she might have imposed a more lenient sentence.[102]

I have already argued above that this rule gives too much discretion to prosecutors for withholding pre-plea discovery.[103] The *Brady* rule's unworkability is part of the problem: prosecutors are unable to accurately gauge the post-trial materiality of evidence in cases that never go to trial.[104] And asking prosecutors to exercise in such mental gymnastics violates the principle of separation of personnel because such prosecutors have to wear three hats—their own, the judge's, and the defense attorney's—to do so.[105] Finally, prosecutors might rely on the fact that judges will be reluctant to find that withheld evidence was "material" on appeal because doing so may upset otherwise valid convictions.[106]

Brady's rationale is rooted in two interdependent purposes. The procedural purpose is avoiding an unfair trial through the provision of

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97 Brady v. Maryland, 373 U.S. 83, 84 (1963).

98 *Id.* at 86.

99 "Due process, it is said, requires only that disclosure of exculpatory evidence be made in sufficient time to permit defendant to make effective use of that evidence at trial." 6 LAFAVE ET AL., *supra* note 29, § 24.3(b) & n.63 (citing lower court cases, no Supreme Court case law); *see, e.g.*, United States v. Davenport, 753 F.2d 1460, 1462 (9th Cir. 1985) ("Disclosure, to escape the *Brady* sanction, must be made at a time when the disclosure would be of value to the accused."). Although Brady was decided under the Fourteenth Amendment's Due Process Clause, the Supreme Court's discovery jurisprudence has treated the Fifth Amendment's Due Process Clause as co-extensive. *See* United States v. Agurs, 427 U.S. 97, 107 (1976).

100 Kyles v. Whitley, 514 U.S. 419, 433 (1995); *Agurs*, 427 U.S. at 107–08.

101 United States v. Bagley, 473 U.S. 667, 682 (1985).

102 *See Brady*, 373 U.S. at 87–88.

103 *See supra* Part I(A).

104 *See supra* Part I(C)(2).

105 *See supra* Part I(C)(2).

106 *See* John G. Douglass, *Can Prosecutors Bluff?* Brady v. Maryland *and Plea Bargaining*, 57 CASE W. RES. L. REV. 581, 589 (2007).

exculpatory evidence.[107] The substantive purpose is preventing the innocent from being convicted:[108]

> Society wins not only when the guilty are convicted but when criminal trials are fair [procedural purpose]; our system of the administration of justice suffers when any accused is treated unfairly. . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant [substantive purpose].[109]

Because *Brady* ultimately asks how the withheld evidence would have affected the relevant decision-maker—the jury as to guilt or innocence, and the judge at sentencing—it means that due process is denied if the decision-makers are unaware of material, exculpatory evidence.

There is a structural rationale behind this due process rule. Judges and juries make decisions based on the evidence and information before them, and in an adversary system, the defense is responsible for presenting this exculpatory information to the court. The *Brady* rule protects the integrity of the adversary system by enabling the defense to make that presentation.[110] By considering competing prosecution and defense narratives, judges and juries make independent decisions about innocence, guilt, and sentencing. Thus, *Brady* structurally checks prosecutors by forcing them to share the power of shaping the narrative with the defense and ultimately to empower Article III decision-makers to arrive at a conclusion independent of the prosecution's story line.[111]

Unfortunately, *Brady*'s structural protections are limited. Justice Marshall, dissenting in *Bagley*, argued that *Brady* materiality should be determined from a pre-trial point of view. Under his proposed test, the prosecutor should "disclose all evidence in his files that might reasonably

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[107] *Brady*, 373 U.S. at 87 (citing Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

[108] *Id.* at 86; *see* Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 LOY. L.A. L. REV. 77, 127 (2013) (contrasting *Brady*'s substantive focus of protecting the innocent with its procedural focus of ensuring a fair trial).

[109] *Brady*, 373 U.S. at 87–88.

[110] Deal, *supra* note 76, at 1809–10.

[111] *Id.* at 1810 n.165 (citing Kyles v. Whitley, 514 U.S. 419, 440 (1995)). "The Court's standard also encourages the prosecutor to assume the role of the jury, and to decide whether certain evidence will make a difference. In our system of justice, that decision properly and wholly belongs to the jury. The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question. Accordingly he will decide the evidence need not be disclosed. But the ideally neutral trier of fact, who approaches the case from a wholly different perspective, is by the prosecutor's decision denied the opportunity to consider the evidence." United States v. Bagley, 473 U.S. 667, 702 (1985) (Marshall, J., dissenting).

be considered favorable to the defendant's case."[112] This broader reading of materiality would improve the functioning of the adversary system by helping the defense to prepare for trial or plea bargaining. But courts have not been willing to extend *Brady*'s due process protections to questions of pre-trial materiality,[113] although I will show below in Part II(C) that the Court has done so in other due process cases outside the *Brady* line.

One significant exception to *Brady*'s post-trial materiality determination can be found in *Pennsylvania v. Ritchie*, which approved of a procedure allowing trial courts to make a pre-trial determination of *Brady* materiality.[114] In that case, Pennsylvania enacted a law protecting the confidentiality of Child and Youth Services files unless the trial court ordered disclosure of those files. In a prosecution of Ritchie for child abuse, the Supreme Court held that the trial court should have examined Child and Youth Services files *in camera* for *Brady* material and turned those materials over to defendant. *Ritchie* presents a solution to the structural problem of prosecutors unilaterally choosing to withhold discovery. In practice, where federal prosecutors face a close call over whether evidence is material and exculpatory and they decide not to turn it over, they frequently submit it to the trial judge for *in camera* review, seeking a finding that the evidence is not material or exculpatory.[115]

In contrast to *Brady*'s rule regarding exculpatory evidence, the Supreme Court has refused to find a due process right to inculpatory evidence. In *Weatherford v. Bursey*, Weatherford and Bursey committed a crime together, but Bursey didn't realize that Weatherford was a police operative.[116] Weatherford testified against Bursey at the bench trial and Bursey was convicted. Bursey never knew that Weatherford would be a prosecution witness. The Supreme Court held that, because there was "no general constitutional right to discovery in a criminal case," the prosecution's failure to reveal the identity of this key inculpatory witness did not violate *Brady*.[117] The fact that Bursey might have opted for a plea bargain had he known in advance of Weatherford's testimony was likewise

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[112] *Bagley*, 473 U.S. at 699–702 (citing examples of evidence which is helpful to the defense but not material).

[113] 6 LAFAVE ET AL., *supra* note 29, § 24.3(b) & n.63 (collecting lower court cases); *accord* Weatherford v. Bursey, 429 U.S. 545, 559–61 (1977). For scholarly commentary, see 6 LAFAVE ET AL., *supra* note 29.

[114] Pennsylvania v. Ritchie, 480 U.S. 39, 58–60 (1987).

[115] Such orders are believed to insulate prosecutors from bar disciplinary proceedings and, to some extent, from appellate findings of an unintentional *Brady* violation.

[116] *Weatherford*, 429 U.S. at 548.

[117] *Id.* at 559.

immaterial, because there was "no constitutional right to plea bargain."[118]

Thus, the Court's due process jurisprudence has not conferred a general right to discovery of inculpatory evidence.[119] This limitation is unwise for two structural reasons. First, prosecutors have too much unregulated discretion not to turn over discovery that is relevant to the preparation of the defense. Second, if the defense is unprepared, both the judge and the jury may be deprived of an effective adversarial presentation necessary for proper adjudication of guilt and sentencing.

C. OTHER RIGHT TO INFORMATION CASES ARISING UNDER DUE PROCESS

This section considers other due process cases outside the *Brady* line that articulate a more robust pre-trial (and potentially pre-plea) conception of the right to information.

1. Executive Duty to Preserve Evidence for Fact-Finder's Benefit— California v. Trombetta

The Supreme Court has upheld the principle of providing broad information to the defense—even beyond that which is material and exculpatory—in its due process jurisprudence about the duty to preserve evidence. In *California v. Trombetta*, the Court held that law enforcement agencies, acting in good faith and according to established policies, did not need to preserve breath samples in driving under the influence of alcohol investigations in order for their analysis of those samples to be admissible. However, the Supreme Court acknowledged that the state in its investigation had a duty to preserve evidence that "might be expected to play a significant role in the suspect's defense."[120]

The *Trombetta* Court placed its holding within a "group of constitutional privileges," including *Brady*, that give defendants access to exculpatory evidence.[121] However, *Trombetta* should in theory give the defense broader access to information than *Brady*. Because *Trombetta* concerned investigations before criminal proceedings were instituted, the Court articulated a materiality standard based on evidence's potential value to the defense at the time the evidence could be preserved. That is, in contrast to *Brady*'s post-trial materiality standard, *Trombetta* tests materiality at the time of the investigation, typically before charges are

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118 *Id.* at 561.

119 *See infra* Part III(B) (discussing United States v. Ruiz, 536 U.S. 622 (2002)).

120 California v. Trombetta, 467 U.S. 479, 488 (1984).

121 *Id.* at 485.

filed.

True, *Trombetta* is deferential to the executive's good faith decisions, which may limit its actual benefit to defendants.[122] However, *Trombetta* also strengthens the due process right "that criminal defendants be afforded a meaningful opportunity to present a complete defense"[123] because it requires the executive to preserve evidence that is not necessarily exculpatory but only "potentially exculpatory."[124] The executive is not left guessing as to the ultimate materiality of any evidence but instead asks the more immediately relevant question of whether it "might be expected to play a significant role in the suspect's defense."[125] More information is likely to flow to the defense under this rule. This checks the executive by helping defendants to investigate and prepare their defense, ultimately resulting in more information and a richer competing narrative for the judge and jury.[126]

2. Right to "Raw Materials Integral to the Building of an Effective Defense"—Ake v. Oklahoma[127]

In *Ake v. Oklahoma*, an indigent defendant was tried on capital charges.[128] The judge rejected Ake's pre-trial request for a court-appointed psychologist, and the jury subsequently rejected Ake's bare-bones insanity defense. Applying the due process balancing test set forth in *Eldridge*,[129] the Supreme Court found a due process violation.[130] Indigent defendants were entitled to equal justice,[131] and the adversary system could not function

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[122] The Court strengthened the good faith requirement in *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

[123] *Trombetta*, 467 U.S. at 485.

[124] *Id.* at 481.

[125] *Id.* at 488–89 (1984) (stating that potentially exculpatory evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means") (citing United States v. Agurs, 427 U.S. 97, 109–10 (1976)).

