# DO NO WRONG

## ETHICS FOR PROSECUTORS AND DEFENDERS

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ABA

AMERICAN BAR ASSOCIATION
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CHAPTER 1

# Are a Prosecutor's Responsibilities "Special"?

Are the responsibilities of prosecutors special? If so, how? Standards for the ethical conduct of prosecutors are often described as different from the standards for criminal defense lawyers and civil advocates. Reference is often made to the "special responsibilities" and "extraordinary duties" of prosecutors, and both courts and ethical rules admonish a prosecutor to be a "minister of justice" and to "seek justice." Such descriptions and rhetoric, though, overstate the differences between the responsibilities of prosecutors and those of other lawyers, and they fail to convey that in many, perhaps most, instances the standard of conduct for prosecutors is identical to that for civil advocates and criminal defense lawyers. Generalizations about a prosecutor's special ethical duties also mask the fact that when prosecutorial standards do differ from those governing other lawyers, it is typically in degree rather than in kind.

In this chapter, we offer a view of the rules governing prosecutors that is more nuanced than traditional views describing prosecutorial ethics as simply different, special, or extraordinary. We do not address here the various rationales that might be offered for creating distinct rules for prosecutors—a topic we turn to in the next chapter.

## *Few Ethics Rules Specifically Address Prosecutors*

It is helpful at the outset to note that specific and detailed rules directly addressing the obligations of prosecutors do not exist for most areas of prosecutorial conduct. Model Rule 3.8, entitled

"Special Responsibilities of a Prosecutor," addresses only eight topics and fails to address many questions prosecutors routinely face, such as conduct during plea negotiations and the boundaries of closing argument at trial. In addition to the scarcity of specific rules, it can be difficult to locate all of the legal and ethical standards addressing particular areas of prosecutorial conduct because they are scattered among a wide variety of sources, including constitutional case law, statutes, ethics, criminal procedure, and evidence rules, as well as internal prosecutorial guidelines. The disclosure obligations of a federal prosecutor, for example, are controlled by the *Brady v. Maryland*, 373 U.S. 83 (1963), line of constitutional cases, the Jencks Act, Federal Rules of Criminal Procedure 16 and 26.2, Federal Rule of Evidence 404(b), the *United States Attorneys' Manual*, as well as applicable ethical rules.

Even when one finds a specific provision, it may fail to give prosecutors adequate notice or guidance concerning their ethical obligations. Cases and ethics opinions dealing with prosecutorial conduct often resolve issues by simply noting that a particular course of action is dictated by the prosecutor's special obligation to seek justice or the prosecutor's special role as a minister of justice, without explaining the reasoning that connects relatively abstract ideas of justice to an appropriate course of conduct in a particular situation.

Enforcement of prosecutorial standards has also been lax, raising additional problems for assessing the current state of prosecutorial ethics. Model Rule 3.8(d), for example, sets forth an obligation to disclose exculpatory evidence or information that appears to be broader than the constitutional *Brady* disclosure obligation. But enforcement of this obligation through professional discipline of prosecutors is scant. There are few ethics opinions or cases addressing its contours. Cases addressing disclosure of exculpatory information often focus exclusively on the constitutional dimension and ignore the separate ethical duty. It is hard to resolve ambiguities concerning disclosure obligations with no body of ethics opinions or case law to provide guidance. For example, whether Model Rule 3.8(d) requires disclosure of exculpatory information prior to entry of a guilty plea remains unaddressed, although this rule and a similar predecessor provision in the 1969 Model Code have been in effect for almost 40 years and prosecutors resolve hundreds of thousands of cases through use of guilty pleas every day.

These problems create areas of ambiguity regarding prosecutorial standards. Nonetheless, some things are clear.

## *Prosecutors Often Subject to Same Rules as Other Lawyers*

More often than not, prosecutor standards do not differ from those applicable to other lawyers. Ethics codes such as the 1969 Model Code of Professional Responsibility and the Model Rules of Professional Conduct, most recently updated in February 2008, contain a few special rules for prosecutors along with a wide range of rules applicable to all lawyers. Prosecutors are subject to both these special rules and these general rules. Some rules of general applicability, such as those on advertising and fees, are not of concern to prosecutors because they neither advertise nor collect fees from clients. But many rules of general applicability are of concern to prosecutors because they deal with work that prosecutors routinely do—work that is often indistinguishable from the work other lawyers do.

Words such as *special* and *extraordinary* used in describing the rules and duties applicable to prosecutors suggest that those rules and duties are peculiar, unique, uncommon—completely distinct from the rules and duties applicable to criminal defense counsel and civil advocates. But simply browsing the table of contents of the ABA Model Rules reveals that the provisions unique to prosecutors are relatively few—confined to eight provisions set forth in Model Rule 3.8. It also reveals that there are many rules that apply equally to all lawyers. Examples include the ethics rules on competence, diligence, and candor toward a tribunal as well as the advocate witness rule.

## Berger v. United States

*Berger v. United States*, 295 U.S. 78 (1935), is the most frequently cited authority in cases, ethics opinions, and academic writing for the special obligations of prosecutors. It has been described as "the locus classicus for discussion of the extraordinary duties of a prosecutor." (CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, § 13.10 at 760 (1986).) Oddly enough, though, the case is an example of a prosecutor being held to account under a rule of general applicability rather than a rule that applies specifically to prosecutors.

The *Berger* case, best known for the quote that although a prosecutor "may strike hard blows, he is not at liberty to strike foul ones," enforced an obligation that is quite ordinary and applies equally to all advocates—the obligation of lawyers in a trial not to

assert their personal knowledge of facts in issue. The prosecutor did a number of improper things warranting criticism, but Justice Sutherland, writing for the majority, focused primarily on the prosecutor's assertion in closing argument of his personal knowledge of a fact he had attempted but failed to prove during the trial's evidentiary phase.

The prosecutor had called a witness named Goldstein to identify the defendant, but, according to Justice Sutherland, Goldstein "had difficulty in doing so." Nonetheless, the prosecutor was apparently convinced that Goldstein knew the defendant and told the jury as much in his closing argument, stating, "[Y]ou can bet your bottom dollar she knew Berger" and describing the witness as "a woman that I knew, knew Berger and could identify him."

