THE LOST JUSTIFICATION: WHITE-COLLAR CRIME AND THE ARGUMENT FOR EXPANDING *BRADY* RIGHTS

Chris Dernbach[*]

I. INTRODUCTION

White-collar crime became a high priority for federal prosecutors beginning in the mid-1970s.[1] Watergate, corporate wrongdoing, and the rise of investigative journalism all contributed to the growing interest in white-collar crime.[2] What was once avoided by the criminal justice system and placed into regulatory and administrative agencies has become a top investigative priority for the U.S. Department of Justice.[3] The post-Watergate public attitude and public disclosures of governmental and corporate misconduct created a ripe climate for the "discovery" of white-collar crime.[4] FBI Director William Webster remarked in 1980 that white-collar crime must be a number one priority "because it strikes at the very fiber of our society by undermining trust and confidence in our political, governmental, and financial systems."[5] Closer to the present, attitudes following the global financial crisis and recession, coupled with the notion that law-enforcement disproportionately targets people of color and those of lower socioeconomic status, create political incentives for the Department of Justice to emphasize white-collar prosecutions.[6] Despite this rise, most observers agree that white-collar criminal justice "is in

[*]J.D. candidate Seton Hall University School of Law, B.A. Ramapo College of New Jersey. I would like to extend my gratitude to Professor Jacob Elberg for his input and guidance.

[1] Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 408 (1993).

[2] *Id.*

[3] TONY. G. POVEDA, RETHINKING WHITE-COLLAR CRIME 132–33 (1994).

[4] *Id*. at 133.

[5] *Id.*

[6] Elizabeth E. Joh & Thomas W. Joo, *Sting Victims: Third-Party Harms in Undercover Police Operations*, 88 S. CAL. L. REV. 1309, 1339 (2015).

need of substantial reform," both to ensure fairness to defendants as well as adequate deterrence.[7]

Preceding the rise of white-collar criminal prosecution was the rise of the plea deal, a legal development that would begin as an extraordinary method of case resolution for obviously guilty defendants and would come to envelop upwards of ninety percent of criminal cases.[8] Because this accepted practice has come to dominate the criminal justice landscape, it is important to have serious discussions about the protection of rights in that context. Justice Kennedy in *Missouri v. Frye* remarked regarding plea bargaining:

> Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. 'To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.'[9]

Justice Kennedy's analysis exhibits the need to ensure that the plea bargaining stage of criminal adjudication affords sufficient rights to criminal defendants. This proposition remains just as true for white-collar defendants.

One area in which academic and circuit court interest has piqued is the *Brady* right to exculpatory evidence. While traditionally serving as a due process trial right since its inception in 1963, many have argued for the expansion of *Brady* material rights into the plea bargaining context to ensure a fair criminal justice process for the ninety-four to ninety-seven percent of criminal defendants who plead guilty and never face the traditional bulwark of criminal justice—the jury trial.[10]

Without minimizing the importance of this discussion's outcome to the traditional criminal defendant, it seems that the expansion of *Brady* material to the plea bargaining stage can have special and distinct implications for a white-collar target or defendant. This Comment will

---

[7] J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 49 (2007).

[8] Stephanos Bibas, *Designing Plea Bargaining From the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1058–59 (2016).

[9] Missouri v. Frye, 566 U.S. 134, 143–44 (2012) (alteration and emphasis in original).

[10] *See, e.g.*, James M. Grossman, *Getting Brady Right: Why Extending* Brady v. Maryland's *Trial Right to Plea Negotiations Better Protects a Defendant's Constitutional Rights in the Modern Legal Era*, 2016 BYU. L. REV. 1525, 1535–36 (2016); Corrina Barrett Lain, *Accuracy Where it Matters:* Brady v. Maryland *in the Plea Bargaining Context,* 80 WASH. U. L.Q. 1 (2002).

argue that because of the inherent complexity of white-collar criminal prosecutions, as well as other factors, pressure is exerted on the defendant to enter into plea agreements. Because of these pressures, including intricate and vague legal and factual issues, exorbitant costs, the need for cooperators, and high sentencing guidelines, it is all the more imperative that we ensure defendants are fully aware of the circumstances surrounding their plea to ensure a just outcome and a just legal system.

While much academic interest has been devoted to the expansion of the *Brady* trial right to the context of plea bargaining, those arguing for that expansion are missing an important and compelling piece of their argument, which exists in the white-collar context.[11] Academic work seems to either discredit the fact that white-collar crime may create unique justifications or ignores its distinct existence altogether. While not discrediting arguments for the expansion of *Brady* in general, and not claiming that white-collar defendants are more deserving of such protections, those who argue for *Brady* expansion would be ill-advised to continue to dismiss compelling justifications that exist for white-collar defendants. It is the purpose of this Comment to present those justifications.

Part II of this Comment will discuss *Brady v. Maryland* and its progeny. This Part will develop an understanding of what a criminal defendant is entitled to from a due process standpoint and the underlying reasoning behind the *Brady* line of cases. This Part will also track the shift of *Brady* from its position as purely a trial right into the realm of plea deals, a practice that encompasses the large majority of criminal adjudications. It will end with an analysis of the circuit split concerning whether the *Brady* right to exculpatory evidence extends to the context of plea bargaining.

Part III of this Comment will discuss the rise of the plea deal as the workhorse of American criminal adjudication. This Part will also discuss some of the potential reasons for that development.

Part IV of this Comment will discuss distinct considerations that arise in the context of white-collar crime. This Part will explain that white-collar crime is inherently complex, and stemming from that

[11] *See, e.g.*, Bibas, *supra* note 8, at 1063 (mentioning white-collar defendants only to say that they "can afford great lawyers and thorough investigations" and, therefore, implying that the white-collar defendants concerns are minimized); Grossman, *supra* note 10, at 1535–36 (discussing DNA-based exonerations and wrongful convictions concerning death-row inmates obviating the need for expansion of *Brady* into the context of plea deals); Lain, *supra* note 10 (discussing expansion generally with no mention of white-collar crime); Petegorsky, *infra* note 29, at 3601 (arguing for the expansion of *Brady* material to plea bargaining through the lens of a robbery case).

complexity are a host of considerations that inform the white-collar space and create unique justifications for expanding the rights of white-collar defendants. Particularly, the complexity of these crimes leads to a "white-collar rationale" by which courts have been willing to erode some protections of white-collar defendants, particularly in the area of investigation, because of the difficulty of prosecuting such crimes.[12] Likewise, white-collar complexity leads to vague actus reus elements, confusing mens rea elements, and prohibitive costs, all of which exert pressure on the white-collar defendant to resolve litigation as quickly as possible.[13] Lastly, the exorbitantly high Federal Sentencing Guidelines, particularly for economic crimes, make any "choice" of whether or not to plead guilty dangerously close to coercion.[14] The high guidelines, coupled with the practice of overcharging, exert even more pressure on the defendant to accept a better deal over risking the "trial penalty."[15] Parallel issues certainly exist outside of the white-collar context, raising similar, if not worse, concerns.[16] These issues are highlighted here in the context of white-collar crime, however, because while concerns have been extensively addressed in the context of traditional crime, or criminal law in general, white-collar crime has received comparatively less focus.