[126] In reasoning that echoes *Trombetta*, some courts have also imposed a limited due process-based duty on prosecutors to create evidence in the form of a pre-trial lineup that could potentially exculpate the accused. *See* People v. Mena, 277 P.3d 160, 165 (Cal. 2012). There is no universal constitutional right for the prosecution to arrange such a lineup. *See id.* (collecting cases). However, some lower courts have held that the trial judge has discretion to grant one "if the request is made promptly after the crime or arrest" and the lineup "may be of value to both sides." United States v. Estremera, 531 F.2d 1103, 1111 (2d Cir. 1976).

[127] Ake v. Oklahoma, 470 U.S. 68 (1985).

[128] *Id.* at 72.

[129] Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see infra* Part III(A).

[130] *Ake*, 470 U.S. at 74.

[131] *Id.* at 76.

properly if the defendant lacked "access to the raw materials integral to the building of an effective defense."[132] In this way, the appointment of the psychologist would have been a safeguard to "diminish the risk of erroneous conviction[s]."[133]

Significantly, discovery relating to the court-appointed psychologist might have ultimately proved fatal to the defense, but as in *Trombetta*, the concern was with giving the defense access to *potentially* exculpatory evidence, judged from a pre-trial perspective. The more complete the prosecution's disclosures, the better the springboard for the defense's independent investigation. *Ake* teaches that the adversary system functions better if the defense receives information that reasonably appears to be necessary for the effective preparation of the defense well in advance of trial.[134]

3. Right to Information "Relevant and Helpful to the Defense" —Roviaro v. United States

In *Roviaro v. United States*,[135] which preceded *Brady*, Roviaro was tried and convicted on drug charges. A confidential informant had been central to the criminal transaction, and Roviaro sought for the government to disclose the informant's true identity. The government asserted that the information was privileged, and the judge denied the motion. The Supreme Court reversed the conviction and supplied a broad standard to guide the trial court's exercise of discretion to order discovery related to an informant. This standard was rooted in fundamental fairness, mandating disclosure "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."[136] The trial court should balance the public's interest in preserving the privilege against the defendant's interest in the evidence.[137]

The *Roviaro* standard of materiality is broader than *Brady*'s and

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[132] *Id.* at 77.

[133] *Id.* at 78.

[134] Justices Burger (concurring) and Rehnquist (dissenting) would have limited *Ake*'s holding to capital cases. *Id.* at 87.

[135] Roviaro v. United States, 353 U.S. 53 (1957).

[136] *Id.* at 60–61. *Roviaro* relies on "fundamental fairness" without mentioning due process. The Supreme Court later clarified that its holding in *Roviaro* was based on the court's supervisory power. McCray v. Illinois, 386 U.S. 300, 309 (1967). Later, in *California v. Trombetta*, the Court categorized *Roviaro* as a case concerning "constitutional privileges" alongside other due process-based access-to-evidence cases. 467 U.S. 479, 485 (1984).

[137] *Roviaro*, 353 U.S. at 62.

should result in more information to judges and juries in informant cases. First, the required balancing is conducted from a pre-trial perspective.[138] Second, unlike the *Brady* rule, which is only concerned with evidence, the requested discovery here was information that might or might not have led to evidence, and that evidence might or might not have been exculpatory. Third, *Roviaro*'s broad conception of the potential materiality of an informant's testimony "to a fair determination of a cause"[139] focuses on the importance of getting sufficient information to the trier of fact through the adversary system.

D. RIGHT TO INFORMATION CASES NOT ARISING OUT OF DUE PROCESS

1. Compulsory Process for the Effective Functioning of the Courts and United States v. Nixon

The Supreme Court has held that several Sixth Amendment rights relate to due process, including "the right to offer the testimony of witnesses" and compulsory process.[140] Taken together, they comprise "the right to present a defense,"[141] which is "a fundamental element of due process of law."[142] But, logically, the right to present a defense would be meaningless if there were no associated right to prepare a defense. Indeed, Chief Justice Marshall acknowledged as far back as *United States v. Burr* that compulsory process should provide the accused, before the trial,[143] with documents that are "really essential to his defence."[144]

In *United States v. Nixon*, a criminal discovery case arising primarily under the Sixth Amendment's Compulsory Process Clause, the Supreme Court employed a separation of powers analysis that depended on the due process principle of adequate information to the decision-maker.[145] The Watergate special prosecutor had sought to subpoena materials from the President of the United States under Rule 17 of the Federal Rules of Criminal Procedure. (Although a Rule 17 subpoena is not technically a

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138 *Id.* at 65 & n.15.

139 *Id.* at 61.

140 Webb v. Texas, 409 U.S. 95, 98 (1972) (per curiam) (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

141 *Id.*

142 *Id.*

143 United States v. Burr, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (No. 14,692d).

144 *Id.* at 37.

145 United States v. Nixon, 418 U.S. 683, 704, 709 (1974).

discovery device,[146] it often serves to augment the materials available to a defendant under Rule 16, typically by making evidence available from third parties.) The materials sought were recordings of conversations between President Nixon and the Watergate defendants, and they were expected to provide key evidence. Although *Nixon* concerned discovery for the prosecutor, its reasoning was broad enough to encompass discovery from the prosecutor, too.[147]

The President tried to quash the subpoena, asserting a separation of powers argument for a strong executive privilege. The Supreme Court rejected that strict separation of powers argument in favor of checks and balances. It held that an unqualified presidential privilege in these circumstances would "plainly conflict with the function of the courts under Art[icle] III"[148] and interfere with the Constitution's clear intent that the "dispersed powers" (tripartite branches), though separate in their assigned functions, be integrated into a "workable government."[149]

Turning to due process principles, the Court found that the President's privilege needed to be weighed against "the rule of law" and the "need to develop all relevant facts in the adversary system."[150] The Court's analysis depended on the due process principle of adequate information to the decision-maker through the adversary process:

> The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. *The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts*, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.[151]

The Court also emphasized that the subpoenaed materials were needed before the trial for "examination and processing" by the special

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[146] *Id.* at 698.

[147] *Id.* at 709.

[148] *Id.* at 707.

[149] *Id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)); *see generally* Brown, *supra* note 91, at 1562–63.

[150] *Nixon*, 418 U.S. at 708–09.

[151] *Id.* at 709 (emphasis added); *see also* Brown, *supra* note 91, at 1564 ("Recognition of an absolute privilege residing in article II would have had tremendous potential to affect important individual rights. It would have amounted to the Judiciary's acquiescing in a criminal system which allowed one governmental department both to prosecute a defendant and to control his defense. That appears to be just the type of consolidation of power that the system of separated powers was intended to thwart.").

prosecutor.[152]

Although *Nixon* addressed compulsory process in the pre-trial context, the same principle of access to information could well be applied to pre-plea criminal discovery. In fact, the *Nixon* Court specifically stated that "[t]he right to the production of all evidence at a criminal trial" implicated not only the Confrontation and Compulsory Process Clauses but also the Fifth Amendment's Due Process Clause.[153] Due process and separation of powers were inextricably intertwined, because an excessively strong executive privilege that withheld "demonstrably relevant" evidence "would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts."[154]

The Court invoked an ancient maxim in favor of expansive compulsory process-based discovery: "'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege . . . ."[155] Although the Court has not used such expansive language in the discovery context, it has applied this same principle to grand jury subpoenas and congressional subpoenas.[156] Such an expansive discovery principle calls not for exculpatory evidence but for "relevant" evidence for the parties to use in the trial preparations.

In another case, the Supreme Court relied on both compulsory process and due process to uphold the principle that the jury cannot perform its truth-seeking function without a robust defense right to present evidence. In *Webb v. Texas*, the Supreme Court held that due process was denied where the trial judge effectively dissuaded a defense witness from testifying.[157] This also violated the right to present a defense through compulsory process:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.[158]

This compulsory process right to prepare a defense is designed to

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[152] *Nixon*, 418 U.S. at 702 (citing Bowman Dairy Co. v. United States, 341 U.S. 214 (1951)).

[153] *Id.* at 711.

[154] *Id.* at 712.

[155] *Id.* at 709 (quoting Branzburg v. Hayes, 408 U.S. 665, 688 (1972)).

[156] *Branzburg*, 408 U.S. at 688 (same principle applied to grand jury subpoenas); United States v. Bryan, 339 U.S. 323, 331 (1950) (same principle applied to congressional subpoenas).

[157] Webb v. Texas, 409 U.S. 95, 98 (1972) (per curiam).

[158] *Id.* (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

check the prosecution by not letting it control the defense case.[159] The right must attach before the trial because the defendant cannot always know that a witness is "in his favor" without some pre-trial discovery.[160] Both the Compulsory Process Clause and the Due Process Clauses can be applied to criminal discovery.[161] One scholar has proposed a theory under which due process should decide some kinds of discovery cases and compulsory process should decide other kinds.[162] For the purposes of this Article, though, it is enough to say that my structural critique extends to discovery cases arising under due process or compulsory process or, as in *Nixon*, both.

2. Other Potential Constitutional Sources of Discovery Rights

There may be other clauses in the Constitution that could serve as the basis for broader discovery rights. For example, the Sixth Amendment right to assistance of counsel includes the right to be advised of "the advantages and disadvantages of a plea agreement."[163] However, without adequate discovery, defense counsel can't always adequately investigate the case to evaluate potential plea agreements.[164] Thus, some scholars have argued that pre-plea discovery is necessary to effectuate defense counsel's Sixth Amendment duty to investigate and provide competent advice.[165] They have even argued that this defense duty may be impossible to effectively carry out with a corresponding prosecution duty to provide broad discovery.[166]

The accused also has a Sixth Amendment right "to be informed of the nature and cause of the accusation."[167] Rooted in that clause, the bill of particulars has in times past been used as a discovery device. Although the bill of particulars could serve as a vehicle for court-ordered pre-plea

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159 Montoya, *supra* note 46, at 863–64; Brown, *supra* note 91, at 1564.

160 Montoya, *supra* note 46, at 867; *cf.* Powell v. Alabama, 287 U.S. 45, 68–71 (1932) (defense counsel cannot be effective at trial without the opportunity to prepare for trial).

161 For example, in *Ritchie*, the Supreme Court applied due process to a discovery issue but could just as well have analyzed the problem under compulsory process. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987).

162 *See* Montoya, *supra* note 46, at 873–78.