Justice Sutherland reasoned based on these statements that "the jury was . . . invited to conclude that the witness Goldstein knew Berger well, but pretended otherwise; and that this was within the personal knowledge of the prosecuting attorney." Both the Model Rules and the Model Code prohibit prosecutors from asserting personal knowledge of facts at issue during a trial. But that duty is imposed not only on prosecutors, as later references to *Berger* seem to suggest. The relevant Model Rules provision is not found in Rule 3.8 covering the "Special Responsibilities of a Prosecutor," but in Rule 3.4, captioned "Fairness to Opposing Party and Counsel," which sets rules applicable to all lawyers. The critical prosecutorial ethical obligation in *Berger* was the same as that imposed on criminal defense lawyers and civil advocates.

## *Extraordinary Remedies*

If not offered to justify the imposition of some extraordinary duty on the prosecutor, what, then, was the purpose of Justice Sutherland's classic description of the prosecutor? The court of appeals had concluded that the prosecutor engaged in misconduct but nonetheless affirmed Berger's conviction because it thought it unlikely that the prosecutor's misconduct had affected the outcome of Berger's trial. The Supreme Court disagreed and ordered a new trial based on a much higher assessment of the probability that the misconduct affected the outcome in the case. Sutherland used the classic passage in *Berger* to introduce his discussion of the appropriate remedy and to justify his departure from the court of appeals on that issue.

Because of the status of the prosecutor as a government representative, Justice Sutherland thought the jury much more likely to

accept the prosecutor's improper assertions than if he had been a private lawyer representing a criminal defendant or a private party. Because of his special status, the prosecutor's "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Justice Sutherland found "prejudice to the cause of the accused . . . so highly probable that we are not justified in assuming its non-existence." Rather than defining an extraordinary obligation, *Berger* is a case about imposing an extraordinary remedy for breach of an ordinary obligation.

## *Model Rule 3.8*

Model Rule 3.8 does contain provisions applicable only to prosecutors because certain tasks are unique to the prosecutor's office. Model Rule 3.8(e), for example, restricts a prosecutor's use of a grand jury subpoena to compel a lawyer "to present evidence about a past or present client" unless certain conditions are fulfilled. This restriction applies only to prosecutors because only prosecutors have access to grand jury subpoena power. Model Rule 3.8(c) states that a prosecutor shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing." Here, again, this restriction is unique to prosecutors because the only lawyer who is in a position to obtain such a waiver from "an unrepresented accused" is a prosecutor.

In 2008, the ABA adopted two new and related responsibilities for prosecutors. Model Rule 3.8(g) requires a prosecutor who comes to know of "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense" to "promptly disclose that evidence to an appropriate authority, and . . . if the conviction was obtained in the prosecutor's jurisdiction, . . . promptly disclose that evidence to the defendant unless a court authorizes delay, and . . . undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit." Model Rule 3.8(h) requires a prosecutor "to seek to remedy the conviction" when "a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense the defendant did not commit." These provisions recognize that as a representative of the government, the prosecutor has a unique obligation to take remedial measures when there has been a miscarriage of justice.

Despite the title of Model Rule 3.8, "Special Responsibilities of a Prosecutor," other provisions that appear in Model Rule 3.8 are not truly peculiar or unique to prosecutors. For example, Model Rule 3.8(a) states that the prosecutor must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Here the prosecutor is required to act as a "gatekeeper" and ensure that a charge has adequate legal and factual support. At first glance, this provision appears similar to Model Rule 3.8(c) and (e), discussed above, because the only lawyer who can prosecute a criminal case is a prosecutor.

Model Rule 3.1 applies similar gatekeeping duties to all lawyers, requiring them to have "a basis in law and fact . . . that is not frivolous" before advancing a claim or argument on behalf of a client. And Rule 11 of the Federal Rules of Civil Procedure creates a duty for civil advocates to screen their filings to make sure they are "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." The probable cause standard applied to prosecutors may be more demanding than the standards used under Model Rule 3.1 and Rule 11, but still the prosecutor's gatekeeping duty is not unique. The difference, if any, is one of degree rather than kind.

Model Rule 3.8(f) is another provision that creates a duty not peculiar or unique to prosecutors. Model Rule 3.8(f) restricts public comments by prosecutors "that have a substantial likelihood of heightening public condemnation of the accused." It also creates a duty to exercise reasonable care to prevent police and others associated with the prosecutor from making statements that would violate either Rule 3.8(f) or Model Rule 3.6, the general provision on public comment applicable to all lawyers.

Again, at first glance, this rule seems unique to prosecutors because it talks about comments concerning an "accused" and exercising control over public comment by police. A criminal defense lawyer or a civil advocate is not, for example, in a position to exercise control over the police regarding comments about an accused person. But, again, one finds similar restrictions on both criminal defense lawyers and civil advocates elsewhere in the Model Rules. Model Rule 3.6 sets forth a general bar on a lawyer participating in litigation from making a public statement when doing so creates "a substantial likelihood of materially prejudicing an adjudicative proceeding."

Model Rule 3.6 clearly applies to prosecutors. Comment [5] to Model Rule 3.8 notes that Rule 3.8(f) "supplements Rule 3.6." So in the area of public comment all advocates have the same duty to

control their statements about pending cases. Rule 3.6 binds prosecutors, criminal defense counsel, and civil advocates alike. Rule 3.8(f) does impose on the prosecutor an additional burden to avoid heightening public condemnation of an accused, but again the difference here is one of degree rather than kind.

What about the prosecutor's duty under Rule 3.8(f) to control the police? Is that a restriction unique to prosecutors? Model Rules 5.1 and 5.3, which apply to all lawyers, create obligations for lawyers to control other lawyers in their firms as well as nonlawyers "employed or retained by or associated with" the lawyer. Model Rule 8.4(a) makes it professional misconduct for a lawyer to violate the ethics rules "through the acts of another." The obligations created by Rules 5.1, 5.3, and 8.4 impose on criminal defense lawyers and civil advocates a duty to take steps to control the public statements of others with whom they work that is quite similar to the prosecutor's duty to control police created by Rule 3.8(f).

