Preplea Disclosure of Impeachment Evidence

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Plea bargaining and guilty pleas are among the most unsavory features of U.S. criminal procedure. In this sordid bazaar of bargained-for justice, the prosecutor dominates the encounter. The prosecutor is authorized to use an array of legally permissible threats to coerce a defendant to accept his offer,[1] to retaliate against a defendant who declines his offer,[2] or to engage in deception and concealment to force the deal.[3] Because they lack knowledge of the evidence and the law-enforcement agenda, courts cannot or will not meaningfully supervise the plea. And given the much harsher consequences of a conviction after trial, a defendant has little choice but to accept the offer. Abuses pervade the guilty-plea process, with the unsettling consequence that millions more defendants are being punished than ever before, often with less justification, and under sloppier procedures.[4]

It is with respect to the prosecutor's power to control the evidence and to decide how much of it to share with a defendant preplea that Professor R. Michael Cassidy aims his critique. In *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment*

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1. *See, e.g.*, Brady v. United States, 397 U.S. 742 (1970); Miles v. Dorsey, 61 F.3d 1459 (10th Cir. 1995); United States v. Pollard, 959 F.2d 1011 (D.C. Cir. 1992).

2. *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978); United States v. Williams, 47 F.3d 658 (4th Cir. 1995).

3. *See* United States v. Ruiz, 536 U.S. 622 (2002); People v. Jones, 375 N.E.2d 41 (N.Y. 1978). *Jones* held that a prosecutor was not required to disclose during plea negotiations that a key witness had died. *Id.* at 42; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9 cmt. (3d ed. 1993) ("This Standard takes no position on this question.").

4. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 264 (2011).

Disclosures,[5] Professor Cassidy deftly explores one of the most controversial areas in criminal procedure—the extent to which a prosecutor legally and ethically is required to disclose evidence and information to a defendant before that defendant pleads guilty. The question is far from abstract. As Professor Cassidy observes, given several recent cases involving disclosure violations by prosecutors,[6] various organizations have advocated broader pretrial disclosure—specifically by amending Rule 16 of the Federal Rules of Criminal Procedure to authorize more extensive and timely pretrial discovery to criminal defendants.[7] In addition, the ABA's Standing Committee on Ethics and Professional Responsibility recently issued a formal ethics opinion purportedly extending a prosecutor's disclosure obligations well beyond the constitutional due process requirements established by the Supreme Court.[8]

As a former state prosecutor, I recall the issues surrounding preplea disclosures in practice. The give and take of the relatively informal bargaining process typically focused on how much information about the case I was willing to share with defense counsel and, of course, the amount of punishment I would be willing to recommend to the sentencing judge if the defendant accepted my offer. I do not recall ever feeling legally or ethically obligated to disclose to defense counsel the strengths and weaknesses of my case prior to the plea; whatever disclosures I made were usually for tactical reasons to obtain the plea. Some evidentiary information already had been disclosed to the defense at the arraignment or shortly thereafter, either through statutorily mandated notice requirements,[9] bills of particulars,[10] or statutory discovery.[11] More information would be disclosed in the event the defendant decided to go to trial.[12]

I may have minimized potential weaknesses in my case and focused on its strengths, and I am sure the defense attorney made

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5. 64 VAND. L. REV. 1429 (2011).

6. *See* Cone v. Bell, 556 U.S. 449 (2009) (remanding to district court for determination of whether withheld evidence would have changed sentencing outcome in capital case); United States v. Stevens, No. 08-cr-231 (EGS), 2009 WL 6525926 (D.D.C. Apr. 7, 2009) (discussing prosecutor's failure to produce evidence in trial of Senator Ted Stevens).

7. *See* Cassidy, *supra* note 5, at 1445–52.

8. *See id*. at 1452–59.

9. *See* N.Y. CRIM. PROC. LAW § 700.70 (McKinney 2011) (electronic surveillance); *id.* § 710.30 (defendant's statements and eyewitness observations).

10. *See id.* § 200.95.

11. *See* FED. R. CRIM. P. 16; N.Y. CRIM. PROC. LAW § 240.20.

