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## TOWARD ETHICAL PLEA BARGAINING

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Defendants in criminal cases are overwhelmingly more likely to plead guilty than to go to trial. Presumably, at least a part of the reason that most of them do so is that it is in their interest to plead guilty, *i.e.*, they will receive a more favorable outcome if they plead guilty than if they go to trial. The extent to which pleas reflect fair or rational compromises in practice, however, depends upon a variety of factors, including the amount of information each of the parties has about the case. Some level of informational symmetry therefore is critical to the plea process. Unfortunately, defendants currently have limited constitutional rights to pre-plea discovery, and prosecutors pre-plea have every incentive to conceal information that might be helpful to defendants. Further compounding the problem, prosecutors in some jurisdictions require as a condition of all pleas that defendants waive any rights they may have to pre-plea disclosures from the government. Because the failure to disclose impeachment or exculpatory information seriously undermines the accuracy and just operation of the plea process, the ethical rules governing prosecutors should be interpreted to require pre-plea disclosure of exculpatory information and impeachment information. While as a practical matter it ultimately would be up to defense counsel to guarantee that prosecutors comply with such an ethical obligation, these rules at the very least would give defense counsel a tool to obtain helpful information so that they can more accurately assess whether pleading guilty is in a client's best interest.

### I. THE IMPORTANCE OF PRE-PLEA DISCLOSURE OF EXCULPATORY AND IMPEACHMENT EVIDENCE

The vast majority of criminal cases in this country are resolved through guilty pleas. In state courts, criminal defendants charged with

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felonies are over twenty times more likely to plead guilty than go to trial.<sup>1</sup> The difference is just as dramatic in the federal criminal justice system, where 86% of felony defendants plead guilty, and just over four percent choose to go to trial.<sup>2</sup> Many factors may lead defendants to plead guilty,<sup>3</sup> but providing defendants with access to information about the case—in particular exculpatory or impeachment information—before the guilty plea is critical to ensuring an accurate and equitable plea process.<sup>4</sup>

First, pre-plea access to exculpatory and impeachment information is necessary to the accuracy of the plea process, *i.e.*, assuring that only factually guilty defendants plead guilty. Some argue that requiring pre-plea disclosure does not enhance the accuracy of pleas because defendants will not plead guilty unless they in fact committed a crime, and they are in the best position to know whether or not they committed the crime.<sup>5</sup> This view relies on the faulty assumptions that: (1) factually innocent defendants will not plead guilty, and (2) defendants always know whether or not they committed a crime.<sup>6</sup>

In fact, there are many reasons that factually innocent defendants may decide to plead guilty if they do not have access to exculpatory or

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<sup>1</sup> In 2002, roughly sixty-five percent of felony defendants in state court pleaded guilty, while less than three percent of felony defendants went to trial. *See* BRIAN J. OSTROM ET. AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 61 (2003), *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=411> (noting that 65% of defendants in 17 state court systems pleaded guilty, while only 3% of defendants in those same jurisdictions went to trial). Similarly, the Bureau of Justice Statistics estimates that in 2004, sixty-six percent of state court felony defendants in the country's 75 largest counties pleaded guilty, while only three percent went to trial. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004—STATISTICAL TABLES, TABLE 19 (2008), *available at* <http://www.ojp.usdoj.gov/bjs/pub/html/fdluc/2004/tables/fdluc04st19.htm>.

<sup>2</sup> *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 2002 11 (2005), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp02.pdf>. The remaining defendants had cases against them dismissed. *Id.*

<sup>3</sup> *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 (2004) (arguing that rational calculations regarding likelihood of conviction at trial and potential sentencing differentials do not fully account for plea decisions, and that many other factors, including lawyer quality and bail decisions, also influence decisions to plead guilty); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 448 (2001) (“A defendant’s decision to plead guilty, and the terms of the bargain, will depend to some degree on an assessment of the risks of conviction.”).

<sup>4</sup> *See* Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 655-57 (2007) [hereinafter McMunigal, *Guilty Pleas*].

<sup>5</sup> *See, e.g.*, Douglass, *supra* note 3 (arguing that recognizing a pre-plea *Brady* obligation may not increase the amount of information that a defendant has).

<sup>6</sup> *See* McMunigal, *Guilty Pleas, supra* note 4 at 655-57; Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989) [hereinafter McMunigal, *Disclosure and Accuracy*]; Corinna Barrett Lain, *Accuracy Where it Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1 (2002).

impeachment information before their plea.<sup>7</sup> Innocent defendants often have less information about the case against them than guilty defendants and therefore cannot accurately evaluate the strength of the case against them.<sup>8</sup> For instance, an innocent defendant who is charged with murder and who was not present at the scene when the homicide occurred may not know (because he was not there) that there were witnesses to the shooting who could exculpate him. Innocent defendants also may be more risk averse than guilty defendants, and, if they are unaware of potentially exculpatory evidence, they may prefer the certainty of a plea to the uncertainty of trial.<sup>9</sup> This is especially true in a world of increasingly severe sentences, many of which are controlled by prosecutors. Innocent defendants faced with draconian penalties who are offered substantially reduced sentences in exchange for their guilty pleas, and who are unaware of exculpatory or impeachment evidence, may believe the chances of success at trial do not outweigh the risk of a higher sentence that may be imposed upon conviction at trial.<sup>10</sup>

In addition, although some defendants may know whether they committed the offense, others lack basic facts regarding their own actions.<sup>11</sup> For example, if the defendant was intoxicated during an altercation, he may not have a particularly clear memory (or he may distrust his memory) of whether he committed the crime with which he is charged. That defendant relies on the testimony of others for information about his own conduct, and lack of access to exculpatory information or evidence may lead such defendant to plead guilty even if he is not.

