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# THE UNIVERSITY OF TEXAS SCHOOL OF LAW

Public Law and Legal Theory Research Paper Series Number 490



## *Monitoring the Plea Process*

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## Monitoring the Plea Process

Susan R. Klein\*

### I. INTRODUCTION: PLEA BARGAINING'S FAILURE

*Gideon v. Wainwright*<sup>1</sup> heralded a new age in American criminal prosecutions. With the Sixth Amendment's right to counsel incorporated into the Fourteenth Amendment and applied to the states, all suspects, rich or poor, might indeed have equal access to justice. Indigent black men in the South would have the same opportunity to fight felony criminal charges and would receive the same sentencing discounts of favorable guilty pleas as rich white Northerners,<sup>2</sup> and the innocent would be accurately separated by adversarial testing from the guilty.

Few scholars or practitioners in 2013 believe that this opportunity has been realized.<sup>3</sup> A primary culprit is legislative

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<sup>1</sup> 372 U.S. 335 (1963).

<sup>2</sup> Equalization at sentencing by plea was not, of course, the goal of the Court at the time it rendered *Gideon*. *Gideon* itself focused on the procedural complexities of trials, and the need for counsel's guidance. Unwarranted sentencing disparity is a much more modern concept. See, e.g., Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223 (2003) (suggesting that mandatory sentencing guidelines can enhance equality and transparency).

<sup>3</sup> See, e.g., David Cole, *Gideon v. Wainwright and Strickland v. Washington, Broken Promises*, in CRIMINAL PROCEDURE STORIES, 101 (Carol S. Steiker ed., 2010); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crimes but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Am. Bar Ass'n, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, v (Dec. 2004), [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/in](http://www.americanbar.org/groups/legal_aid_indigent_defendants/in)

refusal to adequately fund defense counsel for indigent suspects,<sup>4</sup> but the Court shares the blame by settling on the contours of our current two-pronged test in *Strickland v. Washington* that determines when counsel is ineffective and the defendant is accordingly prejudiced.<sup>5</sup> Today, almost exactly fifty years post-*Gideon*, indigent defendants (who comprise eighty percent of total defendants)<sup>6</sup> often get substandard counsel,<sup>7</sup> and innocent individuals are rarely but sometimes convicted or plead guilty.<sup>8</sup>

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itiatives/indigent\_defense\_systems\_improvement/gideons\_broken\_prom  
ise.html (noting that we spend twice as much on criminal  
prosecutors as we do on criminal defense counsel, and finding that  
our shamefully inadequate indigent defense funding "lacks  
fundamental fairness and places poor persons at constant risk of  
wrongful conviction"); U.S. Sentencing Comm'n 2013 Report (finding  
that federal prison sentences of black men were nearly 20% longer  
than those of white men for similar crimes in the years since the  
Supreme Court restored judicial discretion in sentencing in 2005).

<sup>4</sup> See, e.g., Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004).

<sup>5</sup> 466 U.S. 668, 688 (1984) (rejecting a guidelines approach, the Court held that the defendant must show that his attorney's performance was "outside the wide range of professionally competent assistance," that the court "must induce a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, that the court should defer to "tactical" judgments of defense counsel). To establish prejudice, the defendant must show a "reasonable probability that the result would have been different" had counsel been effective. *Id.* at. 694.

<sup>6</sup> Steven K. Smith & Carol J. DeFrances, *Indigent Defense*, BUREAU OF JUST. STAT. BULL., 4 (Feb. 1996), <http://bjs.gov/content/pub/pdf/id.pdf>.

<sup>7</sup> See *supra* notes 3-4; WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

<sup>8</sup> BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHEN CRIMINAL PROSECUTIONS GO WRONG* (2011) (examining 250 cases in which convictions were overturned based upon post-conviction DNA testing, and finding the most common reasons for overturning convictions to be: eyewitness misidentification, false confessions, informant testimony, flawed scientific evidence, and weak defenses); Samuel R. Gross et al., *Exonerations in the United States, 1989-2003*, 95 J. CRIM. L. &

Federally charged criminal defendants obtain talented federal public defenders, who are at least as competent as private counsel. Ninety-seven point four percent of federal criminal convictions in 2010 were by guilty plea<sup>9</sup> not because defendant's had incompetent counsel, but because federal prosecutors cherry-pick cases so that generally only easily-provable cases are charged, and draconian and mandatory minimum penalties and substantial assistance reductions stack the deck heavily in favor of the government.<sup>10</sup> Indigent defendants charged in state courts are generally stuck with either competent appointed counsel facing unreasonable pay caps and insurmountable case loads who therefore cannot possibly do their jobs,<sup>11</sup> or incompetent and unprepared

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CRIMINOLOGY 523 (2005); Innocence Project, *News and Information: Facts on Post-Conviction DNA Exoneration*, [http://www.theinnocenceproject.org/Content/Facts\\_on\\_Postconviction\\_DNA\\_Exonerations.php](http://www.theinnocenceproject.org/Content/Facts_on_Postconviction_DNA_Exonerations.php) (noting a total of 300 men exonerated by DNA evidence by 2012). Other studies suggest that the actual numbers of wrongful convictions and guilty pleas which cannot be discovered by DNA testing is much greater. See Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435 (2009).

As I have noted previously, none of these exonerations are of defendants charged in the federal system. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-federalization of Criminal Law*, 62 EMORY L.J. 1, 8 n.27 (2012).

<sup>9</sup> Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (citing DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, Table 5.22.2009 (2009), available at <http://www.albany.edu/sourcebook/pdf/t5222010.pdf> (containing 2009 and 2010 data)).

<sup>10</sup> Klein & Grobey, *supra* note 8, at 10.

<sup>11</sup> Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (see footnotes 38-40, collecting statistics from various states regarding the massive number of cases that their public defenders handle every year); Am. Bar Ass'n, *supra* note 3, at 17 ("Caseloads are radically out of whack in some places in New York. There are caseloads per year in which a lawyer handles 1,000, 1,200, 1,600 cases."); Carol J. DeFrances, *State-Funded Indigent Defense Services, 1999*, BUREAU OF JUST. STAT. BULL., 1 (Sept. 2001) (surveying the caseloads and expenditures for indigent criminal defense agencies in 21 states. List-appointed counsel face unreasonable pay-caps or are too inexperienced for

attorneys who sleep, drink, take drugs, and bumble their way through the trial or plea process.<sup>12</sup> These defendants are generally factually guilty, and they too plead guilty at the slightly lower ninety-five percent rate; in low-stakes misdemeanor cases so that they can go home with time served,<sup>13</sup> and in felony cases to avoid the much worse outcome of a jury verdict of guilt.<sup>14</sup>

During the same decades that the legislatures were funding prisons but not defense attorneys and the Court was busy interpreting the ineffective assistance of counsel doctrine in such a way as to make the claim essentially unwinnable and therefore meaningless, our criminal justice evolved from an adversarial system to what Judge Gerard Lynch called "a *de facto* administrative regime," where prosecutors interpret the laws and adjudicate cases without written standards or hearings.<sup>15</sup> Most

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the job, and legal aid and public defender attorneys are competent but unable to overcome heavy case loads.

<sup>12</sup> See Blume & Neiman, *infra* note 25; WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (2006) (collecting instances in which capital defense attorneys provided seriously deficient representation); Cole, *supra* note 3; Bright, *supra* note 3.

<sup>13</sup> Josh Bowers, *Punishing the Innocent*, 156 U. PA L. REV. 1117, 1134 (2008) (suggesting that much of the wrongful convictions by plea involve low-level offenses); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 9 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2103787](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103787); Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (2010), [http://www.hrw.org/sites/default/files/reports/us1210webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf).

<sup>14</sup> See, e.g., GARRETT, *supra* note 8 (16 of the 250 exoneration cases were guilty pleas); Stephanos Bibas, *Bargaining Outside the Shadow of Trial*, 117 HARVARD L. REV. 2463, 2495, 2508-10 (2004) (suggesting that innocent defendants are likely more risk averse than guilty ones, and therefore more likely to accept a plea offer); Blume & Helm, *supra* note 13, at 21.

<sup>15</sup> Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2142 (1998) (arguing that our existing system of plea bargaining, at least on the federal level, is one of prosecutorial administration without significant

constitutional criminal procedural guarantees that protect suspects during the investigation and prosecution of state and federal crimes are largely irrelevant in our world of guilty pleas and appeal waivers.<sup>16</sup> Plea bargaining had triumphed,<sup>17</sup> and prosecutors hold all of the cards during these negotiations.<sup>18</sup> Thankfully last term, in *Lafler v. Cooper*<sup>19</sup> and *Missouri v. Frye*,<sup>20</sup> the Court gave us another chance to both police equality of sentences for the guilty and mandate better investigation of the underlying offense to ferret out the innocent.

Fittingly, on the fiftieth anniversary of *Gideon*, five members of the Court recognized that "the criminal justice system is the plea bargaining system."<sup>21</sup> In *Frye*, the Court held that defense counsel's failure to communicate the prosecutor's plea bargain to the defendant constituted deficient performance under *Strickland*'s first prong.<sup>22</sup> In *Lafler*, the government conceded that the defense attorney's erroneous legal advice that the penalty imposed after trial would be better than the sentence

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judicial input). See more recently Gerard E. Lynch, *Frye and Lafler: No Big Deal*, 122 YALE L.J. ONLINE 39 (2012), available at <http://yalelawjournal.org/2012/06/21/lynch.html>.

<sup>16</sup> NORMAN ABRAMS, SARA SUN BEALE, & SUSAN R. KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 913-14 (West 2010).

<sup>17</sup> GEORGE FISHER, PLEA BARGAINING'S TRIUMPH (2004) (describing plea bargaining in early nineteenth century Massachusetts).

<sup>18</sup> See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (prosecutor can add recidivism enhancement raising penalty from five years to mandatory life if defendant refuses to accept plea offer); *Brady v. United States*, 397 U.S. 742 (1970) (guilty plea voluntary even if entered into to avoid death penalty). See also *infra* nn. \_\_\_ - \_\_\_, discussing prosecutors' ability to decrease sentence below mandatory minimums, add or dismiss charges requiring consecutive sentences, fast-track plea discounts, and other prosecutorial tools.

<sup>19</sup> 132 S.Ct. 1376 (2012).