12. *See* 18 U.S.C. § 3500(b) (2006) (requiring disclosure of statements by a prosecution witness in federal trials after the witness has testified on direct examination); N.Y. CRIM. PROC. LAW § 240.45 (requiring disclosure of prior statements of witness after jury sworn).

similar representations. I was acutely aware that the defendant suffered some degree of information deficit about potential weaknesses in my proof. But it was precisely my awareness of the potential vulnerabilities of my case, as well as the time and resources I would be required to expend in preparing for trial, that drove my plea offer—and, I should add, similar offers in well over ninety percent of cases nationwide.[13] It seemed clear to me that the defendant wanted the plea, was willing to make a solemn declaration of his guilt in open court, and was willing to assume the risk that his voluntary settlement of the case was a better option than going to trial and being found guilty. I did not view the process as fundamentally unfair.

Professor Cassidy, an expert in prosecutorial ethics,[14] does see a certain amount of unfairness in this one-sided and unlevel playing field, especially with respect to the rules of discovery that greatly limit the amount of information a defendant has access to before deciding whether to plead guilty. His critique is correct. Criminal discovery is one of the most unfair and dysfunctional features of American criminal procedure. The absence of significant discovery in criminal cases has been a long-standing target of critics who claim that it makes a trial a game of "blind man's bluff,"[15] a "sporting event,"[16] and a virtual "trial by ambush."[17] Indeed, parties in a civil lawsuit for nominal damages learn through pretrial discovery almost every fact and theory about the other side's case prior to deciding whether to settle or go to trial; with few exceptions, criminal defendants who face prison or worse learn very little about the prosecutor's witnesses,

13. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (stating that ninety-seven percent of federal convictions and ninety-four percent of state convictions are obtained through guilty pleas); Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (same); United States v. Ruiz, 536 U.S. 622, 632 (2002) (noting that plea bargaining occurs in the "vast number—90% or more—of federal criminal cases"). It is unclear whether a tension may exist between the *Frye*/*Lafler* holdings and *Ruiz*—particularly whether a lawyer who is counseling a client with respect to a plea is required under *Frye* and *Lafler* to seek out and then advise a client on potential impeachment information that could affect the client's decision to plead guilty, even though a prosecutor has no duty to disclose that information to counsel under *Ruiz*. To be sure, *Frye* and *Lafler* are distinguishable from *Ruiz*; *Frye* dealt with a lawyer's incompetence in failing to communicate to his client a plea offer, and *Lafler* dealt with a lawyer giving a client bad advice that caused the client to reject a plea offer. There is no suggestion that these cases would require a lawyer, in order to perform effectively under the Sixth Amendment, to attempt to obtain and divulge impeachment evidence to a client contemplating a plea.

14. *See* R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS (2005).

15. United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958).

16. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 279.

17. United States v. Kelly, 420 F.2d 26, 29 (2d Cir. 1969).

evidence, and theory of guilt.[18] Professor Cassidy carefully documents the self-serving legal contortions of officials in the Department of Justice to stonewall institutional efforts to amend the Federal Rules of Criminal Procedure in extremely modest ways to try to level the playing field.[19] He also exposes as a toothless irrelevance the ethical rules that address a prosecutor's discovery duties.[20]

For half a century, critics have decried the disparity in knowledge and resources between prosecution and defense with very little success at achieving reform.[21] Some prosecutor offices, mostly for pragmatic reasons to ensure speedier processing of cases, have made their own adjustments to discovery, notably by adopting "open file" discovery policies.[22] And, as Professor Cassidy points out, some federal courts have used their own local court rules to order broader discovery than the Federal Rules require, sometimes by enumerating the kinds of evidence that prosecutors must disclose pretrial and the timing of such disclosures.[23] Broadening discovery rules, as Professor Cassidy suggests, may be the most important reform to enable a defendant to prepare for trial and effectively present his case.

But a "fair trial" and a "fair plea" are widely different concepts. Broadening discovery to ensure a fair trial is a far cry from broadening discovery to ensure a "fair plea," and it is here that Professor Cassidy's critique misfires. The fairness of a trial contemplates a defendant in possession of sufficient information to be able to challenge the

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18. Opponents of expanded discovery often cite the opinion by Chief Judge Arthur Vanderbilt in *State v. Tune*, 98 A.2d 881, 884–85 (N.J. 1953), arguing that expanded discovery would facilitate perjured testimony, would lead to bribery and the intimidation of witnesses, and, because the privilege against self-incrimination protects defendants from reciprocal discovery, would be a one-way street favoring the accused.

19. *See* Cassidy, *supra* note 5, at 1445–52.

20. *See id.* at 1452–59.

21. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 449–53 (1991).