Part V of this Comment will explain how these distinct considerations inform the need for *Brady* exculpatory evidence in the context of plea deals.

II. *BRADY* AND ITS PROGENY: FROM TRIAL TO PLEA DEALS

In the seminal case, *Brady v. Maryland*, Brady and a companion, Boblit, faced trial for first-degree murder.[17] Brady admitted to involvement in the crime but denied participating in the physical killing, implicating Boblit as the actual killer.[18] Brady admitted guilt to first-

12 Braswell v. United States, 487 U.S. 99, 115–16 (1988).

13 Sarah Ribstein, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 DUKE L.J. 857, 867 (2009).

14 NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 6 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [hereinafter THE TRIAL PENALTY].

15 *Id.*

16 *See, e.g.*, Danielle Snyder, *One Size Does Not Fit All: A Look at the Disproportionate Effects of Federal Mandatory Minimum Drug Sentences on Racial Minorities and How They Have Contributed to the Degradation of the Underprivileged African-American Family*, 36 HAMLINE J. PUB. L. & POL'Y 77 (2015).

17 373 U.S. 83, 84 (1963).

18 *Id.*

degree murder and asked only that the jury not return the death penalty.[19] Nonetheless, the jury returned a verdict of capital punishment.[20]

Before the trial, Brady's attorney asked to examine statements made by Boblit.[21] Several were examined, but the prosecution withheld a particular statement.[22] In the withheld statement, Boblit admitted to the physical killing.[23] Brady did not learn of the statement until after his trial, conviction, sentencing, and unsuccessful appeal.[24]

The Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[25] This holding was not untrodden ground, but rather an expansion of a line of earlier cases that expressed the desire for our society to ensure a truly fair trial system.[26] The Court explained that society's goal is not merely to ensure that the guilty are convicted but also to ensure that our nation has a justice system with an overarching principle of fairness.[27] Justice Douglas, writing for a 7-2 majority, expressed this concern by stating, "our system of the administration of justice suffers when any accused is treated unfairly."[28] The *Brady* holding organically transformed from a constitutional due process right into a prosecutorial discovery obligation on the government to provide such evidence at the trial phase of a criminal adjudication.[29]

Giglio v. United States expanded the *Brady* rule to impeachment evidence.[30] The Supreme Court in *Giglio* held that where guilt or innocence turns on the reliability of a witness, nondisclosure of

---

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Brady,* 373 U.S. at 84.

24 *Id.*

25 *Id*. at 87.

26 *See* Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding that even when the state does not solicit the false evidence, if the prosecutor allows it to go uncorrected a violation of due process will result); Mooney v. Holohan, 294 U.S. 103, 112–13 (1935) (holding that the government's knowing use of perjured testimony and suppression of evidence favorable to the defendant resulted is a violation of Constitutional rights).

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

28 *Id.*

29 Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3604 (2013).

30 405 U.S. 150, 154 (1972).

impeachment evidence for that witness falls under the *Brady* rule and is a violation of due process.[31] In other words, the due process requirement for *Brady* material at trial encompasses both exculpatory evidence and impeachment evidence under certain circumstances.

The Court furthered the prosecutorial discovery obligation in *United States v. Agurs*, in which it held that material evidence of substantial value to the defendant must be turned over, even *absent a specific request* by the defense for such material.[32] The Court based its conclusion on what it called "elementary fairness," finding that while the prosecutor has a duty to earnestly prosecute the accused, the people's overriding interest is in a just outcome.[33] The prosecutor "is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'"[34] This role requires the prosecutor to turn over *Brady* material even if the defendant does not ask for it, a departure from the adversarial practice of law in the name of justice.[35]

The Supreme Court in *United States v. Bagley* refined the standard for *Brady* material by finding that evidence is "material" for *Brady* purposes if there is a reasonable probability that, had the evidence been disclosed, the result of a proceeding may have been different.[36] In other words, withholding evidence only violates due process when such evidence has a reasonable probability of changing the outcome.[37] *Kyles v. Whitley* further refined the materiality standard by holding that the standard does not require that the defendant would have been acquitted had the evidence been disclosed, but the suppression must only "undermine[] confidence in the outcome of the trial."[38]

Throughout the development of the *Brady* rule, the Court's overarching concern remained the fairness of the judicial system.[39] The impact on defendants and the fairness of trials remained the principal

[31] *Id*.

[32] 427 U.S. 97, 107 (1976).

[33] *Id*. at 110.

[34] *Id*. at 111 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

[35] *Id.* at 107.

[36] 473 U.S. 667, 682 (1985).

[37] *Id.*

[38] Kyles v. Whitley, 514 U.S. 419, 434 (1995).

[39] *See, e.g.*, *Bagley*, 473 U.S. at 693 (White, J., concurring) ("With a minimum of effort, the state could improve the real and apparent fairness of the trial enormously, by assuring that the defendant may place before the trier of fact favorable evidence known to the government.").

focus.[40] These justifications have featured prominently in the arguments over the expansion of *Brady* to the plea deal context.[41]

III. THE RISE OF THE PLEA DEAL

Plea bargains have come to encompass a massive proportion of criminal cases. Between ninety-four and ninety-seven percent of criminal cases in the United States are resolved through a guilty plea.[42] At the federal level, their acceptance is enshrined in Federal Rule of Criminal Procedure 11, which states, "[a]n attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement."[43] Further, in an unrelated case also entitled *Brady v. United States*, the Supreme Court held that the guilty plea was a constitutional mechanism for criminal justice adjudication.[44] The Court reasoned:

> We cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary. . . . A contrary holding would require the States and Federal Government to forbid guilty pleas altogether . . . . The Fifth Amendment does not reach so far.[45]

The prevalence of plea bargaining has come to the point of nearly inescapable prominence; the practice is here to stay.[46] More than ninety percent of the time, plea bargaining is the end of a criminal adjudication, making that stage the final opportunity to protect the defendant's rights.[47]

---

[40] *See, e.g.*, *Agurs*, 427 U.S. at 116 (Marshall, J., dissenting) ("Our overriding concern in cases such as the one before us is the defendant's right to a fair trial.").

