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BARGAINING WITHOUT THE BLINDFOLD: ADAPTING CRIMINAL DISCOVERY PRACTICE TO A PLEA-BASED SYSTEM

ALEX KARAMBELAS[†]

INTRODUCTION

In 2015, Terrell Gills was arrested on charges related to a Dunkin' Donuts robbery in Queens, based on a partial DNA match.¹ His attorney's investigation yielded news articles about two other Dunkin' Donuts robberies in the same area, which took place in the same week.² In the eighteen months following his arraignment, Mr. Gills was incarcerated at Rikers Island because he was unable to afford his \$10,000 bail.³ During that period, Mr. Gills's attorney made repeated requests for information related to the other two robberies.⁴ It was not until four days before trial that the prosecution disclosed reports from the arresting officers which revealed that a different defendant had been arrested and pleaded guilty to the other two robberies.⁵ Upon being interviewed by Mr. Gills's attorney, the other defendant confessed to the third robbery with which Mr. Gills was charged.⁶ The trial went forward, and Mr. Gills was acquitted.⁷

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¹ Wendy Davis, *New York Considers Changing Discovery Rules That Often Leave Defense Lawyers in the Dark*, A.B.A. J. (May 1, 2018, 1:45 AM), http://www.abajournal.com/magazine/article/new_york_discovery_rules_blindfold [https://perma.cc/37QX-ZTNH].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Mr. Gills's case is an outlier not because discovery was withheld until less than a week before trial, but rather because he did not plead guilty.⁸ Statistically, in the vast majority of cases, a defendant in Mr. Gills's situation would have taken a guilty plea, which would have included a waiver of the right to discovery.⁹ New York Criminal Procedure Law (CPL) article 245, which came into effect in January 2020, introduced sweeping changes to criminal discovery procedure in New York, which would have prevented the eighteen-month delay before the disclosure of arrest reports.¹⁰

This Note argues that pretrial discovery practice should shift from a trial-centric model to one focused on broad pre-plea disclosures through statutory reform. Part I of this Note compares the old New York discovery statute and federal discovery practice with the recent New York discovery reforms. Part II surveys the various approaches to discovery procedure in practice, both in New York, under CPL article 240, and at the federal level, under Rule 16 of the Federal Rules of Criminal Procedure. Because both Rule 16 and CPL article 240 are so restrictive, informal practices and local rules have developed to fill the practical gaps left by these provisions. Part III argues that the problem of adapting discovery practice to a plea-based criminal justice system is best solved through legislative reform efforts, rather than piecemeal policies and local rules. Part IV addresses the role played by discovery in the plea negotiation process. This Part argues that broad pre-plea disclosure serves to ensure that plea agreements are informed, accurate, and efficient.

I. BACKGROUND: DISCOVERY PRACTICE IN NEW YORK AND THE FEDERAL SYSTEM

Except with specific and limited exceptions, criminal discovery is a creature of statute. Defendants have no constitutional or common law right to general discovery in a criminal case.¹¹ Since 1979, New York criminal discovery has been governed by CPL article 240.¹² Criminal justice reforms, addressing discovery,

⁸ See *infra* note 142 and accompanying text.

⁹ See *infra* note 144 and accompanying text.

¹⁰ See generally N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2019).

¹¹ *United States v. Ruiz*, 536 U.S. 622, 629 (2002); see also *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

¹² Criminal Procedure Law, ch. 412, § 2, 1979 N.Y. Laws 1 (repealed 2019).

speedy trial, and bail, were passed in April 2019.¹³ The new discovery statute in CPL article 245 represents a sea change in New York criminal discovery practice and the overall balance of power in pretrial procedure.

A. *New York Discovery Practice Under the Old Statute*

The discovery procedures set forth in article 240 were among the most restrictive in the nation, in terms of both the scope and the timing of disclosures.¹⁴ The discovery process under article 240 was demand-based—rather than automatic—meaning that the discovery process began with a written demand from the defense and the scope of the required disclosures was limited.¹⁵

The right to discovery was only triggered after the filing of a felony indictment or misdemeanor information.¹⁶ The Appellate Division has held that defendants have “‘no right to discovery prior to indictment,’ statutory or otherwise.”¹⁷ For misdemeanors, this restriction can result in a defendant who has no right to discovery material for ninety days following arraignment; a felony defendant could have no right to discovery for as long as six months.¹⁸ This period immediately after arrest is crucial both for effective defense investigation and plea bargaining, because prosecutors often offer plea agreements prior to the filing of an indictment or information.¹⁹

Pretrial access to discovery outside the procedures in article 240 was dependent on the internal policies of the District Attorney’s office for each county. A preliminary hearing prior to indictment, sometimes called a probable cause hearing or a felony exam, could provide the defense with detailed information about

¹³ See Christian Nolan, *New York Removes the Blindfold*, N.Y. ST. B.J., May 2019, at 12, 12.

¹⁴ N.Y. STATE BAR ASS’N, REPORT OF THE TASK FORCE ON CRIMINAL DISCOVERY 2–3 (2015), <https://nysba.org/app/uploads/2020/02/Criminal-Discovery-Final-Report.pdf> [<https://perma.cc/S3DS-6HXH>] [hereinafter NYSBA REPORT]; see also N.Y.C.L. UNION, DISCOVERY IN THE DARK: NEW YORK’S SECRET EVIDENCE RULES 17–22 (2019), https://nyclu.org/sites/default/files/discoveryinthedark_2019.pdf [<https://perma.cc/42P9-V4S7>].

¹⁵ See ch. 412, § 2, 1979 N.Y. Laws at 1–2.

¹⁶ *Id.*

¹⁷ *People v. Reese*, 23 A.D.3d 1034, 1035 (4th Dep’t 2005) (quoting *People v. Walker*, 15 A.D.3d 902, 903 (4th Dep’t 2005)).

¹⁸ Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty To Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1128 & nn. 141–42 (2004).

¹⁹ *Id.* at 1128–29.

the prosecution's case.²⁰ However, such hearings are rarely used, as prosecutors generally choose the less onerous grand jury proceeding.²¹ In addition to such preliminary hearings, defendants could receive substantive early discovery through voluntary disclosure by the prosecution. As discussed in more detail in Part III, some counties adopted internal "open file" discovery policies. However, the extent of the materials produced during voluntary disclosures varied from county to county and prosecutor to prosecutor.²²

The timeline for critical discovery under article 240 was tied to trial rather than arraignment. By contrast, the new statute introduces a deadline which starts from the date of arraignment, including on a felony complaint. The treatment of *Rosario* material illustrates how critical discovery material was treated as a trial right under article 240. *Rosario* is a judicially created rule, later codified in CPL section 240.45, that requires the disclosure of prior recorded statements of prosecution witnesses made to the police, the prosecution, or the grand jury.²³ For witnesses testifying at a hearing, their prior statements did not need to be disclosed until "prior to the commencement of the direct examination."²⁴ For trial witnesses, CPL section 240.45 did not require the prosecution to disclose *Rosario* material until after the jury had been sworn and prior to the prosecution's opening statement.²⁵ As such, defendants had no right to *Rosario* material until after the trial or hearing had already commenced, making any investigation based on that information impracticable.

Similar to the timing of *Rosario* material, the disclosure of exculpatory evidence under *Brady* was tied to the trial timeline and

²⁰ *Id.* at 1124.

²¹ *Id.* at 1124–25. Notably, during the COVID-19 pandemic, prosecutors were forced to use preliminary hearings, when it became impracticable to convene grand juries. See Paul McDonnell, *N.Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html> [<https://perma.cc/5WUZ-PHZ7>] ("Unable to convene grand juries, the city's five district attorneys are turning instead to preliminary hearings, which have not been conducted in New York in decades.")