163 Libretti v. United States, 516 U.S. 29, 50–51 (1995).

164 Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1103 (2004); *see also* Lain, *supra* note 22, at 17.

165 Russell D. Covey, *Plea-Bargaining Law After* Lafler *and* Frye, 51 DUQ. L. REV. 595, 611–12 (2013).

166 *Id.*

167 *See* U.S. CONST. amend. VI. "[T]he Constitution does not address criminal discovery rights." John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2176 n.333 (2000).

discovery, it has fallen out of favor.[168] Likewise, the Supreme Court has interpreted the due process notice requirement to refer only to notice of the charge itself and not the evidentiary support for that charge.[169]

The Sixth Amendment right to confront government witnesses arguably cannot be effective without sufficient discovery. However, the Supreme Court has refused to recognize a right of discovery within the Confrontation Clause, with a plurality in *Ritchie* holding instead that confrontation is strictly a trial right.[170]

Finally, pre-trial suppression motions can be case-dispositive even in the plea-bargaining stage. The constitutional requirements for discovery relating to such claims are unclear. The Supreme Court has recognized a court's power to order the production of discovery relevant to an equal protection claim.[171] This power arises under the equal protection component of the Fifth Amendment's Due Process Clause, although courts are split on whether such a claim can result in the suppression of evidence.[172] Of course, the most common basis for pre-trial suppression motions is the Fourth Amendment. An argument could be made that the Fourth Amendment contains a "hidden" discovery requirement, rooted in due process, requiring the provision of evidence necessary for the defense preparation of a suppression motion. Ultimately, the Supreme Court is unlikely to apply *Brady* to pre-trial suppression motions because *Brady*'s substantive concern is with accurately sorting the guilty from the innocent, not ferreting out law enforcement's constitutional violations.

In summary, the information principle, rooted in both separation of powers and due process, holds that the executive must be restrained through the provision of information to the defense that allows for the adversary system to properly function. Unfortunately, the *Brady* rule embodies the information principle in only a limited way, because *Brady* does not cover inculpatory evidence and is only enforceable post-trial. But the Supreme Court has given strong expression to this principle throughout its due

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[168] *See* FED. R. CRIM. P. 7(f) ("The court may direct the government to file a bill of particulars."); *see also* United States v. Smith, 16 F.R.D. 372, 374–75 (W.D. Mo. 1954) (bill of particulars may be necessary to preparation of the defense).

[169] United States v. Agurs, 427 U.S. 97, 112 & n.20 (1976); *cf.* Wolff v. McDonnell, 418 U.S. 539, 564 (1974) ("We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense.").

[170] Pennsylvania v. Ritchie, 480 U.S. 39, 51–54 (1987) (plurality opinion); *cf. id.* at 61 (Blackmun, J., concurring).

[171] United States v. Armstrong, 517 U.S. 456, 458 (1996).

[172] Brooks Holland, *Race and Ambivalent Criminal Procedure Remedies*, 47 GONZ. L. REV. 341, 349–50 (2012) (collecting cases).

process and compulsory process jurisprudence. In Part III, I examine how this principle can be adapted to pre-plea discovery.

III. ADAPTING DUE PROCESS TO PRE-PLEA DISCOVERY

Part II's structural critique of the right to information cases is helpful in understanding how pre-plea discovery ought to work. Because the criminal justice system is based principally upon plea bargaining instead of jury trials, the task is to adapt constitutional guarantees to plea bargaining procedure.[173] Unfortunately, the Supreme Court has been slow to do this.[174] (Although there is a venerable tradition of scholarly jeremiads calling for its abolition,[175] there is no reason to think that plea bargaining is going away. Thus, it is sensible, if a little disappointing, to consider ways to regulate the practice.) Still, there is a good opportunity to do so for pre-plea discovery because the Supreme Court's right to information cases are principally grounded in due process. Modern due process jurisprudence has shown itself to be flexible enough to meet the demands of a variety of situations.

Part III(A) discusses the evolution of the test for criminal due process from one based on historical practice to one based on a fact-specific balancing of interests. Part III(B) shows how the Supreme Court wrongly applied the due process balancing test in its most significant case about pre-plea discovery, *United States v. Ruiz*. Finally, in Part III(C), I propose my own due process balancing test for pre-plea discovery based on Part II's structural critique.

A. DUE PROCESS EVOLVING

Although the core purpose of due process has always been to make fair and accurate adjudicatory decisions,[176] the Supreme Court has used different tests over time for determining whether a particular feature of criminal procedure comported with due process. An important early case is *Murray's Lessee* (1855), involving the federal government's use of a non-judicial warrant to recover embezzled funds.[177] The Supreme Court decided

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[173] Bibas, *supra* note 56, at 1138.

[174] The Supreme Court has generally been more willing to apply due process protections to trials than to pre-trial procedures. *See* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 3–4 (2006). The first major Supreme Court case upholding plea bargaining was *Brady v. United States*, 397 U.S. 742 (1970), although plea bargaining had already long been in use. FISHER, *supra* note 8, at 175–80.

[175] *See, e.g.*, Schulhofer, *supra* note 8, at 1909; Alschuler, *supra* note 8, at 52.

[176] SULLIVAN & MASSARO, *supra* note 89, at 88.

[177] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 275 (1856).

what constituted due process in that case by reference to the common law and accepted practices at the time of the Fifth Amendment's passage.[178] In other words, the Court took history for its guide.

A later case, *Hurtado v. California* (1884), took a markedly different approach in assessing a state's procedural innovation.[179] The Supreme Court held that California had not violated the Fourteenth Amendment's Due Process Clause by allowing prosecutors in felony cases to dispense with the grand jury indictment and to proceed instead by way of a judicial probable cause determination. The *Hurtado* Court took a different view of the common law than *Murray's Lessee*: "[I]t was the characteristic principle of the common law to draw its inspiration from every fountain of justice, [and] we are not to assume that the sources of its supply have been exhausted."[180] Even if California's procedure did not comport with the common law, as long as the procedure was consistent with "fundamental principles of liberty and justice," due process was satisfied.[181] The new procedure must be non-arbitrary and substantially equivalent to the common law procedure in its protections afforded to defendants.[182]

Although the Supreme Court has never explicitly so held, it appears that the due process cases upholding the constitutionality of plea bargaining like *Bordenkircher v. Hayes*[183] have implicitly drawn on the reasoning of *Hurtado*. In *Hurtado*, California replaced the grand jury—a venerable, extra-governmental check on prosecutorial power—with a preliminary hearing before a judge. The Supreme Court found that hearing to be a constitutionally adequate alternative to a grand jury indictment. Likewise, even though *Bordenkircher* also weakens structural protections, giving prosecutors too much power at the expense of other criminal justice actors by placing enormous pressure on defendants to waive their constitutional right to a jury trial, the Court found no due process violation. This holding can best be understood as viewing plea bargaining as "a constitutionally adequate alternative procedure for the determination of guilt."[184]

Modern due process cases have drawn on either the historical analysis of *Murray's Lessee* or the more pragmatic approach of *Hurtado*.[185] The

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178 *Id.* at 280; SULLIVAN & MASSARO, *supra* note 89, at 82–83.

179 Hurtado v. California, 110 U.S. 516 (1884).

180 *Id.* at 531.

181 *Id.* at 535; SULLIVAN & MASSARO, *supra* note 89, at 84.

182 *Hurtado*, 110 U.S. at 538; SULLIVAN & MASSARO, *supra* note 89, at 84.

183 *See supra* Part II(A).

184 *See* McCoy & Mirra, *supra* note 35 at 915 (assessing plea bargaining practice in light of the unconstitutional conditions doctrine).

185 Of course, the difference between the two approaches need not be so stark. *See, e.g.*,

landmark test announced in *Eldridge* expanded the *Hurtado* approach by considering the merits of a particular procedure without reference to history.[186] There, the Supreme Court considered the process due in a civil case and articulated a balancing test[187] that was subsequently adapted to criminal cases such as *Ake*.[188]

The balancing test first considered "the private interest that will be affected by the action of the State."[189] Because defendants have a risk of being deprived of life, liberty, or property, they have "an almost uniquely compelling" interest in procedures that "diminish the risk of erroneous conviction."[190] The second factor is "the governmental interest that will be affected if the safeguard is to be provided."[191] The Court made clear that the state has an "interest in the fair and accurate adjudication of criminal cases"[192] and downplayed the costs involved to the state in paying for the services of a single medical expert.[193] The third factor was "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided."[194]

In *Medina v. California*, the Supreme Court considered whether a state criminal procedural rule violated due process.[195] The Court, distinguishing *Ake*,[196] held that the *Eldridge* balancing test was inappropriate for evaluating state criminal procedural rules.[197] The Court reasoned that the

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Griffin v. Illinois, 351 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring in judgment) ("'Due process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society. But neither the unfolding content of 'due process' nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy."); Medina v. California, 505 U.S. 437, 443 (1992).

186 Mathews v. Eldridge, 424 U.S. 319, 323 (1976).

187 *Id.* at 334–35.

188 470 U.S. 68, 77 (1985). For a further discussion on *Ake v. Oklahoma*, see *supra* Part II(C)(2). The Supreme Court used the same balancing test in *United States v. Ruiz*, 536 U.S. 622, 631 (2002); *see infra* Part III(C).

189 *Ake*, 470 U.S. at 77 (citing *Mathews*, 424 U.S. at 335).

190 *Id.* at 78.

191 *Id.* at 77 (citing *Mathews*, 424 U.S. at 335).

192 *Id.* at 79. The *Mathews* test has been criticized for not considering fairness. SULLIVAN & MASSARO, *supra* note 89, at 93.

193 *See Ake*, 470 U.S. at 79–80.

194 *Id.* at 77 (citing *Mathews*, 424 U.S. at 335).

195 505 U.S. 437, 439 (1992).

196 *Id.* at 444–45. The concurrence was not persuaded by the majority's attempt to distinguish *Ake*. *Id.* at 453 (O'Connor, J., concurring); SULLIVAN & MASSARO, *supra* note 89, at 97–98.