Second, pre-plea access to exculpatory and impeachment information helps mitigate the potential for inequity in the plea process. Ideally, plea bargains should discount the sentence in the event of conviction at trial by the probability that the defendant will be convicted at trial. Thus, if there is a 50% chance that the defendant would be convicted at trial and would receive a ten year sentence, the plea should carry with it a sentence of five years. Unfortunately, the reality of plea bargaining strays far from that model.<sup>12</sup> Factors completely unrelated to

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<sup>7</sup> See Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, 23 A.B.A. SEC. CRIM. JUST. 28 (2008) (describing cases in which factually innocent defendants pleaded guilty).

<sup>8</sup> See Bibas, *supra* note 3, at 2494.

<sup>9</sup> See *id.* at 2509-10. This problem is exacerbated if the defendant does not believe that his lawyer will sufficiently investigate and litigate his case.

<sup>10</sup> See McMunigal, *Guilty Pleas*, *supra* note 4, at 661 (“[T]he existence of exculpatory information weakening the prosecutor’s case creates an incentive for the prosecutor to offer a very large discount on the potential sentence . . . . This discount in turn creates a very large incentive for false self-condemnation.”).

<sup>11</sup> See McMunigal, *Disclosure and Accuracy*, *supra* note 6, at 972-984; see also Bibas, *supra* note 3, at 2494.

<sup>12</sup> See Bibas, *supra* note 3, at 2470-96. As Professor Bibas has so persuasively argued,

the strength of the government's case, including the quality of counsel and the bail status of the defendant, may affect the bargains defendants are offered and accept.<sup>13</sup> Lack of information about impeachment or exculpatory evidence exacerbates the inequity of the plea process because without access to this information, defendants have no leverage to obtain pleas that accurately reflect the strength of the government's case against them.<sup>14</sup> Access to exculpatory and impeachment evidence therefore is critical not only to an accurate plea bargaining process, but also to making this process equitable.

## II. THE PRE-PLEA INFORMATIONAL IMBALANCE

Unfortunately, the reality is that a serious pre-plea informational imbalance exists—prosecutors generally have far more information about the strengths and weaknesses of cases than do defense counsel. For instance, in the federal system and in states that require a grand jury indictment, the government must present sufficient evidence and witnesses to convince a grand jury that there is probable cause to charge the defendant.<sup>15</sup> Even in most states where cases proceed by information rather than grand jury indictment, the defendant has a right to a preliminary bindover hearing, at which the government must call witnesses to establish its case.<sup>16</sup> Because of these requirements, prosecutors must interview at least some of their witnesses early on in the case and therefore ordinarily have much more information about the strength of their case at that stage than do defense counsel.<sup>17</sup> At least

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structural influences unrelated to the strength of evidence against the defendant “such as lawyer quality, agency costs, bail and detention rules, sentencing guidelines and statutes, and information deficits” have skewed plea bargaining. *Id.* at 2468.

<sup>13</sup> *Id.* at 2479-80. Most troubling, indigent defendants may receive less favorable plea offers because court-appointed counsel may not have the time or bargaining power to negotiate more favorable pleas and because indigent defendants are less likely to be released from jail on bail pending trial. *See id.*

<sup>14</sup> *Id.* at 2494-96.

<sup>15</sup> Although a majority of states do not require indictments, there are still a number of states in addition to the federal system that do require them in felony cases.

<sup>16</sup> In *Lem Woon v. Oregon*, 229 U.S. 586 (1913), the Supreme Court held that the Due Process Clause does not give the defendant a right to a preliminary hearing, but the vast majority of states still provide defendants with that right.

<sup>17</sup> This is not to suggest that prosecutors have perfect information early on in their cases. But the fact remains that at early stages, they are more likely to have a greater amount of information than defense counsel. And while defense counsel have an ethical obligation to investigate the facts and law of a case before making a recommendation that a client accept a plea (*see* CRIM. JUST. SEC. STANDARDS § 4-6.1(B) (“Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.”)), it remains the case that overworked defense counsel are unlikely to investigate cases pre-plea.

some of this information could have a significant impact on the defendant's decision on a plea offer. For instance, if a prosecutor knows that a witness has given police a statement exculpating the defendant, that fact may well cause the defendant to decide to go to trial. Similarly, the fact that the key witness against the defendant has a perjury conviction on his record may affect the defendant's decision about whether to accept a plea. At the very least, possession of this type of information would appear to put the defendant in a better position to negotiate a more favorable plea.