²² See N.Y. CNTY. LAWS' ASS'N, DISCOVERY IN NEW YORK CRIMINAL COURTS: SURVEY REPORT & RECOMMENDATIONS 10–12 (2006), https://www.nycla.org/siteFiles/Publications/Publications228_1.pdf [<https://perma.cc/5X64-AK6C>] [hereinafter NYCLA SURVEY].

²³ *People v. Rosario*, 9 N.Y.2d 286, 289 (N.Y. 1961); *People v. Gillis*, 220 A.D.2d 802, 805 (3d Dep't 1995).

²⁴ Criminal Procedure Law, ch. 412, § 2, 1979 N.Y. Laws 3 (repealed 2019).

²⁵ *Id.*

took place late in the process under the old statute. Although there was no fixed timeline for *Brady* disclosures in article 240, such disclosures were considered “presumptively ‘timely’ ” if they were made no less than thirty days prior to the commencement of trial for a felony, and no less than fifteen days prior to trial for a misdemeanor.²⁶ These trial-centric timing requirements under article 240 resulted in meager pre-plea disclosures.

The challenges presented by the timeline for discovery under the old statute were compounded by the narrow scope of discovery available to defendants. The scope of discovery available to the defense under article 240 was limited to eleven enumerated categories of materials.²⁷ The Court of Appeals held that “[i]tems not enumerated in article 240 are not discoverable as a matter of right unless constitutionally or otherwise specially mandated.”²⁸ As a result, basic materials—such as the non-privileged portions of police notes or official investigation reports—were not included in the required discovery unless the prosecution intended to introduce them at trial.²⁹

Apart from the eleven enumerated categories, much of what defendants received came from constitutionally mandated minimum safeguards rather than statutory provisions. For example, the old statute did not include a provision requiring the disclosure of exculpatory evidence but rather directed prosecutors to comply with constitutional requirements without further guidance.³⁰ This provision had been interpreted as requiring the prosecution to turn over “material” exculpatory evidence, which would have created a “reasonable possibility” of a different outcome.³¹ By contrast, discovery laws in many other states require the prosecution to disclose all exculpatory information rather than just that exculpatory evidence which is determined to be material by the

²⁶ 7 LAWRENCE K. MARKS, *NEW YORK PRETRIAL CRIMINAL PROCEDURE* § 7:50 (2d ed. 2019) (commonly referred to as the “DiFiore Order”); see also Janet DiFiore, Chief Judge of the State of N.Y., *State of Our Judiciary Address* 9 (Feb. 6, 2018), <http://www.nycourts.gov/ctapps/news/soj2018.pdf> [<https://perma.cc/TER6-4QEJ>].

²⁷ See generally William C. Donnino, *Practice Commentaries*, N.Y. CRIM. PROC. LAW § 240.20 (McKinney 2014).

²⁸ *People v. Colavito*, 87 N.Y.2d 423, 427 (N.Y. 1996).

²⁹ *People v. Finkle*, 103 Misc. 2d 985, 986 (Sullivan Cnty. Ct. 1980); NYSBA REPORT, *supra* note 14, at 4.

³⁰ Ch. 412, § 2, 1979 N.Y. Laws at 1–2; see also *Colavito*, 87 N.Y.2d at 427 (“The CPL does not expressly compel pretrial discovery of evidentiary material . . . which the prosecution intends to introduce at trial.”).

³¹ *People v. Fuentes*, 12 N.Y.3d 259, 263 (N.Y. 2009).

prosecution.³² In addition to *Brady* material, witness identities and statements are often at the heart of a criminal case and would be central to any defense investigation of the charges. While defendants were entitled to the names and pretrial statements of prosecution witnesses as *Rosario* material, defendants had no right to the names, contact information, or statements of witnesses who had relevant information unless the prosecution chose to call them at a hearing or trial.³³

The compressed, trial-focused timeline for discovery and the limitations on discoverable materials were tied with the issue of prosecutorial readiness. Under CPL section 30.30 the speedy trial right in New York is tied to prosecutorial readiness, rather than a specified period of time. A defense motion to dismiss must be granted when the prosecution fails to announce its readiness for trial within six months of the commencement of the action for a felony and ninety days for a Class A misdemeanor.³⁴ After the prosecution announces that it is ready for trial, only the time requested by the prosecution is counted against it for section 30.30 purposes.³⁵ As such, a prosecutor may ask for a short, week-long adjournment, but the judge will often set the next date for a month or more due to the court's calendar.³⁶ Regardless of how long the actual adjournment is, only the week requested by the prosecution is counted for speedy trial time.³⁷ Once the prosecution announces their readiness for trial, the speedy trial "clock" stops.³⁸ Prior to the enactment of article 245, prosecutorial readiness and discovery were not linked, either in the statute or in the caselaw.³⁹ In *People v. Anderson*, the prosecution announced its readiness for trial when substantial discovery, including *Rosario* material, a supplemental bill of particulars, and lab reports were still outstanding.⁴⁰ The Court of Appeals held that the delay attributable to outstanding discovery obligations was not chargeable to the prosecution, because such a delay

³² NYSBA REPORT, *supra* note 14, at 5 & n.11 (listing Arizona, California, Colorado, Illinois, Massachusetts, Michigan, Minnesota, Texas, and Washington).

³³ Roberts, *supra* note 18, at 1129–30; *see* *People v. Miller*, 106 A.D.2d 787, 788 (3d Dep't 1984).

³⁴ N.Y. CRIM. PROC. LAW § 30.30(1)(a)–(b) (McKinney 2019).

³⁵ Daniel Hamburg, *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 COLUM. J.L. & SOC. PROBS. 223, 247–48 (2015).

³⁶ *Id.* at 248.

³⁷ *Id.*

³⁸ *Id.* at 247–48.

³⁹ *See* *People v. Anderson*, 66 N.Y.2d 529, 541–42 (N.Y. 1985).

⁴⁰ *Id.* at 539.

did not affect the prosecution's ability to proceed to trial, and because article 240 contained other remedies for such delays.⁴¹

Because of the lack of any connection between discovery compliance and speedy trial under the old statutes, prosecutors were able to announce ready prior to discovery disclosures.⁴² A declaration of readiness without discovery put the defendant in the position of choosing between stopping the speedy trial clock herself and requesting adjournments while waiting for discovery, on the one hand, or proceeding to trial without the benefit of discovery, on the other. Assuming that the statement of readiness was not illusory, there was nothing objectionable about this practice under article 240. Practically, this resulted in incarcerated defendants remaining in pretrial detention without discovery materials or the prospect of release on speedy trial grounds. Such delay without discovery often resulted in the inducement of ill-informed guilty pleas as a means to get out of detention or to avoid the collateral consequences of an open case.⁴³

This structural disconnect between discovery compliance and readiness was problematic even when prosecutors made good-faith statements of readiness and strove to comply with discovery obligations. But, as demonstrated by internal training documents from the Bronx District Attorney's Office, it was common practice for some offices to engage in gamesmanship with the explicit goal of stretching out a case prior to the fulfillment of their discovery obligations.⁴⁴ The internal documents showed that Bronx ADAs were trained to announce readiness for trial at arraignment, and to request only minimal adjournments, relying on the court granting more time than was requested due to "court congestion."⁴⁵ This practice was perfectly acceptable under the old

⁴¹ *Id.* at 543.

⁴² Readiness required a triable accusatory instrument, the availability of witnesses, and the removal of "all legal impediments to the commencement of [the prosecution's] case." John H. Wilson, *When Are the People Ready? The Interplay Between Facial Sufficiency and Readiness Under CPL Section 30.30*, 35 PACE L. REV. 999, 1001 (2015).

⁴³ See *infra* notes 147–150 and accompanying text.

