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Criminal Procedure

Disentangling the Ethical and Constitutional Regulation of Criminal Discovery

June 15, 2018

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In recent years, scholars have urged courts to be cautious when transporting constitutional precedent from one remedial context to another. So, for example, a decision shielding an officer from civil liability for an unreasonable search on the ground that the search did not violate "clearly established" law should not necessarily resolve the separate question whether the fruits of that search should be admissible in a criminal trial under the good-faith exception to the exclusionary rule. We share this concern and wish to call attention to the special problems that can arise when constitutional precedent is thought to inform a government actor's ethical responsibilities. We do so by analyzing the controversy over whether a prosecutor's ethical duty to disclose exculpatory information is coextensive with her constitutional obligation to do so.

In 2009, the American Bar Association issued an advisory opinion concluding that Rule 3.8(d) of the Model Rules of Professional Conduct—which every state has now adopted in some form—imposes disclosure obligations on prosecutors that are broader than the due process floor laid by *Brady v. Maryland* and its progeny. Since then, many states have taken a fresh look at the relationship between *Brady* and Rule 3.8(d). A majority of these states has embraced the

ABA's position, but a substantial minority has rejected it. The biggest fight, and the one on which we focus, concerns whether Rule 3.8(d) requires prosecutors to disclose *all* evidence within their knowledge that favors the defense, as the ABA asserts, or allows withholding of favorable evidence that is not "material" within the meaning of *Brady* case law—that is, withholding of evidence that does not have a "reasonable probability" of changing the outcome of a trial.

Although the substance of Rule 3.8(d) has been on the books since 1969 in either its current form or that of its substantively similar predecessor, DR 7-103(B), it accomplished little during the first four decades of its existence. Rule 3.8(d)'s unimpressive early track record is partly a function of the general reluctance of ethics regulators to bring disciplinary charges of any kind against prosecutors or to impose meaningful sanctions even in the few cases where they did find violations. But there is another reason as well, one that has to do with specific features of Rule 3.8(d) rather than weaknesses in the overall system of professional discipline for prosecutors. Many authorities initially assumed that DR 7-103(B) "merely codifies *Brady*" and so required nothing more from prosecutors than compliance with their constitutional disclosure obligations. And at first, that view seemed plausible. DR 7-103(B), which stated that a prosecutor must disclose evidence within her knowledge that "tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment," bore considerable resemblance to *Brady*'s holding that prosecutors may not withhold "evidence favorable to an accused upon request" that is "material either to guilt or to punishment."

But subsequent developments in *Brady* case law, involving the concept of materiality, have undermined the notion that DR 7-103(B) and Rule 3.8(d) are coextensive with *Brady*. Although the text of the ethics rules contains no trace of a materiality requirement, and the *Brady* decision's references to "material" evidence arguably meant only that the evidence must be "relevant" to trigger the constitutional disclosure obligation, the same cannot be said of the Supreme Court's later *Brady* cases. *United States v. Agurs* held in 1976 that "[t]he mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality'" and that materiality instead hinges on whether "the suppressed evidence might have affected the outcome of the trial." And in 1985, *United States v. Bagley* further specified that "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." *Agurs* and *Bagley* thus make clear that there is a gap between the extent of disclosure required by Rule 3.8(d), which covers "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense," and that demanded by modern *Brady* law.

The ABA recognized as much in 2009. Responding to the growing awareness that suppression of exculpatory evidence causes wrongful convictions, the ABA clarified that *Brady* does *not* dictate the scope of Rule 3.8(d). In Formal Opinion 09-454, it concluded that "Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law" but instead "requires prosecutors to disclose favorable evidence so that the defense can decide on its utility." This opinion prompted courts and bar associations in a number of jurisdictions to revisit the issue, resulting in a significant split of authority.