<sup>20</sup> 132 S.Ct. 1399 (2012).

<sup>21</sup> *Id.*

<sup>22</sup> *Frye*, 132 S. Ct. at 1309.

offered in the plea deal constituted deficient performance, and the Court remanded for a determination as to whether the defendant was prejudiced by undergoing an admittedly fair trial.<sup>23</sup> The Court has acknowledged that it is fundamentally unfair for some defendant to receive steep sentence discounts while others pay full price,<sup>24</sup> at least where defense counsel could have pretty easily obtained the discount for her client, and her client would have accepted the plea.

These two high-profile decisions came on the heels of a recent mini-revival by the Supreme Court of a narrow swath of ineffective assistance of counsel claims.<sup>25</sup> They also coincide with some backlash in Congress and state legislatures regarding coercive pleas and lack of disclosure to defendants, particularly when the specter of convicting the innocent rears its ugly head. Reacting to data on wrongful convictions and noting that these issues that might be more cheaply and quickly resolved through better flow of information, a few Senators in Washington and state legislators in my home state of Texas have proposed bipartisan bills to enforce discovery compliance before a judge can accept a guilty plea.<sup>26</sup> These legislative proposals combined with public

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<sup>23</sup> *Lafler*, 132 S. Ct. at 1391.

<sup>24</sup> See generally Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011) (noting that only the most ignorant and least-well represented defendants pay sticker price for their crimes).

<sup>25</sup> See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (counsel may be ineffective under the Sixth Amendment if he fails to offer the defendant some guidance on the immigration consequences of a guilty plea); *Rumpilla v. Beard*, 545 U.S. 374 (2005) (holding that defense counsel's failure to investigate defendant's history for mitigating evidence amounted to ineffective assistance of counsel); *Wiggins v. Smith*, 539 U.S. 510 (2003) (failure to present mitigating evidence at sentencing amounted to effective assistance of counsel); John H. Blume & Stacey D. Neimann, *It's Like Deja Vu All Over Again*, 34 AM. J. CRIM. L. 127 (2007) (explaining that the *Strickland* standard barred nearly all ineffective assistance of counsel claims until 2000, when *Strickland's* chokehold began to loosen).

<sup>26</sup> See SB 2197, the proposed federal Fairness in Disclosure of Evidence Act of 2012 (hereinafter "FDEA"); Texas SB 91 (proposed by Democrat Rodney Ellis and Republican Robert Duncan (similar)). See *infra* notes 86 and 100, where these bills are

sentiment and these new Supreme Court cases provide the proper climate to demand that judges monitor the details, contours, and substance of federal and state plea negotiations, thereby raising the hope of *Gideon's* opportunities once more.

In the remainder of this essay, I will outline what I believe are our two most promising fixes for the information and resource disparity that skews our system. I will further justify why I believe that some reform is essential. My first proposal, similar to a suggestion I made a few years ago, is to amend the *Federal Rules of Criminal Procedure* (hereinafter "FRCP") and their state equivalents to promote adequate discovery and judicial regulation of the plea process.<sup>27</sup> Specifically, at the federal level the Advisory Committee to the FRCP could create new FRCP 11.1, "Pre-Plea Discovery Conference," that would require a conference between the judge and both parties prior to entry of a guilty plea. To complement this change, the Judicial Committee could amend current Rule 11, rename it FRCP 11.2, and add to the plea colloquy the requirement that the terms of the plea itself be explained satisfactorily before the judge accepts the plea. Together these suggestions would add a new hearing to the process and slightly lengthen the current plea colloquy between the judge and the defendant. Such an additional procedure would still be significantly cheaper, however, than a full-blown trial.

My second suggestion is for the Department of Justice and local District Attorney's Offices to implement internal guidelines to regulate the timing and content of plea negotiations and discovery procedures. The incentive for this action is to ensure the finality of guilty pleas and to stave off potentially harsher legislative or judicial action in this area. Again this could be done cheaply and without fanfare, giving me some reason for mild optimism regarding its chances of success.

## II. NEW JUDICIAL RULES OF CRIMINAL PROCEDURE

### A. *Mandatory Non-waivable Pre-plea Conference - New FRCP 11.1*

My initial suggestion is to mandate a non-waivable pre-plea

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described in more detail.

<sup>27</sup> Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 *Texas L. Rev.* 2023 (2006); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 *VAL. U. L. REV.* 693 (2005).



offer (or pre-trial, for those rare instances where the prosecution does not intend to offer any bargain) conference. Such a conference would make transparent and record the investigation by defense counsel and discovery offered by the federal prosecutors under Rule 16<sup>28</sup> that both parties engaged in in order to comply with the newly-imposed interpretation of effective counsel at the plea negotiation stage. Each state could develop its own version of such a conference, which should be transcribed if at all possible. The judge might ask some variant of the questions that follow to the prosecutor and defense attorney. Or, even more efficiently, these questions could be reproduced on a form to be answered and exchanged between the parties in advance, leaving the conference as a venue for resolving any contested issues these questions might raise.<sup>29</sup> The

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<sup>28</sup> FRCP 16 requires government disclosure of very specific information in its possession upon the defendant's request, such as the defendant's prior oral statements given to law enforcement that the government intends to use at trial; the defendant's written/recorded statements (including statements before the grand jury); the defendant's criminal record; documents and objects that the government intends to use in its case-in-chief or are material to preparing the defense or that were obtained from/belong to the defendant; reports of examination and tests the prosecution intends to use in its case-in-chief or that are material to preparing the defense; written summary of expert witnesses the government intends to use in its case-in-chief or to rebut the defendant's expert testimony on mental condition. If the defendant requests such disclosure from the government and the government complies, the defense must give similar reciprocal discovery to the government.

<sup>29</sup> Such a conference would not violate FRCP 11(e)(1), added in 1974, which prohibits the court from *participating* in plea discussions. That provision was enacted in response to an ABA Report that expressed concern that involving the court might lead the defendant to believe that the judge desires a guilty plea, which in turn might induce a defendant to plea guilty. ABA Standards Relating to Pleas of Guilty § 1.1(a). My proposed conference is focused on discovery of the facts surrounding the case and the substance offer itself, not on the plea negotiation process. Further, the train of not pressuring defendants to plead guilty has already left the station, but the pressure comes from primarily from the prosecutor. The judge will have to be careful about commenting on the substance of the plea, or the Committee will have to amend or eliminate 11(e)(1).

hearing might be conducted by a magistrate in those jurisdictions concerned with trial judges becoming involved in the plea negotiation process.

**To The Prosecutor:**

1) Has the government made a plea offer? If yes, is it in writing? [Please submit copy of plea offer to court.] If no plea deal was offered, please state this fact on the record, or provide date at which it will be forthcoming. If oral plea offer, please relay general substance of the offer to the court. If your office has instituted guidelines on plea discounts, does this plea fall within the general terms for similar cases? If you have guidelines and this plea offer is not within the guidelines, please state the extenuating/mitigating circumstances that take this case outside of your office's ordinary guidelines.<sup>30</sup>

2) Please state when the plea deal expires, or when defendant's acceptance will not be "timely" for purposes of Acceptance of Responsibility (two point reduction in federal system for acceptance of responsibility and addition point for timely acceptance of plea; corresponding "remorse" discount in state/local systems).

3) Please provide your calculation of the Federal Sentencing Guidelines range (state sentencing guidelines range, average sentence for similar offense) for each charge in the accusation. Are there any mandatory minimum or offenses requiring consecutive sentencing? Please provide the same calculation for the negotiated plea, if you offered one.

4) Are you willing to turn over a (redacted) witness list and *Giglio* material concerning these witnesses?<sup>31</sup> (There may be a

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<sup>30</sup> Note that this is similar to departures under the Federal Sentencing Guidelines back when they were mandatory. If the government wanted a sentence higher than the twenty-five percent range offered by the guidelines, or the defense wanted a lower sentence, they must offer a rationale that takes the particular case out of the "heartland." Report to Congress from U.S. Sentencing Comm'n, *Downward Departures from the Federal Sentencing Guidelines*, A-29 (Oct. 2013), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Departures/200310\\_RtC\\_Downward\\_Departures/dep\\_artrpt03.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Departures/200310_RtC_Downward_Departures/dep_artrpt03.pdf).

<sup>31</sup> *Giglio v. United States*, 405 U.S. 150 (1972) (holding

Jencks Act problem here for federal prosecutors).<sup>32</sup> Would you like me to conduct (*in-camera*?) a hearing regarding witness safety?

5) Do you intend to offer eyewitness testimony? If so, please provide a description of procedure of line-up, show-up, etc., including all pictures shown to witnesses. Please include names of witnesses who were present but who could not identify the defendant or who were not interviewed.

6) Please turn over copies of any confessions by defendant or anyone else, preferably audio and video-taped, as required by FRCP 16 (or state equivalent).

7) Will you offer any statements from confidential informants, undercover officers, or jailhouse snitches? Please provide names and *Giglio* materials, including records and any payment or leniency. Please include audio and video records, if any.

8) Have you checked with law enforcement and any other agency involved in this investigation to determine whether there is *Brady* material to reveal?<sup>33</sup> If there is *Brady* material, please provide timetable for disclosure. If you have any material you are unsure about, please turn it over to my bailiff for an *in camera* review.

9) Is there any physical evidence, and were there any DNA, chemical analysis, or scientific tests done on any physical evidence? Please provide the court a list of what results you have shared with the defense or explain why the government is unwilling to share any material listed in FRCP 16 (or the state equivalent).

10) Will any documentary evidence or expert testimony regarding  

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that impeachment evidence is included in *Brady* rule).

<sup>32</sup> See Jencks Act, 18 U.S.C. § 3500 (West 2012) and FRCP 26.2, which provide that, upon motion of the other party, after a witness testifies, the court will order the party calling the witness to produce and statement of the witness in their possession and that relates to the subject matter of the witness testimony.

<sup>33</sup> *Brady v. Maryland*, 373 U.S. 83 (1963) (Due Process requires reversal of conviction if the prosecutor suppressed admissible exculpatory or impeachment evidence favorable to the accused on an issue of guilt or punishment if prejudice ensued.).

the documentary evidence be utilized at trial? Please provide the court with a list of documents you have shared with the defense as required by FRCP 16 (or the state equivalent), or offer schedule of when the government will disclose such documents.