⁴⁴ George Joseph & Simon Davis-Cohen, *Internal Documents Reveal How Bronx Prosecutors Are Taught To Slow Down Cases*, APPEAL (Aug. 2, 2018), <https://theappeal.org/internal-documents-reveal-how-bronx-prosecutors-are-taught-to-slow-down-cases/> [<https://perma.cc/87WY-VCFV>]. One training slide titled "THE POKER GAME" advised trainees to "[k]eep your poker game face on" because "you are ready" and "YOU WILL NEVER BE MORE READY THAN AT ARRAIGNMENTS OR THE FIRST TIME THE CASE IS ON AFTER ARRAIGNMENTS." *Id.*

⁴⁵ *Id.*

discovery and readiness statutes. Specifically, one training slide advised trainee ADAs, “The People CAN be ready without having supplied discovery!! There will be consequences. There may even be sanctions, but it: DOES NOT PRECLUDE A VALID STATEMENT OF READINESS.”⁴⁶ As such, it was common for defendants to find themselves incarcerated with no meaningful discovery, no indication as to the strength of the prosecution’s case, and no prospect of release on speedy trial grounds.⁴⁷ The lack of discovery combined with illusory statements of readiness set the stage for uninformed guilty pleas, regardless of the defendants’ factual guilt or innocence.

The training materials distributed by the Bronx District Attorney’s Office speak to a larger problem with the old discovery regime: insufficient consequences. The consequences for noncompliance were so minor and rarely applied in practice that they were functionally meaningless. Discovery violations are, by their nature, difficult for the defense and courts to detect.⁴⁸ In the cases where violations came to light, they were subject to strictly construed “materiality and harmless-error standards.”⁴⁹ Although CPL section 240.70 set forth a number of possible sanctions for statutory violations,⁵⁰ in practice the only remedies imposed were “adjournment[s] to investigate” or an “adverse inference.”⁵¹ Even where the prosecutor withheld exculpatory evidence until his closing statement, the Court of Appeals held that any error from the nondisclosure was cured by interrupting the closing statement and allowing the defense time to recall a witness.⁵² As countless examples show, the delayed disclosure of evidence often came with few consequences in practice.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 781 (2017).

⁴⁹ *Id.*

⁵⁰ Criminal Procedure Law, ch. 412, § 2, 1979 N.Y. Laws 4 (repealed 2019).

⁵¹ William C. Donnino, Practice Commentaries, N.Y. CRIM. PROC. LAW § 240.70 (McKinney 2014); *see, e.g.*, *People v. Beam*, 161 A.D.2d 1153, 1153 (4th Dep’t 1990) (failure to disclose “*Brady* material until the commencement of trial”); *People v. Cunningham*, 189 A.D.2d 821, 822 (2d Dep’t 1993) (delayed disclosure of ballistics evidence); *People v. Hess*, 140 A.D.2d 895, 896–97 (3d Dep’t 1988) (failure to disclose “an accident reconstruction report . . . until the eve of trial”); *People v. Williams*, 227 A.D.2d 906, 906–07 (4th Dep’t 1996) (failure to disclose 911 tapes until less than one week prior to trial).

⁵² *People v. Smith*, 63 N.Y.2d 41, 68 (N.Y. 1984).

In *People v. Tovar-Ramirez*, a Bronx County case, the defendant was arraigned on misdemeanor charges on August 6, 2017.⁵³ Four court orders and 178 days later, the prosecution ultimately made its initial discovery disclosures on January 31, 2018.⁵⁴ The defense moved to preclude the delayed evidence.⁵⁵ The defense argued that “[i]t is very difficult, if not impossible, to properly determine the strength of a case without discovery” and that the multiple additional appearances necessitated by the delay “pressure[d] [the defendant] to plead guilty” to avoid further court appearances.⁵⁶ The court found that, despite the lengthy delay in disclosure, no sanction was warranted, because the defense was given the opportunity to examine the materials at issue before the matter proceeded to hearing or trial.⁵⁷ The lack of meaningful consequences for delay combined with the trial-based timeline and narrow scope of article 240 resulted in a statutory regime that was ill-suited to a plea-based system.

B. *Federal Criminal Discovery Practice*

Like article 240, federal discovery rules also feature trial-focused timelines and narrow disclosure requirements. Criminal discovery at the federal level is primarily governed by Rule 16 of the Federal Rules of Criminal Procedure as well as by constitutional requirements from *Brady* and its progeny.⁵⁸ Rule 16 does not codify the government’s discovery obligations under the *Brady* Rule. However, Rule 16 requires the disclosure of documents and tangible objects “material to preparing the defense,” which has been interpreted as including evidence “favorable” to the defendant.⁵⁹ Additionally, there is no timeframe for the disclosure of such evidence in Rule 16, meaning that the actual timing of Rule 16 disclosures varies based on local practice and internal policy.

In terms of scope, Rule 16 provides for limited pretrial discovery.⁶⁰ The statute enumerates five categories of discover-

⁵³ *People v. Tovar-Ramirez*, 59 Misc. 3d 1061, 1062 (N.Y.C. Crim. Ct. Bronx Cnty. 2018).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1062–63.

⁵⁶ *Id.* at 1063 (first alteration in original).

⁵⁷ *Id.* at 1066, 1068.

⁵⁸ See generally FED. R. CRIM. P. 16(a)(1); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

⁵⁹ FED. R. CRIM. P. 16(a)(1)(E)(i); see also *Brady*, 373 U.S. at 86–87.

⁶⁰ See FED. R. CRIM. P. 16(a)(1)(A)–(G).

able material which the government is required to disclose to the defense: oral and recorded statements of the defendant, the defendant's prior criminal record, a limited category of documents and tangible objects, reports of examinations and tests, and material relating to the government's expert witnesses.⁶¹ This is an exclusive list that specifically does not require the disclosure of government documents or reports, including police reports.⁶²

While witness statements are not discoverable under Rule 16, they are disclosed as Jencks material, which is similar to *Rosario* material, under the Jencks Act.⁶³ In *Jencks v. United States*, the Supreme Court of the United States held that the defense was entitled to all reports of written and oral statements made by government witnesses, relating to the subject of their testimony.⁶⁴ Almost immediately after the Court's decision in *Jencks*, Congress passed 18 U.S.C. § 3500, the Jencks Act, which codified the substance of the Court's holding but limited its practical use by requiring that no such statement shall be subject to discovery until *after* the witness has testified on direct examination.⁶⁵ While many offices adopt internal policies and turn over Jencks material prior to trial in order to avoid midtrial delays,⁶⁶ courts may not compel the production of such material prior to trial over the government's objection.⁶⁷ Given the timing provision of the Jencks Act, the defense may not receive any witness statements until after the witness has testified, rendering Jencks material all but useless for investigative and plea bargaining purposes.

The statutory treatment of witness statements under the Jencks Act is emblematic of the lack of focus on the plea bargaining stage in traditional discovery practice. Similar to article 240, the timeline and scope of federal discovery rules evince a trial-centric approach that fails to adequately serve a system in which less than four percent of defendants go to trial.⁶⁸

⁶¹ *Id.*

⁶² FED. R. CRIM. P. 16(a)(2).

⁶³ 18 U.S.C. § 3500 (2018).

⁶⁴ 353 U.S. 657, 668–69 (1957).

⁶⁵ 18 U.S.C. § 3500(a), (b).

⁶⁶ See *infra* notes 102–103 and accompanying text.

⁶⁷ See *United States v. Percevault*, 490 F.2d 126, 128–29 (2d Cir. 1974).

⁶⁸ See *infra* note 142 and accompanying text.

