Ethics Watch

Disclosure Obligations of Prosecutors

By Nathan M. Crystal

Directly across from the desk of the prosecutor hangs a small, black and white photograph. It shows a thin, aging man, unshaven, holding the bars to his cell with both hands. The photograph seems more than a moment in time. It appears to be a video of a man not moving, only staring with vacant eyes. It is said that a picture is worth a thousand words, but what does this photograph mean? Its placement indicates that it is significant, but how and why? Is the man in the photograph a famous killer that the prosecutor was able to convict? Viewed this way, the photograph is a trophy. Or, is the photograph a statement that the work of the prosecutor can deprive individuals of one of their most fundamental rights—their liberty? Considered from this perspective, the photograph is a reminder to the prosecutor of his obligation not simply to convict, but to do justice.

Probably the most important aspect of the prosecutor's obligation to do justice is the duty to disclose exculpatory material. But this obligation, like the photograph in the prosecutor's office, is ambiguous.

Consider the following hypothetical: The defendant is accused of robbery of a convenience store. The clerk on duty at the time of the robbery and a customer in the store have identified the defendant in a lineup. Both are very confident of their identifications. The prosecutor has learned from the police that a second customer was about to enter the store when she witnessed the robbery taking place. The second customer was unable to identify the defendant at a photo lineup. That customer has told the police, however, that she was very frightened by the situation and was only able to obtain a quick look at the robber. What are the prosecutor's obligations?

Under a line of cases beginning with *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court has held that prosecutors have an obligation under the due process clauses of the Fifth and 14th Amendments to disclose exculpatory evidence that is material to the guilt or sentencing of a defendant. The duty to disclose also applies to evidence that would tend to impeach the credibility of a government witness whose testimony was central to the government's case. *Giglio v. United States,* 405 U.S. 150 (1972).

While the disclosure obligations set forth in *Brady* and *Giglio* appear to be broad, they are in fact quite limited. First, the prosecution's duty to disclose turns on whether the evidence is "material." The Supreme Court has defined evidence as material "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 129 S.Ct. 1769, 1783 (2009). Prosecutors who do not wish to disclose evidence can often justify nondisclosure (at least in their own minds) by reasoning that the evidence is not material. In the hypothetical store robbery, the prosecutor could decide that the second customer's testimony does not provide a reasonable probability that the result would have been different. Two witnesses are positive in their identifications, the second customer's ability to observe was impaired, and the second customer has only failed to identify the defendant rather than rejecting the defendant as the perpetrator.

Second, the duty to disclose under the *Brady/Giglio* rule does not have a specific time for disclosure. Delay in disclosure is harmful to the defense in itself, but becomes even more significant in light of the Supreme Court's decision in *United States v. Ruiz,* 536 U.S. 622 (2002). In *Ruiz* the Court held that the Constitution does not require the government to disclose material impeachment evidence prior to a plea bargain. An express waiver by the defendant of the right to receive impeachment evidence is constitutionally permissible. The Court did not, however, address the question of whether the government must disclose evidence of actual innocence prior to a plea bargain.

Third, the constitutional duty to disclose exculpatory evidence does not apply to the post-conviction context. See *District Attorney's Office for the Third Judicial District v. Osborne,* 129 S.Ct. 2308 (2009) (holding that *Brady* rule does not apply post-conviction because a defendant who has been found guilty has a limited liberty interest in post-conviction relief).

Finally, prosecutors who have violated their disclosure obligations and their supervisors are nonetheless entitled to absolute immunity from civil liability. See *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009) (absolute immunity applies to administrative functions of District Attorney and chief supervisory prosecutor for allegedly failing to institute supervision and training programs for assistants regarding *Brady* obligations).

One of the leading scholars of criminal procedure, Professor Bennett L. Gresham, has recently argued that the *Brady* rule is "easily evaded and virtually unenforceable." See *Bad Faith Exception to Prosecutorial Immunity for* Brady *Violations,* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1635&context=lawfaculty at 16-29.

While the right to receive *Brady/Giglio* material is limited in a number of respects, prosecutors also have an independent ethical obligation with regard to disclosure of

exculpatory or sentencing material. ABA Model Rule 3.8(d) provides that in a criminal case a prosecutor 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." The rule has been adopted in almost all states, including South Carolina.