22. *See* Panel Discussion, *Criminal Discovery in Practice*, 15 GA. ST. U. L. REV. 781, 786 (1999) (comments of G. Douglas Jones, United States Attorney for the Northern District of Alabama) ("We're taking the approach now that every document that we gather in the course of an investigation will be made available to the defense. And it should be made available at the time of arraignment."). *But see* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 461 (2001) ("Different prosecutors may offer 'open file discovery' and have vastly different ideas of what it means."). In *Banks v. Dretke*, 540 U.S. 668 (2004), the prosecution represented that it had fully disclosed all relevant information that its file contained, but the file did not include critical impeachment information relating to one of the State's key witnesses. In *Strickler v. Greene*, 527 U.S. 263 (1999), the prosecutor told the defendant's lawyer that the prosecutor's files were open and thus there was no need for a formal *Brady* motion, but the prosecution file given to defense counsel did not include several previous statements made by one of the prosecution's key witnesses that would have strongly impeached her testimony.

23. *See* Cassidy, *supra* note 5, at 1483–84.

prosecution's case. The fairness of a plea typically hinges not on the amount of information a defendant possesses, but rather on whether the plea is made voluntarily and with the assistance of competent counsel to protect the defendant's interests.[24] Moreover, a fair trial implicates a host of procedural protections—including rules for discovery and disclosure of information to the defendant—that are absent from a fair plea, and indeed may be waived by a defendant.[25] Finally, whereas a fair trial involves a forced settlement of a factual dispute in a fair adversarial contest before a judge and jury, a fair plea typically does not involve a factual dispute, is not considered an adversarial proceeding, and involves the functional equivalent of a stipulated set of facts. For these reasons, Professor Cassidy's attempt to equate disclosure in these different contexts is a difficult, challenging, and problematic undertaking.

I. REJECTING PREPLEA DISCLOSURE OF IMPEACHMENT EVIDENCE

Professor Cassidy's proposal to broaden disclosure of impeachment evidence preplea suffers from three major defects. First, it is difficult—maybe even impossible—to gauge the value of most impeachment evidence prior to a plea, and therefore impeachment evidence is a dubious candidate for preplea disclosure. Second, even if the materiality of impeachment evidence could be ascertained, disclosure probably would not be a significant factor in a defendant's decision to plead guilty. Finally, there are considerable costs involved in broadening preplea disclosure of impeachment evidence—costs that drain the efficient use of prosecutorial and judicial resources as well as threaten the privacy and safety of witnesses.

As Professor Cassidy explains, there is a significant difference between impeachment evidence and exculpatory evidence.[26] Exculpatory evidence directly supports innocence. It includes scientific evidence excluding the defendant as the perpetrator and proof that a third person committed the crime. Impeachment evidence, by contrast, may prove innocence indirectly by discrediting a prosecution witness who testifies about key elements relating to the defendant's commission of the crime.[27] Professor Cassidy focuses on early

24. *See* Boykin v. Alabama, 395 U.S. 238, 243 & n.5 (1969) (holding that a guilty plea must be voluntary in order to effectively waive rights to trial by jury, to confront accusers, and to avoid self-incrimination).

25. *See* United States v. Ruiz, 536 U.S. 622, 625 (2002) (finding that a "fast track" plea bargain—in which defendants waive indictment, trial, and appeal—is not unconstitutional).

26. *See* Cassidy, *supra* note 5, at 1437–45.

27. To be sure, exculpatory evidence and impeachment evidence are not mutually exclusive. Some impeachment evidence may be so compelling as to severely discredit a key

disclosure of ordinary impeachment evidence that does not prove the defendant's factual innocence. He comes out in favor of expanding the prosecutor's requirement to disclose impeachment evidence, at least as to certain categories of material.[28]

Professor Cassidy makes his reform proposals against the backdrop of the Supreme Court's 2002 opinion in *United States v. Ruiz*.[29] However, as Professor Cassidy recognizes, mandating preplea disclosure of impeachment information through the Constitution is a moot point after the unanimous decision in *Ruiz*, which held that the Fifth and Sixth Amendments do not require a prosecutor to disclose impeachment information prior to a defendant's guilty plea.[30] The Court reasoned that impeachment information is relevant to the fairness of a trial, not to the voluntariness or fairness of a plea.[31] Moreover, according to the Court, the efficient administration of justice would suffer if a prosecutor had to devote more time and resources to securing a plea.[32] And finally, preplea disclosure might endanger the safety of witnesses.[33] However, the Court did not decide whether a prosecutor may be required to disclose preplea exculpatory evidence that supports a claim of factual innocence. Nor did it forbid rulemaking authorities from adopting stricter disclosure standards for impeachment evidence.