C. *Broadening of New York Discovery Practice Under the New Statute*

By contrast, article 245 includes a requirement of automatic discovery no later than twenty days after arraignment for incarcerated defendants and no later than thirty-five days for all others.⁶⁹ Article 245 requires functional “open file” discovery from the prosecution. Prosecutors are required to disclose “all items and information that relate to the subject matter of the case.”⁷⁰ Additionally, the statute includes a non-exhaustive list of twenty-one specific types of material which must be disclosed, using broad “including but not limited to” language.⁷¹ Article 245 imputes possession of material and information in the custody of New York State law enforcement to the prosecution⁷² and requires the free flow of information between the prosecuting office and law enforcement.⁷³ The new statute includes a presumption of openness in favor of disclosure when interpreting the provisions relating to the timing of discovery, disclosure prior to guilty pleas, and the scope of automatic initial discovery.⁷⁴

Unlike article 240 and the federal rules, the timeline for discovery under article 245 is tied to arraignment and reflects the reality that most defendants will not go to trial. Under article 245, the required prosecution disclosures are to take place “as soon as practicable” but not later than twenty calendar days after the arraignment of an incarcerated defendant or thirty-five days for defendants at liberty, on any charging instrument, including misdemeanor and felony complaints.⁷⁵ However, this deadline may be extended by an additional thirty days without a motion where the material in question is “exceptionally voluminous” or where such material is not in the possession of the prosecution, “despite diligent, good faith efforts” to locate same.⁷⁶

⁶⁹ The deadline was originally fifteen days after arraignment for all offenses. However, this timeline was extended in the Fiscal Year 2021 budget legislation. The deadline remains fifteen days from arraignment for Vehicle and Traffic Law violations and other petty offenses. See Ch. 56, pt. HHH, § 1(a)(i)–(iii), 2020 N.Y. Laws (2020 McKinney’s Session Law News of N.Y.).

⁷⁰ N.Y. CRIM. PROC. LAW § 245.20(1) (McKinney 2019).

⁷¹ *Id.* § 245.20(1)(a)–(u).

⁷² *Id.* § 245.20(2).

⁷³ *Id.* § 245.55(1).

⁷⁴ *Id.* § 245.20(7).

⁷⁵ *Id.* § 245.10(1)(a); Ch. 56, pt. HHH, § 1(a)(i)–(iii), 2020 N.Y. Laws (2020 McKinney’s Session Law News of N.Y.).

⁷⁶ CRIM. PROC. § 245.10(1)(a).

The new discovery law also addresses the problem of readiness without discovery. The new speedy trial statute, which was passed with the discovery reforms, requires prosecutors to file a certification of good faith compliance with the section 245.20 discovery disclosures in order to announce ready for trial and affords defense counsel the opportunity to be heard on the record as to the status of the disclosure.⁷⁷ By tying readiness to discovery compliance, defendants are no longer forced to choose between proceeding to trial without any meaningful discovery and waiving their speedy trial rights.

Although the changes to both the scope and timing of discovery disclosures represent a dramatic change from prior practice, they are not inflexible requirements. Article 245 allows either party to obtain a protective order on the record, *ex parte*, or *in camera* upon a showing of good cause.⁷⁸ This provision grants broad judicial discretion in terms of the type of remedy a court may impose, stating that any kind of discovery may be “denied, restricted, conditioned or deferred” or may be subject to “such other order as is appropriate.”⁷⁹ The party seeking a protective order is entitled to expedited appellate review of an adverse ruling.⁸⁰ In addition to protective orders, the court may alter the timeline for discovery upon motion from either party, showing good cause.⁸¹

In one of the most dramatic shifts from the old rule, article 245 requires the prosecution to complete discovery no later than three days prior to the expiration of a pre-indictment plea offer and no later than seven days prior to all other plea offers.⁸² If the prosecution fails to make necessary disclosures before the expiration of an offer, the court is required to consider, upon defense motion, “the impact of [such a] violation on the defendant’s decision to accept or reject [the] offer.”⁸³ Furthermore, if the court finds that the violation materially affected the defendant’s decision, the prosecution must either reinstate the offer or the court must preclude the admission of any improperly withheld evidence at trial “as a presumptive minimum sanction.”⁸⁴

⁷⁷ *Id.* § 30.30(5).

⁷⁸ *See id.* § 245.70.

⁷⁹ *Id.* § 245.70(1).

⁸⁰ *Id.* § 245.70(1), (6).

⁸¹ *Id.* § 245.70(2).

⁸² *Id.* § 245.25(1)–(2).

⁸³ *Id.*

⁸⁴ *Id.*

Additionally, while defendants who plead guilty may waive their rights to discovery, a “plea offer may not be conditioned upon such [a] waiver.”⁸⁵ This is significant, given that, before discovery reform, such waivers were ubiquitous in plea agreements.⁸⁶

The pre-plea discovery provision goes well beyond the reforms recommended by the New York State Bar Association’s Task Force on Criminal Discovery report from 2015.⁸⁷ In that report, NYSBA specifically declined to recommend a statutory pre-plea obligation to complete discovery.⁸⁸ Given the overwhelming prevalence of plea agreements, a statutorily based, enforceable obligation to provide discovery prior to the expiration of a plea offer has profound implications for criminal practice overall.

II. VARIOUS APPROACHES TO CRIMINAL DISCOVERY REFORM

In both New York and the federal system, prosecutors and local courts have made attempts to ameliorate the effects of existing discovery rules through internal policies and local rules.

A. *New York Internal Policies*

Until the passage of the new discovery statute, the level of variance from the provisions of article 240 depended on the internal policies of District Attorneys’ Offices at the county level. In New York City, the variations in discovery practices between Brooklyn and Manhattan represent the most liberal and most restrictive standards, respectively. Even under the old discovery regime, a defendant arrested on the Kings County side of the Brooklyn Bridge would have received broad discovery comparatively early through voluntary disclosures, whereas on the Manhattan side of the bridge, that same defendant would have received little more than what was required by the strict letter of article 240.⁸⁹ Brooklyn has a long-standing internal policy of “open file” or voluntary discovery.⁹⁰ Under the Brooklyn policy, defense counsel typically received the police report, along with

⁸⁵ *Id.*

⁸⁶ See Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist’s Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2011 (2000).

⁸⁷ NYSBA REPORT, *supra* note 14, at 50.

⁸⁸ *Id.*

⁸⁹ Dan Svirsky, *The Cost of Strict Discovery: A Comparison of Manhattan and Brooklyn Criminal Cases*, 38 N.Y.U. REV. L. & SOC. CHANGE 523, 524 (2014).

⁹⁰ NYCLA SURVEY, *supra* note 22, at 8.

any case updates, body-worn camera footage, 911 recordings, photographs of injuries or property damage, and surveillance footage within four to six weeks of the filing of an indictment or misdemeanor information.⁹¹ However, other than a broad commitment to “open file” discovery, Brooklyn apparently did not have a specific written discovery policy delineating material that prosecutors were required to disclose.⁹²

By contrast, discovery practice in Manhattan was far more restrictive under article 240 and more closely mirrored the text of the statute. Manhattan prosecutors provided a Voluntary Disclosure Form (“VDF”) in response to discovery demands in omnibus motions.⁹³ Defense practitioners generally did not receive discovery until the eve of hearing or trial.⁹⁴ In misdemeanor cases particularly, VDFs were typically not disclosed until immediately before the People announced ready for trial.⁹⁵ Moreover, defense attorneys characterized the VDFs received in response to motions as “incomplete,” “non-responsive,” and often inaccurate.⁹⁶ Additionally, defense attorneys reported that the scope and timing of pretrial discovery disclosures depended greatly on the individual ADA.⁹⁷ The District Attorney’s Office indicated that there was no written discovery policy but that “judges and regular practitioners [were] aware of it through longstanding practice.”⁹⁸

Unlike the federal system, where discovery practices have broadened through judicially created rules, New York has seen minimal judicial involvement in this issue. Chief Judge of the New York Court of Appeals, Janet DiFiore, announced new rules regarding criminal discovery on November 8, 2017.⁹⁹ However, other than reminding prosecutors and defense attorneys of their existing discovery obligations, the only new guidance was a

⁹¹ Interview with Paul Magel, Staff Att’y, Brooklyn Defs. Servs., in Queens, N.Y. (Oct. 9, 2019).

⁹² NYCLA SURVEY, *supra* note 22, at 8–9.

⁹³ *Id.* at 9.