**To Defense Counsel:**

1) Have you received a plea offer? Do you have any questions about its terms? Do you have a counter-proposal for the government?

2) Have you explained to your client your assessment of whether the government can prove each element of each charge in the accusation beyond a reasonable doubt at trial?

3) Have you calculated the possible sentencing exposure your client faces if her case goes to trial and she is convicted of all charges, and what is that sentence (if different from government's calculation)? Do you agree with the government calculation of the penalty (the guidelines sentence, mandatory minimum penalties, and consecutive sentencing requirements) that will be imposed if your client is found guilty on all charges, and the sentence range that will likely be imposed if she signs the negotiated plea the government has offered? (See Prosecutor's response to question 3).

4) Have you advised your client that the government's plea offer is a reasonable one? If not, and if it does not interfere with your strategy, would you like to explain on the record why you believe the offer is an unreasonable one?

5) Please relay any defenses that your client intends to raise at trial that require advance notice to the government (alibi, insanity, self-defense).<sup>34</sup> Do you intent to share any physical evidence, witness testimony, or expert or scientific reports concerning these defenses with the prosecution at this time? Do you wish to share any information concerning defenses at trial over which your client has the best access to information even though notice to the government may not be required (self-defense)?

Creating a pre-plea conference is perhaps more politically palatable than either increasing funding for the criminal defense function or expanding constitutional criminal procedural

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<sup>34</sup> See FRCP 12.1 (notice of alibi defense); 12.2 (notice of insanity defense); 12.3 (notice of public authority defense).

guarantees for defendants, as such a conference would not require legislative action, and thus may escape public notice.<sup>35</sup> Moreover, it would save judicial and party resources that might otherwise be expended in an attempt to recreate—sometimes years after the fact—the parties' knowledge and intent during the negotiation process. I suggested something similar in a 2006 article, proposing that federal judges use their newly granted authority over post-trial and post-plea sentencing from the 2005 *Booker* case<sup>36</sup> to enforce stricter compliance with, and perhaps amend, FRCP 11 and 16.<sup>37</sup> I am more sanguine now about change than I was eight years ago. In 2010, the ABA House of Delegates passed a single paragraph recommending that courts at all levels conduct a conference to discuss discovery obligations, though it provided no details.<sup>38</sup> The next year, the ABA suggested the all courts disseminate a "*Brady* checklist" as a complimentary procedure to the earlier resolution, though it did not provide a sample.<sup>39</sup>

Other scholars have more recently made even broader suggestions for judicial involvement. For example, Professor Sandra Guerra Thompson has very recently proposed judicial gatekeeping for both eyewitness identification testimony and more

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<sup>35</sup> See Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 252 (1997) ("Legislatures, responding to voters fearful of crime, have no incentive to devote scarce resources to the defense function rather than to additional police or prison space.").

<sup>36</sup> See *United States v. Booker*, 543 U.S. 220 (2005) (declaring the Federal Sentencing Guidelines to be advisory).

<sup>37</sup> Klein, *supra* note 27; see also Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial Leniency, The Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519 (2009).

<sup>38</sup> ABA Recommendation No. 102D, *Judicial Role In Avoiding Wrongful Convictions*, (Feb. 8-9, 2010).

<sup>39</sup> On Feb. 14, 2011, the ABA House of Delegates adopted Resolution 104A, urging all federal and state courts to disseminate to both parties a written checklist delineating in detail the general disclosure obligations of *Brady*. It further suggests a standing committee to assist the court in formulating and updating this checklist, but it does not provide an actual or sample checklist.

generally all "police-generated witness testimony."<sup>40</sup> Noting that errors in confessions, police informant testimony, and misidentification by eyewitnesses are the leading causes of wrongful convictions, she suggests that courts take a more active role in screening such evidence by holding pretrial reliability hearings. My proposal may make such hearing, where the judge must listen to witnesses and take evidence, less necessary. The pre-plea conference merely requires the attorneys to list on the record what information they have provided or intend to provide to the other party, allowing each party to make a more effective plea decision. For example, a defense attorney can decide after this conference whether a particular statement showing bias or otherwise refuting a government witness will sufficiently destroy the credibility of that witness such that it is worth going to trial rather than accepting the plea. Without such information, the defense attorney cannot make a competent recommendation.

There is ample precedent at the federal level for my proposal. Every few years the Criminal Rules Advisory Committee to the FRCP proposes amendments. Such seemingly-technical procedural rules do not garner much attention from Congress or the press, and tend to be enacted fairly routinely. This committee has amended the Federal Rules of Criminal Procedure numerous times to comply with new Supreme Court decisions and to comport with contemporary notions of fairness and justice. For example, the original adoption of Rule 16 in 1944 noted that discovery is not normally permitted in criminal cases, but provided exceptions for documents seized by the government. The 1966 amendments explicitly permitted discovery in criminal cases and hugely increased the range and scope of pretrial discovery in response to then-current academic scholarship, ABA reports, and Supreme Court and lower court opinions which argued in favor of broader discovery.<sup>41</sup> Changes implemented in the 1974 amendments were to expand reciprocal discovery and provide the defendant "with enough information to make an informed decision as to plea."<sup>42</sup>

Likewise, Rule 11 has been constantly refined by amendment.

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<sup>40</sup> Sandra Guerra Thompson, *Daubert Gatekeeping for Eyewitness Identifications*, 65 SMU L. REV. 593 (2012); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329 (2012).

<sup>41</sup> See Advisory Committee Notes to 1944 and 1966 amendments (West 2012).

<sup>42</sup> *Id.*

In 1966 the Advisory Committee resolved circuit confusion by requiring courts to address the defendant personally in the course of determining that the plea was made voluntarily. In 1974, the Committee enshrined *Boykins v. Alabama*'s rule that the defendant must be apprised of those constitutional rights that she relinquishes by pleading guilty, and in 2007 it altered the colloquy to conform to the Court's holding that the Federal Sentencing Guidelines are advisory.<sup>43</sup>

The Advisory Committee used the amendment process wisely over the last forty-seven years to resolve lower court disputes and combat undue prosecutorial power. Though the Committee cannot get too far ahead of the law in proposing changes (or it might run the risk of a Congressional override),<sup>44</sup> it can and has pushed the envelope a bit in creating fairer procedures, and *Lafler* and *Frye* give it just the right excuse to propose new amendments now. These conferences will add time and expense to each plea, but because this is the only process ninety-five percent of these criminal defendants will ever receive, it is not, in my opinion, an extravagance.

Admittedly, my proposal cannot be as easily implemented in the state systems. It is one thing to implement rules revisions as a sub-constitutional means of regulating constitutional rights at the federal level. That task has been delegated by Congress to a Committee composed of judges and academics. At the state level, many of these rule changes would have to go through legislative committees, and prosecutors might exercise a "veto" on many of these disclosure requirements. Moreover, the volume of cases is much greater in the state systems,<sup>45</sup> and this will of course

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<sup>43</sup> See *United States v. Booker*, 543 U.S. 220 (2005); *Boykin v. Alabama*, 395 U.S. 238 (1969); FRCP 11 (West 2012) Advisory Committee Notes to 1966, 1974, and 2007 amendments.

<sup>44</sup> For example, there was some controversy when USAOs started to require appeal waivers as part of boilerplate plea agreement language. Rather than step in to the fray and try to resolve the issue, the Committee adding the appeal and habeas waivers to its Rule 11 colloquy, but specifically took no position on the constitutionality of the waiver. See FRCP 11(b)(1)(N) (West 2012) and the Advisory Committee Note to the 1999.

<sup>45</sup> On average between 1994 and 2010, ninety-five percent of felony convictions were at the state and local level in 2011; only five percent were at the federal level. See Klein & Grobey, *supra* note 8, at 93 (tbl. 10).

affect the time and resources involved in adding a conference to every case. There will be costs associated with accelerating discovery obligations, particularly the requirement to make efforts to obtain *Brady*-related material from police, and this may have some effect on the bargains that are offered and the willingness to adopt such rules. Thus my proposal is more promising at the federal level, though these federal rules are often used as a model for similar state rules.

The third question concerning sentencing that the judge will ask each party during this new conference builds on information presently imparted to defendants in open court, transcribed for the record, at the Rule 11 colloquy. Pursuant to current Rule 11(b)(1)(M) the judge informs the defendant that in determining defendant's sentence under the particular charges to which defendant is pleading guilty, she (the judge) will calculate the applicable range and possible departures under the Sentencing Guidelines; pursuant to Rule 11(b)(1)(H) the judge tells the defendant the statutory maximum penalty for each charge to which she pleads; and under Rule 11(b)(1)(I) the judge relays any mandatory minimums for charges to which defendant pleads.<sup>46</sup> That information may be too late to be of value, however, as the defendant has already at this point discussed the matter with his attorney and agreed to accept the deal. More importantly, it does not provide sufficient information to the defendant or her attorney to make an informed decision. It does not give the defendant any advice on what the guideline penalty range will actually be for the charges to which she is pleading (there are many variables in the manual that can influence this calculation); it does not tell the defendant what the guidelines and statutory penalty range would be for the additional charges that are being dismissed as part of the plea (information necessary to determine the potential guideline exposure after a trial if the plea is rejected); it does not inform the defendant of the ordinary sentencing differentials between pleading guilty and going to trial (such as points for remorse). Continuing, it does not tell the defendant what her defense attorney predicts will be her most likely sentence after plea or after trial based upon the defense attorney's evaluation the strength and weakness of various charges, the probability of a guilty verdict on each, and the characters of the offender, the offense, and the judge that might influence the eventual sentence.

Simply asking question number three concerning sentencing on

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<sup>46</sup> FRCP 11 (West 2012).



the record before to a plea decisions might nip in the bud, or at least more easily resolve, many claims that would otherwise arise later in a habeas petition. So far, many of the claims under *Lafler* and *Frye* (especially the successful ones) involve a defendant who now wants a trial (if she took a bad plea)<sup>47</sup> or who now wants the original plea re-offered (if she went to trial and received a higher sentence or took a plea less generous than the original offer)<sup>48</sup> because the defense attorney miscalculated the potential sentence. There is no good reason to pay for a wasted trial and then have to reconstruct a plea offer (that may not be in writing) when we can get this sentencing information out plainly in advance of either plea or trial through the discovery conference. Likewise, there is no reason to have to hold a trial, perhaps years after a plea that was later declared to have been entered without effective assistance of counsel, if we could have determined that the plea was a bad deal at the time.