## *When Are a Prosecutor's Duties Distinct?*

There are situations in which the prosecutor's obligations are truly distinct, especially when compared with those of a criminal defense lawyer. For example, the prosecutor under *Brady v. Maryland* and Model Rule 3.6(d) is obligated to turn over exculpatory evidence and information. The analog for a defense lawyer would be an obligation to give to the prosecution inculpatory evidence and information. Clearly, the defense lawyer has no such obligation, based on rules of confidentiality and the constitutional prohibition on compelled self-incrimination.

But the prosecutor's duty to turn over exculpatory evidence is not more demanding than what is required of civil litigants under modern federal discovery rules. These require a party, without awaiting a discovery request, to turn over all information and the identity of all witnesses that support or undermine any party's claims or defenses. While the prosecutor's *Brady* disclosure obligation is restricted by a narrow materiality limitation, federal civil discovery rules permit a party to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party" even if the information is not admissible at trial "if the discovery appears reasonably calculated to lead to the *discovery* of admissible evidence." (FED. R. CIV. P. 26.)

A stark contrast between prosecutor and criminal defense counsel is found in their respective obligations regarding the filing of a criminal charge and the entry of a "not guilty" plea. If the

prosecutor knows that someone is innocent, the prosecutor is obligated not to charge or convict the person. If the prosecutor learns that a charged defendant is innocent, he or she must dismiss the charge. But when a defense lawyer knows that a client is guilty and concludes that the prosecution can prove its case beyond a reasonable doubt, the defense is not barred from entering a not guilty plea, continuing to represent the client, and working toward a dismissal or acquittal. To require anything less of defense counsel would negate the presumption of innocence and the right against self-incrimination, and would relieve the government of the burden of proving guilt beyond a reasonable doubt.

So, are the statements one often encounters about "special responsibilities" and "extraordinary duties" of prosecutors simply empty rhetoric? Such statements often are misleading overgeneralizations, but our view is that they express a poorly articulated but widely shared view on the part of judges, lawyers, and the public. In areas in which prosecutors exercise discretion and their conduct is not covered by general ethics rules or the special rules for prosecutors found in ethics codes, we expect the prosecutor to act as a monitor both of substantive and procedural justice in ways not expected of either criminal defense lawyers or civil advocates. Though seldom described in detail, it is this monitoring obligation that creates for the prosecutor a responsibility that properly is characterized as different, special, and extraordinary in comparison with other litigating lawyers.

## *Conclusion*

The notion that there is something exceptional about a prosecutor's ethical obligations is critical in understanding those obligations, but overgeneralization and overstatement can mask the fact that in many situations the prosecutor is subject to precisely the same rules as other litigating lawyers. We address the rationales for creating distinct obligation for prosecutors in the next chapter.

## *Resources for Chapter 1*

### Rules and Standards

MODEL RULES OF PROFESSIONAL CONDUCT 3.1, 3.4, 3.6, 3.8, 5.1, 5.3, and 8.4(a).

FEDERAL RULES OF CIVIL PROCEDURE 11 and 26.

FEDERAL RULES OF CRIMINAL PROCEDURE 16 and 26.2.

FEDERAL RULE OF EVIDENCE 404(b).

## Cases and Ethics Opinions

*Berger v. United States*, 295 U.S. 78 (1935).
*Brady v. Maryland*, 373 U.S. 83 (1963).

## Articles, Reports, Books, and Other Sources

Bennett L. Gershman, *The Prosecutor's Duty to the Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001).
Kevin C. McMunigal, *Are Prosecutorial Standards Different?*, 68 FORDHAM L. REV. 1453 (2000).
CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, § 13.10 at 760 (1986).
The Jencks Act, 18 U.S.C. Section 3500.

CHAPTER 18

# Disclosing Exculpatory Material in Plea Negotiations

Are prosecutors constitutionally compelled to disclose exculpatory material to criminal defendants who plead guilty? Are they ethically bound to do so? Consider a hypothetical robbery prosecution in which the victim identifies the defendant from police photos of known offenders. Because the victim's identification is strong and the offense violent, the prosecutor refuses to enter into plea negotiations. A week before trial, the victim is apprehensive about the trial and the prospect of cross-examination. She tells the prosecutor that she fears she made a mistake in the photo identification and now thinks the man she picked from the police photos is not the man who robbed her. May the prosecutor negotiate a guilty plea without disclosing the victim's statement about her possible misidentification of the defendant? What if the victim tells the prosecutor she is certain the man she picked is not the man who robbed her?

Despite the fact that more than 90 percent of federal and state criminal cases are resolved through guilty pleas, the prosecutor's disclosure obligations regarding exculpatory material in plea negotiations remain controversial. This chapter examines the history, development, and current state of the law on prosecutorial disclosure of exculpatory material in plea negotiations and discusses both practical and ethical implications for defense lawyers and prosecutors. It also argues that such disclosure should be constitutionally mandated.

## *History*

Over 40 years ago, the Supreme Court held in *Brady v. Maryland,* 373 U.S. 83 (1963), that due process requires a prosecutor to disclose material exculpatory evidence to a defendant. In subsequent cases, the Supreme Court refined the *Brady* doctrine. In *Giglio v. United States,* 405 U.S. 150 (1972), for example, the Court expanded the scope of the *Brady* rule by holding that impeachment evidence falls within the *Brady* disclosure requirement. Later, though, the Court significantly limited the *Brady* rule by imposing a narrow definition of materiality. In *United States v. Bagley,* 473 U.S. 667, 682 (1985), the Court explained that evidence in the hands of the government is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different."

Despite the long history of the *Brady* rule, the Supreme Court was slow to address the question of whether the constitutional mandate of *Brady* applies in the context of plea negotiations. All but one of the Supreme Court cases interpreting and applying the *Brady* rule have involved convictions obtained by means of a trial. We address the single case involving a guilty plea later in this chapter.

## *Ethical Disclosure Obligation*

In addition to their legal discovery duty, prosecutors have an ethical obligation to turn over exculpatory material. Rule 3.8 of the ABA's Model Rules of Professional Conduct, adopted in almost every state, provides the following:

> 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, 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 precursor to Rule 3.8, Disciplinary Rule 7-103(B) of the ABA Model Code of Professional Responsibility, sets forth a similar obligation.