[41] Petegorsky, *supra* note 29, at 3613 ("General appeals to fairness motivate the desire for *Brady* disclosure during plea bargaining as well: if the true goal of the criminal process is justice, then a prosecutor's suppression of exculpatory evidence to coerce a defendant to plead guilty directly contravenes that goal.").

[42] Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye*,* 41 HASTINGS CONST. L.Q. 561, 562 (2014).

[43] FED. R. CRIM. P. 11(c)(1).

[44] 397 U.S. 742, 753 (1970).

[45] *Id.*

[46] *But see* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037 (1984) (arguing that the "pervasively important assumption" that plea bargaining is necessary and inevitable is mistaken).

[47] Lain, *supra* note 10, at 49.

American plea bargaining began as a tool for prosecutors to dispose of cases and eventually gained traction with judges, creating a dynamic where "all of the system's power-holders" shared an interest in plea bargaining.[48] Professional prosecutors were rare in colonial America.[49] As they became more commonplace, defense attorneys likewise became more common, the rules of evidence became more formalized, and trials went from lasting minutes to lasting days.[50] These factors created a packed docket, convincing many judges to accept guilty pleas.[51] By 1900, the rate of guilty pleas was close to ninety percent and the plea bargaining system had cemented its place in American criminal practice.[52] As early as 1920, observers commented on the disappearance of the jury trial.[53] Plea bargaining has now reached a point in the twenty-first century where some jurisdictions have few, if any, criminal trials.[54] But because the plea bargain began as an exceptional process, a way for certainly guilty defendants to expedite their cases and save the hassle of reaching an obvious conclusion, the legal system did not attempt to include safeguards into the system.[55] This lack of safeguards in an adjudication mechanism with such prominence creates concern over a potential lack of justice in the American criminal justice system.[56]

Professional prosecutors are not the only force credited with spurring the rise of the guilty plea. Several factors contributed to the preeminence of plea bargaining, and the preeminence of plea bargaining

---

[48] George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1016 (2000); *see also* Bibas, *supra* note 8, at 1059.

[49] Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC (Sep. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171.

[50] *Id*.

[51] *Id.*

[52] *See id.*

[53] Fisher, *supra* note 48, at 859.

[54] Alkon, *supra* note 42, at 562.

[55] Bibas, *supra* note 8, at 1059; *see also* THE TRIAL PENALTY, *supra* note 14 (arguing that the jury trial was established as a means of protecting against the tyranny of government and ensuring that the protections of the Constitution were not trampled, but the rise of the guilty plea serves no similar purpose of transparency and accountability).

[56] While this article will focus exclusively on the American criminal justice system, it is worth mentioning that the expansion of plea bargaining has become a global affair. *See* Robert Hanson, *Plea Bargains Save Time and Money, But Are Too Easily Abused,* ECONOMIST (Nov. 9, 2017), https://www.economist.com/leaders/2017/11/09/plea-bargains-save-time-and-money-but-are-too-easily-abused (showing that of ninety countries studied in 1990, only sixteen permitted plea bargaining, but by 2017, sixty-six of them did).

necessarily created the shirking of the jury trial. Fisher's take on this outcome is quite glum:

> There is no glory in plea bargaining. In place of a noble clash for truth, plea bargaining gives us a skulking truce. Opposing lawyers shrink from battle, and the jury's empty box signals the system's disappointment. But though its victory merits no fanfare, plea bargaining has triumphed. Bloodlessly and clandestinely, it has swept across the penal landscape and driven our vanquished jury into small pockets of resistance. Plea bargaining may be, as some chroniclers claim, the invading barbarian. But it has won all the same. . . . Like most of history's victors, plea bargaining won in great part because it served the interests of the powerful.[57]

Aside from his mournful prose, Fisher's analysis demonstrates that the guilty plea has overtaken the criminal justice system. His analysis and implicit disapproval are not new, nor without concurrence. The Supreme Court of Wisconsin in the 1877 case, *Wight v. Rindskopf*, stated that pleas are an encroachment on the role of the judiciary and "hardly, if at all, distinguishable in principle from a direct sale of justice."[58] Still today, plea bargaining continues to be extensively criticized by academics, jurists, and advocates.[59] But what caused such a dynamic is likely a web of factors.

Some argue that the expansion of the criminal justice system spurred the rise of the guilty plea.[60] "[T]he criminal-justice system has become a 'capacious, onerous machinery that sweeps everyone in,' and plea bargains, with their swift finality, are what keep that machinery running smoothly."[61] Because of the vast expansion of the criminal justice system, the only way to keep it functioning is to adjudicate a majority of cases through plea bargaining; the system simply could not operate without the guilty plea.[62] This preeminence, and the harsh consequences that may come with conviction at trial, means that it may be a rational choice to plead guilty to a crime of which you are innocent, avoiding the jury trial altogether and eroding the quintessential defender of innocence.[63]

---

57 Fisher, *supra* note 48, at 859.

58 43 Wis. 344, 354 (1877).

59 Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent On Plea Bargaining*, ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112.

60 Yoffe, *supra* note 49.

61 *Id*.

62 *See* Gretchen Gavett, *The Problem with Pleas*, PBS FRONTLINE (Oct. 31, 2011), https://www.pbs.org/wgbh/frontline/article/the-problem-with-pleas.

63 *Id.*

Others argue that the Federal Sentencing Guidelines strongly contribute to the downfall of the jury trial. According to the National Association of Criminal Defense Lawyers, the exorbitant sentences imposed by the Federal Sentencing Guidelines, particularly for economic crimes under Section 2B1.1, make any choice of whether to plead guilty or go to trial purely illusory, because the "trial penalty" of a jury conviction is too high to risk.[64] In other words, a cost-benefit analysis supplants guilt or innocence as the determinant of whether or not many defendants will plead guilty.[65] Likewise a function of the Federal Sentencing Guidelines, the practice of overcharging has been named as a reason for the acceptance of guilty pleas.[66] The charging decisions of prosecutors are largely immune from any formal process of legal review.[67] Through this process of filing additional charges or excess counts, the prosecutor creates leverage in plea negotiations and makes the eventual plea offer seem more attractive.[68] Consequently, more plea deals are made, and fewer jury trials take place.

It is worth noting that some recognize that plea bargaining is not inherently one-sided. Both the prosecutor and the defendant generally have some bargaining power to exercise that will help their outcome.[69] The prosecutor is practically limited in his or her ability to bring cases to trial. The basic constraints on time mean that only a fraction of cases can go to trial.[70] Likewise, the burden of proof in criminal trials means that the prosecutor must grapple with the reality that he or she may not be able to present evidence sufficient to obtain a conviction.[71] The prosecutor, however, can decide the charges, and decide the sentence recommendation to the judge, giving him immense power over the process.[72] The prosecutor also may face administrative pressures to dispose of cases efficiently, meaning that if a defendant wishes to bring a case to trial, the prosecutor may have to decide whether or not that

64 *See* THE TRIAL PENALTY, *supra* note 14, at 343.