My proposal will also force the parties and the judiciary to confront the unresolved timing issues surrounding constitutional

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<sup>47</sup> See *Johnson v. Uribe*, 682 F.3d 1238 (9th Cir. 2012) (granting habeas petition to vacate plea and grant a trial where petitioner accepted a plea deal to a sentence above the statutory maximum), *amended in*, 700 F.3d 413 (9th Cir. 2012).

<sup>48</sup> See, e.g., *United States v. Soto-Lopez*, 475 Fed. App'x 144 (9th Cir. 2012) (unpublished) (holding that defendant was entitled to an evidentiary hearing on his section 2255 claim that attorney's bad advise to reject a "fast track" 48-month plea led to a later guilty plea to a more serious charge without a plea agreement and a 77-month range), *remanded sub nom.* *Soto-Lopez v. United States*, No. 07-3475, 2012 WL 3134253 (S.D. Cal. Aug. 1, 2012) (granting motion to vacate conviction and ordering government to re-offer the 48-month fast-track plea agreement); *United States v. Rivas-Lopez*, 678 F.3d 353 (5th Cir. 2012) (requiring evidentiary hearing on defendant's 2255 motion alleging ineffective assistance of counsel where defendant convicted by jury trial and sentenced to 188 months after rejecting a plea deal that would have had guidelines range of 87-108 months, because defense attorney erroneously told defendant that if he pleaded he would face 262-327 months); *Jones v. United States*, No. 11-5136, slip op. (6th Cir. Nov. 5, 2012) (per curiam) (grating habeas motion and instructing government to re-offer original 210-month plea after defendant convicted by jury trial because defense attorney ineffectively miscalculated the 420-month guideline sentence).

obligations under *Brady* (when material must be turned over), and even deeper conflicts regarding the precise content of a prosecutor's disclosure duties (what material must be turned over). The most common causes of conviction of innocent persons can be avoided by more thorough and timely discovery. These issues have been ignored for too long. If the Advisory Committee is uncomfortable resolving these still-controversial issues, then the conference could be used to make a record of what the prosecutor in that case believes *Brady* requires in timing and content, so that the defendant has something concrete to argue at the conference and at appeal.<sup>49</sup> The ABA has opined that federal and state prosecutors must disclose exculpatory evidence before a plea agreement is signed.<sup>50</sup> However, the United States Attorney's Manual does not require federal prosecutors to do so.<sup>51</sup> State prosecutors are left to wonder whether they need only disclose exculpatory information that consists of admissible evidence that is so material that there is a reasonable probability that the result at trial would be different if she had disclosed it (the present test conducted in hindsight and required under *Brady*), or whether they need to disclose *all* information (not just admissible evidence) that "tends to negate guilt," as required by the Model Rules of Professional Responsibility ostensibly applicable in most states.<sup>52</sup>

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<sup>49</sup> This might consist of an appeal of an adverse conference ruling, or the defendant's later claim, after he has taken or rejected a plea based in part on this information, that he had ineffective assistance of counsel during the negotiation.

<sup>50</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454 (2009). This opinion also notes that the ethical duty of prosecutorial disclosure under Model Rule of Professional Conduct 3.8(d) is broader than the constitutional obligation established by *Brady* and its progeny.

<sup>51</sup> UNITED STATES ATTORNEYS' MANUAL (2010) [hereinafter USAM], *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.justice.gov/usao/eousa/foia_reading_room/usam/); CRIMINAL JUSTICE RESOURCE MANUAL 165 (2010).

<sup>52</sup> See ABA CRIMINAL JUSTICE SECTION, CRIMINAL JUSTICE STANDARDS 3-3.11(a), *available at* [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pfunc\\_blkold.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blkold.html) (requiring timely disclosure of "all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment"); MODEL RULES OF PROF'L CONDUCT R.

My proposal applies to all defendants, but will most affect two categories: (1) those who took a plea based upon erroneous advice who really should have gone to trial or gotten a better deal (either because they are innocent, or because the government's evidence was not great, or because they were not being given the same deal as similarly situated defendants), and (2) those who rejected a good plea offer based upon erroneous advice who really should not have gone to trial (the defendants in both *Lafler* and *Frye*).<sup>53</sup> If a defense attorney must communicate the fact of a plea offer to her client, and must give good advice to the client who rejects the plea (the defendants in *Lafler* and *Frye*), then it seems to me that the attorney must give this same good advice to the over ninety-five percent of her clients who accept the government's offer.<sup>54</sup> To ensure that this Sixth Amendment right is being complied with for the first category of defendants, the judge should make certain inquiries before accepting any plea deal. Was the particular bargain a good one for this defendant? If we can figure out if this was a bad deal at the conference, the plea can be rejected and a trial date set (or a new plea offered). Forcing a category one defendant who took a bad deal to wait for a collateral review of her conviction and sentence based upon an ineffective assistance of counsel claim at the plea stage is inefficient for all parties, particularly the government, as this review may occur years later and much of the evidence (in the form of testimony from defense counsel, prosecutors, and witnesses to the crime) may have been misplaced or forgotten. This will be a difficult case to try if the plea is

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3.8(d) (2012) (same).

<sup>53</sup> In *Lafler* the defendant endured a trial with a much greater sentence than the rejected bargain because defense counsel told defendant that since he intended to shoot below the waist, the government could not prove intent to kill. *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012). The government conceded ineffectiveness in *Lafler*, so we do not know when an interpretation of the law is so wrong at the plea stage as to be ineffective. See *id.* at 1384; *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

<sup>54</sup> *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), both require sound advice at the plea stage as a matter of Sixth Amendment doctrine. Again, I am not suggesting that my proposed pre-plea discovery conference is required by the federal constitution in order to protect this right.

overturned.

It also should be preferable from their own viewpoint for the Department of Justice and District Attorney's Offices to hold these conferences for category two defendants who rejected a plea offer. If the defendant is successful in showing that she would have taken the plea if properly advised, then the government wasted a lot of time and money trying a case for nothing. Chances are that the remedy will be to enforce the earlier plea offer.<sup>55</sup>

*B. Plea Acceptance Colloquy - New FRCP 11.2*

My second suggestion regarding amendments to the FRCP is to amend current Rule 11, which would be relabeled as FRCP 11.2, to add additional information to the Rule 11 colloquy between the judge and the defendant.<sup>56</sup> State judicial committees would need to amend their versions of Rule 11 similarly. The judge considering the plea might ask the defendant some variant of the following additional questions:

**To Defendant:**

1) Did you receive a written copy of the plea agreement at or sometime after the pre-plea discovery conference? Do you

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<sup>55</sup> I could find very few cases so far. See, e.g., *Merzbacker v. Shearin*, 706 F.3d 356 (4th Cir. 2013) (four life sentences after state criminal trial upheld on habeas as state court on first hearing found that the defendant's testimony that he would have accepted a plea deal had one been offered was not credible); *Titlow v. Burt*, 680 F.3d 577 (6th Cir. 2012) (finding ineffective assistance of counsel at plea as defendant's attorney was misinformed about the facts of the case because he failed to review the file and he failed to advise client on her exposure at sentencing or reasonableness of plea), *cert. granted*, 133 S. Ct. 1457 (2013).

<sup>56</sup> See also Donald A. Dripps, *Plea Bargaining and the Supreme Court: The End of the Beginning?*, 25 FED. SENT'G REP. 141, 142 (2012) (commenting that if defense counsel obligations regarding investigation of the facts and exploring potential defense were enforceable during the plea colloquies, then "the systemic pressure for avoiding trials would require an investment in the defense function that would enable all defendants to receive the sort of advice contemplated by the Court's recent decision").

understand the terms of the plea agreement? If not, would you like the defense attorney and prosecutor to explain any particular term on the record?

2) Did the expected sentence change from that described to you at the discovery conference? Are the same mandatory minimum and consecutive sentences you were informed of being imposed?

3) Did you and your attorney receive all discovery from the government that we discussed at our pre-plea conference? Are there any investigative avenues that your defense attorney did not pursue despite your request? [Ask defense attorney to explain.]

4) Are you satisfied with your defense counsel, and with the terms of your plea agreement? If not, why not (be specific)?

5) Has your counsel informed you of possible immigration consequences from this plea?<sup>57</sup>

6) Have you been asked to waive an ineffective assistance of counsel claim, and is this claim included in your agreement? Do you understand that you are waiving \_\_\_\_\_ [insert waiver language here; e.g., waiver of right to appeal based upon ineffective assistance of counsel except where such the grounds for such a claim could not be known by the defendant at the time she entered the guilty plea]. Did your attorney/another attorney assist you in deciding whether to accept this waiver?

Federal judges could ask such questions now without waiting for a change to FRCP 11 or its state equivalent. While not as helpful alone towards rationalizing sentences and separating the innocent from the guilty as in combination with my Rule 11.1 proposal, such a discussion on the record would ensure that discovery disclosures were made, and would assist both parties in reconstructing the plea process in later litigation.

### *C. Justification for the New Rules*

*Lafler* and *Frye* give us a new opportunity to monitor the substantive results of criminal dispute resolution through pre-plea and pre-trial conferences, after we have notably failed to adequately monitor defense counsel competence utilizing doctrines generated from *Gideon* and *Strickland*, and this is an opportunity

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<sup>57</sup> Now required by *Padilla v. Kentucky*, 559 U.S. 356 (2010).

we should not squander. I am convinced that providing information to all parties at an earlier stage will be more successful than our present system in rationalizing sentences and uncovering innocence. Requiring conferences will be significantly more successful than a post-*Lafler* and *Frye* system that does not insist on these pre-plea conferences, but instead relies on determining defense counsel competence in hindsight and without written records.