Jurisdictions that have sided with the ABA include North Dakota (2012), Virginia (2012), Texas (2015), Illinois (2015), the District of Columbia (2015), Washington (in dictum) (2015), Utah (2016), New York City (2016), Massachusetts (2016), and California (2017). These jurisdictions have emphasized both the plain meaning of the Rule as well as the practical problem that there is "no objective . . . way to evaluate before trial whether [evidence or information] will be material to the outcome," for "[n]o one has that gift of prophecy."

Yet four states have expressly rejected the ABA's opinion—Ohio (2010), Wisconsin (2013), Oklahoma (2015), and Louisiana (2017)—and accepted the position that Colorado had previously staked out in 2002: that the constitutional and ethical obligations of prosecutors are the same. Tellingly, proponents of this interpretation tend not to defend it on textual grounds. Instead, the principal argument these states and their allies (such as the DOJ) have articulated is that a generous reading of Rule 3.8(d) would force prosecutors to juggle "inconsistent disclosure obligations," thus "generat[ing] confusion [that] could too easily devolve into a trap for the unwary."

We find this administrability concern unpersuasive even on its own terms. The disclosure obligations imposed by Rule 3.8(d) are broader than the *Brady*doctrine, but not *inconsistent* with it, because "compliance with the higher standard [necessarily] satisfies the lower standard." Prosecutors run afoul of the Constitution only by disclosing less—not more—than *Brady*'s restrictive materiality-based standard requires. In fact, the Supreme Court has advised that "the prudent prosecutor" should "resolve doubtful questions in favor of disclosure" in light of the fact that materiality is "an inevitably imprecise standard" that "can seldom be predicted accurately until the entire record is complete." Equally important, the Court has recognized that "[a]lthough the Due Process Clause . . . only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense *may arise more broadly under a prosecutor's ethical or statutory obligations*" (emphasis added), citing both Rule 3.8(d) and other ABA guidelines that closely track that Rule. The Court thus has treated its *Brady* jurisprudence as a constitutional floor beneath which states must not sink rather than as the final word on prosecutorial disclosure obligations that protect defendants' rights.

Although many states are developing a clear-headed understanding of the relationship between Rule 3.8(d) and *Brady*, there are lessons to be learned from the fact that it took almost 50 years to get this far and that the issue remains contested to this day. One such lesson involves the proper design of outcome-centered materiality rules like the one that has become central to the *Brady* doctrine. Appellate and postconviction courts routinely consider materiality—often using different terminology, like *prejudice* or *harm*, to get at the same idea—when reviewing criminal convictions. But they usually frame their analysis of materiality, known as harmless error review, as a remedial inquiry *distinct from* the question whether the defendant's procedural rights were violated. Had the Supreme Court conceptualized the *Brady* right as encompassing a broad duty to disclose subject to harmless-error review in the event of a breach—as Justice Marshall persuasively urged in his *Bagley* dissent—it would have been clear from the outset that prosecutors' disclosure obligation extends to *all* evidence favorable to the defense, regardless of materiality. We regard this approach as far more sensible. In ordinary circumstances, there is no persuasive argumentfor denying a criminal defendant access to all potentially exculpatory information.

Perhaps it is not too late for the Court to fix this aspect of its *Brady* jurisprudence—some scholars and litigants have not yet given up on that cause, and the oral argument in one recent Supreme Court case (*Smith v. Cain*) suggests that several Justices are sympathetic to the idea that materiality should no longer play a role in defining the scope of prosecutors' disclosure obligations under *Brady*. But regardless of whether the *Brady* doctrine will be reformed, the conflation of ethical with constitutional disclosure obligations should serve as a cautionary tale for courts considering whether to "[b]orrow[] the materiality standard" from *Brady* in other areas of criminal procedure, or for scholars encouraging them to do so. And at the very least, all states should embrace the ABA's interpretation of Rule 3.8(d) in order to ensure that prosecutors' disclosure practices are held to a higher standard than the deficient constitutional floor put in place by modern *Brady* case law.