The prosecutor's ethical disclosure duty is broader than the constitutional duty under *Brady*. The Supreme Court in *Kyles v. Whitley*, 514 U.S. 419, 432 (1995), acknowledged the more expansive nature of the ethical requirement, stating that *Brady* "requires less than . . . ABA Model Rule of Professional Conduct 3.8(d)." The ethics rule, unlike the *Brady* rule, has no materiality restriction and is not limited to admissible evidence.

The ethics rule makes no specific mention of plea negotiations or guilty pleas. But the language of the rule, in particular its requirement of "timely disclosure," certainly appears to mandate that prosecutors disclose exculpatory material during plea negotiations, if not sooner. Yet, secondary sources, such as treatises, do not typically discuss the ethics rule in the context of plea negotiations, and we have found no ethics authority that applies the rule in that context.

Because their attention tends to focus on *Brady's* constitutional mandate, prosecutors may not be aware of the ethics rule and the fact that it requires more than *Brady*. Even if they are aware of the ethics rule, prosecutors may fail to perceive its message because of the legal profession's general attitude toward disclosure of information in negotiations. Disclosure of material information is a central issue in negotiation ethics. A number of commentators have argued for a duty of disclosure of information material to a matter in the context of all negotiations, but the Model Rules have not adopted such a rule. Model Rule 4.1 states that "a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person," but nondisclosure appears to be an accepted convention for negotiators. Many seasoned defense attorneys and prosecutors accordingly expect each other to play their cards close to the vest unless there is a rule or decision to the contrary. These attitudes present the danger that prosecutors will draw the line between ethical and unethical behavior regarding exculpatory material by reference to prevailing practice standards accepting nondisclosure in negotiations rather than the language of Model Rule 3.8(d).

For federal prosecutors in particular, the tendency to be less than forthcoming about the weaknesses in their cases in plea negotiations is buttressed by the fact that prosecutors do not have an affirmative duty to turn over impeachment evidence concerning their witnesses under the Jenck's Act and Federal Rule of Criminal Procedure 26.2 unless and until the witness testifies at trial. Pursuant to state discovery rules, state prosecutors in many jurisdictions,

however, have a more extensive disclosure obligation at earlier phases in the case than their federal counterparts and, thus, may be more likely to recognize and respond to the ethical disclosure mandate.

## *Implicit* Brady *Waivers*

The *Brady* rule is familiar to prosecutors and defense counsel alike. Every day in state and federal trial courts, defense counsel request and prosecutors agree to provide *Brady* material as a routine part of pretrial motion practice. When, as often happens, the case is resolved through a negotiated plea, however, typically nothing is said about *Brady* material. Federal and state rules of criminal procedure covering plea allocution do not mention a defendant's right to *Brady* material. And *Brady* disclosure is not usually listed in the litany of rights the defendant is told he or she is waiving when entering a guilty plea.

Defense lawyers tend to assume that a defendant has the constitutional right to receive *Brady* material prior to entry of a guilty plea. Prosecutors often view the defendant's decision to plead guilty as extinguishing any such right—that receipt of *Brady* material is a trial right relinquished along with the right to a trial by pleading guilty.

## *Why Require Disclosure of Exculpatory Information During Plea Negotiations?*

DNA testing has provided vivid lessons on wrongful convictions, and the consequent exonerations reveal a host of sources contributing to inaccuracy in criminal trials, such as the use of jailhouse informants, eyewitness identification error, inadequate legal representation, coerced confessions, and the psychological phenomenon of escalation of commitment toward the guilt of a particular suspect. The same factors increase the risk of convicting the innocent through guilty pleas. Another factor associated with wrongful convictions is prosecutorial failure to reveal exculpatory information in violation of *Brady*.

Is there reason to believe that failure to disclose *Brady* material contributes to factually inaccurate guilty pleas? Failure to disclose exculpatory information unknown to the defense at trial obviously means the jury will not hear the evidence and be more likely to render an inaccurate verdict. But there is no jury at a guilty plea hearing.

An intuitive response to the question of whether *Brady* disclosure aids accuracy in guilty pleas is "no." Two assumptions prompt such a response. First, it is appealing to assume that a defendant entering a guilty plea, unlike a juror at a trial, knows whether or not he or she "did it." A second assumption is that a defendant is very unlikely to make a false inculpatory statement when entering a guilty plea in open court. After all, the defendant clearly knows that factual statements admitting guilt in a guilty plea hearing are against the defendant's penal and social interests, having been warned by the judge that an admission of guilt at the hearing will provide the basis for a criminal conviction. In addition, a defendant makes such statements after receiving advice of counsel and often under oath and subject to penalty of perjury.

Undoubtedly *most* defendants who plead guilty know the facts determining their criminal liability, and they are also sincere when they confess their guilt in a guilty plea. In the pages that follow, though, we demonstrate two things: (1) some defendants pleading guilty lack such knowledge and sincerity, and (2) we need to examine critically our assumptions about the knowledge and sincerity of defendants pleading guilty. Once we understand the knowledge and sincerity risks posed during guilty pleas, we can see how *Brady* disclosure in the guilty plea context would help reduce those risks.

## *Knowledge*

The notion that a defendant knows whether or not he or she "did it"—that is, whether or not the defendant engaged in an act that fulfills the conduct element of the charged offense—is certainly true in most cases. But it is not true in all cases. Moreover, even if a defendant knows whether or not he or she fulfilled the act element of the offense, it does not necessarily follow that the defendant has adequate knowledge to establish other elements of the crime or other factors critical in determining criminal liability. The view that a defendant knows if he or she "did it" reflects a restricted, simplistic view of guilt and innocence that ignores many of the factors our substantive criminal law uses to define criminal liability, such as circumstances, results, causation, mental states, and defenses.