A good part of the reason that my proposals are a necessary first step towards resolving the inequities noted in the introduction to this essay is that in our new administrative world of criminal justice virtually all defendants' plead guilty, and these plea bargains are unreviewed and generally unreviewable by any official beyond the prosecutor who proposed them. There is good reason to doubt Seventh Circuit Judge Easterbrook's statement in his justifiably famous 1972 article that "plea bargaining [is] at least as effective as trial at separating the guilty from the innocent. To the extent there is a difference, negotiation between sophisticated persons unencumbered by the rules of evidence is superior."<sup>58</sup> While perhaps true when written thirty years ago, this claim is inaccurate today, and therefore some reform of the plea process is essential. First, under our present plea system some critical information is never revealed unless and until there is a trial: for example, a lie or misperception may not be uncovered until cross-examining a government witness at trial. At the federal level, much information is not required to be shared under Rule 16 until immediately before trial or, in the case of *Giglio* material regarding government witnesses, not until after direct examination.<sup>59</sup> Thus there might be evidence that would lead to acquittal that would never come to light if a defendant takes a plea relatively early in the process, as most do. Defense counsel cannot bargain pre-trial with this in mind, as she has no idea what she is giving away, and is in no position to demand anything in exchange for potential evidence in any case.

Second, aside from the lack of transparency (the prosecution knows what *Brady* and *Giglio* material exists, the defense attorney often has no clue), the parties do not have nearly equal bargaining power. This affects both the separation of the guilty from the innocent and the rationality of sentences among the

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<sup>58</sup> Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1972 (1970).

<sup>59</sup> Jencks Act, 18 U.S.C. § 3500 (2012).

guilty. Prosecutors can punish recalcitrant defendants by heaping on additional charges for failure to capitulate.<sup>60</sup> Prosecutors can also threaten to include a charge imposing a mandatory minimum or consecutive sentence, can charge a weapon as a separate offense rather than a penalty enhancement, can pin the entire amount of loss or drugs on a minor conspirator, and can file notice of prior offenses, which under federal and state three strike-type provisions often double or triple a sentence.<sup>61</sup> Defendants have much more of an incentive to accept a bargain now as sentence lengths have become more draconian over the last few decades,<sup>62</sup> and rewards for entering pleas, via remorse, cooperation, and other discounts have grown larger. In the federal system, for example, the defendant receives a two point reduction (about twenty-five percent) off her sentence for acceptance of responsibility when she pleads guilty, and then an extra third point for a "timely" plea,<sup>63</sup> which is a plea taken before the prosecutor begins to prepare for trial. One extra point can translate to many months of imprisonment in serious cases. Likewise, some federal defendants get a four-point reduction for "fast track" pleas if that federal docket is particularly crowded.<sup>64</sup> And the only way out of a mandatory minimum sentence

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<sup>60</sup> See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Brady v. United States*, 397 U.S. 742 (1970).

<sup>61</sup> Klein, *supra* note 27, at 2037-38.

<sup>62</sup> See Armed Career Criminal Act, 18 U.S.C. § 924(e) (2012) (federal three strikes provision mandating minimum 15-year penalty for felon in possession of a firearm who has three prior conviction for drug offenses or violent felonies); MARK MAUER, *THE RACE TO INCARCERATION* (1999); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); MICHAEL TONRY, *SENTENCING MATTERS* (1996); Frank O. Bowman III, *Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 428 (2004) (illustrating the substantial increase under the Federal Sentencing Guidelines of sentences for economic crimes); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467 (2001) (describing the rise of mandatory minimum sentences in the 1970s).

<sup>63</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2012).

<sup>64</sup> *Id.* § 5K3.1 (enacted 2003 as part of PROTECT Act).

is a substantial assistance motion by the government.<sup>65</sup>

At the state and federal levels, prosecutors are paid their salary regardless of whether or not the case goes to trial. The possibility of a trial is particularly costless for federal prosecutors, who can simply dismiss cases if a greater percentage of defendants suddenly refused to plea, knowing that the most serious of such cases would be picked up for state and local prosecutors, who do not have the luxury of cherry-picking. Most District Attorneys are voted in, not appointed, and they are responsible for the general police powers in the jurisdiction, not just crimes based upon enumerated powers. Many state-level defense attorneys literally cannot afford to go to trial. Except for those few working in public defender offices, their payment structure simply does not allow for it. Public defenders who work for the government, like prosecutors, are on salary. Nonetheless, some public defender services are suing because of over-burdensome caseloads. Defense attorneys rarely go to trial, but only through trial preparation might one actually conduct a thorough factual investigation and be able to cross-examine witnesses to discover the truth.

These critiques of our current plea process hold true for the vast bulk of state defendants, who are prosecuted for the core offenses listed in the FBI index of crimes,<sup>66</sup> and the vast majority of federal defendants, who are prosecuted for controlled substance and immigration offenses.<sup>67</sup> I have to bracket a few categories of defendants who are able to take advantage of American trials—what Justice Scalia called the "gold standard" of justice.<sup>68</sup> This small group of accused persons include

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<sup>65</sup> See 18 U.S.C. § 3553(e)(2012); U.S. SENTENCING GUIDELINE MANUAL § 5K1.1. There is also the little-used "safety-valve" provision for those defendants with no criminal records who commit drug offenses without violence or weapons. U.S. SENTENCING GUIDELINE MANUAL, *supra* note 63, § 5K2.20.

<sup>66</sup> These include homicides, robberies, aggravated assault, and property offenses. *Uniform Crime Report: Crime in the United States*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s> (last visited May 10, 2013).

<sup>67</sup> Klein & Grobey, *supra* note 8, at 6 (noting that fifty-nine percent of federal criminal defendants in 2011 were charged with either immigration or drug offenses).

<sup>68</sup> *Lafler v. Cooper*, 132 S. Ct. 1376, 1398 (2012) (Scalia,



particularly wealthy and sophisticated defendants, defendants who are championed by cause groups such as the ACLU,<sup>69</sup> corporate criminal defendants who have their attorneys paid for by their employers and who often strike deals before indictment,<sup>70</sup> and those charged with regulatory offenses who are unlikely to see prison time even if convicted by a jury.<sup>71</sup> At least some of these defendants will continue demand trials unless we change the criminal justice system even more dramatically.

The third reason Judge Easterbrook's lauding of the plea negotiation process has become incorrect is that in today's system information that may exonerate a defendant may never see the light of day because of the very modern but increasingly popular practice, at least on the federal level, of general discovery and *Brady* waivers in plea agreements. Some of these plea agreements demand waivers not only of discovery rights under the FRCP and the Jencks Act, but further include both *Brady* (actual innocence) and *Giglio* (impeachment) material. The Supreme Court has thus far sanctioned only the *Giglio* waivers, and that was in a pre-*Lafler* case.<sup>72</sup> Perhaps with the Court's new acknowledgment that the plea

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J., dissenting).

<sup>69</sup> See Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195 (2005).

<sup>70</sup> Memorandum from Paul J. McNulty, Deputy Attorney General (Dec. 12, 2006) (superseding Memorandum from Larry D. Thompson, Deputy Attorney General (Jan. 2003)); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2009).

<sup>71</sup> Klein & Grobey, *supra* note 8, at 66-68 (noting that most "regulatory offenses" are not true strict liability crimes, that such offenses comprised only two-percent of the federal criminal caseload in 2011, and that the median sentence for such crimes is zero months imprisonment).

<sup>72</sup> *United States v. Ruiz*, 536 U.S. 622 (2002) (holding that a plea agreement may waive right to impeachment evidence and evidence of affirmative defenses, but not reaching issue of *Brady* waivers of exculpatory evidence as to innocence). There is currently a circuit split on the issue of whether a defendant can waive her right to exculpatory evidence of actual innocence. See *United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010) (collecting cases).

negotiation is the criminal justice system, this holding will be re-examined. In the meantime, the government's demand for these waivers continues unabated. For example, in my home jurisdiction, the Western District of Texas, such waivers became standard for all agreements about a year ago.<sup>73</sup> Nationwide, the practice of demanding discovery waivers is mixed. I entered into a Cooperation Agreement with the United States Sentencing Commission to examine all plea agreements nationwide that contained pleas to arson, carjacking, and/or robbery entered between January 2008 and December 2010.<sup>74</sup> My team's preliminary examination of federal plea agreements of all arson cases between 2008 and 2010 and a random sampling of robbery cases between 2006 and 2010 revealed that about twenty-five percent included such a waiver.<sup>75</sup> This number was right in line with my guess, based upon the unscientific method of calling the twelve or so former students of mine who are now AUSAs around the country and asking them about the practice in their offices. Some of the agreements we coded

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<sup>73</sup> Boilerplate language in these pleas provide that "in addition to waiving pretrial motions, the Defendant agrees to give up and waive any claims he/she might have now or may acquire later to any information possessed by the prosecution team that might be subject to disclosure under discovery rules, including the Federal Rules of Criminal Procedure, the Jencks Act, local court rules, and Court Orders, including information that might be considered exculpatory or impeaching under *Brady v. Maryland* and *Giglio v. United States*." See, e.g., *United States v. Bonetello*, No. 13-051, ¶ 2 (W.D. Tex. April 3, 2013) (plea agreement); see also *United States v. Conroy*, 567 F.3d 174, 170 (5th Cir. 2009) (holding that a defendant can constitutionally waive his *Brady* rights in a plea agreement).

<sup>74</sup> Susan R. Klein & Judith W. Sheon, *United States Sentencing Commission Cooperation Agreement for Research Project* (May 4, 2011). The agreement between Prof. Susan Klein and Judith W. Sheon, Staff Director, United States Sentencing Commission was entered pursuant to 28 U.S.C. section 995(a)(6)-(7), granting authority to the Commission to enter into "cooperation agreements," and is consistent with the Commission's public access policy published as Public Access to Sentencing Commission Documents and Data, 54 Fed. Reg. 51279 (Dec. 3, 1989).

<sup>75</sup> Susan R. Klein et al., Unpublished Study Results (on file with at the University of Texas) (Of the 622 arson and robbery cases we coded, a total of 147, or 23.6%, contained a *Brady*, *Giglio*, or FOIA waiver. Such waivers were most common in major cities, and least common in small towns and rural areas).

from the Commissioner's database include waivers not only of Rule 16 and *Brady* and *Giglio*, but also rights under the Freedom of Information Act and the Privacy Act of 1974.<sup>76</sup> As of the date of this writing, Main Justice has not taken a position on their propriety.

Discovery waivers are particularly harsh on the innocent, for whom such favorable evidence might exist. It is perhaps for this reason that the Department of Justice no longer requests that those pleading guilty waive their rights under the Innocence Protection Act of 2004 to DNA testing.<sup>77</sup> A DNA waiver, like the *Brady* waivers and the appeal waivers, are boilerplate, so a defense attorney cannot bargain around such a waiver for a client who she believes might be innocent. Defense attorneys can demand no concessions in exchange for agreeing to the waivers.