Unlike Professor Cassidy, and in agreement with the Court's rationales in *Ruiz*, I do not support a general rule of criminal discovery that would mandate extensive preplea discovery—especially one that would require disclosure of an array of different types of impeachment evidence prior to a defendant's guilty plea.[34] Except in

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witness's testimony linking the defendant to the crime, thereby proving factual innocence. *See, e.g.*, Smith v. Cain, 132 S. Ct. 627, 629–31 (2012) (ordering new trial where only eyewitness previously told police he could not supply a description of the perpetrators, "could not ID anyone," and "would not know them if [he] saw them" (alteration in original)); Kyles v. Whitley, 514 U.S. 419, 442 (1995) (ordering new trial where key eyewitness gave statement to police that was "vastly different" from trial testimony).

28. Cassidy, *supra* note 5, at 1482–86. Specifically, Professor Cassidy suggests that he would require disclosures where a witness fails to identify the defendant in a lineup and where the government has given the witness an inducement to testify. *Id.* at 1482. His approach would also require disclosure of "substantial inconsistencies between a witness's version of events on key elements of the government's proof." *Id.* at 1483–84.

29. 536 U.S. 622.

30. *Id.* at 625.

31. *Id.* at 629.

32. *Id.* at 632.

33. *Id.* at 631–32.

34. Professor Cassidy begins his piece by describing serious "flaws" in prosecutors' discovery practices and by citing prominent cases documenting misconduct. However, while these flawed practices involved nondisclosures of significant impeachment evidence, the nondisclosures occurred in connection with the defendants' trials and prejudiced the verdicts—

extreme instances of prosecutorial concealment—such as concealment of exculpatory or impeachment evidence that would support a claim of factual innocence—and despite the arguments of several distinguished commentators to the contrary,[35] I am not convinced that significantly broadening the disclosure of impeachment evidence during plea bargaining is a necessary reform or that it will make much of a difference to defendants who are contemplating a plea. Furthermore, I do not believe that any incremental benefit in increased disclosure would outweigh the added expenditures of time and resources by prosecutors and the judicial system.

Professor Cassidy asserts that impeachment evidence contains "limitless elasticity"[36] and presents far greater "complexities"[37] than exculpatory evidence.[38] As a result, he believes it is much more difficult for a prosecutor to assess the materiality of such evidence *before trial*.[39] He also claims that it is easier to assess the materiality of exculpatory evidence than the materiality of impeachment evidence.[40] This assessment is correct. But Professor Cassidy fails to

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they did not involve a guilty plea. Moreover, recent efforts by the Department of Justice to improve discovery practice—which Professor Cassidy effectively critiques—appear to focus not on preplea disclosure but on pretrial disclosure. Finally, the recent ethics opinion by the ABA Standing Committee—which Professor Cassidy also effectively critiques—appears to focus more on pretrial disclosure of exculpatory evidence than preplea disclosure of impeachment evidence.

35. *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 959 (1989) (advocating a constitutional, ethical, and statutory mandate to disclose *Brady* material to criminal defendants during plea bargaining); Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, CRIM. JUST., Fall 2008, at 28, 33, 59 (arguing that "open file" discovery should be expanded and standardized to allow defendants access to the government's evidence).

36. Cassidy*, supra* note 5, at 1431.

37. *Id.* at 1441.

38. To be sure, Professor Cassidy's characterization of impeachment evidence as "elastic" and "nuanced" may be entirely accurate. But the same terminology could be used to describe many other types of proof, such as circumstantial evidence, opinion evidence, character evidence, and hearsay evidence. Moreover, there are instances where "core" or "classic" exculpatory evidence could also be characterized as "elastic," "complex," "intractable," and "nuanced." An eyewitness's account of the crime and the witness's identification often contain discrepancies involving perception, recollection, and retrieval, which, if sufficiently material, can effectively undercut that observation.

39. It appears that Professor Cassidy's discussion is referring to the use of this evidence at a trial rather than preplea. He refers to an assessment of this information by a "jury," the way in which the information will affect the witness's credibility, and how an appellate court will review the "trial record." *Id.* at 1439–41.