Two cases exemplify knowledge deficiencies. The defendant in *State v. Gardner*, 855 P.2d 1144 (Idaho Ct. App. 1994), was charged with vehicular manslaughter after the car he was driving crossed the center line of a highway and ran into an oncoming truck, killing one person and seriously injuring three others. Tests indicated

that Gardner was under the influence of marijuana and sleep deprived. Gardner pleaded guilty, stating at the hearing that "he could not remember anything about the accident and believed that he might have fallen asleep while driving because he had not slept the previous night." (*Id*. at 1147.) The court imposed a prison sentence of ten years, with a four-year minimum. Gardner was apparently wrong about having caused the collision. What he did not know was that his front tire had blown out and that the tire failure, rather than an act on his part, had caused his car to swerve into oncoming traffic.

A witness in a car following Gardner's car at the time of the accident gave a written statement to the Idaho State Police that "when the blue car [Gardner's vehicle] was about ten feet in front of the truck I believe the driver's front tire blew. The whole [*sic*] jumped into the oncoming lane like it was on rails." (*Id*.) In a deposition in a subsequent civil case, "the witness explained that he observed the left front tire blowing out. He saw a puff of dust and rock chunks that appeared to have been caused by the tire blowing, then the car immediately jerked to the left." (*Id*.) The Idaho Court of Appeals applied the *Brady* disclosure duty to guilty pleas, found that the prosecution's failure to disclose the witness statement violated this duty, and vacated Gardner's guilty plea.

The *Gardner* case shows a defendant who mistakenly thought he had done something that caused another person's death. He did not have adequate knowledge to establish facts that determined his liability. Without disclosure of the witness statement, Gardner would have been wrongly convicted and would have served a significant sentence of at least four years. *Brady* disclosure here remedied a wrongful homicide conviction based on an erroneous guilty plea and prevented significant wrongful imprisonment.

*Carroll v. State*, 474 S.E.2d 737 (Ga. Ct. App. 1996), provides another example of a defendant who pleaded guilty when she did not know facts crucial to determining her criminal liability. As in *Gardner*, the case involved a homicide charge arising from an automobile wreck. The defendant was the 19-year-old driver of a car in which two adults and a toddler were passengers. During a heavy rainstorm, Carroll lost control of the car, which left the road, turned over, and ejected a passenger, who died. Neither alcohol nor drugs were involved.

The officer who investigated the accident scene had yet to complete a class in accident reconstruction. Despite lack of qualifications, he concluded in a written "information sheet" and in testimony at a preliminary hearing that the defendant's speed was 70

mph in a 35-mph zone and that the condition of the road and its shoulder "had no impact on the accident." Without independent knowledge of her exact speed, the road conditions, and what caused her to lose control of the car, Carroll pleaded guilty to serious felony charges in reliance on the officer's "expert" conclusions.

The investigating officer's conclusions about Carroll's speed and the role of road conditions turned out not to be supported by the evidence at the scene of the wreck. An experienced accident reconstruction expert—the instructor teaching the accident reconstruction course in which the investigating officer was enrolled—reviewed the investigating officer's work. Days before the defendant pleaded guilty, the experienced examiner concluded that it was not possible to calculate the speed of Carroll's car based on the data the investigating officer had collected and that, in his view, the condition of the road had played a role in what he viewed as an accident. In *Carroll*, as in *Gardner*, a defendant erroneously pleaded guilty because she did not know facts critical to determining her criminal liability. The Georgia Court of Appeals reversed Carroll's conviction and allowed her to withdraw her guilty plea.

Both *Gardner* and *Carroll* illustrate that there are situations in which disclosure of *Brady* material in the guilty plea context may be just as crucial to an accurate determination of criminal liability as in the trial context.

## *Sincerity*

Lack of sincerity on a defendant's part in pleading guilty is likely a more pervasive source of inaccuracy in guilty pleas than lack of knowledge. Rather than pleading guilty because they wrongly but sincerely think they are guilty, as in *Gardner* and *Carroll*, defendants may falsely condemn themselves even though they know they are not guilty. Several Innocence Project cases have revealed such false condemnation in guilty pleas. In one case, Christopher Ochoa not only falsely condemned himself of rape and murder in an erroneous guilty plea, but also testified falsely against an innocent alleged accomplice.

Concern about sincerity in cases involving disclosure of exculpatory evidence arises from the incentives influencing both prosecutors and defendants in plea negotiations. Cases in which *Brady* material exists are particularly prone to creating incentives that encourage false self-condemnation.

The most likely response by a prosecutor who discovers *Brady* material is to dismiss the case for legal, ethical, and strategic reasons.

If the prosecutor does not dismiss, the next most likely response is to attempt to resolve the case through a guilty plea, especially if no obligation to disclose exculpatory information applies in the guilty plea context. If the prosecutor chooses to negotiate a guilty plea in a case in which *Brady* material exists, the prosecutor has an incentive to offer a large sentence differential, which in turn creates a powerful incentive for an innocent defendant to plead guilty.

Reconsider the robbery hypothetical we presented at the beginning of this chapter. The prosecution's case is based entirely on the testimony of the robbery victim, who identified the defendant from police photographs of persons with a record of similar violent crime. With only the victim's testimony to rely on, the prosecutor is unsure about obtaining a conviction at trial. Prior to trial, the victim is uncertain of her identification of the defendant. Assume that the prosecutor then offers the defendant a guilty plea limiting his sentencing exposure to five years, a significant concession in light of the defendant's substantial prior record and the fact that the charged offense carries a maximum penalty of 15 years' incarceration. On the eve of trial, the defendant indicates willingness to plead guilty if the prosecutor limits the sentence to one year. Is the prosecutor free to accept a guilty plea without disclosing the victim's statement of uncertainty about the identification?

In this scenario, exculpatory information weakening the prosecutor's case creates an incentive for the prosecutor to offer a very large discount on the potential sentence, from 15 years to one year. This sentence differential in turn creates a powerful incentive for false self-condemnation by the defendant. In sum, we should expect prosecutors if they do not dismiss to divert cases with *Brady* information from the trial to the guilty plea arena and to offer the sort of sentence differentials that undermine confidence in a defendant's admission of guilt.