For many years, those in favor of requiring pre-plea disclosure of both traditional exculpatory evidence and impeachment evidence have argued not only that the Constitution requires such disclosure, but also that the Constitution is the best mechanism to ensure full disclosure.<sup>18</sup> The government's disclosure obligations in criminal *trials* are the subject of well-known constitutional law. Criminal defendants have a constitutional right to disclosure of all evidence that is favorable to the accused, in the possession of the government, and material to guilt or punishment.<sup>19</sup> The right to evidence "favorable to the accused" includes both exculpatory evidence and impeachment evidence.<sup>20</sup> The constitutional rule, moreover, applies to evidence in the possession of not only the prosecutor but also other government attorneys and police officers.<sup>21</sup>

While this disclosure obligation appears relatively broad, the Court's definition of materiality has limited the circumstances under which defendants can obtain relief for its violation.<sup>22</sup> In *Bagley*, a plurality of the Court concluded that a defendant is entitled to reversal of his conviction only if the undisclosed evidence is material, and "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."<sup>23</sup> Although this standard imposes a higher burden for the defendant than the ordinary harmless error standard, the decisions in *Brady* and its progeny still have resulted in pre-trial disclosure of a great deal of exculpatory and impeachment evidence.

While *Brady* provides a valuable tool for pre-trial disclosure of

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<sup>18</sup> See McMunigal, *Disclosure and Accuracy*, *supra* note 6, at 1005-06 (arguing that recognizing a constitutional disclosure obligation "would likely be the most effective" way of ensuring that the evidence is disclosed).

<sup>19</sup> See *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S. 667 (1985).

<sup>20</sup> See *Giglio v. United States*, 405 U.S. 150 (1972); *Bagley*, 473 U.S. at 676. Impeachment evidence is information that could be used to undermine the credibility of a government witness.

<sup>21</sup> See *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

<sup>22</sup> Steven H. Goldberg, *What Was Discovered in the Quest for Truth?*, 68 WASH. U. L.Q. 51, 56 (1990); H. Lee Sarokin and William E. Zuckermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089 (1991).

<sup>23</sup> *Bagley*, 473 U.S. at 682.

exculpatory information, it does not appear that the Constitution is a particularly viable, or effective, method of ensuring *pre-plea*, as opposed to pre-trial, disclosures. This is so for two reasons: (1) it appears unlikely that there is a constitutional right to *Brady* evidence pre-plea, and (2) even if there is such a right, it is very difficult to obtain relief for a violation of that right.

The Supreme Court has held that the Constitution does not require the government to disclose impeachment evidence before pleas.<sup>24</sup> In *Ruiz*, the Supreme Court held that the Fifth and Sixth Amendments do not require that the government disclose, before entry of a defendant's guilty plea, any impeachment information that would otherwise be subject to disclosure at trial.<sup>25</sup> While the issue in *Ruiz* was limited to pre-plea disclosure of *impeachment* evidence, rather than traditional exculpatory *Brady* evidence,<sup>26</sup> it appears unlikely that the Court will come to a different conclusion for the pre-plea disclosure of *Brady* information. At least some of the reasons it gave for concluding that the right to disclosure of impeachment evidence relates to trials and does not extend to pleas apply equally to traditional *Brady* evidence. For instance, the Court reasoned that "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*."<sup>27</sup> It would appear that exculpatory *Brady* information, like impeachment information, would relate to the fairness of the trial, rather than to whether the defendant's plea is voluntary. The Court, moreover, has taken pains to reject distinctions between exculpatory and impeachment evidence.<sup>28</sup> Although the Court also highlighted the special risks of requiring the government to disclose impeachment evidence before a plea—namely the risk that disclosure might jeopardize the safety of government witnesses—it certainly is far from clear that the Supreme Court would recognize a pre-plea right to *Brady* information.

Even if the Court ultimately concludes that there is a constitutional right to disclosure of *Brady* evidence before a plea, the standards that

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<sup>24</sup> See *United States v. Ruiz*, 536 U.S. 622 (2002).

<sup>25</sup> *Id.* at 625. The presentation of the issue in *Ruiz* was complicated somewhat by the fact that the defendant was challenging the government's requirement (as a condition of its plea offer) that she waive disclosure of impeachment information. Nonetheless, the Court made clear that it was deciding "whether the Constitution requires . . . preguilty plea disclosure of impeachment information," *id.* at 629, and it made equally clear that its answer to that question is "no."

<sup>26</sup> The Court noted that the government's "proposed plea agreement . . . specifies [that] the Government will provide 'any [known] information establishing the factual innocence of the defendant' . . .". See *id.* at 631. Although the exculpatory information the government agreed to provide is somewhat narrower than the information covered by *Brady*, the Court made clear throughout the opinion that it was addressing only impeachment information. *Id.*

<sup>27</sup> *Id.* at 629 (emphasis in original).