Recently the ABA Committee on Ethics and Professional Responsibility issued Opinion #09-454 discussing the obligations of prosecutors under Rule 3.8(d). Both the text of the rule and the opinion make clear a number of important differences between the constitutional standard and the ethics rule for disclosure. First, the ethics rule does not require that the exculpatory information be material. The standard under the rule is whether the evidence "tends" to negate guilt, mitigate the offense, or mitigate sentencing. In fact, under the rule it is unnecessary for the information to be admissible in evidence. Opinion #09-454, at 4-5. Second, the rule requires "timely" disclosure of exculpatory evidence. The opinion states that timely disclosure means "as soon as reasonably practical." Timeliness requires disclosure prior to any guilty plea proceeding. *Id*. at 6. In addition, a defendant cannot "waive" the prosecutor's obligations under Rule 3.8(d). *Id*. at 7. Third, prosecutors have an ethical obligation to adopt proper supervisory procedures to comply with their ethical and legal disclosure obligations. *Id*. at 8.

Despite the existence of this ethics rule, for many years ethics charges against prosecutors for failing to disclose exculpatory or mitigating material were rare. However, in recent years this "hands off" attitude by disciplinary authorities toward prosecutors seems to be changing. In the highly-publicized Duke Lacrosse case in 2007, North Carolina prosecutor Michael Nifong was disbarred for improper prejudicial pretrial publicity and failure to disclose exculpatory material. This year California prosecutor Benjamin Field was suspended for four years for misconduct including intentionally withholding key evidence from the defense in two cases. Criminal charges against U.S. Senator Ted Stevens were dismissed because the prosecutors withheld exculpatory evidence. The case has prompted a review by the Justice Department of its policies on disclosure and renewed calls for amendment to Federal Rule of Criminal Procedure 16 to broaden the disclosure obligations of prosecutors. While the trend in the case law is to hold prosecutors ethically responsible for violation of their disclosure obligations, there are exceptions. The Ohio Supreme Court recently, and in the opinion of this author erroneously, held that the Ohio ethics rule, which was very similar to the ABA Model Rule, was equivalent to the constitutional standard, and only required disclosure of "material" information. *See Disciplinary Counsel v. Kellogg-Martin,* 923 N.E.2d 125 (Ohio 2010).

South Carolina is one of few states that has a significant body of case law on the disclosure obligations of prosecutors. Our Supreme Court has disciplined solicitors for violation of *Brady* obligations. See *In re Grant*, 343 S.C. 528, 541 S.E.2d 540 (2001); Cf. *In re Humphries*, 354 S.C. 567, 582 S.E.2d 728 (2003) (deputy solicitor suspended for one year for failure to disclose recording of conversation between defendant and his counsel). In addition, the Court has held that a solicitor is subject to discipline for failure to properly supervise a deputy solicitor with regard to his disclosure obligations. *In re Myers*, 355 S.C. 1, 584 S.E.2d 357 (2003). The South Carolina Bar Ethics Advisory Committee has opined that a prosecutor has a duty to reveal to the defense that police officers gave false and incomplete statements to their superiors during an official department investigation in all cases in which any one of the officers will be a witness during trial, thereby placing the officer's credibility at issue. *S.C. Bar Ethics Adv. Op.* #03-11.

The S.C. Supreme Court, however, has not faced the issue of whether a solicitor is subject to discipline for failure to comply with the requirements of Rule 3.8(d) when those obligations go beyond what is legally required. Because of the limitations of the *Brady* rule, serious enforcement of *Brady* obligations must be through the disciplinary process. In the opinion of this author, the S.C. Supreme Court should follow ABA Opinion #09-454 and reject decisions like the Ohio Supreme Court's decision in *Kellogg-Martin*.

With regard to post-conviction disclosure, solicitors in South Carolina do not have any legal or ethical obligation to disclose exculpatory material. South Carolina has not adopted ABA Model Rules 3.8(g) and (h), which require disclosure of exculpatory evidence post conviction in some situations. South Carolina does have a statutory procedure by which defendants who have been convicted of certain serious offenses may apply for post-conviction testing of DNA evidence. S.C. Code Ann. §17-28-10 et seq. The statute provides that solicitors may consent to such testing. *Id* at. §17-28-110. The statute does not apply to non-DNA evidence that comes to the attention of a solicitor after a conviction. Thus, with regard to post-conviction disclosure, solicitors have substantial discretion as to whether to consent to DNA testing and whether to disclose non-DNA exculpatory evidence.

Few solicitors will have photographs on their walls of individuals who have been imprisoned, but any conscientious solicitor will at least have a mental image of the potential fate of a defendant. Whether the image is physical or mental, however, there should be no ambiguity in the minds of solicitors as to their obligations. Their commitment is to justice, and as the U.S. Supreme Court has said on numerous occasions, the "prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." *Cone v. Bell*, 129 S.Ct. 1769, 1783 n. 15 (2009). ■