*State v. Johnson*, 544 So. 2d 767 (La. Ct. App. 1989), strongly suggests that the defendant in that case pleaded guilty to a crime he did not commit and that failure to disclose exculpatory information contributed to that wrongful guilty plea. Johnson was charged with selling illegal drugs on two different days. The undercover officer testified that there was no doubt in her mind that the same person sold her drugs on both days and that Johnson was that individual. (*Id*. at 771.) During the trial, the defendant pleaded guilty to one of the drug offenses in return for dismissal of the other charge and an agreement not to bring per-

jury charges against him, his mother, or his fiancée. He received a sentence of six years at hard labor.

But state records revealed that Johnson was in state custody at the time of one of the offenses and thus could not have committed it. And the undercover officer's certainty that the same man committed both crimes indicated that Johnson had not committed the other offense. The Louisiana court set aside the guilty plea, conviction, and sentence. The facts in *Johnson* suggest that powerful incentives induced the defendant to falsely condemn himself. In addition to avoiding conviction on one of the charges, he also avoided perjury charges against himself, his mother, and his fiancée.

## Brady *Disclosure as a Remedy*

Prosecutorial disclosure of exculpatory information in the guilty plea context would help remedy both lack of knowledge and lack of sincerity undermining the accuracy of guilty pleas. It would in some cases reveal and remedy a defendant's lack of knowledge about a critical element and in other cases provide a check on high sentence differentials driven by the existence of exculpatory information undermining the sincerity of a defendant pleading guilty.

Such a prosecutorial disclosure duty might be imposed by recognizing that the constitutional duty created by *Brady v. Maryland* extends to the guilty plea context or by legislative action through a statute or criminal procedure rule, such as amendment of Federal Rule of Criminal Procedure 11. Another way to create such a duty would be for ethics authorities either to interpret ABA Model Rule 3.8's "timely disclosure" obligation to attach prior to the acceptance of a guilty plea or to redraft Model Rule 3.8 to clearly impose such a disclosure duty.

### *Current Law*

Current law on whether prosecutors must disclose exculpatory information in the guilty plea context is in a troubled and confused state. Two decades ago, the issue of whether *Brady v. Maryland*'s prosecutorial duty to disclose exculpatory evidence applies to guilty pleas had just begun to attract the attention of practitioners, judges, and commentators. Few courts, for example, had addressed the issue, and the courts that had addressed it had come to different conclusions.

By 2002, when a case dealing with *Brady* and guilty pleas first came before the U.S. Supreme Court, that situation had changed. By then a good number of federal and state cases had confronted the issue. The majority recognized that prosecutors do have a duty to disclose *Brady* material prior to a guilty plea, whereas some courts held that *Brady* does not apply in the guilty plea context.

In the past two decades, the academic literature has also given greater attention to *Brady* and guilty pleas. The first article we can find discussing *Brady* and guilty pleas was published in 1981. In the intervening 27 years, several professors and practitioners, along with a number of student authors, have written on the issue. As with judges, the overwhelming majority of commentators support requiring *Brady* disclosure prior to guilty pleas.

## United States v. Ruiz

In 2002, the Supreme Court finally addressed *Brady* in the guilty plea context. In *United States v. Ruiz*, 536 U.S. 622 (2002), the Court severely restricted, and left open the possibility of entirely rejecting, application of *Brady* to guilty pleas. Though the scope of the *Ruiz* decision is ambiguous, there is little question that the case marks a significant restriction of *Brady* rights in the guilty plea context and runs counter to the trend in lower federal and state courts prior to *Ruiz*.

The context in which *Ruiz* arose is critical to evaluating the Supreme Court's decision in the case. During the 1990s, lower federal courts showed a strong trend toward applying *Brady* to guilty pleas. In a 1995 case, *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995), the Ninth Circuit joined this trend.

Following *Sanchez*'s holding that a defendant pleading guilty retains *Brady* rights—that such rights are not implicitly waived by entry of a guilty plea—federal prosecutors in the Southern District of California incorporated an *express* waiver of *Brady* rights in what were termed "fast-track" plea agreements. These agreements included express waiver of *Brady* as a condition of receiving lenient treatment. The express waiver, though, was not a complete waiver. The defendant waived the right to receive *Brady* material that constituted impeachment information or was relevant to an affirmative defense. But the prosecution agreed to turn over "any [known] information establishing the factual innocence of the defendant."

The defendant in *Ruiz* challenged the validity of this express *Brady* waiver as a condition to a plea agreement, and the Ninth Circuit found the express waiver unconstitutional. Despite the fact

that a circuit split had developed on whether a guilty plea implicitly waives *Brady* rights, the Supreme Court did not grant certiorari in a case directly addressing that issue. Rather, the Court granted certiorari in *Ruiz,* a case presenting the more unusual issue of an express waiver of *Brady* rights prior to a guilty plea. The Supreme Court overruled the Ninth Circuit and approved the express partial waiver found in the fast-track plea agreement at issue in *Ruiz*.

The express waiver approved in *Ruiz* restricted *Brady* disclosure in two significant ways. First, it dramatically restricted the scope of *Brady* material by excluding information relevant to impeachment and affirmative defenses and including only information bearing on "factual innocence." Neither the fast-track agreement nor the Supreme Court's opinion in *Ruiz* identified the theories of relevance that fall within the phrase *factual innocence*.

The second way in which the express waiver in *Ruiz* restricted *Brady* disclosure was by raising the persuasiveness threshold required for disclosure of information bearing on f*actual innocence*. Under the *Brady* rule, information must be turned over only if it is *material*. The Supreme Court's most recent iterations of the *Brady* rule define material as creating "a reasonable probability that the government's suppression [of the information] affected the outcome of the case." (*United States v. Bagley*, 473 U.S. 667, 675 (1985).) To be *Brady* material, the information "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles v. Whitley*, 514 U.S. 419, 435 (1995).) In other words, information in the trial context must be disclosed if it is likely to create reasonable doubt in the mind of a juror.

In contrast, the disclosure obligation set forth in the plea agreement approved in *Ruiz* required disclosure only if the information *establishes* factual innocence. The phrase *establishing factual innocence* indicates that to warrant disclosure, the exculpatory information must have greater persuasive force than required by the *Brady* materiality standard. In essence, rather than create reasonable doubt about guilt, the information must prove innocence in order to mandate disclosure. The level of persuasiveness required for a particular item of favorable information to *establish* factual innocence (e.g., a preponderance standard, a clear and convincing standard, or a beyond reasonable doubt standard) was not clarified by the fast-track agreement or the Supreme Court's *Ruiz* opinion.