<sup>28</sup> See *United States v. Bagley*, 473 U.S. 667, 676 (1985) (rejecting the defendant's effort to distinguish between impeachment and exculpatory evidence).

courts have established in order for defendants to prevail on such claims are almost impossible to meet.<sup>29</sup> A couple of courts of appeals post-*Ruiz* have allowed defendants to challenge the voluntariness of their guilty pleas based upon the failure of the government to disclose exculpatory evidence,<sup>30</sup> but the circumstances under which courts conclude that a defendant is entitled to prevail on such a claim are very narrow.<sup>31</sup> Part of the reason for this relates to the showing of “materiality” that a defendant must demonstrate. In order to prevail on a claim that the government violated defendant’s right to *Brady* evidence before trial, a defendant must establish “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>32</sup> In the guilty plea context, there has been some confusion regarding how this standard should apply, but a showing of materiality appears to require the defendant to show, at the very least, that “there is a reasonable probability that but for the failure to produce such information the defendant would not have entered the plea but instead would have insisted on going to trial.”<sup>33</sup> The difficulty is that for defendants who have already pleaded guilty, it is nearly impossible to establish that they would have acted differently in light of the undisclosed evidence.<sup>34</sup> Particularly where the record is unclear regarding what the defendant knew when he decided to enter into his plea (or where the record contains only the defendant’s testimony), it is difficult to establish how

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<sup>29</sup> I recognize that determination of a prosecutor’s pretrial disclosure obligation should be and is a different matter from determination, after a failure to disclose, of whether the defendant is entitled to a reversal of his conviction on appeal. See Yaroshefsky, *supra* note 7. Nonetheless, prosecutors inevitably rely on the difficulty of meeting the appellate standard when deciding whether to disclose exculpatory or impeachment material. As such, as a practical matter, the appellate standard defines the parameters of disclosure.

<sup>30</sup> See, e.g., *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006); *Smith v. Baldwin*, 510 F.3d 1127 (9th Cir. 2007).

<sup>31</sup> For instance, in *Ferrara*, 456 F.3d at 2, the First Circuit concluded that the government’s failure to disclose exculpatory evidence could render a plea involuntary only if it was “sufficiently outrageous” or when the defendant’s misapprehension about the strength of his case “results from some particularly pernicious form of impermissible conduct that [implicates] due process concerns.”

<sup>32</sup> *Bagley*, 473 U.S. at 682.

<sup>33</sup> See *United States v. Avellino*, 136 F.3d 249 (2d Cir. 1998) (quoting *Tate v. Wood*, 963 F.2d 20, 24 (2d Cir. 1992)); see also *Baldwin*, 510 F.3d 1127; *Lain*, *supra* note 6, at 38 (concluding that “courts have thus far unanimously required defendants to show a reasonable probability that with *Brady* disclosure, they would have insisted upon going to trial.”)

<sup>34</sup> See *Douglass*, *supra* note 3, at 477 (“The post-plea *Brady* standard is so hypothetical, so flexible, and so diluted that it offers little more than an illusion of protection for most defendants.”). Another problem for defendants is that this standard may require the defendant to show not only that he would have chosen to go to trial if the evidence were disclosed, but also that he would have been acquitted at trial. See *Lain*, *supra* note 6, at 42-43 (“[T]he problem with using the ‘insist upon trial’ materiality standard to judge post-guilty plea *Brady* claims becomes clear: defendants can only meet it where the suppressed *Brady* evidence is strong enough to plummet the chance of conviction at trial.”).

and why the additional information would have made a difference.<sup>35</sup> Given these difficulties, even defendants in jurisdictions recognizing a pre-plea *Brady* obligation who have been able to establish that the government withheld exculpatory information pre-plea have been unlikely to succeed in gaining relief.<sup>36</sup>

Finally, prosecutors in at least some jurisdictions appear to require waivers of any right to disclosure of exculpatory information or evidence as a condition of guilty plea offers.<sup>37</sup> While a court may be unlikely to enforce such a waiver if it were to conclude that there is a right to pre-plea disclosure of exculpatory evidence,<sup>38</sup> the Supreme Court has held that a defendant can waive certain constitutional rights during the guilty plea process.<sup>39</sup> The government certainly will argue that a waiver is enforceable, and perhaps most importantly, if the plea agreement includes such a waiver, prosecutors will believe that they are not required to disclose any *Brady* information to defendants before pleas, and they therefore will not disclose that evidence.<sup>40</sup> For all of

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<sup>35</sup> See Douglass, *supra* note 3, at 478-80.

<sup>36</sup> Professor Douglass also argues that recognizing a right to pre-plea disclosure of exculpatory and impeachment evidence will result in the disclosure of less evidence than defendants currently receive because prosecutors provide a great deal of *inculpatory* evidence to the defendant in order to convince him to accept a guilty plea. According to Professor Douglass, if the government knows that it is required to disclose exculpatory and impeachment evidence, and it also knows that the extent to which the evidence is exculpatory or impeaching will depend on defendant's knowledge of the government's inculpatory evidence, it will not disclose the inculpatory evidence, thus resulting in a net loss of information for the defendant. See Douglass, *supra* note 3 at 483-85. This argument misses the point that if the inculpatory evidence is mitigated by impeachment evidence, disclosing only the inculpatory evidence will mislead the defendant into believing that the government's case is stronger than it is, so the net loss of that inculpatory information may not harm the defendant as much as the provision of only the inculpatory information.