197 *Medina*, 505 U.S. at 443.

states had substantial expertise, through common law experience, in designing criminal procedures, and their considered judgments in that regard should not be proscribed by the Due Process Clause unless they "offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[198] Fundamental fairness could be gauged by historical practice.[199] Where history was not conclusive, the Court would ask simply whether the state rule ran afoul of "any recognized principle of 'fundamental fairness,'"[200] defined narrowly.[201] The Court has never definitively decided whether it will apply the deferential *Medina* test or the *Eldridge* (*Ake*) test to criminal due process cases.[202]

B. THE RIGID DUE PROCESS OF *UNITED STATES V. RUIZ*

In *Ruiz*, Angela Ruiz had been arrested carrying thirty kilograms of marijuana in her luggage. The prosecution offered her a reduced sentence in exchange for a plea agreement that would have guaranteed discovery of "any [known] information establishing the factual innocence of the defendant" but required Ruiz to waive any right to discovery of witness impeachment information.[203] Ruiz rejected the plea agreement, pleaded guilty, and sought the benefit of the rejected plea agreement at sentencing. The Supreme Court held that due process did not require the government to turn over impeachment evidence before the guilty plea.[204]

The *Ruiz* Court reasoned that a constitutional guilty plea waiver required only a general "awareness of relevant circumstances" and not a "complete knowledge" of those circumstances.[205] Although the Court conceded that well-informed pleas are "wiser," a plea was "voluntary" if made knowingly, intelligently, and with sufficient awareness of the general consequences of the plea.[206] Such awareness need not include the specific circumstances of the plea such as the strength of the prosecution's case or

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198 *Id.* at 445 (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977)).

199 *Id.* at 446.

200 *Id.* at 448 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

201 *Id.* at 443 (citing *Dowling*, 493 U.S. at 352); *see also* Rochin v. California, 342 U.S. 165, 170 (1952) ("We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function.").

202 *See* Kaley v. United States, 134 S. Ct. 1090, 1101 (2014) (declining to decide the reach of *Medina* and *Mathews*).

203 536 U.S. 622, 625 (2002).

204 *Id.* at 633.

205 *Id.* at 630.

206 *Id.* at 629–30; *see also* Boykin v. Alabama, 395 U.S. 238, 244 (1969).

likelihood of conviction at trial.[207] This holding was in line with Supreme Court precedent judging waivers as "an intentional relinquishment or abandonment of a known right or privilege."[208]

In *Brady v. United States* (not to be confused with *Brady v. Maryland*), the Supreme Court arguably took a slightly broader view of whether a waiver was truly knowing and intelligent.[209] The Court in *Brady v. United States* held that a guilty plea could still be voluntary even if entered into to avoid the death penalty. Although a knowing waiver required only "sufficient awareness of the relevant circumstances and likely consequences,"[210] the Court highlighted the desirability of the defendant, with the assistance of counsel, making "an intelligent assessment of the relative advantages of pleading guilty"[211] and "rationally weigh[ing] the advantages of going to trial against the advantages of pleading guilty."[212] This implies that defendants without adequate knowledge of the strengths and weaknesses of the prosecution's case might not be "knowingly" pleading guilty. Several commentators have argued that a guilty plea is not knowing and voluntary if the defendant lacks knowledge of material exculpatory evidence.[213] The lower courts, both before and after *Ruiz*, have struggled with the issue of whether a generalized pre-plea *Brady* duty exists.[214] The First Circuit has held that a prosecutor's failure to disclose evidence could negate the knowingness and voluntariness of a guilty

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[207] *Ruiz*, 536 U.S. at 629–30.

[208] McCarthy v. United States, 394 U.S. 459, 466 (1969) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); *see also id.*

[209] 397 U.S. 742 (1970).

[210] *Id.* at 748.

[211] *Id.* at 748 n.6.

[212] *Id.* at 750.

[213] *See* Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3612 & n.125 (2013) (citing McMunigal, *supra* note 35, at 964). Some have gone so far as to argue that a waiver of the right to *Brady* material cannot be knowing and intelligent because the information is material to guilt or innocence and the defendant does not know what he does not know. *See* Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 581–84 (1999).

[214] *See* Douglass, *supra* note 32, at 440 n.11 (pointing to differing interpretations of whether a pre-plea *Brady* duty exists pre-*Ruiz*). For cases after *Ruiz*, compare United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (refusing to extend *Ruiz* to *Brady*), with McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003) (finding it "highly likely" that the Supreme Court would, if faced with the issue, extend *Ruiz* to *Brady*). For a discussion of how *Lafler* and *Frye* might shed light on lower courts' dilemma, see Covey, *supra* note 165, at 600–02.

plea.[215]

The central problem with *Ruiz* is that it ignores *Brady v. Maryland*'s fairness rationale: due process is violated where the defense lacks access to exculpatory evidence because the resulting trial would be unfair. For example, the *Ruiz* Court concluded that defendants who plead guilty voluntarily, even if the government fails to disclose impeachment information to them, are in fact guilty.[216] The Supreme Court made a similar assumption in *Brady v. United States* and other cases.[217] But there is a real danger that factually innocent defendants will rationally choose to plead guilty based on the perceived strength of the government's case. One antidote is a right, enforceable before the guilty plea, to all material, exculpatory evidence.

Another shortcoming of *Ruiz* is that it declines to hold that plea bargaining implicates not just innocence and guilt, but also sentencing. In fact, even though plea bargaining collapses adjudication and sentencing in most cases,[218] the Supreme Court has never held that defendants have a right to understand the sentencing consequences of their pleas.[219] Instead, if the defendant is factually guilty, then any sentencing consequences of which he was not aware at the time of the guilty plea are simply irrelevant to the validity of that plea.[220] Although there is a range of mutually beneficial sentencing outcomes to any guilty plea,[221] defendants need sufficient information to assess the likely sentencing consequences that they face.

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[215] Ferrara v. United States, 456 F.3d 278, 291 (1st Cir. 2006) ("Under limited circumstances, however—everything depends on context—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.").

[216] United States v. Ruiz, 536 U.S. 622, 629–30 (2002).

[217] Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1009 (1986) ("[T]he [*Brady*] opinion seems to reflect a belief that all guilty pleas that meet the voluntary and intelligent standard are honest and truthful confessions and are not affected by factors independent of the defendant's guilt or innocence—in other words, that such pleas are accurate."); *see also* Tollett v. Henderson, 411 U.S. 258, 263–64 (1973).

[218] Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 171 (2012) ("Charging *is* now convicting, which *is* sentencing. Plea bargaining itself has undermined these checks and balances, and judges need to use their remedial powers to restore some semblance of balance, however imperfect."); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 287–88 (1972).

[219] *See, e.g.*, 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, 588 (2014) ("Thus far, the Court has not taken an expansive view in defining 'intelligent.'").

[220] *See Ruiz*, 536 U.S. at 629–30.

[221] *See* Lain, *supra* note 22, at 25.

The *Ruiz* Court formulated a bright-line rule that would not slow down the machinery of plea bargaining. Previously, the Court had held that impeachment evidence should be evaluated for materiality just the same as any other form of exculpatory evidence.[222] This rule required laborious, case-by-case consideration, but for good reason: impeachment evidence can be the most powerful *Brady* material of all, as when a police officer's or a confidential informant's history of dishonesty casts his version of events in an entirely different light. But the Court held that impeachment information, because it helps defendants in only "random" ways,[223] simply need not be disclosed—no case-specific materiality analysis was needed.

The *Ruiz* Court, drawing on *Ake* and *Eldridge*, balanced the following considerations: "(1) the nature of the private interest . . . (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests."[224] As for the first factor, the Court decided that discovery of impeachment evidence was of only limited use to defendants, especially where they were not waiving the right to receive discovery showing their factual innocence of the crime.[225] As for the second factor, the Court concluded with little analysis that the proposed rule would not decrease the chance of innocent people pleading guilty.[226] The third factor prevailed, because the proposed rule could seriously interfere with the efficient administration of justice.[227]

Ironically, although *Ruiz* employed a modern due process balancing test, the Court did not account for the fact that *Brady*, if not adapted to plea bargaining, is a dead letter for the 97% of federal defendants who plead guilty. In other contexts, particularly ineffective assistance of counsel, the Court has recognized the new legal landscape and extended trial-based rights to plea bargaining.[228] Given the kinship between due process and separation of powers, I argue that separation of powers principles should have informed the application of the balancing test in *Ruiz*. In the next section, I explain how the balancing test should be adapted to pre-plea discovery.

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[222] United States v. Bagley, 473 U.S. 667, 676 (1985); *see also* Napue v. Illinois, 360 U.S. 264, 269 (1959) (pointing out that witness credibility can determine the outcome of trial).

[223] *Ruiz*, 536 U.S. at 630.

[224] *Id.* at 631 (citing Ake v. Oklahoma, 470 U.S. 68, 77 (1985)).

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010); Hill v. Lockhart, 474 U.S. 52 (1985).

C. A DUE PROCESS BALANCING TEST ADAPTED TO PRE-PLEA DISCOVERY

This section considers how to determine whether a defendant has received due process in pre-plea discovery. The *Eldridge /Ake* balancing test is the best jumping-off point because it provides the most flexibility in responding to modern legal problems. In *Eldridge*, the Supreme Court considered what process was due in denying social security benefits. This was a modern, administrative law question that was not amenable to resolution by historical inquiry.[229] Likewise, the problem of pre-plea discovery is a modern concern: it did not largely supplant the jury trial until, at the latest, the 1920s.[230] Like the social security question in *Eldridge*, pre-plea discovery cannot be productively analyzed solely by reference to past practices but is instead a modern phenomenon calling for a modern test.[231] Just as the *Eldridge* test has yielded meaningful baseline rules in the civil context,[232] my modified *Eldridge* test helps establish meaningful baseline rule for pre-plea disclosures.

Of course, as I have already argued, providing due process in plea bargaining requires sensitivity to structural considerations of restraining executive discretion to put adequate information into the hands of plea bargaining defendants, who in large measure convict and sentence themselves. Thus, for pre-plea discovery, I would modify the *Eldridge/Ake* test to balance the interests of criminal defendants and society. First, to gauge the defendant's interests, one should ask whether, from a pre-trial perspective, the undisclosed material at issue is likely to play a significant role in the preparation of the defense for plea bargaining. This includes the related aims of accurately sorting the innocent from the guilty (discussed below in Part III(C)(1)) and promoting reasonably informed sentencing that minimizes unwarranted sentencing disparities (discussed below in Part III(C)(2)). A second question that gauges defendants' interests is structural: whether there are clear judicial standards to review the prosecutor's decision not to disclose that can be enforced before the guilty plea (discussed below in Part III(C)(3)). Finally, we should ask whether the

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229 Medina v. California, 505 U.S. 437, 453–54 (1992) (O'Connor, J., concurring).