65 *See* Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 84 (2009).

66 Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining,* 118 COLUM. L. REV. 1303, 1304 (2018) ("As plea bargaining scholars have long recounted, prosecutors' ability to threaten inflated sentences, combined with their power to trade those sentences away for pleas of guilt, allows them to control 'who goes to prison and for how long.'").

67 Brian D. Johnson*, Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT. R. 256, 258 (2019).

68 *Id.*

69 Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 93 (1976).

70 *Id*.

71 *Id.*

72 *Id.* at 94.

trial will be effectual.[73] As Justice White recognized in *Brady v. United States*, the criminal defendant can receive a substantial benefit from a guilty plea in exchange for giving a substantial benefit to the state.[74] Both sides typically have bargaining power, though problems with plea bargaining persist.

Regardless of the underlying reason or coalition of reasons spurring the rise of guilty pleas, the American criminal justice system has accepted the practice as the workhorse of criminal adjudication, though its participants and supposed beneficiaries may mourn with Professor Fisher. This dynamic creates a need in American criminal law to take rights that traditionally only existed in the case of the jury trial and find ways to ensure that the same issues are addressed in the context of plea bargaining so that the same unfairness may be avoided.

A. Brady *in the Context of Plea Deals*

Despite the vast criticisms of the plea bargaining process and abundance of calls for reform,[75] some circuit courts have balked at the opportunity to expand the rights of criminal defendants in this context. Circuit courts are split over whether or not the prosecutor's duty to turn over *Brady* material applies in the context of plea deals or is confined to the realm of the jury trial.[76] The Supreme Court fueled this debate in its 2002 decision in *United States v. Ruiz*.[77] In that case, the Supreme Court placed a major limitation on *Brady* rights, but only on the expansion of *Brady* that came out of *Giglio*.[78] The Court held that a defendant's due process rights were not violated when a prosecutor failed to disclose *impeachment* evidence prior to the entry of a guilty plea.[79] This holding did not explicitly encompass the traditional *Brady exculpatory* evidence.[80] As such, circuits post-*Ruiz* have created a split over whether due process is violated by a prosecutor's failure to disclose material *exculpatory* evidence prior to the entry of a guilty plea.[81]

The first appellate court to address that issue was the Seventh Circuit, and they reasoned in favor of expansion in *McCann v. Mangialardi*.[82] While lacking the opportunity to actually decide the

[73] *Id*. at 93–94.
[74] 397 U.S. 742, 753 (1970).
[75] *See* Walsh, *supra* note 59.
[76] Grossman, *supra* note 10, at 1529.
[77] 536 U.S. 622 (2002).
[78] *Id.* at 631.
[79] *Id*. at 625.
[80] Grossman, *supra* note 10, at 1529.
[81] *Id*.
[82] 337 F.3d 782 (7th Cir. 2003).

issue of whether the right to *Brady* exculpatory evidence exists in the context of a plea deal, the Seventh Circuit found that the language used by the Supreme Court in *Ruiz* strongly suggested that if exculpatory evidence were withheld, a violation of due process would result.[83] They based this finding on the Supreme Court's distinction between impeachment evidence and exculpatory evidence, with the former being difficult to characterize as "critical information of which the defendant must always be aware prior to pleading guilty."[84]

The Tenth Circuit followed suit in *United States v. Ohiri*, largely agreeing with the Seventh Circuit's reasoning in *McCann*.[85] The court here again relied on the distinctions drawn in *Ruiz* between impeachment information and exculpatory evidence.[86] Based on that separate treatment, the Seventh Circuit found that *Ruiz* was not intended to apply to exculpatory evidence, but only to impeachment information. Because the evidence in *Ohiri* was exculpatory, the defendant could mount a *Brady* challenge.[87]

Opposing the reasoning of the Seventh and Tenth Circuits, other circuits have held that the *Brady* right to exculpatory evidence, like the right to impeachment evidence implicated in *Ruiz*, does not exist in the plea bargaining context. In perhaps the strongest rejection of such an expansion, the Fifth Circuit in *United States v. Conroy* flatly rejected the argument that the Supreme Court's limitation to impeachment evidence in *Ruiz* implied that exculpatory evidence was on a different footing and could give rise to a *Brady* challenge to a guilty plea.[88] The Fifth Circuit held that the entry of a guilty plea precluded the defendant from challenging on *Brady* grounds.[89]

In *Friedman v. Rehal*, the Second Circuit took up the issue and also found that the Supreme Court's ruling in *Ruiz* would apply to both impeachment and exculpatory evidence.[90] The Second Circuit explained that the Supreme Court "has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial."[91] Because of this undifferentiated treatment, the court found that the

83 *Id.* at 787–88.
84 *Id.* at 787.
85 133 Fed. Appx. 555 (10th Cir. 2005).
86 *Id*. at 562.
87 *Id.*
88 567 F.3d 174, 179 (5th Cir. 2009).
89 *Id.*
90 618 F.3d 142, 154 (2d. Cir. 2010).
91 *Id.*

holding in *Ruiz* would likely apply to exculpatory evidence as well.[92] Nonetheless, the court did not have the opportunity to reach the question because the evidence at issue in *Friedman*, which involved the fact that one witness was hypnotized to help him recall information, fit squarely within the category of impeachment evidence.[93]

The Fourth Circuit, much like the Second, did not have the opportunity to reach the *Brady* issue.[94] The court did, however, strongly indicate that they would agree with the Fifth Circuit that the right to *Brady* material did not exist in the context of a guilty plea. The court cast the *Brady* right as purely a trial right.[95] The purpose of the right, according to the court, was to "preserve the fairness of a trial verdict and to minimize the chance that an innocent person would be found guilty."[96] The court noted that when a defendant pleads guilty, the concerns of an innocent conviction are "almost completely eliminated because his guilt is admitted."[97] This dicta strongly indicates that the Fourth Circuit would hold that the *Brady* right does not attach to the entry of a guilty plea.

In light of this circuit split, and the overwhelming proportion of criminal adjudications taking place via plea bargain, rather than through a trial, expansion of traditional trial rights, like *Brady*, outside of the trial context is increasingly important.[98] Such an expansion would not be without precedent, as the Supreme Court has, as recently as 2012, expanded other traditional "trial rights" to the context of plea bargaining.[99] As the remainder of this Comment will show, such an expansion is uniquely important in the white-collar context, and such arguments should not be ignored by those who favor the expansion of *Brady*.