40. *Id.* at 1439. One of the problems in assessing the materiality of undisclosed evidence when a defendant pleads guilty is identifying the appropriate test to be used. In discussing the materiality of undisclosed evidence when a defendant pleads guilty, Professor Cassidy asks, "[M]aterial as to what? . . . [T]he likely effect of the impeachment evidence on a trial . . . or the likely effect . . . on the defendant's decision to plead guilty?" *Id.* at 1479. Professor Cassidy does not answer this question, although he does refer to other commentary on the subject. *Id.* at 1479

draw the proper conclusion from his analysis—that disclosure of exculpatory evidence and ordinary impeachment evidence should be treated differently. If one's focus is on the fairness and accuracy of the plea process, it would seem that a prosecutor's duty to disclose ordinary, nonexculpatory impeachment evidence would be far less compelling than his duty to disclose exculpatory evidence. Evidence that shows a witness may be lying or mistaken usually is more attenuated proof of innocence than evidence that would directly exonerate a defendant, or (in the familiar constitutional due process test) evidence that, if disclosed, would create a reasonable probability that the defendant would be acquitted. Impeachment evidence usually is uncertain, ambiguous, and contingent. The witness, even if called, has not yet testified, and it is difficult to predict how the testimony will be developed. Also, prosecutors may more readily discount the probative value of impeachment evidence because it may be cumulative of other evidence that has already been used to impeach the witness.[41]

Even assuming a prosecutor can overcome the evaluative challenges that impeachment evidence presents, is there any reason to believe that disclosure of ordinary impeachment evidence, as distinct from disclosure of exculpatory evidence, would make any appreciable difference to a defendant contemplating a guilty plea? If a justification for preplea disclosure is to provide defendants with adequate information,[42] cases involving exculpatory evidence offer a far stronger justification for preplea disclosure than those involving ordinary impeachment evidence.[43] It seems to me that the only instance in

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n.240. In general, Professor Cassidy is probably correct that it is easier to assess the materiality of exculpatory evidence than that of impeachment evidence, yet it is noteworthy that several recent Supreme Court decisions involved the nondisclosure of impeachment evidence, the materiality of which was not a difficult call. *See, e.g.*, Smith v. Cain, 132 S. Ct. 627, 630 (2012) (holding that withheld evidence impeaching an eyewitness was material); Cone v. Bell, 556 U.S. 449, 470–71, 476 (2009) (remanding for further consideration of withheld evidence that could impeach witnesses); Banks v. Dretke, 540 U.S. 668, 698–703 (2004) (finding material State's withholding of identity of key witness as police informant); Kyles v. Whitley, 514 U.S. 419, 454 (1995) (reversing denial of habeas petition where impeachment evidence was withheld).

41. *See, e.g.*, Johns v. Bowersox, 203 F.3d 538, 546 (8th Cir. 2000) (finding no *Brady* violation because suppressed evidence had limited impeachment value); United States v. Avelino, 136 F.3d 249 (2d Cir. 1998) (finding no reasonable probability that defendant would have pled not guilty but for undisclosed impeachment evidence); *see also* Wetzel v. Lambert, 132 S. Ct. 1195, 1198 (2012) (noting role of cumulativeness to materiality determination).

42. To be clear, neither Professor Cassidy nor I believe this "accuracy" argument is a sufficient reason to require preplea disclosure of impeachment evidence, though other scholars have argued to the contrary. *See* Cassidy, *supra* note 5, at 1468–76 (describing and refuting the "accuracy" argument).

43. *See, e.g.*, Youngblood v. West Virginia, 547 U.S. 867, 868 (2006) (describing note withheld by state trooper indicating that victim's testimony was false and that sexual encounter

which disclosure of impeachment evidence preplea would significantly influence a defendant's decision would be in the rare case where such evidence supports a claim of factual innocence.

Professor Cassidy employs several examples to demonstrate the elasticity of impeachment information and the potential usefulness of such evidence to a defendant's decision to plead guilty.[44] The examples describe several of the major impeachment techniques—a witness's prior inconsistent statements, impaired capacity to observe or remember, and misconduct affecting the witness's character for truthfulness. Some of these examples are clearly relevant as potential avenues of impeachment. However, they do not appear to me to be of significant value in discrediting the witness, and it is unlikely that disclosure of this information would realistically affect a defendant's decision to plead guilty.