⁹⁴ *Id.*

⁹⁵ Telephone Interview with Margaret Darocha & Amanda Barfield, Trial Att’ys, N.Y. Cnty. Def. Servs. (Oct. 11, 2019) [hereinafter Darocha & Barfield Interview].

⁹⁶ NYCLA SURVEY, *supra* note 22, at 9.

⁹⁷ Darocha & Barfield Interview, *supra* note 95.

⁹⁸ NYCLA SURVEY, *supra* note 22, at 9.

⁹⁹ *See generally* Press Release, N.Y. State Unified Ct. Sys., Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases (Nov. 8, 2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR17_17.pdf [<https://perma.cc/JJ9G-YXNJ>].

statement that disclosures are “presumptively ‘timely’ ” if made thirty days prior to trial or fifteen days prior to the hearing.¹⁰⁰ Without substantive statewide guidance, discovery practices between offices were a patchwork of unwritten and unenforceable discovery policies that varied from county to county and failed to provide either predictability or transparency.

B. Federal Internal Policies and Local Rules

In both individual district offices and at the national level, federal prosecutors have adopted internal policies based on both practical and equitable concerns, which provide for broader pre-trial discovery than statutorily required.¹⁰¹ Regarding the Jencks Act, which does not require the disclosure of witness statements until after direct examination, one District Court Judge remarked, “[s]ince the Jencks Act is utterly impractical, it is routinely ignored.”¹⁰² Further, that judge noted that it was “common practice” for federal prosecutors in Massachusetts to “disclose Jencks Act materials voluntarily at the commencement of trial, if not before.”¹⁰³ Individual United States Attorneys’ Offices adopt their own formal or informal discovery procedures concerning Jencks material. For example, in 1990, the United States Attorney’s Office for the Eastern District of New York (“EDNY”) adopted a policy of voluntarily disclosing information related to the testimony of government informants in prior cases, although there was no requirement to do so.¹⁰⁴ In 1999, a similar policy was adopted as a written manual by the United States Attorney’s Office for the Northern District of California (“NDCA”), when one of the drafters of the original EDNY policy memo was

¹⁰⁰ N.Y. STATE JUST. TASK FORCE, REPORT ON ATTORNEY RESPONSIBILITY IN CRIMINAL CASES 16 (2017), <http://www.nyjusticetaskforce.com/pdfs/2017JTF-AttorneyDisciplineReport.pdf> [<https://perma.cc/MC8T-WALU>].

¹⁰¹ See, e.g., Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Just., to Dep’t Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010) [hereinafter Ogden Memo], <https://www.justice.gov/archives/dag/memorandum-department-prosecutors> [<https://perma.cc/J9D8-NN62>]; U.S. Dep’t of Just., Just. Manual § 9-5.001(C) (2020).

¹⁰² Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 678 (1999) (quoting *United States v. Owens*, 933 F. Supp. 76, 78 (D. Mass. 1996) (alteration in original)).

¹⁰³ *Owens*, 933 F. Supp. at 78.

¹⁰⁴ Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 273 (2017); Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., at iii, xxviii (2015).

serving as the head of the Criminal Division there.¹⁰⁵ But that policy was abandoned as of 2002 following the appointment of a new United States Attorney in that district.¹⁰⁶ At the national level, Department of Justice (“DOJ”) guidelines, located in the Justice Manual (formerly the United States Attorneys’ Manual) provide for pretrial discovery beyond the scope of Rule 16 in certain areas.¹⁰⁷

In addition to the Justice Manual, guidance on discovery is provided through internal memoranda. In the wake of the infamous prosecution of former Alaska Senator Ted Stevens, the DOJ established a working group to address policies related to discovery and case management.¹⁰⁸ Subsequently, Deputy Attorney General David Ogden issued a memorandum regarding criminal discovery practice.¹⁰⁹ The Ogden memo emphasized the importance of prompt disclosures of exculpatory evidence and encouraged prosecutors “to provide broad and early discovery consistent with any countervailing considerations.”¹¹⁰ The memo included no specific guidance on the timing of such disclosures, merely encouraging prosecutors to exchange exculpatory information “reasonably promptly” and impeachment evidence “at a reasonable time before trial.”¹¹¹ Regarding pre-plea disclosure, the Ogden memo simply reminds prosecutors to “be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation.”¹¹² Despite the fact that ninety-seven percent of all federal convictions are the result of pleas,¹¹³ both the Justice Manual and the Ogden memo focus almost

¹⁰⁵ Kozinski, *supra* note 104.

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g.*, U.S. Dep’t of Just., Just. Manual, § 9-5.001(C) (2020).

¹⁰⁸ Ellen S. Podgor, *Pleading Blindly*, 80 MISS. L.J. 1633, 1633–34, 1646 (2011). Senator Stevens’s conviction on corruption related charges was ultimately set aside after evidence of prosecutorial misconduct, including the concealment of *Brady* material, came to light. Regarding the Ted Stevens prosecution, *see generally*, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court’s Order, Dated Apr. 7, 2009, *In re* Special Proceedings, 842 F. Supp. 2d 232 (D.D.C. 2012) (Misc. No. 09-0198), http://legaltimes.typepad.com/files/Stevens_report.pdf [<https://perma.cc/NE57-Q9N2>].

¹⁰⁹ *See generally* Ogden Memo, *supra* note 101.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ U.S. SENTENCING COMM’N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 tbl.11 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf> [<https://perma.cc/QHG5-FE69>].

exclusively on discovery practice in relation to trial. Furthermore, although these internal policies provide for greater discovery than Rule 16 and *Brady*, neither the Justice Manual policies nor the memoranda guidelines are judicially enforceable “absent an ‘independent constitutional’ basis” for relief.¹¹⁴ As such, if internal policies are ignored, there is virtually no recourse for criminal defendants.¹¹⁵

The restrictive nature of both Rule 16 and the Jencks Acts has led judges in many districts to adopt local rules which broaden the scope of criminal discovery.¹¹⁶ A survey of federal local rules identified thirty-eight districts that broadened the scope of materials subject to disclosure and established timelines for the disclosure of *Brady* material.¹¹⁷ These local rules enumerate further categories of discoverable material in addition to those in Rule 16 and eliminate the Rule 16 materiality requirement.¹¹⁸ Additionally, many local rules have incorporated an explicit *Brady* requirement, rather than merely referencing the government’s constitutional discovery obligations.¹¹⁹ In some districts, the local rules broaden *Brady* “by eliminating the . . . ‘materiality’ requirement” and instead mandating the disclosure of all evidence favorable to the defendant.¹²⁰

However, the weakness of district-specific rules is demonstrated by the range of timing requirements for *Brady* material in such local rules. The timeline for *Brady* disclosure in local rules runs the gamut from “within [fourteen] days after arraignment” to “not less than [seven] days before trial” to “in time for effective use at trial.”¹²¹ Out of all of the districts with local discovery rules, only Massachusetts requires any sort of pre-plea disclosure specifically.¹²² As such, while there is a trend toward

¹¹⁴ Podgor, *supra* note 108, at 1636; Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 177 (2004) [hereinafter Podgor, *Guidelines*].

¹¹⁵ Podgor, *Guidelines, supra* note 114, at 177.

¹¹⁶ See generally LAURAL HOOPER ET AL., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES: FINAL REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES 11–17 (2011); Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59 (2017).

¹¹⁷ HOOPER ET AL., *supra* note 116.

¹¹⁸ McConkie, *supra* note 116, at 80.

¹¹⁹ *Id.* at 80–81.

¹²⁰ HOOPER ET AL., *supra* note 116, at 11.

¹²¹ *Id.* at 14–15.

¹²² *Id.* app. B at 11.

the broadening of federal criminal discovery through local rules, the disparate approaches adopted by various districts has resulted in inconsistent standards. Moreover, the local rules are generally trial-centric and fail to address the issue of pre-plea disclosures.