<sup>37</sup> See Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 568-70 (noting practice of U.S. Attorney's offices in California to require disclosure waivers as a condition of plea); Douglass, *supra* note 3, at 509-10 (observing that prosecutors in California "have placed explicit 'Brady waivers' in standard plea agreements.")

<sup>38</sup> See Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2040-41 (2000) (arguing that the Court should not enforce plea-bargain waivers of right to disclosure). The Ninth Circuit held that requiring the defendant to waive her right to disclosure of impeachment evidence was unconstitutional, see *United States v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001), but the Supreme Court reversed on the ground that there was no constitutional right to pre-plea disclosure of impeachment evidence. See *United States v. Ruiz*, 536 U.S. 622 (2002). At last check, no other circuit had concluded that waivers of disclosure of exculpatory evidence are unconstitutional or unenforceable.

<sup>39</sup> See, e.g., *United States v. Mezzanatto*, 513 U.S. 196 (1995) (enforcing waiver of protections of Rule 410 of the Federal Rules of Evidence, which precludes the government from introducing statements a criminal defendant makes during the course of plea negotiations).

<sup>40</sup> Because discovering *Brady*-type claims after the fact tends to be so difficult, a prosecutor's understanding that he is obliged to disclose facilitates disclosure much more than relying on the after-the-fact procedures. Of course, to the extent that remedies are available for the failure to disclose, such remedies should create disclosure incentives for the prosecution. But if a

these reasons, the Constitution does not provide prosecutors with an incentive to disclose exculpatory or impeachment information before pleas.

III.    ARGUMENTS TO STRENGTHEN THE ETHICS RULES TO REQUIRE PRE-  
PLEA DISCLOSURE BY PROSECUTORS

Because the Constitution does not appear to be a particularly reliable means of ensuring adequate pre-plea disclosures by the government, the disclosure obligation must come from another source if it is to exist. The ethical rules governing prosecutors are a natural source for this obligation because the purpose of the rules is to further the public's interest in a fair process. Unfortunately, the Model Rules of Professional Conduct, as currently interpreted, may not require pre-plea disclosure of any evidence covered by the rule, and it is not clear whether impeachment evidence is even covered by the rule. Accordingly, the rules need to be amended to clarify that the disclosure provisions require pre-plea disclosure and the disclosure of any impeachment information of which the government is aware. Once amended in these ways, the ethical rules governing prosecutors could provide an important tool for requiring disclosure for two reasons. First, there is no materiality requirement under the rules. Second, once a prosecutor has an ethical obligation to disclose, there is a strong argument that the government cannot obtain a waiver of its obligations under the rules.

A.    *The Ethical Rules Should Be Amended to Reflect the Prosecutor's  
Role as Minister of Justice*

Rule 3.8(d) of the Model Rules of Professional Conduct provides: "The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ." <sup>41</sup> Any evidence and information covered by *Brady* that is "known" to the prosecutor is subject to "timely" disclosure under the rule. Unfortunately, the rule never specifies whether "timely" disclosure requires a prosecutor to disclose evidence prior to the entry of a guilty plea. <sup>42</sup>

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prosecutor believes that she has obtained a legitimate waiver, she is unlikely to comply with the disclosure obligation, and it is unlikely that the defendant will discover the undisclosed evidence.

<sup>41</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (1983).

<sup>42</sup> See Douglass, *supra* note 3, at 458 ("The rules require prosecutors to disclose exculpatory

Particularly given the rule's recognition that a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate,"<sup>43</sup> there is certainly a strong argument that even if the Court concludes that the Constitution's fair trial *Brady* requirements do not apply to pleas, the ethical rules nonetheless should require a prosecutor who knows of exculpatory information to disclose that information.<sup>44</sup> An example illustrates the point. A prosecutor in a murder case has one eyewitness who has identified the defendant as the perpetrator. There is physical evidence that is consistent with the witness's identification, but the government's case clearly relies upon the identification by the eyewitness. If that eyewitness later tells the prosecutor that she believes her original identification was tainted by her desire to ensure that someone was arrested and that she can no longer say with any certainty that the defendant is the perpetrator, the prosecutor's failure to disclose that fact to the defense attorney in the course of plea negotiations both undermines the accuracy of the proceeding by increasing the risk that an innocent defendant will plead guilty<sup>45</sup> and involves deception by the prosecutor insofar as he conveys the impression that he could prevail at trial. Because a prosecutor who undermines accuracy and engages in deception violates his obligation to act as a minister of justice, the ethical rules should require the prosecutor to disclose that information. Despite these arguments, Rule 3.8(d) does not appear to have been enforced against prosecutors who fail to disclose *Brady* evidence before pleas, nor do prosecutors appear to feel obligated by the rule to disclose it.<sup>46</sup> In order to impose this obligation, the rule or comments should explicitly provide that a prosecutor is required to disclose this evidence pre-plea in order to comply with the rule.