92 *Id.*

93 *Id.* at 153.

94 United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010).

95 *Id.* at 285.

96 *Id.*

97 *Id.*

98 *See* Grossman, *supra* note 10, at 1536 (arguing that the *Brady* rule is useless to most defendants because "an overwhelming number of cases never reach trial. Thus, Brady cannot help the supermajority of defendants" who plead guilty).

99 *See* Lafler v. Cooper, 566 U.S. 156 (2012); Missouri v. Frye, 566 U.S. 134, 145 (2012) (expanding the Sixth Amendment right to effective assistance of counsel to the plea bargaining context).

IV. DISTINCT CONSIDERATIONS IN WHITE-COLLAR CASES

In order to analyze the implications of plea deal *Brady* material in the context of white-collar crime, it is first important to engage in a surface level discussion about the definition of white-collar crime. Edwin Sutherland is credited with coining the term "white collar crime" in a speech to the American Sociological Society in 1939.[100] He later defined the term to mean "a crime committed by a person of respectability and high social status in the course of his occupation."[101] Sutherland, however, operated in the field of Sociology, and thus did not seek to create a legal definition of use to this current analysis.[102] His focus was entirely theoretical; he hoped to create a better understanding of criminal behavior.[103]

Herbert Edelhertz attempted to remedy this deficiency and helped guide the term's shift into the legal space by defining white-collar crime as "an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage."[104] Because Edelhertz was the former head of the Fraud Section of the U.S. Department of Justice, this definition was influential in how the Justice Department would come to define white-collar crime in the 1970s.[105] Particularly distinct in Edelhertz's definition is the removal of the personal element, which Sutherland employed. In other words, Edelhertz identified only the offense, without characterizing the offender.

The FBI's White-Collar Crime subsection of its website states that such crimes are "characterized by deceit, concealment, or violation of trust and are not dependent on the application or threat of physical force or violence. The motivation behind these crimes is financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage."[106] The FBI website goes on to establish several criminal acts that lend themselves to the white-collar

100 POVEDA, *supra* note 3, at 31.

101 EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 7 (1983).

102 James William Coleman, *The Theory of White-Collar Crime From Sutherland to the 1990s* in WHITE-COLLAR CRIME RECONSIDERED 53 (Kip Schlegel & David Weisburd eds., 1992).

103 *Id*.

104 HERBERT EDELHERTZ, NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, THE NATURE, IMPACT, AND PROSECUTION OF WHITE-COLLAR CRIME 3 (1970).

105 POVEDA, *supra* note 3, at 40.

106 FBI, *White Collar Crime*, https://www.fbi.gov/investigate/white-collar-crime (last visited October 28, 2019).

context, including "public corruption, money laundering, corporate fraud, securities and commodities fraud, mortgage fraud, financial institution fraud, bank fraud and embezzlement, fraud against the government, election law violations, mass marketing fraud, and health care fraud."[107]

Some choose to define white-collar crime by reference to what it is *not*. One such formulation by a law professor states:

> A white collar offense is one that does not necessarily involve the use or threat of physical force, either against the victim or the victim's property. Nor does "white collar crime" encompass offenses directly related to the possession, sale, or distribution of controlled substances. The term "white collar crime" also excludes crime directly related to organized crime activities. Finally, "white collar crime" excludes laws relating to certain policy-driven areas such as immigration, civil rights, and national security, and excludes common theft crimes. This definition of white collar crime is a broad one, encompassing offenses from simple fraud using the mail and wires to local political corruption cases and sophisticated securities and tax cases.[108]

This formulation creates another definition focusing on the crime itself to the exclusion of any consideration of the offender.

One dictionary definition reads "crime that typically involves stealing money from a company and that is done by people who have important positions in the company: crime committed by white-collar workers."[109] This definition, while arguably not far from Sutherland's original definition, certainly does not create a useful benchmark for analysis. Merriam-Webster likewise has a *legal* definition of "white-collar crime," which reads, "crime that is committed by salaried professional workers or persons in business and that usually involves a form of financial theft or fraud (as in securities dealing)."[110] This definition is also both underinclusive and overinclusive.

There is no widely accepted definition of white-collar crime.[111] Definitions focusing on the offender can potentially lend themselves to bias and prejudice. Those focusing only on the offense will be both over

---

[107] *Id.*

[108] Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199, 1209–10 (1999).

[109] *White-Collar Crime,* MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/white-collar%20crime (last visited Oct. 30, 2019).

[110] *Id*.

[111] Gerald Cliff & Christian Desilets, *White Collar Crime: What It Is and Where It's Going*, 28 NOTRE DAME J.L. ETHICS PUB. POL'Y 481, 482 (2014).

and under-inclusive. It is beyond the purpose of this Comment to develop a comprehensive and usable definition of white-collar crime. Suffice it to say that it is important for the reader to have a common sense understanding of what is typically considered to be white-collar crime, and what, for lack of a better term, this Comment will refer to as traditional crime (non-white-collar crime).

The Supreme Court and lower courts have never treated defendants' *Brady* rights differently based upon the type of crime committed, be it a traditional crime or a white-collar crime. Traditional crime defendants and white-collar defendants, in theory, possess the same rights, adjusting for the circuit in which they are charged. But while the need for exculpatory evidence may seem obvious in the traditional crime context, such a need in white-collar crime is not as intuitive.[112] For traditional criminal defendants, *Brady* material may consist of a confirmed alibi,[113] another person's confession,[114] a blood sample that does not match the defendant,[115] or a whole host of other items that may lead to a moment of courtroom drama. A white-collar defendant's *Brady* material may not be as strikingly obvious and, hence, has attracted less academic interest.[116] Nonetheless, the need for *Brady*'s expansion in the plea deal context of a white-collar prosecution is just as necessary for the preservation of a fair criminal justice system and presents unique considerations that justify such expansion. These justifications present an important and compelling piece of the argument that such expansion must take place, and those who argue in favor of such an expansion would be mistaken to continue ignoring it.

The white-collar defendant is faced with systematic differences that arise out of the nature of the crime involved. The Supreme Court in *Braswell v. United States* found that prosecution of white-collar crime is inherently difficult.[117] Because of this inherent difficulty, the Court noted their apprehension about affording broader rights to white-collar targets during the investigation stage.[118] This "White Collar Rationale" favors the government at the expense of white-collar targets and

---

112 Some have also stated that people simply do not care about fairness for white-collar defendants. Walter Pavlo, *Can White-Collar Defendant's Get a Fair Trial?*, FORBES (Dec. 19, 2012), https://www.forbes.com/sites/walterpavlo/2012/12/19/can-white-collar-defendants-get-a-fair-trial/#11cdfb58590a.