Professor Cassidy's examples illustrate the intractable nature of impeachment evidence. But it is unclear whether any of the impeachment information Professor Cassidy posits should be disclosed either under discovery rules generally or in connection with a prosecutor's *Brady* duty.[45] He suggests that most conscientious prosecutors would view his first example involving a victim's inconsistencies on minor details of her story as requiring disclosure under *Brady*, and he expects widespread disagreement among prosecutors on whether the other situations require *Brady* disclosure.[46] Even heeding the Supreme Court's admonition to prosecutors to err on the side of transparency,[47] I strongly disagree

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with victim was consensual); *Banks*, 540 U.S. at 674 (describing allegation that key witness was police informant who provided false testimony); *Kyles*, 514 U.S. at 441–45 (discussing eyewitnesses' mistaken identification of defendant); United States v. Agurs, 427 U.S. 97, 110 n.18 (1976) (discussing police report indicating that fingerprints on murder weapon proved that defendant could not have fired fatal shot).

44. Professor Cassidy's scenarios involve (1) a witness's alteration over time of "minor details" of her story (impeachment by showing that a witness made prior inconsistent statements); (2) a case in which one of four eyewitnesses to a crime had been drinking alcohol at a party earlier in the evening (impeachment by undermining a witness's capacity to observe or recall an event); (3) an FBI case agent accused of violating bureau policies (impeachment by showing a witness's commission of a prior wrongful act); (4) an eyewitness who has informed the prosecutor that she cannot remember where she parked her car (impeachment by showing a witness's deficient memory); and (5) a case in which one of several eyewitnesses to a barroom fight advised the prosecutor that she heard that the victim is a "serious pothead" (impeachment of the victim's credibility through a hearsay statement). Cassidy, *supra* note 5, at 1438–39.

45. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

46. Cassidy, *supra* note 5, at 1441.

47. *See* Cone v. Bell, 556 U.S. 449, 470 n.15 (2009) ("[T]he prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles*, 514 U.S. at

with Professor Cassidy that many prosecutors would believe that there exists a constitutional or ethical duty to make disclosures in any of the scenarios he provides.[48] The examples represent potentially useful impeachment opportunities, but ones of uncertain and unknown value. It is unlikely that any of this information would affect in any meaningfully way a jury's assessment of the witness's credibility or that it would, to state the familiar *Brady* standard, create a reasonable probability that with this information a jury would acquit the defendant.[49] And given the coercive pressures on a defendant to plead guilty, it is a stretch to suggest that knowledge of this information would influence a defendant's decision. Moreover, even assuming that a prosecutor would be required preplea to disclose to the defense impeachment evidence that strongly supports a factual claim of innocence, Professor Cassidy's examples do not represent the kinds of impeachment evidence that would support such a claim even under the most demanding interpretation of *Brady*'s disclosure standard.[50]

Furthermore, the apparent justification for broader preplea disclosure—to ensure that the plea is voluntary and accurate—does not require disclosure of the above examples of impeachment information. Professor Cassidy concedes correctly that disclosure of this evidence does not affect the voluntariness of the plea.[51] As the Supreme Court noted in *Ruiz*, a defendant's free will is hardly affected

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439 ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.").

48. Indeed, it is not clear that any of this evidence would be relevant. For example, it is unclear whether a witness's consumption of a glass of wine at a party affects the witness's ability to perceive; that forgetting where one parked one's car suggests faulty memory (who hasn't sometimes forgotten where they parked their car?); or that the unsubstantiated accusation against an FBI agent would even be considered favorable, let alone admissible, as it does not appear to involve dishonesty. Finally, the hearsay statement that the victim is a pothead, without more, has very little value. To be sure, as Professor Cassidy notes, these examples do not encompass other important categories of impeachment evidence that traditionally are used to discredit a witness, such as a witness's criminal record, mental infirmity, or a motive to lie.

49. *See Kyles*, 514 U.S. at 421 (interpreting *Brady* to require a prosecutor to turn over evidence where there is a reasonable probability that disclosure would produce a different result).

50. It would be interesting to speculate whether, given the recent Supreme Court decisions finding that the prosecutor violated *Brady* by failing to disclose impeachment evidence to a defendant who was convicted after trial, these same situations would also violate *Brady* if the defendant had pleaded guilty and the prosecutor obtained a *Ruiz* waiver from him. *See supra* note 40 (listing recent *Brady* decisions). These instances all involved blatant and arguably intentional prosecutorial misconduct and clearly present much harder *Brady* questions than Professor Cassidy's impeachment scenarios. To the extent that the undisclosed evidence in the Supreme Court cases strongly supports a claim of factual innocence, the Court might very well find a due process violation, notwithstanding the waiver.