230 FISHER, *supra* note 8, at 1.

231 For this reason, in *District Attorney's Office for Third Judicial District v. Osborne*, the Supreme Court, which applied the *Medina* test in considering a modern question—defendants' post-conviction rights to access DNA evidence—should have instead used a modern due process balancing test. 557 U.S. 52, 69 (2009).

232 *Cf.* Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1322 (2012) (discussing how predecessors to Mathews required notice "at a meaningful time and in a meaningful manner.").

production of pre-plea discovery would impose undue costs on society (discussed below in Part III(C)(4)).

1. Promoting Accuracy in Adjudication

To apply *Brady* to pre-plea discovery, I begin with *Brady*'s materiality requirement, which asks how the withheld information might have changed the trial or sentencing outcome.[233] Because plea bargaining puts the onus of adjudication and sentencing on defendants instead of juries and judges, the structural critique suggests that we ask how the withheld information might have changed the plea agreement.

First, consider how withheld information might have changed the outcome of the proceedings in terms of innocence or guilt. A jury, to convict, would see and hear all the witnesses, listen to the entire trial, weigh all the evidence and arguments, and ultimately decide whether the government had proved its case beyond a reasonable doubt. Because a plea-bargaining defendant performs this task instead of the jury, the key issue is how the withheld information might have affected the defendant's decision to plead guilty.

The Supreme Court has used similar reasoning to adapt the right to effective assistance of counsel, which is a trial-based right, to plea bargaining. In *Hill v. Lockhart*, the High Court held that a defendant who had pleaded guilty due to ineffective assistance of counsel could show that he had been prejudiced by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[234] Prejudice was to be measured both subjectively[235] and objectively.[236]

Hill's materiality test, although not explicitly analyzed in terms of separation of powers principles and getting sufficient information into the hands of the adjudicator, is consistent with this Article's approach. Just as the due process materiality standard looks to how withheld information might have affected the jury verdict or sentence, the Sixth Amendment right to effective assistance of counsel looks to how information that defense counsel incompetently failed to convey to the defendant might have affected the defendant's decision to plead guilty.[237] The similarities between

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233 *See supra* Part II(B).

234 Hill v. Lockhart, 474 U.S. 52, 59 (1985).

235 *Id.* at 60 ("Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial.").

236 *Id.* at 59–60 (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)).

237 Petegorsky, *supra* note 213, at 3636; *see also* Lafler v. Cooper, 132 S. Ct. 1376

these two standards is no coincidence: the Supreme Court, in formulating its *Strickland v. Washington* materiality standard (later adopted in *Hill*), explicitly drew on *Brady*'s materiality standard.[238] That the materiality tests are so similar should come as no surprise, because both of them are designed to prevent a breakdown in the adversarial process, which happens when the defendant lacks sufficient information.[239] And both of these rights are too fundamental to be "lost in translation" from our old trial-based system to our system of pleas.

Several circuit courts have formulated materiality rules applying *Brady* to pre-plea discovery. These rules borrow from the same logic of *Strickland* and *Hill*'s materiality standards that look to how the withheld information affected the defendant. For example, the Ninth Circuit in *Sanchez v. United States* asked "whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial."[240] This is an objective test that focuses on "the likely persuasiveness of the withheld information,"[241] presumably to a reasonable person in the defendant's shoes.[242]

The *Sanchez* test has been criticized for focusing on the defendant's state of mind instead of on whether the undisclosed evidence undermines the court's confidence in whether the defendant who pleads guilty is actually guilty.[243] To be sure, any materiality test ought to help to sort factually innocent from factually guilty defendants. But that argument does not address the core structural problem of plea bargaining: defendants who plead guilty have to act as their own judge and jury. And the objectivity of *Sanchez*'s materiality test allows courts to consider whether undisclosed exculpatory evidence would have caused a reasonable defendant not to plead guilty.

For reasons already explained, my proposed balancing test must be conducted from a pre-trial perspective to be useful in evaluating the

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(2012); Missouri v. Frye, 132 S. Ct. 1399 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010).

[238] *Strickland*, 466 U.S. at 694 (drawing on *Agurs* in formulating its materiality standard).

[239] *Id.* at 685–87.

[240] Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995); *see also* Miller v. Angliker, 848 F.2d 1312, 1321–22 (2d Cir. 1988); Conte, *supra* note 13, at 91–92 & n.94.

[241] *Sanchez*, 50 F.3d at 1454 (quoting *Miller*, 848 F.2d at 1322).

[242] The First Circuit has also applied an objective test. Ferrara v. United States, 456 F.3d 278, 294 (1st Cir. 2006).

[243] Douglass, *supra* note 106, at 588–89 (2007) ("The question is not whether defendant made an informed choice to plead guilty. The question is whether undisclosed *Brady* evidence undermines our confidence in the adjudication of guilt that is based on that plea.").

sufficiency of pre-plea discovery.[244] Thus, instead of using *Brady*'s post-trial materiality test, I borrow pre-trial materiality tests from one of the right to information cases discussed above in Part II(C). In *Trombetta v. California*, the Court imposed a law enforcement duty to preserve evidence that "might be expected to play a significant role in the suspect's defense."[245] The pre-trial test is necessary to empower judges to check prosecutorial discovery discretion before a guilty plea. Finally, evidence that prosecutors think is inculpatory might actually be or become mitigating or exculpatory with proper defense investigation and preparation. This weighs in favor of a broad pre-plea discovery regime.

2. Informed Sentencing and Unwarranted Disparities

Next, consider how information withheld by the prosecutor might have changed the sentence in a case. The sentencing judge considers everything the jury hears at trial, information that was excluded from trial under the law of evidence, and a wide variety of other information that comes to light during pre-trial proceedings and at sentencing.[246] Sentencing judges consider not just the offense of conviction but the defendant's history and character, the defendant's criminal history, and conduct related to the offense of conviction. They consider the equities of the case, the purposes of punishment, and how similarly situated defendants have been treated.[247] For the defendant to perform adequately as his own judge and jury, he needs a similar amount of information about his case.

The American Bar Association has issued nonbinding guidelines for prosecutors consistent with these principles. The guidelines direct prosecutors to provide "complete and accurate information" to the sentencing judge, including "any information in the prosecutor's files relevant to the sentence."[248] To the extent that the presentence report is incomplete, the prosecutor must make appropriate disclosures to the court and defense counsel.[249] This guideline goes beyond *Brady* by requiring the disclosure of both inculpatory and exculpatory information at sentencing and is based on principles of fairness, accuracy, and distributive justice.

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[244] *See supra* Part II(B).

[245] California v. Trombetta, 467 U.S. 479, 488 (1984); *see supra* Part II(C)(1).

[246] *See supra* Part I(C)(2).

[247] *See* 18 U.S.C. § 3553(a) (2012); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-6.1(a) (3d ed. 1993) ("The prosecutor . . . should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.").

[248] Standard 3-6.2(a).

[249] *Id.*

Courts have been reluctant to formulate post-trial materiality tests related to sentencing. For example, the *Sanchez* test (discussed above at Part III(B)(1)) relates only to guilt or innocence. Given society's strong interest in similarly situated defendants receiving similar sentences, a better materiality test would also ask whether a reasonable person in the defendant's shoes might have still pleaded guilty on the same terms and received the same sentence had he known about the undisclosed information.[250]

Perhaps one reason that courts have been reluctant to formulate a post-guilty plea *Brady* materiality test related to sentencing is the difficulty of formulating a remedy. Where a defendant pleads guilty based on misinformation, a simple remedy is to allow the defendant to withdraw the guilty plea.[251] Likewise, where a plea offer lapses or is rejected due to counsel's incompetence, the Supreme Court has held that prejudice can be established where the defendant shows "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."[252] The remedy in that situation is to force the prosecutor to re-open the former offer, and then ask if the defendant would have taken the offer and if the court would have approved it.[253]

As if that were not hard enough, the harder case is where a lack of discovery causes a defendant, who would have certainly pleaded guilty, to agree to a heavier sentence than he otherwise would have. Allowing the defendant to withdraw his plea might not make him whole because he has no constitutional right for the prosecutor to later make a different plea offer.[254] The best way to make the defendant whole might be to give him the deal that he would have agreed to had he known of that undisclosed information. Unfortunately, that standard might be unworkable, requiring

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[250] Where the defendant pleaded guilty without knowledge of inculpatory evidence that would increase the sentence, there are at least two instances where prejudice might not occur. First, the sentencing court might allow the defendant to withdraw from the plea agreement. Second, the sentencing court might decide not to consider the undisclosed information at sentencing. *See* FED. R. CRIM. P. 16(d)(2)(C) (allowing court to prohibit party from using evidence that was not disclosed in violation of Rule 16).

[251] In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Supreme Court refused to find that Hill's counsel had been ineffective because Hill had failed to allege that, but for the allegedly ineffective advice, he would have pleaded not guilty and insisted upon a trial. Id. at 60. However, had the Court upheld the claim, it seems reasonable that the remedy could have been allowing Hill to withdraw his guilty plea.

[252] Missouri v. Frye, 132 S. Ct. 1399, 1409 (2012).

[253] *Id.* at 1410–11.

[254] Weatherford v. Bursey, 429 U.S. 545, 561 (1977) (Marshall, J., dissenting).

intense judicial supervision of plea negotiations that never occurred.[255] Fortunately, one way to sidestep and mitigate such problems is to make clear, specific rules mandating broad pre-plea discovery for prosecutors to follow and to allow pre-plea litigation of discovery disputes.[256]

3. Pre-Trial Judicial Enforcement of Discovery Rules

The proposed due process balancing test considers whether there are clear judicial standards to review the prosecutor's decision not to disclose that can be enforced before the guilty plea. In the absence of these standards, the prosecutor's decision not to disclose is completely unchecked. The current federal discovery regime sometimes follows this approach. For example, Rule 16 contains a mechanism for pre-trial orders enforcing disclosures.[257] And even though the *Brady* rule is typically enforced only after trial, prosecutors have made use of the procedure outlined in *Pennsylvania v. Ritchie* to seek the court's pre-trial concurrence of a decision to withhold discovery from the defense.[258]

Requiring pre-trial judicial supervision and review of prosecutorial discovery decisions answers an important criticism of the *Eldridge* balancing test: that it doesn't establish a procedural floor for due process.[259] Given the historical and conceptual affinity between due process and separation of powers, as well as the problems inherent in consolidating all discovery discretion in prosecutors, it makes sense that, for pre-plea discovery, judges should have clear discovery rules and standards that they can enforce before the guilty plea.