III. THE WEAKNESSES OF NON-STATUTORY APPROACHES

The problem of adapting a trial-based system of discovery to a plea-based system of criminal justice is best solved through legislative reform rather than local rules, prosecutorial policy, or reliance on constitutional jurisprudence. Not only is a statutory approach consistent with the nature of discovery as a statutory right, but a judicially enforceable statutory requirement also serves as a legislative and judicial check on the prosecutorial power of the executive.

While informal discovery policies put in place by prosecutors' offices help to ameliorate the harshest effects of strict discovery practice, it cannot serve as a meaningful substitute for statutory reform. The various discovery policies in New York under the old statute illustrate some of the pitfalls of reliance on informal practice. These policies varied wildly from borough to borough and, in some cases, from ADA to ADA.¹²³ Furthermore, the use of unwritten policies undermines both accountability and consistency. Even where such office-level policies are written, as is the case with some federal guidelines,¹²⁴ they vary from district to district and may be rescinded at any time.¹²⁵ Because such policies only exist at the pleasure of the specific District or United States Attorney, they provide limited predictability. Both the vast degree of variance between offices and the lack of transparency in the formation and application of such policies promote disparate outcomes. Given how critical adequate discovery is for ensuring the fairness of pretrial procedure, "[c]ompliance with the government's disclosure obligations cannot be left to the political vagaries of [ninety-three United States] Attorneys' offices and the countless District Attorneys' offices across the country."¹²⁶

In addition to being inconsistent and opaque, such internal policies are not judicially enforceable. If individual prosecutors

¹²³ See *supra* note 97 and accompanying text.

¹²⁴ See, for example, the internal policy of disclosing prior testimony of informants adopted by the EDNY and NDCA as discussed in Kozinski, *supra* note 104.

¹²⁵ See, e.g., *id.*

¹²⁶ *Id.*

or bureaus choose to deviate from their internal guidelines, defendants are left with no recourse unless they can articulate “an ‘independent constitutional’ basis” for relief.¹²⁷ The DOJ Justice Manual, for example, states that it “is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.”¹²⁸ Without a mechanism for judicial enforcement, internal policies are of limited use in ensuring adequate pretrial disclosures. However, local rules on discovery practices at the federal level also suffer from the problem of producing inconsistent results across jurisdictions. Although a judicially enforceable rule is preferable to an internal policy, district-level rules fail to solve the problem of geographic inconsistency. As demonstrated by the wide range of timelines set for the disclosure of *Brady* material in various local rules, defendants relying on such rules will experience divergent practices depending on that court’s specific rule.¹²⁹

Faced with the inconsistency and unpredictability of local rules and internal policies, some scholars have called for the expansion of the *Brady* right to the realm of plea negotiation.¹³⁰ However, on a fundamental level, *Brady* is ill-suited for the task of promoting better informed and more accurate plea agreements. Compared to the broad pre-plea discovery required in statutes such as CPL section 245.25, *Brady* is an extremely limited right. The only disclosure required under *Brady* is of evidence that is both “favorable” to the defendant and “material either to guilt or to punishment.”¹³¹

The materiality requirement both limits the scope of any discovery which may be developed by such a rule and continues the consolidation of prosecutorial power during plea negotiation. The materiality limit on *Brady* evidence requires the prosecutor to step into the role of the defense attorney to determine what may be “material” without knowledge of the defense theory of the case or trial strategy.¹³² The manner in which the term “material”

¹²⁷ Podgor, *Guidelines*, *supra* note 114.

¹²⁸ U.S. Dep’t of Just., Just. Manual, § 1-1.200 (2020).

¹²⁹ See HOOPER ET AL., *supra* note 116, at 14–15.

¹³⁰ See, e.g., Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty To Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3645–47 (2013).

¹³¹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹³² See Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1, 14 (2017); see also *United States v. Bagley*, 473 U.S. 667,

is defined by the prosecutor will determine the scope of discovery received by the defendant prior to trial.¹³³ Judicially unenforceable internal policies encouraging prosecutors to err on the side of caution when making *Brady* disclosures are not sufficient. Furthermore, the Supreme Court's suggestion in dicta that prosecutors avoid "tacking too close to the wind" when making *Brady* determinations is similarly insufficient because it neither provides substantive guidance to prosecutors nor creates any enforceable right for defendants.¹³⁴

In addition to the limitations imposed by the materiality requirement, *Brady* requires no disclosure of inculpatory evidence,¹³⁵ which is important both for ensuring that plea agreements are fully informed and for inducing more accurate plea agreements earlier in the process. Disclosure of inculpatory evidence helps to ensure the disclosure of exculpatory evidence, which may not be recognized as such by the prosecutor.¹³⁶ Additionally, even for factually guilty defendants, the disclosure of inculpatory evidence is necessary to ensure fully informed guilty pleas.¹³⁷

On a structural level, *Brady* is a poor tool for pre-plea disclosure because it is a rule which is "enforced only retrospectively" after a conviction has already been obtained.¹³⁸ Post-plea *Brady* claims face a number of obstacles in practical application.¹³⁹ *Brady* claims after a guilty plea must show that the newly disclosed evidence in question was both favorable and material to guilt or punishment in the absence of a trial record.¹⁴⁰ Additionally, the level of skepticism demonstrated by the courts in finding nondisclosures "material" in *Brady* claims after a jury conviction will only be magnified after a defendant's courtroom

696-97 (1985) (Marshall, J., dissenting) (discussing the challenges faced by prosecutors in appreciating how evidence in their own files may be favorable to the accused).

¹³³ See H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1103 (1991).

¹³⁴ *Kyles v. Whitley*, 514 U.S. 419, 439 (1995).

¹³⁵ *Brady*, 373 U.S. at 87.

¹³⁶ McConkie, *supra* note 132, at 13.

¹³⁷ See *id.* at 15 (discussing factors such as "the value of stolen goods," the weight and "purity" of controlled substances, and "the actions of co-conspirators").

¹³⁸ John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 443 (2001).

¹³⁹ See *id.* at 478-83.

¹⁴⁰ *Id.* at 480.

confession of guilt.¹⁴¹ *Brady*, local rules, and internal policies are all inadequate vehicles for ensuring equitable pre-plea discovery when compared to a legislative approach that produces consistent, transparent, and enforceable discovery rules.

IV. THE NEED FOR PRETRIAL DISCOVERY IN PLEA NEGOTIATIONS

The overall liberalization of the New York discovery statute, taken together with the requirement for pre-plea disclosures, highlights both the ways in which traditional discovery methods fail to adequately serve a plea-based system and the importance of statutory reform. Due to the sheer volume of cases which are resolved through pleas, the most critical phase of the process for criminal defendants has shifted from trial to plea negotiation. Ninety-six percent of all criminal cases in New York state and ninety-seven percent at the federal level are resolved via plea agreement rather than trial.¹⁴² Defendants who engage in plea negotiation in lieu of trial generally do so without the discovery which would be disclosed close to or on the eve of trial.¹⁴³ Additionally, plea agreements are often contingent upon the defendant's waiver of her right to post-plea discovery.¹⁴⁴ Such waivers prevent a defendant who has pleaded guilty from determining if, for example, *Brady* material was withheld prior to a plea.

A threshold matter in any discussion of plea bargaining is recognition of the fact that factually innocent and factually guilty defendants plead guilty. The National Registry of Exonerations identifies 547 cases to date of post-plea exonerations¹⁴⁵ and the Innocence Project lists thirty-one individuals who pleaded guilty and were subsequently exonerated using DNA evidence.¹⁴⁶ There

¹⁴¹ *Id.* at 478–79.

¹⁴² N.Y. STATE DIV. OF CRIM. JUST. SERVS., CRIMINAL JUSTICE PROCESSING REPORT: CRIMINAL JUSTICE CASE PROCESSING, ARREST THROUGH DISPOSITION, NEW YORK STATE, JANUARY–DECEMBER 2017, at 23 tbl.11 (2018), <http://www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2017-NewYorkState.pdf> [<https://perma.cc/APB8-5GQ9>]; U.S. SENTENCING COMM'N, *supra* note 113.