51. Cassidy, *supra* note 5, at 1466–67.

by the amount of information he possesses.[52] In the *Miranda* context, by way of analogy, the voluntariness of a waiver is unaffected by the defendant's ignorance of the subject matter of the interrogation,[53] his lawyer's efforts to contact him,[54] or the fact that a previously unwarned statement may not be used against him.[55] Accuracy of the plea is a much stronger justification for disclosure, as Professor Cassidy notes.[56] But it is unreasonable to believe that the disclosure of ordinary, nonexculpatory impeachment information—the types of impeachment information in Professor Cassidy's examples—would affect in any meaningful way the reliability of a defendant's open acknowledgement of guilt.[57]

Finally, as Professor Cassidy recognizes, broadening impeachment disclosure preplea would impose significant burdens on the efficient use of prosecutorial and judicial resources as well as undermine the privacy and safety of witnesses. Prosecutors would be required to expend considerable time reviewing case files for impeachment information and, in some cases, seeking a court's intervention for orders permitting nondisclosure. This time could be used for ongoing investigations and trial preparation. Moreover, early disclosure would compromise the privacy and safety of witnesses, thereby negating one of the principal benefits of pleas. The costs of broadening impeachment disclosure, in short, would seriously outweigh the uncertain and often marginal benefits to a defendant contemplating a plea.

II. THE ABA'S INTERPRETATION OF MODEL RULE 3.8

Professor Cassidy's exploration of impeachment evidence in the guilty-plea context provides an opportunity to examine a recent opinion of the ABA's Standing Committee on Ethics and Professional Responsibility that elaborates on a prosecutor's disclosure duty under

52. United States v. Ruiz, 536 U.S. 622, 629 (2002).

53. *See* Colorado v. Spring, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege.").

54. *See* Moran v. Burbine, 475 U.S. 412, 423 (1986) (holding that the police's failure to inform the defendant of his lawyer's telephone call was insufficient to "vitiate the validity of a waiver").

55. *See* Oregon v. Elstad, 470 U.S. 298, 318 (1985) ("[A] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.").

56. Cassidy, *supra* note 5, at 1468.

57. It should be noted that guilty pleas are permitted even though a defendant protests his innocence. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970).

Model Rule 3.8(d). The ABA opinion requires a prosecutor to disclose to the defense all favorable evidence or information, regardless of whether the information would be considered material under the constitutional *Brady* standard.[58] Professor Cassidy skillfully takes apart the bar opinion, whose reasoning he finds "misguided and flawed."[59] In examining the history of Rule 3.8(d), he suggests convincingly that the materiality concept was retained when the ethics rule was promulgated, despite the opinion's disclaimer.[60] Indeed, the Rule's phrase "tends to negate guilt" is quite similar to the language used in *Brady*. Professor Cassidy also points out that, under the ABA's new interpretation, a prosecutor may be in violation of the ethics rule by not disclosing information preplea even though he may be in full compliance with his due process duty under *Ruiz*—not a healthy conflict for a prosecutor.[61] Moreover, as Professor Cassidy notes, the bar opinion forbids a prosecutor to seek a waiver of access to impeachment information from a defendant who pleads guilty.[62] However, this part of the opinion not only is in conflict with *Ruiz*, which unanimously ruled that a prosecutor may seek a waiver, but it also finds no support in the text of the rule. And finally, as Professor Cassidy notes, the opinion is perverse in one important respect—it imposes a disclosure duty on a prosecutor that is narrower than the constitutional duty, because it applies only to information of which a prosecutor has actual knowledge.[63] Contrary to clear Supreme Court authority,[64] the bar opinion does not require that a prosecutor attempt to locate *Brady* information that other agencies involved in the investigation might possess.[65]

Although I agree with much of Professor Cassidy's treatment of the ABA opinion, I part company with him in a few places. He portrays the opinion as creating a "firestorm" and portending "serious battles" or even a "showdown" with prosecutors over disclosure practices.[66] I am not convinced that Professor Cassidy's fears are well

58. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 at 1 (2009) [hereinafter ABA Formal Op. 09-454].

59. Cassidy, *supra* note 5, at 1458.

60. *Id.*

61. *Id.* at 1455.

62. *Id.* at 1456.

63. *Id.* at 1457.

64. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

65. Indeed, I am unaware of any other bar opinion that appears to impose a less demanding ethical duty on a lawyer than the duty required by the Constitution or statutes.