4. Not Imposing Undue Costs on Society

Against the interests of the defendant and the public in fair and informed adjudication and sentencing, my proposed test balances the interests of the public (often through the government) in restricting pre-plea discovery. Those interests are the administrative cost of producing evidence as well as the potential for harm to the government's case and witnesses by revealing the identities of witnesses.[260] Such costs are significant in many cases, and any pre-plea discovery regime that ignores them runs the risk of grinding the system of pleas down to a halt.

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[255] It would also contravene Rule 11's policy prohibiting judicial involvement in plea discussions. FED. R. CRIM. P. 11(C)(1).

[256] *See infra* Part IV(A)(2).

[257] FED R. CRIM. P. 16(d)(2)(A); *see infra* Part IV(A).

[258] *See supra* Part II(B).

[259] SULLIVAN & MASSALO, *supra* note 89, at 93–94.

[260] United States v. Ruiz, 536 U.S. 622, 631–32 (2002).

Of course, society's interests are not mutually exclusive to those of the defendant. Society has a strong interest in providing due process to criminal defendants. Affording due process to all defendants helps protect the innocent, promotes respect for the criminal law, and honors widely shared constitutional principles that are fundamental to our democracy.

5. Whether the Supreme Court Should Adopt This Proposed Test

Although my proposed test is based on due process and separation of powers principles, the Supreme Court could not adopt it without clarifying certain tensions in its jurisprudence concerning the information principle. For example, although the Court has shown concern for accurately sorting the innocent from the guilty, that concern has only manifested itself in *Brady*'s concern for fair trials; the *Ruiz* Court incorrectly concluded that failing to disclose impeachment evidence categorically posed no danger to the accuracy of guilty pleas. Still, because *Ruiz* drew a sharp distinction between impeachment evidence and exculpatory evidence generally, the Supreme Court could still find a generalized pre-plea *Brady* duty that helps protect the innocent from pleading guilty.[261]

Additionally, the Supreme Court has consistently rejected a general right to discovery that would help defendants effectively prepare a defense, assess the strength of the government's case, and understand the likely sentencing consequences of a guilty plea versus a jury trial.[262] This rejection is in tension with several due process and compulsory process cases discussed above in Part II that uphold the right of defendants, under certain circumstances, to receive information—exculpatory or not—in the government's possession that is material to the preparation of their defense.

The Court has recently emphasized in *Ruiz* that the *Brady* rule is not enforceable pre-trial. However, several of the Court's cases in other contexts have asked whether certain material is likely to play a significant role in the preparation of the defense.[263] Likewise, Rule 16 itself requires disclosures of certain materials that are material to the preparation of the defense, although the rule puts no time limit on that disclosure requirement.[264]

The difficulty in formulating constitutional rules relating to pre-plea discovery is that the delicate balancing of competing interests does not lend itself to simple, black letter rules. The Court's attempts to formulate

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[261] Many commentators have advocated for this. *See, e.g.*, Lain, *supra* note 22, at 5.

[262] See discussion of *Weatherford v. Bursey*, 429 U.S. 545 (1977), *supra* Part II(B).

[263] *See supra* Part II.

[264] FED. R. CRIM. P. 16(a)(1)(E)(i), (F)(iii).

specific discovery rules that go beyond *Brady* have not been successful. For example, in *Jencks v. United States*, the Court announced a new rule pursuant to its supervisory power: that when a witness testified at trial on direct examination, the government had to disclose to the defense any prior inconsistent statements.[265] Lower courts began to elaborate upon that rule, spawning uncertainty and complexity.[266] Congress responded with the Jencks Act, a similar but more narrow and inflexible rule.[267] In subsequently upholding the Jencks Act, the High Court recognized that its authority to create non-constitutionally-mandated discovery rules existed only where Congress had not acted.[268] Congress' general supremacy over criminal procedural rulemaking is premised on its superior capacity as a democratic branch to make uniform, detailed rules that balance defendants' and society's interests in criminal discovery.

Finally, the Supreme Court's plea bargaining jurisprudence has consistently prioritized the public's interest in maximizing plea bargains over the due process interests of the public and defendants.[269] Still, the Court has recently extended the right to effective assistance of counsel to the plea-bargaining stage and conceded that plea bargaining "*is* the criminal justice system."[270] Perhaps future decisions based on that concession will cause the pendulum to swing back the other way.

Even if my proposed test is not adopted by the Supreme Court, it can still provide helpful guidance to other rulemaking bodies, like Congress, the Department of Justice, and district court judges, in formulating rules of pre-plea discovery. In Part IV, I also discuss how my structural/due process test validates the local rules relating to pre-plea discovery in several district courts.

IV. INNOVATIVE DISTRICT COURT RULES REQUIRING BROAD PRE-PLEA DISCOVERY

My proposed structural/due process balancing test for pre-plea discovery gives specific guidance to courts in evaluating whether pre-plea discovery regimes comport with due process. My test also explains why the local discovery rules in several districts are consistent with the Constitution.

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[265] Jencks v. United States, 353 U.S. 657, 668 (1957).

[266] Palermo v. United States, 360 U.S. 343, 346 & n.3 (1959).

[267] Jencks Act, 18 U.S.C. § 3500 (2012).

[268] *Palermo*, 360 U.S. at 353 & n.11.

[269] *See* United States v. Ruiz, 536 U.S. 622, 631–32 (2002); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Brady v. United States, 397 U.S. 742, 750–72 (1970).

[270] Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

In this section I highlight several key features of these rules: (1) they have broader disclosure standards than *Brady* or Rule 16 require; (2) they specify whole categories of discovery outside of Rule 16 that must be disclosed; (3) they require discovery to be provided soon after the arraignment and thus in time to influence plea bargaining; (4) they allow prosecutors to seek the court's permission to defer discovery in appropriate cases; (5) they require the parties to meet and confer about discovery issues before resorting to motions; and (6) they are as self-executing as possible so that the defense need not file discovery motions.

I briefly discuss how, in districts that have not adopted broad pre-plea discovery, individual judges can accomplish the same results by issuing discovery orders in every case.

Finally, I mention a few proposals outside of local rulemaking for implementing the policies behind my balancing test,[271] with the aim of promoting uniform and broad pre-plea discovery throughout the federal system.

A. LOCAL RULES

Many district courts, responding to the need for clarity in regulating pre-plea discovery, have implicitly weighed the same concerns that my balancing test addresses[272] and taken advantage of Rule 57's broad rulemaking authority.

1. How Criminal Procedural Rules Are Made

Congress and the courts jointly regulate discovery through a rulemaking process established by the Rules Enabling Act.[273] A committee made up of Supreme Court and federal judges drafts rules; the public has an opportunity to comment on the rules; the rules are revised accordingly and transmitted to the Supreme Court for approval. The Supreme Court transmits the rules to Congress, which must act on the rules within six months or they automatically go into effect.[274]

To allow fine-tuning of these rules, Congress has granted local rulemaking power to the district courts under Rule 57 and 28 U.S.C.

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[271] *See supra* Part III(C).

[272] *See supra* Part III(C).

[273] 28 U.S.C. § 2072 (2012).

[274] *See* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655 (1995) (describing the federal rulemaking process in detail); *see also* 28 U.S.C. § 2072(b) (2012) ("Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

§ 2071. Through these statutes, Congress has re-allocated substantial rulemaking authority to the district courts,[275] allowing district courts to make rules governing the practice in their own districts.

2. Significant Innovations in Local Rules Related to Pre-Plea Discovery

A survey of these local rules reveals an overarching theme of constraining prosecutorial discretion through district court regulation of pre-plea discovery. Because district courts have inherent authority to enforce their own local rules, they give the defense an immediate enforcement remedy for discovery violations and thus increase the likelihood that the defense will have the discovery it needs in time for plea bargaining.

First, many districts have a broader standard of materiality for pre-trial discovery than *Brady* (or even Rule 16)[276] requires. For example, the District of Vermont requires disclosure of "[a]ll information and material known to the government that may be favorable to the defendant on the issues of guilt or punishment, as provided by *Brady v. Maryland*," within fourteen days of arraignment.[277] That phrase, "may be favorable," is a pre-trial standard much broader than the *Bagley* materiality standard, which requires "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding [as determined post-trial] would have been different."[278] Similarly, the District of Massachusetts requires broad disclosure of "exculpatory information" within twenty eight days of arraignment, although certain categories of exculpatory information need

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[275] Linda J. Rusch, *Separation of Powers Analysis As A Method for Determining the Validity of Federal District Courts' Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 CONN. L. REV. 483, 485 (1991). Local civil rules have had wide variation. *Id.*; *see also* COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PROCEDURE (1989) (reviewing local civil rules and finding wide variety).

[276] As a point of comparison, Rule 16 sets forth a broader materiality standard than *Brady* for certain categories of discovery by requiring the prosecution to produce certain documents, objects, and reports of examinations and tests if they are "material to preparing the defense" or if "the government intends to use the item in its case-in-chief at trial." FED. R. CRIM. P. 16(a)(1)(E)(i), (a)(1)(E)(ii), and (F)(iii). Under Rule 16, evidence is "material" if "there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993) (citations and internal quotation marks omitted).

[277] D. VT. L. CRIM. R. 16(a)(2).

[278] United States v. Bagley, 473 U.S. 667, 682 (1985).

not be turned over until just before trial.[279] "Information" is a broader category than admissible evidence, and by definition, it need not be "material" under *Brady* and *Bagley*, because it must be turned over long before trial. From this pre-trial (and typically pre-plea) perspective, exculpatory information is information that casts doubt on the government's case, without having to determine how its nondisclosure might affect the case's outcome.[280]

Second, many districts have local rules that specify whole categories of documents and information to be turned over, regardless of their content. These rules increase the flow of information to the defense by forcing prosecutors to make disclosures without the need for pre-trial guessing about post-trial materiality. The categories of information include: all Rule 16 discovery,[281] search warrant documents,[282] electronic surveillance materials,[283] names and addresses of witnesses,[284] impeachment (*Giglio*) information,[285] consensual interceptions,[286] audio and visual recordings related to the charges,[287] the identity of unindicted co-conspirators,[288] an inventory of all items seized by law enforcement,[289] and information concerning lineups and photo identification procedures, regardless of whether the defendant was identified.[290] Such information can be tremendously helpful in preparing the defense. (As discussed below, to the extent that the prosecution can articulate the harm to the government's case

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[279] D. MASS. L.R. 116.2(A) (defining "[e]xculpatory information" to include information that tends to cast doubt on defendant's guilt, including impeachment evidence, or diminish the degree of the defendant's culpability); *see also* D. CONN. L. CRIM. R. 16(a) & STANDING ORDER ON DISCOVERY ¶ (A)(11) (requiring disclosure of "All information known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of Brady" within 14 days of arraignment).