113 Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 269 (3d Cir. 2016).

114 *Michael Hanline*, CAL. INNOCENCE PROJECT, https://californiainnocenceproject.org/read-their-stories/michael-hanline (last visited October 30, 2019).

115 People v. Murphy, 128 A.D.2d 177, 186 (N.Y. App. Div. 1987).

116 *See supra* text accompanying note 11.

117 Henning, *supra* note 1, at 410.

118 *See* Braswell v. United States, 487 U.S. 99, 115–16 (1988).

defendants by avoiding proscriptions on government power that will allow the already difficult task of prosecuting white-collar crime to become even harder.[119] The same complexity recognized by the Court in *Braswell* ultimately pervades the white-collar space to the extent that it creates unique justifications for the expansion of *Brady* rights. While being useful to the prosecutor from a practical perspective, it serves as a justification for those advocating for the expansion of *Brady* rights to the plea bargaining stage.

The complexity of white-collar prosecution creates an independent factor that lends itself to the proposition that *Brady* rights are particularly necessary in the white-collar space. White-collar criminal prosecution involves intricate factual and legal issues, a dynamic that has particular importance for the *Brady* analysis. White-collar crime is inherently more complex than traditional crime, and evidence of wrongdoing is often concealed in mountains of discovery.[120] Additionally, the issues involved in white-collar crime are significantly different from those involved in the context of traditional crime.[121]

In a white-collar case, it may be less clear whether the defendant committed a crime.[122] This uncertainty grants the prosecutor greater discretion on whether to charge and what to charge, increasing the prosecutor's bargaining power over white-collar targets.[123] This increased bargaining power can manifest itself as pressure on the white-collar defendant to plead guilty.[124] Samuel Buell identified two ways in which the criminal justice system responded to the difficulties of white-collar prosecution, both of which create concerns for targets.[125] First, he argues that white-collar statutes are open-ended, refusing to define criminal behavior with any specificity so as to remain flexible for "innovative wrongdoing."[126] Others have referred to this concept as an "over-criminalization" that is the "product of vague, duplicative, and sometimes incomprehensible criminal statutes that aggressive

119 Henning, *supra* note 1, at 410.

120 *Id.* at 408.

121 Ribstein, *supra* note 13; *see also* Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons From Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165 (2004) (recognizing that other commentators have discussed the immense power of federal prosecutors and the current status of white-collar criminal prosecutions allows federal prosecutors to act as gods).

122 Ribstein, *supra* note 13.

123 *Id.*

124 *Id.*

125 Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1628 (2007).

126 *Id.*

prosecutors apply to an ever-widening array of circumstances."[127] This furthers the dynamic of prosecutorial discretion that leads to increased bargaining power and pressure on white-collar targets and defendants to plead guilty. Secondly, white-collar prosecution places a strong emphasis on mental state, in part because of the ambiguous actus reus elements.[128] Because white-collar statutes contain uncertain actus reus elements that are malleable to innovation, the concern will largely focus on the mens rea of the individual involved.

White-collar defendants themselves may not even know whether or not they have broken the law.[129] Particularly in the corporate context, mens rea can be even more challenging because decision-making may be more diffuse.[130] In the traditional crime context, the defendant often has the best sense of whether or not he or she is guilty, which, despite inadequacies in the criminal justice system disadvantaging defendants which are beyond the scope of this Comment, can serve as a safeguard to the entry of an innocent guilty plea.[131] For the white-collar defendant, the uncertainty and fear of what a jury may infer about his or her mental state can be a daunting gamble that he or she is simply unwilling to make when a guilty plea will come with less jarring punitive consequences.

Because of this emphasis on *mens rea*, which is more central to a white-collar prosecution, the defendant has more uncertainty, and thus, some might be more likely to adopt a cost-benefit analysis, rather than a guilt-innocence analysis.[132] A prosecution turning on mens rea "can be more difficult to anticipate, harder to defend against, and more likely to produce error by the fact finder."[133] While the white-collar target or defendant will, of course, know the mental state he possessed during the event or series of events in question, he will likely be unaware of how that mental state comports with the law and whether or not the actual acts he took were criminal in nature.[134] He is even less informed of what the fact-finder will infer about his or her mental state. The white-collar

127 Strader, *supra* note 7.

128 Buell, *supra* note 125.

129 Ribstein, *supra* note 13, at 865.

130 *Id.* at 866.

131 *But see* Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1114 (2015).

132 *See* Podgor, *supra* note 65.

133 Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 841 (2014).

134 *See* Ribstein, *supra* note 13, at 869 (noting that while traditional crime may have mens rea requirements of "knowledge" or "purpose" that are straightforward and well-defined, white-collar crime may be accompanied by mens rea requirements such as "willfulness," "bad purpose," or "consciousness of wrongdoing" which creates more difficult issues).

defendant may not even have the bare protection of being convinced of his or her guilt or innocence, opening the door for innocent guilty pleas through a mechanism not present in the traditional criminal context.

The standards used in white-collar crime are also newer and less settled than those in the traditional criminal context. They do not come with extensive case law and can leave a legitimate question over whether a given course of conduct is legal or criminally punishable.[135] Subtle differences create the line between standard business practice and crime,[136] and when wrongdoing does exist, it is often surrounded by a host of lawful and productive activities.[137] As a whole, the substantive law underlying white-collar prosecutions is less favorable to defendants than it is in traditional crime.[138]

The costs of white-collar criminal defense are also prohibitively high, yet again due to the complexity of the issues involved in such prosecutions.[139] The white-collar defendant cannot mount a sufficient defense without digging into the complex legal and factual issues that have been discussed. To effectively grapple with these issues, the white-collar defense attorney must undertake extensive discovery, investigation, and fact-finding. The defense attorney must also comb through massive amounts of discovery produced by the government that is likely the result of an extensive investigation undertaken by multiple federal agencies. All of this translates to costing an inordinate amount of an attorney's time, which translates to costing an inordinate amount of money for the defendant.[140] By criminalizing behavior that is ambiguous, complex, and unclear, white-collar statutes ensure that defense of such claims is difficult, thereby ensuring that it is expensive, thereby ensuring that pressure is exerted on the white-collar defendant to avoid as much expense as possible, which will often mean a guilty plea. Furthermore, prosecutorial resources in white-collar cases, and more narrowly in financial fraud cases, are more plentiful, meaning that the white-collar defendant must attempt to compete.[141]