Rule 3.8(d) is similarly ambiguous with respect to whether *Giglio-*

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information in a 'timely fashion,' though they are ambiguous as to whether that means in time for trial or in time for an informed plea."); McMunigal, *Disclosure and Accuracy*, *supra* note 6 at 1025 (noting that the "ethical rules dealing with the prosecutorial duty make no mention of plea negotiations or guilty pleas. Rather, they reflect the same ambiguity about disclosure in the plea context as the constitutional *Brady* rule does.").

<sup>43</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8(d) cmt 1 (1983).

<sup>44</sup> This Essay focuses on the Model Rules of Professional Conduct, but similar arguments can be made under the American Bar Association Standards Relating to the Administration of Criminal Justice. For example, Standard 3-3.11, which has been adopted in at least some jurisdictions, contains some of the same ambiguities as those presented in Rule 3.8(d), but there appears to be a stronger argument that it covers pre-plea disclosures. This standard prohibits prosecutors from failing to make "timely disclosure" of evidence tending to negate the guilt of the accused, but it also provides that timely disclosure should be "at the earliest feasible opportunity." CRIM. JUST. SEC. STANDARDS § 3-3.11.

<sup>45</sup> See *supra* notes 7-11 and accompanying text.

<sup>46</sup> See Douglass, *supra* note 3, at 458 n.86 ("My own research has uncovered no legal ethics opinion applying a *Brady*-like obligation to prosecutors in plea bargaining, and no reported case of a prosecutor subjected to disciplinary action for failing to disclose exculpatory information in advance of a plea.")

type impeachment evidence constitutes “evidence that tends to negate the guilt of the accused.” Some impeachment evidence clearly falls within the mandate of the rule. For instance, if a key witness against the defendant recants an earlier inculpatory statement and says that the defendant was not involved, that recantation could be used to impeach the testimony of the witness at trial but it also is clearly exculpatory evidence for the defendant “tending to negate his guilt.”<sup>47</sup> But other impeachment evidence—such as evidence that a key witness has a motive to lie or has a damaging record of committing perjury—is not so clear. While this evidence may tend to negate the guilt of the defendant in the sense that it makes it less likely that the witness is telling the truth, it does not necessarily establish the factual innocence of the defendant in the same way as the earlier example of the witness who says that the defendant was not the perpetrator.<sup>48</sup>

The rule and its commentary provide no guidance regarding whether it covers the latter type of impeachment evidence. There is some indication, however, that the drafters intended to cover impeachment evidence, since the drafting committee specified that “[w]ith regard to whether information is exculpatory, see *Giglio v. United States*, 405 U.S. 150 (1972).”<sup>49</sup> More recently, the Ethics 2000 Commission of the American Bar Association considered the applicability of Rule 3.8(d) to impeachment evidence.<sup>50</sup> Although the Commission ultimately failed to specify that Rule 3.8(d) covers impeachment evidence, there at least appeared to be some sentiment in the Commission that Rule 3.8(d) does apply to it. At an early meeting, the Commission established a consensus that it should add a reference to impeachment information to Rule 3.8(d).<sup>51</sup> Several months later, it decided to put the reference to impeachment information in a comment to the rule, rather than including it in the text of the rule.<sup>52</sup> At a later

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<sup>47</sup> See R. Michael Cassidy, “Soft Words of Hope”: *Giglio*, *Accomplice Witnesses*, and the *Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1170 (2004).

<sup>48</sup> *Id.* at 1170.

<sup>49</sup> *Id.* at 1170 n.227. As Professor Cassidy notes, the reference to “exculpatory information” is somewhat confusing, since the rule does not require disclosure of “exculpatory information” and instead uses the phrase “tends to negate the guilt of the accused.” The reference to *Giglio* nonetheless provides at least some evidence that the drafters were thinking, in the context of this rule, about both exculpatory *Brady* evidence and *Giglio* impeachment evidence.

<sup>50</sup> The American Bar Association Commission on Evaluation of the Rules of Professional Conduct, referred to as the Ethics 2000 Commission, was formed in 1998 to evaluate and update the rules. Most of the recommendations of the Commission were adopted by the ABA House of Delegates in 2002. For a fascinating account of the Commission’s failure to impose any additional obligations on prosecutors, see Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573.

<sup>51</sup> See ABA Ctr. for Prof’l Responsibility, Comm’n on Evaluation of the Rules of Prof’l Conduct, Minutes from Dec. 10-12, 1999, Meeting in Amelia Island, Fla., at <http://www.abanet.org/cpr/e2k/121099mtg.html>.