66. Cassidy, *supra* note 5, at 1432, 1453.

founded. First, his apprehensions appear to be based on two previous ethical "battles"—the government's efforts to subpoena a defendant's lawyer before a grand jury, in violation of Model Rule 3.8(f), and the government's efforts to contact a defendant without his lawyer's knowledge, in violation of Model Rule 4.2.[67] However, these disputes concerned a very different ethical issue—they involved actions by the government that potentially could destroy the attorney-client relationship. These are the kinds of actions that readily invite condemnation by the bar. They are quite distinct from the government's long-standing statutory authority to restrict the amount of discoverable information to which a defense attorney has access prior to trial.

Moreover, it is not clear that the bar opinion even applies to the disclosure of impeachment evidence at all, or that it applies to preplea disclosure. The opinion restates the disclosure standard in Rule 3.8(d)—evidence or information that "tends to negate guilt"—but never defines that standard. The rule suggests, and the opinion declares, that the standard imposes a more demanding duty on a prosecutor than the constitutional materiality standard, and the opinion "explores" the prosecutor's disclosure duty through a hypothetical. However, that hypothetical involves the disclosure of *exculpatory evidence*, not impeachment evidence, and it is used in a context that appears to address a pretrial disclosure, not a preplea disclosure.[68]

In sum, while Professor Cassidy effectively demonstrates several weaknesses in the bar opinion's treatment of a prosecutor's disclosure duty, he may be assuming, incorrectly, that the opinion applies to a prosecutor's disclosure of impeachment evidence. From its

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67. *See id.* at 1432 & n.9 (discussing disputes over Model Rules 3.8(f) and 4.2).

68. The opinion posits the hypothetical of a robbery case in which the victim and a bystander have identified the defendant from a photo array and a lineup. However, the prosecutor has learned that two other eyewitnesses who viewed the same lineup did not identify the defendant, as well as that there was a confidential informant who attributed the robbery to someone else. ABA Formal Op. 09-454, *supra* note 58, at 2. The opinion also refers several times to the prosecutor's disclosure of "exculpatory evidence." *Id.* at 5. The opinion claims that the information in the hypothetical is not necessarily material under the constitutional test but would tend to negate guilt under the ethical standard of 3.8(d), regardless of the strength of the remaining evidence and even if the prosecutor believes that the evidence is unreliable. *Id.* The opinion further states that there is no de minimis exception to the prosecutor's disclosure duty, which essentially requires a prosecutor to disclose virtually all information that may be viewed as favorable to a defendant or that tends to negate guilt. *Id.* It seems to me that most conscientious prosecutors would view the information in the bar opinion hypothetical as required to be disclosed under *Brady*. Moreover, to suggest that a prosecutor is ethically required to disclose all favorable information, no matter how minimal, effectively renders the bar opinion the functional equivalent of an open-file policy.

text it appears that the opinion applies to exculpatory evidence only. Moreover, Professor Cassidy may be overstating the significance of the opinion on the disclosure obligations of prosecutors. I have not seen anything to suggest that this bar opinion is related to earlier battles over the ethical rules on government subpoenas to lawyers and on secretly contacting a client's lawyer. Indeed, the disclosure of evidence prior to plea is a much less controversial topic.

CONCLUSION

I concur with Professor Cassidy that constitutional and statutory rules of procedure are far better vehicles to regulate and guide prosecutors than ethics rules and opinions—especially when the ethics rules purport to provide guidance to prosecutors but are so unclear that they fail to do so. Given the vacuum created by the failure to enact statutory discovery reforms, the inappropriateness of regulation by ethics agencies, and the *Ruiz* decision, Professor Cassidy takes an understandably cautious approach to disclosure of impeachment information before a guilty plea. Because preplea disclosure presents special dangers and problems in terms of efficiency, witness safety, and victim privacy, he advocates as the most promising approach—either under *Brady* or as a general approach to preplea discovery—rulemaking by individual jurisdictions. The substance of these rules would require disclosure of specific categories of impeachment information and would provide time schedules for that disclosure.[69]

These are all good suggestions. Professor Cassidy's article provides added support for meaningful discovery reform, greater *Brady* compliance by prosecutors, and increased preplea disclosure of information supporting factual innocence. But in the end, I am still hesitant to adopt rules mandating preplea discovery of nonexculpatory material, even if disclosure is limited to specific categories of evidence. Given my own experience with the plea process, and having observed the process over the years, I continue to believe that—assuming they bargain honestly and in good faith—prosecutors should not be constrained in their ability to obtain pleas by categorical rules of discovery that could undermine the efficiency of the plea process and threaten the privacy and safety of witnesses.

69. *See* Cassidy, *supra* note 5, at 1483–84.