¹⁴³ McConkie, *supra* note 132, at 5.

¹⁴⁴ See Blank, *supra* note 86, at 2011.

¹⁴⁵ NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> [<https://perma.cc/SWZ4-NFAB>] (filter “Tags” column to show only records containing tag “P”).

¹⁴⁶ *When the Innocent Plead Guilty*, INNOCENCE PROJECT (Jan. 26, 2009), <https://www.innocenceproject.org/when-the-innocent-plead-guilty/> [<https://perma.cc/7WRL-7PH2>]; see also John H. Blume & Rebecca K. Helm, Essay, *The Unexonerated: Fac-*

are numerous pressures on both factually innocent and factually guilty defendants to enter a plea, rather than risk going to trial.¹⁴⁷ Pretrial detention, recurring court dates, and the mere fact of having an open criminal case can disrupt the defendant's life, leading to loss of employment or custody, as well as immigration consequences.¹⁴⁸ Additionally, overcharging and charges which carry mandatory minimums push even factually innocent defendants to plead guilty in order to avoid the possibility of vastly harsher punishment at trial.¹⁴⁹ Innocent defendants may also plead guilty due to structural pressures which have the effect of penalizing defendants for going to trial.¹⁵⁰ As such, pre-plea discovery is necessary to ensure both procedural and substantive fairness.

More robust pre-plea disclosures benefit defendants, prosecutors, and the courts by promoting more accurate plea agreements and earlier plea agreements, and by supporting greater judicial economy. The "shadow-of-trial" theory of litigation, which started as a civil concept, has been applied by scholars to criminal cases as well.¹⁵¹ Under this theory in the criminal context, rational parties will anticipate their chances at trial, discounted by the potential sentence in the event of conviction, and then use that calculus to come to a bargain.¹⁵² There are many complications in applying this theory of litigation to criminal cases, but the basic idea of plea negotiation as based on a risk assessment remains valid, in theory at least.¹⁵³ However, in a system with

tually Innocent Defendants Who Plead Guilty, 100 CORNELL L. REV. 157, 172–73 (2014).

¹⁴⁷ Blume & Helm, *supra* note 146, at 173.

¹⁴⁸ See Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–14 (2017); see also Blume & Helm, *supra* note 146, at 173–74.

¹⁴⁹ Blume & Helm, *supra* note 146, at 180.

¹⁵⁰ See U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a)–(b) (U.S. SENT'G COMM'N 2018) (offering a three-point reduction on the Offense Level if the defendant makes a prompt guilty plea *before* the government must begin trial preparations).

¹⁵¹ The seminal work on this concept in the civil realm is Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). For its application to criminal law, see, for example, Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992), and Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

¹⁵² Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 (2004).

¹⁵³ *Id.* at 2466–69 (critiquing the application of this model to plea bargaining in practice).

severe informational imbalances, criminal defendants are not able to make the sort of risk assessments envisioned by the shadow-of-trial theory of litigation.¹⁵⁴

Pre-plea disclosure can also induce earlier plea agreements in strong cases.¹⁵⁵ It is not uncommon for defendants to refuse initial plea offers when they lack the benefit of pretrial discovery, prolonging negotiations until disclosures are made close to trial and thereby wasting resources.¹⁵⁶ This idea of encouraging guilty pleas by providing greater information is at the heart of the federal practice of “reverse proffers.”¹⁵⁷ During a reverse proffer, the prosecutor explains to the defendant the evidence marshaled against her, usually making disclosures beyond what is required by *Brady* and Rule 16.¹⁵⁸ However, there are no formal policies regarding reverse proffers, meaning that the timing and scope of such sessions are determined by individual prosecutors.¹⁵⁹ Regardless, reverse proffers are useful for reaching earlier pretrial resolutions through plea agreements.¹⁶⁰ By the same token, requiring pre-plea disclosure would also produce greater efficiency by leading “prosecutors to ‘weed out’ the weakest cases” earlier in the process.¹⁶¹

When there is limited pre-plea discovery, there is an incentive for prosecutors to engage in a degree of “bluffing” in weak cases or cases where there are potential issues of admissibility of key evidence.¹⁶² Bluffing as used in this context does not refer to

¹⁵⁴ *Id.* at 2495; Douglass, *supra* note 138, at 449–50.

¹⁵⁵ See Milton C. Lee, Jr., *Criminal Discovery: What Truth Do We Seek?*, 4 U.D.C. L. REV. 7, 19–20 (1998).

¹⁵⁶ *Id.*

¹⁵⁷ Bibas, *supra* note 152, at 2525.

¹⁵⁸ Lisa Phelan & Megan Gerking, *Efficient Criminal Enforcement—Achieving Faster, Better, Stronger Investigations and Resolutions*, ANTITRUST SOURCE, Feb. 2019, at 1, 6 (2019); see also Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1066 (2006); Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 167–68 (2012).

¹⁵⁹ Phelan & Gerking, *supra* note 158.

¹⁶⁰ *Id.*

¹⁶¹ Douglass, *supra* note 138, at 505.

¹⁶² See Bennett L. Gershman, *Preplea Disclosure of Impeachment Evidence*, 65 VAND. L. REV. EN BANC 141, 142–43 (2012) (“I may have minimized potential weaknesses in my case and focused on its strengths, and I am sure the defense attorney made similar representations. I was acutely aware that the defendant suffered some degree of information deficit about potential weaknesses in my proof.”); Eleanor J. Ostrow, Comment, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581, 1584–87 (1981); see also Petegorsky, *supra* note 130, at 3646.

violations of legal or ethical rules.¹⁶³ Rather, it refers to situations where the prosecutor has concluded in good faith that there is probable cause, but, for any number of reasons, is not convinced that she would be able to prove the charges beyond a reasonable doubt at that time.¹⁶⁴ Prosecutorial bluffing can “take many forms,” ranging from mere puffery to more overt practices, such as overcharging or bringing charges which carry a mandatory minimum to serve as leverage early on.¹⁶⁵ It can also consist of more subtle practices, such as announcing trial readiness without truly being prepared to go to trial, with the knowledge that they will receive additional time to prepare due to court backlogs, as was suggested by the Bronx DA training materials.¹⁶⁶ This type of bluffing can be particularly effective against factually innocent defendants who lack the sort of personal knowledge of the allegations that a factually guilty defendant would possess.¹⁶⁷ Pre-plea discovery obligations both require prosecutors to make an earlier, more in-depth assessment of their case and allows defendants to negotiate on a level playing field.

Pre-plea discovery promotes greater accuracy and fairness in plea agreements. It is a well-accepted principle of negotiation theory that an imbalance in information creates an advantage for one side in the bargaining process.¹⁶⁸ The plea bargaining process is no exception, and defendants’ ability to negotiate depends on their access to information. Historically, the prosecution has been afforded broad discretion to withhold pre-plea discovery, which can result in inequitable plea agreements, especially on weak cases.¹⁶⁹

On a structural level, the plea bargaining process consolidates the lion’s share of both the procedural power and substantive information in the hands of the prosecution, particularly without pre-plea discovery. In this context, charging decisions, plea offers, sentencing recommendations, and, in the absence of a contrary statute or rule, discovery disclosures are all left to the discretion

¹⁶³ William F. McDonald et al., *Prosecutorial Bluffing and the Case Against Plea Bargaining*, in PLEA BARGAINING, 1, 21 (William F. McDonald & James A. Cramer eds., 1980).

¹⁶⁴ *Id.* at 4.

¹⁶⁵ See Ostrow, *supra* note 162, at 1584–87.

¹⁶⁶ See *id.*; Joseph & Davis-Cohen, *supra* note 44.

¹⁶⁷ Bibas, *supra* note 152, at 2495.