The fourth reason that Judge Easterbrook's reliance on plea bargaining to be as effective as trials is misplaced is that information that escapes the secrecy of the discovery waiver will not be available to assist most defendants even if later revealed because almost all plea agreements include appeal waivers.<sup>78</sup> Though it may be possible for innocent-but-convicted defendants to bypass the appeal waiver by claiming that counsel was ineffective

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<sup>76</sup> *Id.*

<sup>77</sup> One month after the Innocence Protection Act of 2004, 18 U.S.C. § 3600 (2012), gave federal convicts the right to request DNA testing, the Department of Justice directed United States Attorneys to secure a waiver of that right whenever possible. However, on Nov. 18, 2010, Attorney General Eric Holder issued a memorandum directing federal prosecutors not to require such waivers as part of plea agreements. Memorandum from Eric H. Holder, Jr., Attorney General, on Guidance Regarding Use of DNA Waivers in Plea Agreements, available at <http://www.justice.gov/ag/ag-memo-dna-waivers111810.pdf>.

<sup>78</sup> See Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209 (2005) (study of 1,000 randomly selected plea agreements found that nearly two-thirds contained waivers of defendants' rights to appeal); see also Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. Rev. 113 (1999) (suggesting that defenses based on separation of powers, federalism, and the Eighth Amendment's prohibition against Cruel and Unusual Punishment should be barred from being the subject of consensual waiver as against public policy).

in accepting the plea (most courts, thankfully, will not enforce a waiver of the right to appeal if negotiated without effective assistance of counsel as against public policy),<sup>79</sup> such a claim is unlikely to be successful. The defendant would have to show that the appeal waiver was not a matter of negotiating strategy, and that counsel's advice to plead before discovery (as most defendants now do, and most defense attorneys recommend) was deficient performance. This problem will at least be ameliorated if not solved by my proposed changes to the FRCP.

This is because in addition to the discovery advantages, another advantage of my proposal is its effect on the currently very-popular appeal and newly-blossoming effective assistance of counsel waivers. With any luck, the reasoning in *Lafler* and *Frye*, coupled with the discovery and written record requirements contained in my new proposals, will limit the usefulness, if not the ubiquity, of appeal waivers. In the majority of jurisdictions (and the correct position, in my opinion), defendants cannot waive their right to effective assistance of their attorney at the plea negotiation stage.<sup>80</sup> I believe this to be true despite a smattering of such waivers, mostly in state courts in the South, highlighted by Professor Nancy King in her excellent contribution to this symposium.<sup>81</sup> It is for this reason that the United States

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<sup>79</sup> Those same courts that accept appeal and habeas waivers in plea agreements and reject defendants' argument that such provisions are void as contrary to public policy will still provide a "miscarriage of justice" exception whereby they refuse to honor the waiver if the sentence imposed was in excess of the maximum allowed by law, was based on unconstitutional factors such as race or gender, or was tainted by ineffective assistance of counsel. See, e.g., *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003) (en banc). I hope from this reasoning that a defendant could not constitutionally waive her right under *McMann v. Richardson*, 397 U.S. 668 (1984), to effective assistance of counsel at plea, or her new right under *Lafler* and *Frye* to effective assistance of counsel during plea negotiations. I believe that such a waiver would be contrary to our strong public policy interest in convicting only the innocent, and in rationalizing sentences. Developing this argument is beyond the scope of this essay, but will be the subject of my next.

<sup>80</sup> See *supra* note 74.

<sup>81</sup> Nancy King argues that defendants can and do waive their right to an effective attorney at the plea negotiation stage. Nancy King, *Plea Bargains that Waive Claims of Ineffective*

Attorney's Office for the Southern District of Alabama, and several other offices in the Eleventh Circuit, have completely changed course on including waivers of ineffective assistance of counsel.<sup>82</sup> For a short time a few years ago, pre-*Lafler* and *Frye*, they did include such waivers, but upon further reflection, and after being slammed by various district courts who were not fond of the practice, they eliminated them. Instead, they include boilerplate language that "[t]he defendant has had the benefit of legal counsel in negotiating this Plea Agreement. He has discussed the facts of the case with his attorney, and his attorney has explained to the defendant the essential legal elements of the criminal charge which has been brought against him. The defendant's attorney has also explained to the defendant his understanding of the United States' evidence and the law as it relates to the facts of his offense."<sup>83</sup>

Thus defendants will claim there was ineffective assistance at the plea negotiation stage if they end up with a very high sentence after signing a rotten deal, when later investigation shows the government's case was weak and a better deal could have been obtained. Likewise, a defendant will claim ineffective assistance at the plea negotiation stage if later evidence is discovered which supports a colorable claim of actual innocence. Defendants should be able to generally make this claim of ineffective assistance of counsel regardless of the appeal and/or habeas waiver in the plea agreement, as the attorney was arguably ineffective in advising the client to sign a plea deal containing such a waiver. Likewise, they can make this claim even if there

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*Assistance - Waiving Padilla and Frye*, \_\_\_\_ DUQ. L. REV. \_\_\_\_ (forthcoming 2013). My reading of the cases does not support the proposition that any of these decisions explicitly upheld a waiver of effective assistance of counsel that was spelled-out in a plea agreement. While waivers were mentioned, the decision did not rely upon them. Further response regarding the constitutionality of such waivers is too complex to pursue in this footnote, and I will have to ask the reader to either accept my argument, *supra* note 65, that such a waiver is void as against public policy, or to wait for my next essay on the subject. See Susan R. Klein, *Waiving Everything*, (forthcoming 2014).

<sup>82</sup> E-mail from Christopher Bodnar, Assistant United States Attorney Southern District of Alabama, to author (Apr. 19, 2013)(on file with author).

<sup>83</sup> United States v. Wilson, No. 12-00293-KD, ¶ 6 (S.D. Ala. 4/19/13)(plea agreement).

is an effective assistance of counsel waiver in their plea agreement, as generally that same deficient attorney will have advised the defendant to sign that waiver. Agreeing to a plea with appellate and collateral attack waivers (or waivers of effective assistance of counsel) was not a voluntary and knowing decision by the defendant but was rather a decision suggested by an attorney who had not adequately investigated the facts or the law, and was thus deficient at the plea negotiation stage. This Sixth Amendment claim may circumvent a defendant not otherwise being allowed to challenge the evidence or the law directly. The defendant may still be permitted to indirectly challenge both legal misinterpretations of the law and failure to investigate the facts, by claiming that she would have gotten a better deal with a competent attorney, because the law and/or facts were actually on her side, and a competent attorney would have properly advised her to reject the entire deal.<sup>84</sup>

My proposal will be successful only if defendants are not permitted to waive the initial pre-plea discovery conference and additional notice provisions under new FRCP 11.1 and 11.2.<sup>85</sup> One

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<sup>84</sup> However, some state courts treat a "knowing and intelligent" plea agreement as an implicit waiver of all ineffective assistance of counsel claims, at least claims regarding conduct that occurred prior to the entry of the plea. See, e.g., *State v. Bregizer*, 2012 Ohio 5586, 201 WL 5995060 (Ohio Ct. App. Dec. 3, 2012). These cases seem to be just plain wrong after *Lafler*, and probably wrong even before 2012. The defense attorney's bad legal advice and failure to investigate at the plea negotiation stage caused the bum deal, and thus a defendant's agreement to sign such a deal is "voluntary" only by a true stretch of that word.

<sup>85</sup> The Advisory Committee will need to enact into new FRCP11.1 the condition that it is a non-waivable procedure. If we allow parties to waive the discovery conference, then prosecutors will circumvent new Rule 11.1 by presenting the guilty plea and waiver of the discovery conference at the beginning of the Rule 11.2 conference. Criminal procedure is rife with waivers of everything waivable. For example, this is what happened after Congress enacted FED. R. EVID. 410 in 1972, making inadmissible any statements made during the course of plea negotiations. See, e.g., *United States v. Mezzanatto*, 513 U.S. 196 (1995) (enforcing a waiver provision which permitted the prosecutor to use the statements a defendant made during the course of plea negotiation when responding to contrary testimony by the defendant himself); *United States v. Velez*, 354 F.3d 190 (2d Cir. 2004) (enforcing a

cannot, presumably, waive the current Rule 11 colloquy, as there would be no other way to ensure that the plea was voluntary and intelligent. If I am correct that one cannot waive effective assistance of counsel at plea, this conference can be considered part of this same process. This non-waiver standard is modeled after both the new federal and state of Texas 2012 discovery proposals, neither of which allow a defendant to waive the receipt of exculpatory material as part of her plea bargain.<sup>86</sup>

If new Rule 11.1 is implemented, courts would soon confront the issue of whether the defendant can waive receipt of answers to certain questions within the new discovery conference, even if she cannot waive the conference itself. For example, can a defendant state on the record at the conference that she waives her right to receive *Giglio* material? The Supreme Court held that she can do so, and also waive her right to evidence supporting her affirmative defense, in her written plea agreement in *United States v. Ruiz*,<sup>87</sup> but that was decided before *Lafler* and *Frye*.

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much broader waiver allowing the prosecutor to use any statement a defendant made during a plea negotiation and any testimony derived from such a statement to rebut any evidence offered by or on behalf of defendant). Another example is the waiver of direct and collateral appeals of pleas, which became popular in the early 1990s, and the new ineffective assistance waivers that have begun to pop-up since *Lafler* in 2012.

<sup>86</sup> See *supra* note 26. The FDEA covers all information, data, documents, evidence, or objects that "may reasonably appear to be favorable to the defendant." *Id.* This closely resembles the broader ABA Model Rule 3.8(d), not the narrower *Brady* rule. Such material must be provided to the defendant after arraignment and before entry of a plea. All new information must be disclosed as soon as practicable, regardless of whether the defendant has agreed to plead guilty. It also preempts the Jencks Act, though the judge may grant protective orders if necessary. Finally, the right cannot be waived by the defendant as part of his plea bargain, unless this waiver takes place in open court and the parties establish to the judge that such a waiver is "in the interest of justice."