[280] D. MASS. L.R. 116.2(a).

[281] *See, e.g.*, D. VT. L. CRIM. R. 16(a)(1); D. MASS. L.R. 116.1(C)(1)(a).

[282] *See, e.g.*, D. VT. L. CRIM. R. 16(a)(4); D. CONN. L. CRIM. R. 16(a) & STANDING ORDER ON DISCOVERY ¶ (A)(7); D. MASS. L.R. 116.1(C)(1)(b).

[283] *See, e.g.*, D. VT. L. CRIM. R. 16(a)(5); D. CONN. L. CRIM. R. 16(a) & STANDING ORDER ON DISCOVERY ¶ (A)(8); D. MASS. L.R. 116.1(C)(1)(c).

[284] *See, e.g.*, D. VT. L. CRIM. R. 16(a)(3) ("The government may withhold the names and/or addresses of those witnesses about whom it has substantial concerns" and must notify the defense if it does so); D. CONN. L. CRIM. R. 16(a) & STANDING ORDER ON DISCOVERY ¶ (A)(9); N.D. W. VA. L. CRIM. R. 16.07–16.08 (list of witnesses and trial exhibits).

[285] D. CONN. L. CRIM. R. 16(a) & STANDING ORDER ON DISCOVERY ¶ (A)(10).

[286] D. MASS. L.R. 116.1(C)(1)(d).

[287] D. NEV. L. CRIM. R. 16-1(b)(1)(A); D. Vt. Loc. R. 16(a)(4).

[288] D. MASS. L.R. 116.1(C)(1)(e).

[289] N.D. GA. L. CRIM. R. 16.1.

[290] D. MASS. L.R. 116.1(C)(1)(f); *see also* D. CONN. L. CRIM. R. 16(a) & STANDING ORDER ON DISCOVERY ¶ (A)(12); D. MASS. L.R. 116.1(c)(1)(F).

or interests that might result from that disclosure, the prosecution must seek a protective order.) Rules requiring disclosure of specified categories of material spare the defense from the often-insurmountable hurdle of finding out whether a piece of discovery exists or proving that it could be helpful to the defense.[291]

These local discovery rules follow Rule 16's general approach of specifying whole categories of discovery to be turned over before trial. Rule 16's categories include the defendant's statement, documents and objects, and reports of scientific examinations and tests and expert witness reports. These items must be disclosed without any need for prosecutors to determine whether they are inculpatory or exculpatory. Broad discovery of pre-defined categories of evidence also assumes that pre-trial disclosures help the defense prepare for trial, providing juries and judges with an effective adversarial presentation.

Third, several local rules require disclosure early in the case, which would help the defense to prepare for plea bargaining in most federal cases.[292] Districts with this type of provision most often require discovery to be provided within fourteen days of arraignment.[293] Some districts require discovery to be provided at arraignment.[294] Some districts establish a separate deadline for the disclosure of certain materials, such as impeachment information, that are typically not known to the government until just before trial.[295] These deadlines pegged to the arraignment stand in stark contrast to Rule 16's silence regarding timing of pre-trial disclosures.[296]

Fourth, several districts have established presumptively broad discovery regimes but allow prosecutors to obtain court orders as needed

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[291] FED R. CRIM. P. 16 advisory committee's notes on 1974 amendment.

[292] Federal criminal cases on average take 6.5 months from filing to disposition. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009, at 9 (2011), http://www.bjs.gov/content/pub/pdf/fjs09.pdf). Federal immigration felonies usually take about four months to resolve, typically by plea deal. *See* MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, Immigration Offenders in the Federal Justice System, 2010, at 25, 29 (2012), http://www.bjs.gov/content/pub/pdf/iofjs10. pdf (revised Oct. 22, 2013).

[293] *See, e.g.*, D. VT. L. CRIM. R. 16(a); E.D. WASH. L. CRIM. R. 16(a); D. MONT. L. CRIM. R. 16.1(a); D. NEB. L. CRIM. R. 16.1(a)(3); W.D. TEX. L. CRIM. R. 16(b)(1)(C); M.D. TENN. L. CRIM. R. 16.01(a)(2); *see also* D. HAW. L. CRIM. R. 16.1(a) (within seven days of arraignment); D. MASS. L.R. 116.1(C)(1) (28 days).

[294] W.D. PA. L. CRIM. R. 16(B); S.D. ALA. L. CRIM. R. 16.13(b)(1).

[295] *See, e.g.*, D. MASS. L.R. 116.2(B)(2); *cf.* D. UTAH L. CRIM. R. 16-1(c) (comply with Rule 16 14 days before trial).

[296] In fact, such rules may contradict the Jencks Act, too.

exempting them from compliance.[297] This type of provision seems to assume that run-of-the-mill federal cases do not contain any or much discovery that cannot reasonably be provided to the defense early in the case.

Fifth, several districts have local rules requiring the prosecution and defense to meet and confer about discovery early in the case.[298] Some districts require the parties to meet and confer before filing a discovery motion.[299] In Massachusetts, if the prosecution declines to turn over particular items of discovery, the prosecution must provide defense counsel and the court its reasons. Only then can the defense file a discovery motion.[300] These rules encourage open dialogue between the parties and should help the defense to become aware of potential discovery issues. They also may tend to discourage the filing of discovery motions, which increase litigation costs and therefore tend to reduce the available benefits to both parties from negotiated plea agreements.

Sixth, these local rules are as self-executing as possible. They may require the prosecutor to certify on the record that all discovery required by the local rules has been timely provided.[301] Similarly, some rules require the prosecution to file statements certifying compliance with discovery requests.[302] They may set a rebuttable presumption that the defense has requested discovery,[303] instead of requiring the defense to prove under Rule

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[297] Deal, *supra* note 76, at 1812 ("[M]y approach identifies the concrete harm that early disclosure poses to the adversarial system and asks prosecutors to weigh that harm against the costs of keeping favorable evidence from the jury given the particular facts of the case."). One example of this, as the *Ruiz* Court pointed out, is that turning over witness related information can be tailored to the case at hand, citing 18 U.S.C. § 3432 (2012) ("[S]uch list of the veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person."). 536 U.S. 622, 632 (2002). Rule 16 contains a provision allowing prosecutors to seek such orders. FED R. CRIM. P. 16(d)(1).

[298] *See, e.g.*, D. ALASKA L. CRIM. R. 16.1(a); D.D.C. L. CRIM. R. 16.1.

[299] *See, e.g.*, D. MINN. L. CRIM. R. 12.1(b); D. UTAH L. CRIM. R. 16-1(a).

[300] *See, e.g.*, D. MASS. L.R. 116.3(F).

[301] *See* D. UTAH L. CRIM. R. 16-1(f) and (h) (party from whom discovery is requested must file a notification of compliance); D. NEB. L. CRIM. R. 16.1(a)(4) ("Upon providing the required discovery, the government must file and serve a notice of compliance."); E.D. OKLA. L. CRIM. R. 16.1(A)(1) (requiring prosecutor to put the status of discovery on the record at arraignment with specificity); *see also* Jason Kreag, *The* Brady *Colloquy*, 67 STAN. L. REV. ONLINE 47 (2014) (proposing that judges question prosecutors on the record regarding their compliance with *Brady* obligations).

[302] *See, e.g.*, D. NEB. L.R. 16.1(A)(4) ("Upon providing the required discovery, the government must file and serve a notice of compliance.").

[303] *E.g.*, D. MASS. L.R. 116.1(b) ("A defendant shall be deemed to have requested all the discovery authorized by Fed. R. Crim. P. 16(a)(1)(A)-(D) unless that defendant files a

16 that it has requested the appropriate discovery.[304] Other districts, notably Nevada, require the parties to agree on their own discovery schedule, enforceable by the court.[305] This reduces the need for defense motions and simply creates an expectation, enforceable by the court, that discovery will be provided.[306]

These provisions make a record of the defense's reliance on the prosecutor's representation that required discovery has been provided or does not exist. That reliance has important legal consequences. First, a plea was involuntary unless "entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel."[307] A plea induced by misrepresentation may also be rendered involuntary. Thus, the plea may be rendered involuntary where the prosecutor inaccurately represents the state of discovery preceding a guilty plea.

The second legal consequence is that defense reliance on the prosecutor's representation broadens *Brady*'s materiality standard. Under the reasoning of *Bagley*, if the defendant makes a specific request for *Brady* material and does not receive it, the Court is more likely to find that defense counsel detrimentally relied on the prosecution's explicit or implicit representation that the requested discovery did not exist.[308] Thus, when the defense requests a certain class of material, or the local rules require its automatic production, the prosecution has less room to err in determining whether the information is "material" for *Brady* purposes.[309] Because prosecutors have a hard time making this determination anyway,[310] rules

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Waiver of Request for Disclosure[.]"); E.D. WASH. L. CRIM. R. 16(a); see also D. HAW. L. CRIM. R. 16.1(7) ("[I]t shall be presumed that defendant has made a general [*Brady*] request."); D. KAN. GENERAL ORDER OF SCHEDULING AND DISCOVERY ("In general, the court will order the parties to comply with Rules 12, 12.1, 12.2, 16 and 26.2 of the Federal Rules of Criminal Procedure, with [*Brady* and its progeny], and with Title 18, U.S.C. § 3500, as well as Rule 404(b), Federal Rules of Evidence. A request is not necessary to trigger the operation of the Rules and the absence of a request may not be asserted as a reason for noncompliance.").

304 FED R. CRIM. P. 16(a)(1) and (c)(2).

305 D. NEV. L. CRIM. R. 16-1.

306 *See* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxxiv (2015) (proposing that local rules require discovery without the need for defense motions).

307 Brady v. United States, 397 U.S. 742, 755 (1970) (citation omitted).

308 *See* United States v. Bagley, 473 U.S. 667, 682–83 (1985).

309 6 LAFAVE ET AL., *supra* note 29, at § 24.3(b) (discussing "Specific Request Element"); Deal, *supra* note 76, at 1792 (discussing Justice Stevens' dissent in *Bagley* justifying less stringent materiality standard where the defense has actually requested the information).