<sup>52</sup> See ABA Ctr. for Prof’l Responsibility, Comm’n on Evaluation of the Rules of Prof’l

meeting, however, the Commission concluded that the proposed changes unnecessarily duplicated the Rules' requirement that prosecutors comply with the Constitution.<sup>53</sup> Ultimately, then, despite the fact that the Commission initially unanimously agreed that Rule 3.8 should require the disclosure of impeachment evidence, the Commission did not recommend any changes to Rule 3.8(d) or its commentary.<sup>54</sup>

The bottom line is that it is unclear whether Rule 3.8(d) requires the disclosure of impeachment evidence. As with pre-plea disclosures, however, the ambiguity surrounding the rule's coverage of impeachment evidence may have contributed to an absence of enforcement actions against prosecutors who fail to disclose impeachment evidence.<sup>55</sup> In order to ensure that prosecutors understand that Rule 3.8(d) requires disclosure of impeachment evidence, the comment to the rule initially discussed by the Ethics 2000 Commission should be adopted.

#### B. *The Advantages of the Ethical Rules as a Tool for Disclosure*

Once Rule 3.8(d) is amended to clarify that it requires pre-plea disclosures and that it applies to impeachment evidence, it will be an important first step toward ensuring disclosure by the government.<sup>56</sup> Indeed, as a means of furthering disclosure, the ethical rules offer a

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Conduct, Minutes from Feb. 11-13, 2000, Meeting in Dallas, Tex., at <http://www.abanet.org/cpr/e2k/021100mtg.html>. The fact that the Commission believed it could ensure the Rule's coverage of impeachment evidence by adding relevant language to the comment rather than amending the actual Rule, suggests that the Commission believed that the phrase "tends to negate the guilt of the accused" in the Rule could be legitimately interpreted to encompass impeachment evidence. See MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 14 (1983) ("Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.").

<sup>53</sup> See ABA Ctr. for Prof'l Responsibility, Comm'n on Evaluation of the Rules of Prof'l Conduct, Minutes from Mar. 16-17, 2001, Meeting in Charleston, S.C., at <http://www.abanet.org/cpr/e2k/e2k-03-16mtg.html>.

<sup>54</sup> According to one member of the Commission, "[t]he Commission decided against attempting to explicate the relationship between paragraph (d) of this Rule and the prosecutor's constitutional obligations under *Brady* and its progeny." Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 469 (2002).

<sup>55</sup> Cf. Cassidy, *supra* note 47, at 1170 ("[A] review of disciplinary reporters from 1980 to 2002 reveals that no prosecutor in any state has been sanctioned by state bar disciplinary authorities for failing to reveal promises, rewards, and inducements to a government witness under the general 'tends to negate guilt' standard of either Rule 3.8(d) or Code provision DR 7-103(b).").

<sup>56</sup> Of course, amending the Model Rules of Professional Conduct does not ensure that the rule will be adopted in all jurisdictions. Indeed, given the fact that many prosecutors very likely would resist this change, it is doubtful that all, or even many, jurisdictions would adopt it. Nonetheless, amendment of the rule, even in some jurisdictions, still would be a positive change.

couple of advantages over the Constitution. First, Rule 3.8(d), unlike *Brady* and *Giglio*, does not require that the evidence be material in order to be subject to disclosure. Instead, Rule 3.8(d) requires only that the evidence “tend[] to negate the guilt of the accused or mitigate[] the offense.”<sup>57</sup> As discussed above, even in jurisdictions that have recognized a constitutional pre-plea disclosure obligation, the materiality standard poses a significant hurdle for defendants.<sup>58</sup> Because prosecutors know that they do not have a constitutional disclosure obligation unless the evidence is material, and because a prosecutor’s assessment of materiality may be even less generous than the Court’s, it is very likely that the constitutional materiality requirement significantly limits the amount of evidence that actually is disclosed to defendants. The absence of a materiality requirement in Rule 3.8(d) makes a prosecutor’s obligation to disclose much more definite, and it therefore should result in a higher rate of disclosure than has previously occurred.<sup>59</sup>

Of course, Rule 3.8(d) requires less disclosure than the constitutional rule in the sense that it only obligates prosecutors to disclose “evidence or information known to the prosecutor.”<sup>60</sup> Thus, while the constitutional rule requires disclosure of information in possession of any government agent, *i.e.*, other government lawyers and the police,<sup>61</sup> Rule 3.8(d) requires disclosure only if the prosecutor knows of the evidence or information. Limiting the ethical rule’s disclosure obligation in this way makes sense because the focus of the ethical rule is on the conduct of the prosecutor. As a practical matter, this limitation also alleviates the rule’s burden on prosecutors. It is certainly possible that prosecutors will take affirmative steps to shield themselves from exculpatory and impeachment evidence so that they do not have an obligation to disclose. But given the current system in which the prosecutor is essentially free from any pre-plea disclosure requirements, a Rule 3.8(d) mandate would provide a net gain in information.

The second advantage of using Rule 3.8(d) to enforce pre-plea disclosure obligations is that a prosecutor may not be able to discharge the requirement by obtaining a waiver from the defendant. As

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<sup>57</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (1983).

<sup>58</sup> See *supra* notes 32-38 and accompanying text.