The *Ruiz* opinion has a number of serious flaws. First, the Court's analysis failed even to acknowledge, much less consider, the substantial body of case law from both the federal circuits and the state courts applying *Brady* in the context of guilty pleas, the

primary thrust of which runs counter to the Court's analysis and conclusion. Nor did the Court acknowledge the academic commentary or address the arguments advanced therein, the primary thrust of which, again, was contrary to the *Ruiz* Court's reasoning and result. The Court's failure to acknowledge or address both prior authority and academic commentary contrary to the Court's position seriously undermines the persuasiveness of its analysis.

Second, the Court grossly overstated the burdens that disclosure of *Brady* material in the guilty plea context would impose on the government. The Court treated mandating *Brady* disclosure in the guilty plea context as the functional equivalent of open file discovery. In doing so, Justice Breyer ignored the materiality limitation on *Brady* disclosure that severely restricts what the government must produce and thus lessens the burden of producing it.

A third serious flaw in *Ruiz* is the Court's summary dismissal of any possible connection between *Brady* disclosure and wrongful conviction through guilty plea. As we discussed above, there is a highly plausible connection between failure to disclose *Brady* material and wrongful conviction through a guilty plea.

Justice Breyer, for example, devoted one short paragraph to exculpatory information relating to affirmative defenses, and a single sentence to dismissing any need for disclosure of such information. In doing so, he appeared to accept without examination a view of innocence that excludes consideration of widely accepted criminal law principles of justification and excuse. A defendant with a valid affirmative defense, in other words, appears not to qualify as *factually innocent* in Justice Breyer's view, despite the fact that substantive criminal law views such a person as not properly subject to criminal liability. The prosecutors who drafted the waiver at issue in *Ruiz* and the Supreme Court seem to view the criminal law of affirmative defenses as unworthy of enforcement in the context of a guilty plea.

Cases from lower courts, as well as academic commentary, show how disclosure of information relating to an affirmative defense can contribute to accuracy in guilty pleas. Without *Brady* disclosure in the guilty plea context, for example, a defendant may fail to raise an otherwise valid entrapment defense because the defense may not know that the person who enticed the defendant to commit the crime was an agent of the government, either an undercover law enforcement officer or a government informant. Similarly, the prosecution might have records showing that the defendant suffers from a mental illness that creates a credible basis

for an insanity defense. The defendant might be incapable of or unwilling to convey this information to his or her lawyer.

Provocation provides a third example of a defense that could unwittingly be ignored in the guilty plea context without prosecutorial disclosure of *Brady* material. Some jurisdictions limit the provocation defense to certain victims. Maryland, for example, requires that "the victim was the person who provoked the rage." (*Dennis v. State*, 661 A.2d 175 (Md. Ct. Spec. App. 1995).) A defendant in a situation such as a bar fight among strangers involving multiple participants might not know after the fact whether the person killed was in fact one of the provokers. (*See State v. Lawton*, 688 A.2d 1096 (N.J. Super. Ct. App. Div. 1997).) If the prosecution has evidence unknown to the defendant showing that the victim *was* one of the provokers, such disclosure would be critical for a defendant and his or her lawyer to determine accurately the applicability of a provocation defense. Each of the affirmative defense examples just discussed illustrates that the prosecution may have information critical to ensuring a factually accurate guilty plea of which the defendant may be unaware.

Justice Breyer similarly devotes a single sentence to the possible connection between disclosure of impeachment information and the factual accuracy of guilty pleas. He concludes that the prosecution's obligation to turn over "information establishing the factual innocence of the defendant," along with Rule 11's provisions on entry of a guilty plea, "diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty." (*Ruiz*, 536 U.S. at 631.) But when a defendant during a guilty plea hearing relies on information provided by the prosecution, rather than the defendant's independent knowledge, to establish an element of an offense or eliminate an affirmative defense, the prosecution revealing key impeachment information advances accuracy in precisely the same way it does at trial—by alerting the person relying on the information provided by the government to potential weaknesses in that information.

## *Implicit Waiver after* Ruiz

The Court's approval in *Ruiz* of an express partial waiver of *Brady* rights as a condition to a plea bargain is clear. But what happens to *Brady* rights in the guilty plea context when the plea bargain does not contain such an express waiver? Does the very act of pleading

guilty implicitly waive all or some *Brady* rights? The answer to this key question depends on how one interprets *Ruiz*.

Most commentators have argued that a guilty plea *should not*, and most lower courts have found that a guilty plea *does not*, constitute such an implicit waiver. This implicit waiver issue was not before the *Ruiz* Court, and Justice Breyer did not explicitly state a conclusion about what, if any, rights to *Brady* disclosure a defendant pleading guilty retains absent an express waiver. Also, Justice Breyer did not address the academic commentary, the arguments advanced in that commentary, or the lower court authority on implicit waiver. Nonetheless, much of the language of Justice Breyer's opinion is troublingly broad and might, unwisely in our view, be read as entirely extinguishing *Brady* rights in the context of guilty pleas.

In response to the Supreme Court's decision in *Ruiz*, the American College of Trial Lawyers proposed modifying Federal Rule of Criminal Procedure 11 to impose a duty to disclose exculpatory information in the guilty plea context. This proposal was rejected by the Federal Rules Advisory Committee. Unless such a rule is adopted, the scope of *Brady* disclosure in the guilty plea context will continue to be uncertain and contested and will depend on how lower courts and the Supreme Court interpret *Ruiz*.

## *Implications of* Brady *Waivers*

What are the practical implications in all this? From the defense perspective, there are several lessons.