310 *See supra* Part I(C)(2).

mandating broad disclosure allow prosecutors to avoid prophesying about post-trial materiality.

An important question about these local rules is what effect they are actually having on the criminal justice system in their respective districts. The fact that such rules have been adopted in dozens of districts throughout the country since the 1990s[311] is a strong indication that the sky has not fallen. But hard empirical data about the effects of these local rules is not yet available.[312]

In summary, these innovative local rules are designed to put adequate information in the hands of the defense in time for plea negotiations, and judges can enforce these rules before the guilty plea with minimal litigation. These rules are consistent with my due process test for pre-plea discovery, and they do not appear to exert a significant drag on the system's ability to process virtually all its cases through guilty pleas, although more research needs to be done.

B. STANDING ORDERS AND CASE-SPECIFIC DISCOVERY ORDERS

Even in districts that have not promulgated good local discovery rules, a judge may regulate her judicial practice "in any manner consistent with federal law, these rules, and the local rules of the district."[313] Thus, on a case-by-case basis or through the use of standing orders, judges can regulate pre-plea discovery.

Although a full discussion of the district courts' inherent authority to regulate discovery is beyond the scope of this paper, federal courts retain "strong inherent power, completely aside from the powers Congress expressly conferred in the Rules."[314] The Supreme Court has stated, in formulating its own discovery rule through common law methods, that it has "power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts."[315] Lower courts have likewise recognized this authority.[316] In fact, the Advisory Committee stated

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311 *See, e.g.*, S.D. FLA. L.R. 88.10 (effective Dec. 1, 1994); D. MASS. L.R. 116.1 (adopted Sept. 1, 1990); E.D. PA. L. CRIM. R. 16.1 (effective Jan. 1, 1998).

312 In a future paper, I intend to study this issue by interviewing criminal practitioners in several districts that have adopted strong pre-plea discovery regimes.

313 FED. R. CRIM. P. 57(b).

314 Hanna v. Plumer, 380 U.S. 460, 473 (1965) (citation omitted).

315 Palermo v. United States, 360 U.S. 343, 345 (1959).

316 United States v. Fletcher, 74 F.3d 49, 54 (4th Cir. 1996) (recognizing court's inherent authority to order pre-trial disclosure of list of government witnesses); United States v. Moore, 936 F.2d 1508, 1515 (7th Cir. 1991) (same); United State v. Stubblefield, 325 F. Supp. 485, 486 (E.D. Tenn. 1971).

that Rule 16 was "not intended to limit the judge's discretion to order broader discovery in appropriate cases."[317]

Some judges have issued blanket, standing discovery orders in all their criminal cases. For example, one California judge, in a district that already has a local rule requiring discovery to be provided within fourteen days of arraignment,[318] has routinely required the parties to provide all requested discovery "without unreasonable delay."[319] His order carries express warnings of penalties for failure to comply, including exclusion of evidence.[320]

A similar example can be found in the District Court for the District of Columbia. It was in that district that the Department of Justice conducted a high-profile corruption investigation of Senator Ted Stevens of Alaska, and the case ultimately had to be dismissed because of *Brady* violations. Judge Emmett G. Sullivan, who presided over the case, issues a *Brady* compliance order in each case requiring the "timely" production of all *Brady* material.[321] In contrast, other district courts have refused to issue *Brady* orders on the grounds that *Brady* is a "self-executing responsibility."[322]

An advantage to these orders is that they are well-suited to the exigencies of plea bargaining. By clarifying the parties' discovery obligations, they theoretically reduce litigation. Although it is not clear whether these *Brady* orders result in more discovery being turned over to the defense, prosecutors are not likely to resist them (except in cases where early compliance would prejudice the government's interests), either because those prosecutors plan on providing the discovery anyway, or they do not want to be seen as unjustly withholding discovery.

In addition to or instead of standing orders, district judges can issue case-specific pre-trial orders regulating discovery. These orders usually

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317 FED. R. CRIM. P. 16 advisory committee's notes.

318 E.D. CAL. L.R. 440(a).

319 Senior District Judge Lawrence K. Karlton used this same standing order for years, the violation of which "may result in the imposition of sanctions including, but not limited to, monetary sanctions, the exclusion of evidence, or the striking of testimony or documents." United States v. Valencia-Mendoza et al., No. 09-cr-408 LKK (E.D. Cal. Sept. 24, 2009).

320 *Id.*

321 Standing Brady Order, United States District Court for the District of Columbia, http://www.dcd.uscourts.gov/dcd/sites/dcd/files/StandingBradyOrder.pdf, accessed on October 2, 2014.

322 United States v. Flores, No. CR 08–0730 WHA (N.D. Cal. Mar. 24, 2011); *see also* United States v. Avellino, 129 F. Supp. 2d 214, 220 (E.D.N.Y. 2001) ("Absent some type of indication, however, that the government is not discharging its *Brady* obligations, there is no need for the Court to undertake the requested in camera review and, for that reason, the Court declines to do so.").

issue in response to defense motions. Such motions are relatively rare, for several reasons. First, the defense may not be aware of even the general nature of the discovery that has been withheld. Second, where the defendant's goal is a plea agreement, filing a motion risks prolonging the litigation and incentivizing prosecutors to make less generous plea offers to defendants who file discovery motions.

A practical problem with standing discovery orders, *Brady* compliance orders, and case-specific orders is that meaningful appellate review of such orders can be difficult. Direct appeal of pre-trial discovery orders may not be available, although the prosecution might seek a writ of mandamus.[323] District courts do not have consistent standards for their application of inherent powers. The fact-intensive nature of these situations implies that appellate review will be deferential, as for abuse of discretion, but the contours of such discretion are still undefined.[324]

C. RECOMMENDATIONS

Our federal pre-plea discovery regime does not provide sufficient structural protections to defendants. The system must be rebalanced; judges need a greater role in enforcing due process-based rights to pre-plea discovery.[325] For reasons stated above in Part III(C)(5), the Supreme Court is not likely to constitutionalize comprehensive pre-plea discovery. The Supreme Court could, however, act in its rulemaking capacity to transmit amendments to Rule 16 to Congress in line with the innovative local discovery rules discussed above in Part IV(A).

That failing, district courts can continue to promulgate their own local discovery rules. Such rules have a decades-long track record in districts throughout the country. The District of Massachusetts has one of the best and most comprehensive local discovery rules regimes in the country.[326]

In the meantime, judges in districts without such rules can enter *sua sponte Brady* compliance orders and discovery orders in every criminal case.[327]

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[323] United States v. Coppa, 267 F.3d 132, 137 (2d Cir. 2001).

[324] *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982).

[325] I and other scholars have proposed other procedures that would facilitate this. McConkie, *supra* note 45; *see also, e.g.*, Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559 (2013).

[326] For a discussion of several Massachusetts provisions, see *supra* Part IV(A)(2).

[327] SIDNEY POWELL, LICENSED TO LIE: EXPOSING CORRUPTION IN THE DEPARTMENT OF JUSTICE 213 (2014); *see also* Kozinski, *supra* note 306, at xxxiii (recommending that judges enter *Brady* compliance orders in every criminal case).

Congress could also pass reform legislation outside of the Rules Enabling Act. For example, one recent bill, the Fairness in Disclosure of Evidence Act of 2012,[328] would have required the prosecution to immediately disclose material that reasonably appeared to be favorable to the defendant as to guilt or innocence, sentencing, or any preliminary matter. The immediacy requirement would create an enforceable pre-plea discovery obligation. The government could seek a protective order to defer discovery in appropriate cases.[329] Unfortunately, this bill died in Committee.

Finally, the Department of Justice has a role to play here as well. It can give its line prosecutors stronger and more detailed directives regarding pre-plea discovery, and it can ensure prosecutors follow these directives by providing sufficient training and administering internal discipline where necessary to those who do not.

CONCLUSION

This Article's structural framework for assessing pre-plea discovery provides a novel way of appraising our plea-bargaining procedure. Plea bargaining generally, and the current pre-plea discovery regime specifically, weakens the structural protections that criminal defendants and the public should enjoy. Most people would agree that all government actors should be "checked" in some way; that the concentration of too much power in the hands of prosecutors—the vast majority of whom are well-meaning—is dangerous. My structural critique and its associated due process balancing test explain why judges and legislatures should have a greater role in checking prosecutors. Putting more discovery into the hands of the defense is an important check on prosecutorial power because it allows defendants to prepare a defense and to plea bargain with a better understanding of their likely sentencing exposure.

Of course, such changes do not actually restore structural protections; they merely attempt to approximate what has been lost. Without a jury trial, the criminal justice system will never work as originally intended. Many scholars have argued that the trial penalty, which incentivizes defendants to waive their separation of powers protections like the jury trial, is

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[328] S. 2197, 112th Cong. (2012), https://www.govtrack.us/congress/bills/112/s2197/text.

[329] *See A Call for Congress to Reform Federal Criminal Discovery*, THE CONSTITUTION PROJECT (2012), http://www.constitutionproject.org/pdf/CallforCriminalDiscoveryReform.pdf; Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639 (2013) (detailed policy analysis of Fairness in Disclosure of Evidence Act of 2012).

unconstitutional.[330] The Supreme Court has not agreed.[331] It must certainly be the case that plea bargaining is unconstitutional at least in the sense that our modern system of pleas bears little resemblance to the Constitution's design and the common-law tradition from which it came. But due process needs to look forward, not backwards. As Justice Matthews stated in *Hurtado*:

> [i]t is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right . . . was preserved and developed by a progressive growth and wise adaption to new circumstances.[332]

A due process jurisprudence that is sensitive to structural protections can balance the interests of defendants and society at large.

Even if the Supreme Court's due process jurisprudence does not catch up with the realities of plea bargaining, other branches of government can act. Federal prosecutors should provide broad pre-plea discovery as a matter of Department-wide policy, not the discretion of individual prosecutors. Congress should amend the Federal Rules of Criminal Procedure along the lines of my proposed due process balancing test to provide for broad pre-plea discovery. But many federal district courts are not waiting on Congress, the Supreme Court, or the Department of Justice—they have promulgated helpful local rules that have inspired this Article's analysis. Hopefully, this structural conception of due process can make plea bargaining not just more efficient but also more fair.

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330 *See, e.g.*, Schulhofer, *supra* note 8.

331 *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 363–4 (1978).

332 Hurtado v. California, 110 U.S. 516, 530 (1884); *see also* SULLIVAN & MASSARO, *supra* note 89, at 85.