<sup>59</sup> There is one other way in which the disclosure obligation of Rule 3.8(d) potentially is broader than that of the Constitution. Rule 3.8(d) requires disclosure of both “evidence” and “information,” while the Constitution appears to require only the disclosure of evidence. See, *e.g.*, *United States v. Bagley*, 473 U.S. 667, 674-75 (1985) (describing the Court’s earlier rulings as requiring the disclosure of “evidence”). Arguably, then, Rule 3.8(d) would require disclosure of exculpatory information that would not be admissible at trial, but the Constitution would not require disclosure of such information.

<sup>60</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (1983).

<sup>61</sup> See *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

discussed above, prosecutors in at least some jurisdictions currently require the defendant to waive any right to disclosure as a condition of a plea. There is a strong argument, however, that defendants cannot waive a prosecutor's Rule 3.8(d) obligations. In general, the Rules of Professional Conduct are designed to further the public's interest, rather than to promote the benefit of specific parties.<sup>62</sup> Rule 3.8 in particular recognizes that a "prosecutor has the responsibility of a minister of justice . . . . This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."<sup>63</sup> Because the obligations set forth in Rule 3.8, including the mandatory disclosure provision, implicate the prosecutor's responsibility for assuring systemic justice, there is a strong argument that an individual defendant should not be able to relieve the prosecutor of those obligations. There is, moreover, no provision under the Rule for the defendant to waive the prosecutor's obligations. While some of the Model Rules of Professional Conduct can be waived,<sup>64</sup> those rules specify the waiver circumstances and requirements.<sup>65</sup> To the extent, then, that the practice of prosecutors in some jurisdictions has been to require waiver of disclosure obligations, Rule 3.8(d) might be the best mechanism for assuring such disclosure.<sup>66</sup>

By far the most potent criticism of the Model Rules as a means for enforcing prosecutor's obligations is that enforcement actions are only infrequently brought, and ethics rules are therefore unlikely to change the behavior of prosecutors.<sup>67</sup> While this argument has force, ethical

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<sup>62</sup> See MODEL RULES OF PROF'L CONDUCT pmb. ¶ 12 (1983) ("The profession has a responsibility to assure that its regulations are conceived in the public interest . . . .").

<sup>63</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1983).

<sup>64</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983) (providing that a client can waive a conflict of interest under certain circumstances); MODEL RULES OF PROF'L CONDUCT R. 4.2 (1983) (prohibiting communication with a represented person unless the other lawyer consents).

<sup>65</sup> See sources cited *supra* note 64.

<sup>66</sup> Professor Douglass argues that defendants benefit from disclosure waivers because those waivers make it more likely that defendants will be advised at their guilty pleas about the disclosure rights they would enjoy if they were to go to trial. See Douglass, *supra* note 3 at 514-16. Professor Douglass, however, assumes that defendants have little right to pre-plea disclosure because of *Brady's* materiality requirement, and that they therefore are not forfeiting any information gain by agreeing to the waiver. *Id.* at 511-514. Because Rule 3.8(d) does not require a showing of materiality, the informational gain from the disclosure would be much greater than any educational benefit the defendant might obtain by signing a waiver.

<sup>67</sup> See, e.g., Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Janet C. Hoefel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133, 1146 (2005) ("[T]he prudent prosecutor is unconcerned about an ethical violation. Even assuming the prosecutor is aware of his duty to disclose favorable evidence under the professional codes . . . , he has never heard of a prosecutor being disciplined for his exercise of discretion in withholding evidence.").

rules still provide a legitimate, albeit imperfect, mechanism for ensuring disclosure. First, all it takes is one well-publicized disciplinary action in order to significantly increase compliance.<sup>68</sup> Second, even if enforcement actions are not brought very frequently, an ethical rule requiring disclosure gives defense attorneys a tool for ensuring that their clients have sufficient information to decide whether to plead guilty. This system, of course, would rely on the diligence of defense counsel in demanding the information and informing prosecutors of their obligations. Many of the protections afforded to defendants in the criminal justice system, however, depend on defense counsel. While such a system is not perfect, it still represents an improvement over a system that fails to provide any protection for defendants. Finally, although there may be at least some prosecutors who follow ethical rules only if they believe there will be a negative consequence for violating them, there are other prosecutors who will follow those rules as long as they know of them. As such, mandatory pre-plea disclosure provisions would have the effect of influencing many, even if not all, prosecutors, resulting in an informational gain for many criminal defendants.

Ethical rules requiring pre-plea disclosure of exculpatory and impeachment information will not solve the pre-plea informational imbalance that currently exists in the criminal justice system. They would, however, provide at least a first step toward ensuring that defendants in the criminal justice system are “accorded procedural justice” and that plea bargaining more closely resembles an ethical enterprise.

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<sup>68</sup> The very public disbarment of Michael Nifong, the former District Attorney in Durham, N.C. illustrates that point. See Duff Wilson, *Prosecutor in Duke Case Disbarred by Ethics Panel*, N.Y. TIMES, June 17, 2007, at 11.