Competent and effective representation dictates that defense lawyers find out if their particular jurisdiction has resolved the issue of the constitutional right to *Brady* material in plea negotiations. As discussed above, the Court in *Ruiz* approved express waivers limited to impeachment material and affirmative defense information, but left open the question of whether a defendant retains *Brady* rights absent an express waiver. Since *Ruiz*, few jurisdictions have addressed this issue, and the pre-*Ruiz* circuit split remains. If the jurisdiction recognizes the constitutional right, the defense lawyer should inform the prosecutor and the court of the relevant law, insist on receipt of *Brady* material prior to plea negotiations, and ask the court to enforce this right. Absent an express waiver such as the type in *Ruiz*, a defense lawyer has a good faith argument that there is a constitutional right to *Brady* material in plea negotiations.

If the law is unclear, which it presently is in many jurisdictions, the defense lawyer again should request *Brady* material dur-

ing plea negotiations and ask the trial court for a ruling recognizing the defendant's right to this material. The prosecutor may well provide *Brady* material in a particular case, even if not clearly constitutionally required to do so in the jurisdiction, to avoid having to brief and argue the issue. If the prosecutor hesitates to agree to provide *Brady* material during plea negotiations, that fact alone should put the defense lawyer on notice that there may be exculpatory evidence worth seeking either through independent investigation or through a court ruling. Even if the constitutional right to *Brady* material in plea negotiations is unclear, the defense lawyer can seek to make provision of such material a term of the plea agreement. If successful, the defendant then obtains a contractual right to the material.

Finally, even if the relevant jurisdiction has ruled that *Brady* does not apply to plea negotiations, the defense lawyer may nonetheless seek disclosure of exculpatory material by trying to make it a term of the plea agreement or through reliance on ethics rules such as Model Rule 3.8(d). In this regard, defense counsel should note that Comment [1] to Rule 4.1 was amended in 2002 to provide that unethical "[m]isrepresentations can also occur by . . . omissions that are the equivalent of affirmative false statements." Certain exculpatory evidence, such as the evidence in some of the cases discussed above that severely undermines the prosecution's theory of guilt or negates scientific or eyewitness evidence necessary to establish guilt, appears to us to fall within the type of omissions that are the equivalent of affirmative false statements.

What about practical and ethical implications from the prosecutor's perspective? Again, the starting point for prosecutors is to research the law and ethics rules in their jurisdictions.

If the jurisdiction imposes an obligation to reveal exculpatory material based on the *Brady* constitutional rule or a discovery rule, the prosecutor must live up to those obligations or affirmatively argue for a modification or reversal of existing law. If the law is unresolved in the particular jurisdiction, revealing *Brady* material during plea negotiations allows the prosecutor to avoid having to brief and argue the issue as well as the possibility of a constitutional violation if a court later rules that *Brady* does apply to plea negotiations. One downside of full disclosure from the prosecutor's point of view may be that in some cases prosecutors will be forced to dismiss or make more lenient offers in plea negotiations. On the other hand, revealing *Brady* material during plea negotiations may have the practical effect of preventing some defendants from pleading guilty to crimes for which they are not liable.

If the prosecutor wishes to avoid disclosure of some *Brady* material during plea negotiations, one alternative is a narrowly drafted partial *Brady* waiver of the type approved in *Ruiz*.

As noted above, the prosecutor has a clear ethical obligation in many jurisdictions to disclose exculpatory information in the government's possession in a timely fashion regardless of its materiality, admissibility, or a defense request. Ethical prosecutors, therefore, will disclose all exculpatory information in the government's possession prior to plea negotiations to insulate themselves from possible disciplinary action. Although we have found no disciplinary cases involving nondisclosure in plea negotiations stage, in *People v. Mucklow*, 35 P.3d 527 (Colo. 2000), the Colorado Supreme Court publicly censured a prosecutor for failing to disclose exculpatory information prior to a preliminary hearing, and one of the reasons North Carolina disbarred Michael Nifong was for failing to turn over exculpatory material in the pretrial stage while prosecuting members of the Duke Lacrosse Team.

## *Conclusion*

The Court's decision in *Ruiz* approving explicit partial *Brady* waivers has left a number of unanswered questions concerning disclosure rights during plea negotiations. Because the constitutional dimension of disclosure absent an express waiver is still unsettled and its ethical aspects not widely recognized by the defense and prosecution bars, this area presents serious potential legal and ethical pitfalls. Defense lawyers and prosecutors alike should give careful consideration to the legal obligation of disclosure and their respective ethical obligations of competence and disclosure. Explicitly addressing disclosure of exculpatory material in every plea negotiation would be a positive step toward avoiding those pitfalls.

## *Resources for Chapter 18*

### Rules and Standards

Model Rules of Professional Conduct 3.8, 3.8(d) and 4.1.

Model Code of Professional Responsibility Disciplinary Rule 7-103(B).

Federal Rules of Criminal Procedure 11 and 26.2.

### Cases and Ethics Opinions

*Brady v. Maryland*, 373 U.S. 83 (1963).

*Giglio v. United States*, 405 U.S. 150 (1972).

*United States v. Bagley*, 473 U.S. 667 (1985).

*State v. Johnson*, 544 So. 2d 767 (La. Ct. App. 1989).
*State v. Gardner*, 855 P.2d 1144 (Idaho Ct. App. 1994).
*Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995).
*Dennis v. State*, 661 A.2d 175 (Md. Ct. Spec. App. 1995).
*Kyles v. Whitley*, 514 U.S. 419 (1995).
*Carroll v. State*, 474 S.E.2d 737 (Ga. Ct. App. 1996).
*State v. Lawton*, 688 A.2d 1096 (N.J. Super. Ct. App. Div. 1997).
*People v. Mucklow*, 35 P.3d 527 (Colo. 2000).
*United States v. Ruiz*, 536 U.S. 622 (2002).

## Articles, Reports, Books, and Other Sources

John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 Emory L.J. 437 (2001).
Corinna Barrett Lain, *Accuracy Where It Matters*: Brady v. Maryland *in the Plea Bargaining Context*, 80 Wash. U. L. Q. 1 (2002).
Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 Hastings L.J. 957 (1989).
Kevin C. McMunigal, *Guilty Pleas*, Brady *Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651 (2007).
Ellen Yaroshefsky, *Ethics and Plea Bargaining—What's Discovery Got to Do with It?*, 23 Criminal Justice No. 3, 28 (Fall 2008).