<sup>87</sup> 536 U.S. 622 (2002) (holding that plea agreement may waive right to impeachment evidence and evidence of affirmative defenses, but not reaching issue of *Brady* waivers of exculpatory evidence as to innocence). There is currently a circuit split on the issue of whether a defendant can waive her right to exculpatory evidence of actual innocence. See *United States v.*

Under my proposal the judge and all parties would have the opportunity to consider whether counsel is being ineffective in recommending this waiver, in light of other discovery issues raised at the conference.

In some instances, it might be considered deficient performance to waive *Giglio* or other discovery rights before at least discussing the case with the client. For example, if there is physical evidence to test and known witnesses to depose, these facts may come to light at the non-waivable conference. At my proposed conference, the defense attorney would have to waive details of these tests on the record, and the prosecutor would have to request such waiver on the record. That appearance of obscuring the truth might be sufficient to prevent such a waiver request. If not, the court might disallow the waiver in particular cases where it seems possible that evidence of factual innocence might be otherwise revealed (unless perhaps the defendant is willing to stipulate that the tests would show he is guilty, in the absence of any reward from the government for that stipulation). This will constitute at least some progress over our present system of regularly including discovery waivers in a boilerplate plea agreement that the defense must ordinarily simply take or leave.

Generating a written record might also make the prosecutor hesitant to request a discovery waiver. The existence of such a record will mean if a prosecutor is ordered to turn over materials and she fails to do so, she is violating a court order. That court order carries much more punch than a mere failure to fully comply with a statutory discovery requirement (particularly where that discovery requirement is unclear and its contents are debatable). The recently concluded Court of Inquiry in Texas concerning former Judge Ken Anderson in the famous Texas case of Michael Morton demonstrates the pitfalls of a failure to comply with a judge's discovery order.<sup>88</sup> Judge Anderson was forced to

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Moussaoui, 591 F.3d 263 (4th Cir. 2010) (collecting cases).

<sup>88</sup> Michael Morton was exonerated by DNA evidence for the murder of his wife after spending twenty-five years in state prison. Aside from the bloody bandanna worn by the actual killer, which could not be effectively tested for DNA at the time it was collected, the prosecutor's files contained a statement from the defendant's young son saying that a "monster" killed his mom while his dad was not home, and witness testimony about a strange green truck trolling the neighborhood. See Chuck Lindell, *Morton Lawyer: Hidden evidence 'would have made the defense,'* AUSTIN AM.



justify his discovery failures in open court and faces the possibility of arrest and jail time. Though this procedure is peculiar to Texas (as are so many things!), it is the existence of a court order from the trial judge to the prosecutor that will determine whether a criminal contempt citation against the prosecutor is possible. The possibility of real action against the prosecutor for discovery failures will move this obligation to the top of every prosecutor's "to-do" list.

Moreover the new warnings in the colloquy in new FRCP 11.2 would require courts to rule on not only on waivers of discovery, but also waivers of appeals and waivers of ineffective assistance of counsel claims (as detailed in question number four that the judge asked to defendant at the Rule 11.2 hearing). This will establish on the record a basis upon which a defendant can effectively challenge counsel's effectiveness, even if she signed one of the dubious effective assistance of counsel waivers in her agreement. That will force courts to resolve the constitutionality of such waivers, if Professor King is correct regarding their new appearance. It will require courts to examine the substance of each waiver closely (some are contain much more draconian language than others), as well as the circumstances surrounding its signing (did the defendant have assistance of counsel in making the decision to waive effective counsel, was her choice a voluntary and knowing one).

### III. EXECUTIVE ACTION: CREATING DEPARTMENT OF JUSTICE AND DISTRICT AND COUNTY ATTORNEYS INTERNAL GUIDELINES REGARDING PLEAS

My second proposal, in addition to or in lieu of amendment the FRCP, is to create internal guidelines for prosecutors regarding the substance of plea agreements. Prominent scholars have suggested internal Department of Justice self regulation in other areas, such as prosecutorial discretion in selecting charges to file, whether to decline a file offered from a law enforcement agency, and in selecting between state and federal venues where federal sentences are likely to be longer.<sup>89</sup> The Department of

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STATESMAN (Feb. 6, 2013), <http://www.statesman.com/news/news/crime-law/witness-describes-and-person-prosecution-strategy/nWHH6/>.

<sup>89</sup> Rachel Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089 (2010); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); Daniel Richman, *Political Control of Federal Prosecutions—Looking Backward and*

Justice has written policies on these matters in its United States Attorneys Manual.<sup>90</sup> The problem with these guidelines is that they tend to provide only vague standards, which do not instruct a prosecutor on the appropriate course of action in a particular case. Further, there is no effective method of enforcement for these guidelines. There is no independent cause of action for a defendant who believes the Department has violated its own guideline,<sup>91</sup> and no teeth in the Court's current test for enforcing rational prosecutorial decision-making through constitutional or statutory provision.<sup>92</sup> My experience working as a federal criminal prosecutor is that Assistants do read and attempt to follow internal guidelines to the extent they can.

Even though clearly not a panacea, having internal guidelines focuses prosecutors' attention on the subject of the guideline. I believe this kind of internal guidance on plea negotiation might be more successful than charging guidelines because of the government's interest in preventing withdrawals of pleas and thus having to try an old case years after the plea was entered, and in preventing being forced to offer more lenient pleas after winning a guilty verdict at trial. In other words, the government has a strong interest in maintaining the *status quo*—pleas once accepted are final and cannot be withdrawn, convictions after trial are final and cannot be reversed.

Many felony defendants languish in jails or prison at the state and federal levels with little to do but file habeas

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*Forward*, 58 DUKE L.J. 2087 (2009).

<sup>90</sup> See, e.g., USAM, *supra* note 51, § 9-27.001 (Principals of Federal Prosecution); *id.* § 9-031 ("Petite Policy" (generally barring dual and successive prosecution)).

<sup>91</sup> United States v. Caceres, 440 U.S. 741 (1979) (holding that Department policies governing its internal operations do not create rights which may be enforced by defendants against the Department).

<sup>92</sup> Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997) (suggesting a harsher Equal Protection test to combat selective prosecution than offered by the Court in *Armstrong*); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879 (2005) (suggesting that federal judges narrowly interpret federal crimes to ensure proportionality with state crimes).

petitions. Their trial counsel may no longer be working on the case and therefore has no stake in whether a defendant wants to withdraw her plea. It is the government that does not want to be placed in a situation that might require them to try (or re-try) an old case. While successfully withdrawing a plea is rare, it may become less so after *Lafler* and *Frye*, and this might warrant preemptive action by the government. This is particularly true where the original trial prosecutor never fully prepared the case because of any early guilty plea. Witnesses' memories fade, and agents and prosecutors have moved on to other cases. It is more efficient and just to resolve discovery and deficient counsel issues before a plea or a trial than years later in a habeas petition.

Thus it might be to the government's advantage to officially record the plea deal and its sentencing consequences, and to explain when the deal expires and what penalties are mandated both with and without the plea. The government might even wish to send this in writing to the defense counsel, and copy the court. It may make sense to develop written internal guidelines for what a case is "ordinarily" worth, so that a particular defendant cannot claim that her deal was substandard. The prosecutor may then establish on the record any aggravating or mitigating circumstances of the defendant's criminal conduct that might affect her sentencing and charge recommendations. The prosecutor may also wish to hear from the defense attorney concerning the personal characteristics of her client (for example, is she supporting children? What is her criminal history? Does she have medical issues best addressed outside prison? Does she have substance abuse problems that can be remedied? Is she employed with community ties?) that might effect the government's willingness to dismiss charges or agree to a particular sentence.

The Department of Justice has long provided a lengthy but rather general section of the United States Attorneys Manual devoted to discovery. This section was amended in 2010 to be more defendant-friendly in direct response to congressional inquiries concerning various *Brady* breakdowns in federal high-profile cases.<sup>93</sup> It now requires the government to disclose not only

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<sup>93</sup> *E.g.*, *United States v. Mahaffly*, 693 F.3d 113 (2d Cir. 2012) (vacating conspiracy to defraud brokerage firms count due to government's 2007 failure to disclose *Brady* material); *United States v. W.R. Grace*, 401 F. Supp. 2d 1087 (D. Mont. 2005) (finding many *Brady* violations in complex environmental case); Beth Brennan & Andrew King-Reis, *A Fall from Grade: United States v. W.R. Grace and the Need for Criminal Discovery Reform*, 20

*Brady* material, but all information that is "inconsistent with any element of the crime" or that "casts a substantial doubt upon the accuracy of any evidence," even if this information is "not itself admissible evidence" in "sufficient time to permit the defendant to make effective use of that information at trial."<sup>94</sup> Of course this does not resolve the critical timing issue of whether such material must be delivered before a plea, and, unfortunately, as discussed in Part IIC, *Brady* waivers are becoming more frequently sought in plea negotiations. Nonetheless, the Department of Justice did amend the discovery section of the Manual, promulgated a January fourth, 2010 memorandum from Dept. Att'y Gen. David Odgen that expanded federal discovery, and created a Department of Justice working group that established an office *Brady* and *Giglio* coordinator in each United States Attorneys Office.<sup>95</sup>

This fast and significant response demonstrates that the Department would much rather regulate itself than wait for Congress to do it for them.<sup>96</sup> The Department officially opposes the Fairness in Disclosure of Evidence Act of 2012, another congressional enactment that came as a response to a *Brady* violation.<sup>97</sup> This bill would resolve both the *Brady* timing issue

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CORNELL J.L. & PUB. POL'Y 313 (2011) (discussing government's failure to comply with its discovery obligations in a series of 2009 cases).

<sup>94</sup> USAM, *supra* note 51, §§ 9-500-9-5.150.

<sup>95</sup> See Memorandum from David W. Odgen, Deputy Attorney General, (Jan. 4 2010), in CRIMINAL JUSTICE RESOURCE MANUAL, *supra* note 51, 165. The "Odgen Memo," which defines who belongs on the "prosecution team," lists categories of evidence that must be disclosed, and explains how prosecutors should conduct the discovery review. This memo describes the new working group that established this office coordinator to provide annual training, "serve as on-location advisors," create an on-line directory of resources, produce a handbook, and oversee a project to develop electronic storage of materials.