While sympathy for costs is typically not considered a significant concern for the white-collar criminal defendant, it certainly informs the discussion over why it is important to protect defendants' rights. Because white-collar defendants are faced with criminal prosecutions

135 *See id.* at 863–64.
136 *See id.*
137 Buell, *supra* note 125, at 1627.
138 Buell, *supra* note 133, at 888.
139 *See* Buell, *supra* note 125, at 1650.
140 Ribstein, *supra* note 13, at 866.
141 *See* Strader, *supra* note 7, at 53.

that are inherently more expensive to defend, the argument that such defendants have more money, and that we are therefore less concerned about their adequate representation, is futile. Most white-collar defendants cannot afford a proper defense because of the higher costs involved in defending white-collar crimes.[142] The aspect of civil forfeiture that accompanies the white-collar context may also mean that criminal defendants are unable to pay their counsel of choice because their funds are seized by the government as potential proceeds of the illegal act.[143] This high economic cost is not presented to show that the white-collar defendant is worse off than the traditional criminal defendant, but rather to show that it is a mistake to dismiss the protection of white-collar defendants simply because of a misconception that such persons have the economic resources to adequately defend themselves. White-collar defendants are likely to be richer than traditional criminal defendants,[144] but relying on those resources as a justification for ignoring conversation regarding white-collar reform is a mistaken premise given the greater resources needed for an adequate defense. Similarly, if one subscribes to one of the offense-based definitions of white-collar crime, such a discussion would be futile because white-collar crime under those definitions can cross socioeconomic boundaries.

Lastly, sentencing guidelines treat the white-collar defendant with "genuine harshness."[145] Historically, this was not the case. White-collar offenders were privileged in their sentencing, and "[p]robation, community service, fines, and short terms of imprisonment followed by early parole were commonplace."[146] In fact, the issues surrounding white-collar sentencing were among the chief reasons Congress decided to endorse the Federal Sentencing Guidelines, which today control all federal sentencing.[147]

The original guidelines made some movement away from leniency and parole and toward imprisonment for white-collar offenders.[148] This was largely a measure meant to combat the disparity between traditional crime and white-collar crime sentences, which was unjustifiable for a system claiming blind justice and equality of

142 *See* Ribstein, *supra* note 13, at 860.

143 Lawrence S. Goldman & Jill R. Shellow-Levine, *Pre-Indictment Representation in White-Collar Cases*, 24 CHAMPION 18, 19 (2000).

144 *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 29 (1997).

145 Buell, *supra* note 133, at 829.

146 *Id.* at 833.

147 *Id.*

148 *Id*. at 834.

punishment.[149] Amendments in the following decades, however, turned a corrective measure into an about-face, making the sentencing of white-collar criminal defendants increasingly harsh.[150]

Additionally, the Sarbanes-Oxley Act was passed in 2002 and was meant to address corporate crime while also changing the sentencing framework for white-collar crime.[151] The changes affected harsher sentences for white-collar defendants by including sentencing enhancements for white-collar offenses that "affect a large number of victims or endanger the solvency or financial security of publicly traded corporations, other large employers, or 100 individual victims."[152] The act also sought to ensure that white-collar offenders would serve time in federal prisons, rather than half-way houses.[153]

In *Missouri v. Frye*, a case dealing with the right to effective assistance of counsel at the plea bargaining stage, Justice Kennedy recognized that sentences that may be longer than appropriate appear on the books mainly because such disconcerting sentences can serve as a tool for the prosecutor to bargain with, rather than as a judgment by Congress or the prosecutor that such a sentence is deserved.[154] The combination of prohibitive costs and unnerving sentences amounts to a form of coercion in which defendants have no financial ability to effectively defend themselves and win in the face of a massive sentence, so they must accept the lesser sentence offered in a plea bargain.[155] While this Comment is not making a judgment regarding the justice of American criminal sentencing in either the traditional or white-collar context, the reality of this exposure does inform the conversation.

V. *BRADY*, PLEAS, AND THE WHITE-COLLAR CONTEXT

The complexity embedded within the prosecution and defense of white-collar crime creates pressures on the defendant to enter into guilty pleas. The actus reus elements are broad. The mens rea elements are more complex, less defined, and more relied upon, meaning that the prosecutor will have a harder time proving them, and the defendant will have more fear that they will be misconstrued. The defendant himself

149 *Id*. at 833–34.

150 *Id*. at 834.

151 *See* Jamie L. Gustafson, *Cracking Down on White Collar Crime: An Analysis of the Recent Trend of Severe Sentences for Corporate Officers*, 40 SUFFOLK U. L. REV. 685, 692 (2007).

152 *Id.* at 693.

153 *Id*.

154 *See* 566 U.S. 134, 144 (2012).

155 Ribstein, s*upra* note 13, at 860.

may not even know if his or her actions are criminally punishable. These considerations create a distinct need for *Brady* material at the plea bargaining stage of white-collar prosecution. Vague actus reus grants the prosecutor enormous amounts of discretion that can be exercised in charging decisions by allowing for "gray-area" prosecutions, which prosecute "behavior that does not plainly fall within the scope of the criminal statute."[156] Where wide discretion exists, so too should protections to counteract that discretion. The expansion of *Brady* material to the plea bargaining stage would create an added protective mechanism that would help to counteract the pressures placed on defendants to plead guilty. In the white-collar space, where wide discretion for prosecutors and unique pressures on defendants exists, this expansion is just as necessary as it is for the traditional criminal case. Given the argument that substantive white-collar criminal law is less favorable to defendants than traditional criminal law,[157] this may, in fact, be one area where it is possible to argue that it is even *more* imperative to the white-collar defendant that a *Brady* expansion takes place.

It is important to note that the analysis of white-collar crime does not come at the expense of similar arguments for traditional crime, or criminal law in general. This discussion is meant to highlight a piece of the rights-expansion argument that has been excluded in academic focus. The distinct implications for white-collar defendants should not be equated with an argument that these considerations are superior or more imperative; they are simply co-existent and parallel. For this reason, the expansion of *Brady* into the plea bargaining stage would serve as an important safeguard on the rights of white-collar defendants, just as it would for traditional criminal defendants. Ignoring this importance in favor of a focus on traditional crime disregards compelling justifications that exist in favor of the expansion of *Brady* rights.

The turning over of exculpatory evidence would give the white-collar defendant a more accurate picture of the outcome of a potential trial. The issues in white-collar crime are complex and mens rea focused. Access to exculpatory evidence will give the white-collar defendant a more accurate outlook on his or her defense, and whether or not there is a significant chance that his or her mens rea will be inferred to be criminally culpable.