¹⁶⁸ Douglass, *supra* note 138, at 449–50.

¹⁶⁹ See McConkie, *supra* note 132, at 8.

of the prosecution.¹⁷⁰ This concentration of power largely removes the traditional “checks and balances” of power between the legislature, prosecution, trial and appellate judges, and juries.¹⁷¹ A statutory requirement of pre-plea discovery introduces a legislative counterbalance to the broad power held by the prosecution in this phase.

Because there is “no general constitutional right” to criminal discovery, most criminal defendants who engage in plea negotiation do so without the majority of discovery which they would have received otherwise.¹⁷² Although prosecutors may turn over early discovery depending on the jurisdiction and internal policies of their office, there are no enforceable pre-plea discovery standards unless they are created by local rule or statute. Even the question of whether *Brady* applies to plea negotiation is the subject of a circuit split and has not been addressed by the Supreme Court.¹⁷³ The lack of enforceable discovery requirements denies defendants the benefits of the protections afforded by due process and erodes the structural checks and balances of the criminal justice system.

Critics have raised various arguments in opposition to broad pretrial discovery. First among these arguments is concern about witness safety.¹⁷⁴ In his testimony on the implementation of the criminal reform package, Manhattan District Attorney Cyrus Vance argued that the required disclosure of *Rosario* material and witness information would endanger witnesses and discour-

¹⁷⁰ *Id.* at 8–9.

¹⁷¹ *Id.* at 8.

¹⁷² *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)); *see also* *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

¹⁷³ In *United States v. Ruiz*, the Supreme Court held that disclosure of impeachment information prior to plea is not required by *Brady*. 536 U.S. at 625. The Seventh and Tenth Circuits interpreted *Ruiz* as barring post-plea *Brady* challenges based on the nondisclosure of impeachment evidence only, whereas the Fifth Circuit interpreted *Ruiz* as foreclosing any post-plea *Brady* challenge based on impeachment evidence or exculpatory evidence. *See Alvarez v. City of Brownsville*, 904 F.3d 382, 394 (5th Cir. 2018); *United States v. Ohiri*, 133 F. App'x. 555, 562 (10th Cir. 2005); *McCann v. Mangialardi*, 337 F.3d 782, 787–88 (7th Cir. 2003). For a discussion on the circuit split, *see* Petegorsky, *supra* note 130, at 3625–31.

¹⁷⁴ *See, e.g.*, Cyrus R. Vance Jr., *Testimony for City Council Committee on the Justice System Oversight: Hearing on “Preparing for the Implementation of Bail, Speedy Trial, and Discovery Reform,”* MANHATTAN DIST. ATT'Y'S OFF. (May 22, 2019), <https://www.manhattanda.org/testimony-for-city-council-committee-on-the-justice-system-oversight-hearing-on-preparing-for-the-implementation-of-bail-speedy-trial-and-discovery-reform/> [https://perma.cc/2PMM-A829].

age cooperation with law enforcement.¹⁷⁵ However, either party may obtain a protective order upon a showing of good cause under article 245.¹⁷⁶ In the event of an adverse ruling on an order of protection with regard to witness information, the party seeking the order is entitled to expedited review.¹⁷⁷ Additionally, counties where the District Attorney's office has adopted an internal open file discovery policy have not seen any impact on witness security.¹⁷⁸ Brooklyn District Attorney Eric Gonzalez remarked that "[o]ur 'open file discovery' practice has not resulted in the negative outcomes some reform opponents fear. The safety of victims and witnesses is not compromised by our practice and they are not discouraged from coming forward."¹⁷⁹ Furthermore, other states that require even broader disclosure of witness information by statute have not experienced the type of witness intimidation or tampering which has been cautioned against here.¹⁸⁰ The use of protective orders ensures witness safety without needlessly denying vital information to the defendant. Requiring a showing of good cause before a judge and allowing for ex parte applications and expedited review of adverse rulings balances the interests of the defendant and the prosecution, all the while preserving witness safety.

Opponents of broad pretrial disclosure also argue that the expense of early discovery makes such a requirement cost prohibitive.¹⁸¹ However, this argument is without merit. While the initial implementation of new requirements may have required additional funding for the transition period, broad and early discovery is likely to promote greater judicial and prosecutorial economy of resources over time. Formalized pre-plea discovery promotes efficiency by inducing earlier pleas in strong cases and earlier dismissals in weak cases. Delayed disclosure, or even strict compliance with restrictive discovery rules, can result in costly delays and continuances.¹⁸² Strict compliance with the statutory timeline in the Jencks Act, for example, would result in disrupt-

¹⁷⁵ *Id.*

¹⁷⁶ N.Y. CRIM. PROC. LAW § 245.70(1) (McKinney 2019).

¹⁷⁷ *Id.* § 245.70(6).

¹⁷⁸ Eric Gonzalez, *Reform Discovery Rules, Writes District Attorney*, TIMES UNION (Mar. 2, 2019, 5:32 PM), <https://www.timesunion.com/opinion/article/Commentary-Reform-discovery-rules-writes-13656795.php> [<https://perma.cc/AW37-RM7X>].

¹⁷⁹ *Id.*

¹⁸⁰ *See Lee, supra* note 155, at 22–23.

¹⁸¹ *See, e.g., Vance, supra* note 174.

¹⁸² *See, e.g., Sarokin & Zuckerman, supra* note 133, at 1090.

tive midtrial delays and adjournments to allow for defense inspection of the newly disclosed material.¹⁸³ An automatic and standardized process for discovery eliminates the expense of motion practice for the prosecution, the defense, and the courts.¹⁸⁴ Additionally, other states have statutory requirements that go beyond the disclosures required in article 245, yet there is “not a shred of evidence that these criminal justice systems have suffered any drop in efficiency as a result.”¹⁸⁵ Furthermore, voluntary internal practices of early and broad disclosure, such as open file discovery in Brooklyn and the practice of offering reverse proffers at the federal level, indicate that the costs are outweighed by the benefits.¹⁸⁶

CONCLUSION

Unlike the alternative approaches to discovery reform, statutory reform creates a judicially enforceable right and consistency across jurisdictions. A statutory requirement for pre-plea discovery, as seen in New York CPL section 245.25, rebalances the distribution of power in the plea bargaining context by imposing a legislative check on the prosecutorial power of the executive. Additionally, statutory reform promotes fairness at a broader level by ensuring that defendants in different jurisdictions have access to the same type of discovery. One of the guiding principles of criminal justice policy is the avoidance of disparate outcomes for similarly situated defendants. Without reasonably equal access to pre-plea discovery, there will be dissimilar outcomes for defendants in similar cases.¹⁸⁷

There is no doubt that the regulation of pretrial discovery practice involves a complex balancing of interests. This weighing of competing interests is precisely why the problem of discovery in the pretrial context calls for a legislative solution, rather than a judicial or prosecutorial one. Because this is essentially a policy question, it is the proper role of the legislature, not prosecutors, to gather input and establish a rule that balances the practical and ethical concerns at issue.

¹⁸³ *Id.*

¹⁸⁴ McConkie, *supra* note 132, at 18; Svirsky, *supra* note 89, at 527.

¹⁸⁵ Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 274.

¹⁸⁶ Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 516 (2009).

¹⁸⁷ McConkie, *supra* note 132, at 15.

While the discovery deficits in Mr. Gills's robbery case did not prevent him from being acquitted after trial, he is an exception to the rule.¹⁸⁸ The deficiencies of traditional pretrial discovery practice are not cured by the procedural safeguards of a trial for more than ninety-five percent of defendants who take a plea.¹⁸⁹ In a system where plea negotiation is the norm for the overwhelming majority of defendants, it is both unrealistic and unfair to maintain a trial-centric system of discovery. A creature of statute from birth, criminal discovery is most appropriately reformed through legislative action.

¹⁸⁸ See *supra* Introduction.

¹⁸⁹ See *supra* note 142 and accompanying text.