<sup>96</sup> Another recent example of this phenomenon was when Congress recently threatened legislation to protect the attorney-client privilege in the corporate setting. The Department quickly changed its internal policy requiring such waivers as a show of cooperation. ABRAMS, BEALE, & KLEIN, *supra* note 16, at 961-65.

<sup>97</sup> After Alaskan Senator Ted Steven's conviction was reversed based upon prosecutorial misconduct in failing to turn over exculpatory evidence. Judge Emmet Sullivan on Apr. 17, 2012,

and the *Brady* content issue in favor of defendants. The potential enactment of the FDEA gives the Department even more incentive to get its own house in order so that Congress is not forced to do it for them.

Likewise, state officials would prefer to police themselves rather than wait for a legislative response. For example, Texas prosecutors and law enforcement officers have publicly responded to media reports of exonerations. The Waxahachie Police Department enacted policy 2.005 on April 16, 2012, which provides for *Brady* obligations close to the broad ABA rules, mandates disclosure by officers to prosecutors, and provides for officer training and discipline for failure to disclose.<sup>98</sup> The Texas District and County Attorneys Association ("TDCAA") conducted a study in response to a Northern California Innocence Project Report that criticized Texas for numerous *Brady* violations and other instances of prosecutorial misconduct over the last five years.<sup>99</sup> The TDCAA published the findings of its study in a thoughtful report, has stepped up *Brady* and ethics training for newly-elected prosecutors, and is considering supporting some version of the new Texas discovery bill.<sup>100</sup> As state officials are

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appointed Henry F. Schuelke, III as Special Counsel to investigate and prosecute criminal contempt proceedings. The Special Counsel's March 13, 2012 Report was the impetus for the FDEA of 2012, SB 2097, proposed on Mar. 15, 2012. See *supra* note 26. Deputy U.S. Attorney General James Cole testified before the Senate Judiciary Committee that the problems that resulted in the Stevens debacle are not "systemic." However, the ABA, U.S. Chamber of Commerce, and the NACDL all support the bill.

<sup>98</sup> WAXAHACHIE POLICE DEPT. POLICY 2.005 (2012) (on file with Texas District and County Attorneys Association and with author).

<sup>99</sup> THE VERITAS INITIATIVE, NORTHERN CALIFORNIA INNOCENCE PROJECT REPORT (2012), available at <http://prosecutorialoversight.org> (claiming 91 instances of prosecutorial misconduct in Texas over the last five years). This research was conducted by the Veritas Initiative, an entity of the Northern California Innocence Project at the Santa Clara University School of Law. See *What is the Veritas Initiative*, THE VERITAS INITIATIVE (Sept. 22, 2010), <http://www.veritasinitiative/org>.

<sup>100</sup> *Setting the Record Straight on Prosecutorial Misconduct*, TDCAA (Sept. 10, 2012), [www.tdcaa.com/reports/setting-the-record-straight-on-prosecutor-misconduct](http://www.tdcaa.com/reports/setting-the-record-straight-on-prosecutor-misconduct) (eight-month working group to study what measures prosecutors can take to help eradicate wrongful convictions in Texas, finding six cases of deliberately

given the incentives and the opportunity to self-regulate and thereby reduce expensive trials and incarceration, the possibility of rule changes that encourage the equal treatment of offenders and the reliable acquit of the innocent grows.

#### IV. CONCLUSION

To be clear, I am not arguing that *Lafler* and *Frye* demand pre-plea conferences or other criminal procedure rule changes as a matter of federal constitutional law, or even that the United States Supreme Court is somehow required to adopt the reforms as prophylactic rules.<sup>101</sup> Rather, I suggest that these cases have helped reshape the political terrain for my proposed reforms. Prosecutors now have more incentive to accede to these reforms because it is in their interest to avoid *Lafler/Frye* claims (putting the plea deal on the record helps them do that), to avoid bad publicity, to save resources, and to avoid harsher legislative reforms. My proposals can be accomplished without creating additional constitutional criminal procedural guarantees that might be ignored or in fact be counter-productive,<sup>102</sup> and without requiring judges to reexamine precedents in controversial areas concerning constitutional procedural guarantees and finality of judgment rules.<sup>103</sup>

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dishonest or fraudulent conduct resulting in injustice). The TDCAA, through Rob Keppel, has stepped up its training course for newly-elected prosecutors, and is exploring Senator Ellis' proposed SB 91 with a working group of academics (including the author of this essay), William Allison, Director of University of Texas' Criminal Defense Clinic, and representatives of the local defense bar to draft a compromise bill.

<sup>101</sup> See Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001).

<sup>102</sup> William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (suggesting that political actors sidestep judicial broadening of criminal procedural rights).

<sup>103</sup> See Jennifer Laurin, *Still Convicting the Innocent*, 90 TEX. L. REV. 1473 (2012) (arguing that the Court has been unwilling in the last few years to reconsider some outdated and flatly incorrect precedents regarding criminal procedure guarantees, such as those involving DNA and eyewitness identification).

I recognize that the Court in *Lafler* and *Frye* imposed new duties on public and private defense counsel, not on the executive or the judicial branches of the government. However, I suggest reforming judicial and prosecution conduct rather than imposing additional rules on defense attorneys primarily because defense attorneys and their clients have already proven unable to challenge a system so heavily stacked against them.<sup>104</sup> Defense attorneys cannot investigate cases without proper funding nor expect to uncover exculpatory and impeachment evidence and test physical evidence without prosecutorial cooperation. Moreover, ineffective assistance of counsel claims are inadequate to vindicate the right of defendants to effective plea negotiation representation, not only because the standard for prevailing on such a claim is so very high, but also because of the numerous structural impediments to bringing an ineffectiveness claim. For example, non-capital indigent defendants are not entitled to state-provided representation in state post-conviction or federal habeas claims.<sup>105</sup> Given the increasing procedural complexity of these forums, proceeding *pro se* is a sure path to failure for these defendants.<sup>106</sup> Finally, criminal defendants are extremely

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<sup>104</sup> A successful civil malpractice action against a defense attorney for ineffective assistance of counsel is essentially impossible. If raised after trial, the former defendant must prove he was acquitted. If the client pleads guilty, most jurisdictions bar a defendant from bringing any action at all. The overwhelming majority of collateral attacks on trial counsel for being ineffective lead nowhere. Even in those very rare cases where trial counsel is later determined to have been ineffective, no action by the state bar or anyone else is ever taken against the attorney. *But see* Cara H. Drinan, *Lafler and Frye: Good News for Public Defense Litigation*, 25 FED. SENT'G. REP. 138 (2012) (suggesting that these new cases can and have stimulated defense reform suits, such as ones in Missouri and Florida, that argue that insufficient funding and excessive caseloads violates the constitution).

<sup>105</sup> Carol S. Steiker & Jordan M. Steiker, *Part II: Report to the ALI Concerning Capital Punishment*, 89 TEX. L. REV. 367, 406 (2010).

<sup>106</sup> In the wake of *Frye* and *Lafler*, there have been thousands of collateral attacks on pleas and convictions based upon ineffective assistance of counsel at plea. One of my research assistants checked Westlaw's "all fed" database in February of 2013 and found that most are *pro se* and completely

unlikely to pursue malpractice claims against their trial counsel for bad advice, providing no incentive for defense attorneys to change their behavior.<sup>107</sup>

I will conclude with a more controversial statement. As we continue to make criminal adjudication cheaper by substituting process-laden and time-consuming trials with unregulated guilty pleas, we will continue to get more felony guilty pleas with their attendant long prison terms. The plea revolution may well have contributed to our stunning increase in incarceration rates during the last fifty years.<sup>108</sup> Only recently (since 2009 for the total prison population and since 2007 for the imprisonment rate per 100,000)<sup>109</sup> has it become impossible for most jurisdictions to afford to house more prisoners, in part due to our country's economic downturn.<sup>110</sup> Such is my impression, though one might

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unintelligible, and the pleas and convictions are routinely affirmed.

<sup>107</sup> See, e.g., Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. REV. 1 (2002).

<sup>108</sup> The Bureau of Justice Statistics (part of the Department of Justice) has produced incarceration statistics that cover the last few decades. At the end of 2011 there were 1,537,415 prisoners serving sentences of more than one year in state and federal prisons (these prisoners are referred to as "sentenced prisoners"). E. ANN CARSON & WILLIAM J. SABEL, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS: PRISONERS IN 2011 6 tbl.5 (2012), available at <http://bjs.gov/content/pub/pdf/p11.pdf>. Compare that whopping 2011 figure to 315,974, the total number of sentenced prisoners in 1980, and 739,980, the total number of sentenced prisoners in 1990. ALLEN J. BECK & DARRELL K. GILLIARDAND, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS: PRISONERS IN 1994 8 tbl.10 (1995), available at <http://bjs.gov/content/pub/pdf/Pi94.pdf>. To give a better idea of what that means, between 1984 and 1994 the total number of sentenced prisoners in the United States (state and federal) increased by 128.8%. *Id.* at 4 tbl.3.

<sup>109</sup> The imprisonment rate is the number of prisoners under state or federal jurisdiction with a sentence of more than one year per 100,000 U.S. residents.

<sup>110</sup> From 2007 to 2011, the imprisonment rate fell from 506 per 100,000 persons to 492 per 100,000 persons. CARSON & SABEL, *supra* note 108, at 6 tbl.6. The total number of prisoners serving



plausibly argue that the increase in prison population stemmed instead from an increase in crime rates, a decrease in public tolerance for misconduct, the war on drugs, the release of those previously committed to mental institutions, over-criminalization, or some combination of the above. In any case, we need a process for monitoring plea negotiations that provides sufficient information to the plausibly innocent and those receiving unfair deals that at least a few of them continue to demand jury trials. Amending the plea negotiating process is necessary to ensure that we do not lose the longstanding intangible benefits of our adversarial criminal justice system, such as our jury system's check on government overreaching and the educative function of public trials. We should not allow plea-bargaining to make our adjudication so efficient and coercive that we find the wrong people to be guilty, or convict and sentence more people than we can sustainably punish. Putting the brakes on rampant plea-bargaining through sensible additional procedures and substantive review of plea deals would be a step in the right direction.

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sentences of more than one year has been declining since 2009, when the number of sentenced prisoners maxed out at 1,553,574, as compared with the 2011 figure, which had dropped to 1,537,415. *Id.* at 6 tbl.5.