156 Strader, *supra* note 7, at 49.

157 Buell, *supra* note 133, at 888.

Turning over exculpatory evidence would also not interfere with the "White Collar Rationale" espoused by the Court. The White-Collar Rationale deals with the *investigation* of white-collar crime. In other words, it is a recognition by the Court that placing obstacles in the way of government investigation will create more ways for defendants to shield their wrongdoing. This important goal would not be impacted by the expansion of *Brady*. *Brady* gives defendants access to government evidence when it is material and exculpatory. This would in no way impede the government's investigation of the crime. By necessity, the investigation has already happened, and the government simply must share in the fruits to ensure that justice is done.

The exorbitant costs of defending against a white-collar prosecution mean that many defendants will have no option but to plead guilty. While we typically consider white-collar defendants to be wealthier, the costs involved in defending a long and complex white-collar trial are extremely high, making it impossible for the average individual to defend. This dynamic means that the white-collar defendant is pressured to plead guilty. If the *Brady* right applied to such a guilty plea, there would be less concern that an innocent individual would plead guilty simply by virtue of costs. Provided with exculpatory evidence, the white-collar defendant may be able to equalize his or her knowledge with that of the traditional criminal defendant, whose conscience stands as a barricade to an innocent plea. The white-collar defendant will often not have the sense of reassurance that his or her factual innocence will prevail, because he or she may not know that such factual innocence exists. With exculpatory evidence, the defendant can better assess the government's case, which means they can better assess their guilty plea, resulting in a more favorable plea, a willingness to go to trial, or the prosecutor dropping charges that cannot be proved. The alternative is an under-informed guilty plea driven by fear of costs and harsh sentencing without knowledge of evidence that would tend to show innocence. Such a dynamic cannot be sustained in a justice system that is built around the premise of a search for truth.

Exculpatory evidence will also help to lessen the fear imposed on white-collar defendants by high federal sentencing guidelines. Harsher sentencing guidelines that came in response to what was perceived to be unfair leniency to the corporate and white-collar defendant mean that the possibility for a frightening outcome at trial informs the defendant's willingness to plea bargain, exerting pressure on the defendant and acting as a tool for the prosecutor. In fact, Section 2B1.1 of the Federal Sentencing Guidelines, which deals with economic crimes, has been particularly criticized for yielding sentences that are

disproportionate to the culpability of the defendant.[158] This section of the guidelines allows for large sentencing enhancements based on the amount of loss that occurred or was intended to occur, meaning that a sentence can be drastically extended based on such monetary results.[159] For instance, in a securities fraud case, *United States v. Adelson*, US District Court Judge Rakoff recognized that the guidelines would call for life-imprisonment and stated that such a result showed that the "guidelines have run so amok that they are patently absurd on their face."[160] Because of these high sentences, white-collar defendants who fall under this section, and other white-collar sections as well, face unnerving pressure to plead guilty. This places extraordinary power in the hands of prosecutors to obtain guilty pleas. This is exhibited through the thorough documentation of the practice of overcharging as a tool for plea negotiations.[161] Through access to exculpatory evidence, the white-collar defendant will have a better sense of what charges have the possibility of sticking, and which do not. He or she will know that certain charges are impossible to pursue and have information relating to punishment. If evidence exists that would reduce the level of punishment imposed on a defendant, that will help to better inform the guilty plea.

It is important to note, however, that the white-collar defendant will frequently proffer—i.e., give the government evidence of his or her culpability—before the guilty plea.[162] Because such proffers often occur pre-indictment, especially in the white-collar context where prosecutors are more willing to discuss the case pre-indictment,[163] many white-collar defendants will have admitted culpability before any *Brady* material would necessarily reach them even if the expansion of *Brady* to plea bargaining were to be achieved. Although outside the scope of this Comment, this may present an argument for an even greater extension of the *Brady* right into the realm of pre-indictment proffer agreements. The practice of proffering in white-collar crime shows that *Brady* expansion to plea bargains would not solve all fairness

158 *See* THE TRIAL PENALTY, *supra* note 14, at 343.

159 *See id*.

160 441 F. Supp. 2d 506 (S.D.N.Y. 2006).

161 *See generally* Mike Work, *Creating Constitutional Procedure:* Frye, Lafler, *and Plea Bargaining Reform*, 104 J. CRIM. L. & CRIMINOLOGY 457, 478–80 (2014).

162 *See* Benjamin Naftalis, *"Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules*, 37 COLUM. J.L. & SOC. PROBS. 1, 13 (2013) ("The pressure to cooperate with the government is particularly strong white-collar cases . . . .").

163 Goldman & Shellow-Lavine, *supra* note 143, at 71.

issues for white-collar defendants but would nonetheless be an important step in the right direction.

Lastly, the availability of exculpatory evidence will also help to assure that guilty pleas are entered into based upon actual guilt. The aim of the prosecutor is that "guilt shall not escape or innocence suffer."[164] The expansion of *Brady* into the plea bargaining context would have the effect of ensuring that the combined pressures discussed in this article do not amount to a coercive dynamic where the innocent white-collar defendant feels the need to plead guilty to escape the mere possibility of a stiffer sentence after trial. While the possibility of an innocent defendant pleading guilty is mentioned last in this article, it is merely because such a possibility is a byproduct of the factors discussed earlier. The discussion over substantive and procedural rights in the criminal space should always express concern over finding guilt and revealing innocence, and this Comment is so concerned.

VI. CONCLUSION

The need for the expansion of *Brady* material into the plea bargaining context is paramount. Plea bargains constitute the vast majority of criminal adjudications, and protections built to protect the rights of defendants during trial cannot be blind to the fact that the jury trial has receded to the background. To protect constitutional rights, *Brady* rights must be transplanted into the plea bargaining context. The white-collar crime arena has distinct considerations informing this debate, and counseling in favor of the expansion, which should not be ignored by those wishing to create that expansion. White-collar crime criminalizes broad actus reus, thereby relying on mens rea and creating a body of substantive law that may be even less favorable to defendants than traditional criminal law. The intricate legal issues involved will create an inordinately expensive defense. High sentencing guidelines set the backdrop for this array of factors exerting pressure on a white-collar defendant and prosecutor. This combination of pressures, unique to the white-collar space, makes a white-collar defendant likely to plead guilty, even though innocent. Expanding the *Brady* right to plea bargaining would give the white-collar defendant a better understanding of his or her defense and a better outlook on the realistic opportunity for success at trial, diminishing the likelihood of a guilty plea when, in fact, the defendant is innocent. Those wishing to make this

[164] United States v. Agurs, 427 U.S. 97, 111 (1976) (quoting Berger v. United States, 296 U.S. 78, 88 (1935)).

system more just should use the white-collar context as an important piece of their argument to expand *Brady* to plea bargaining.