

## Amend Rule 11 to Require Disclosure

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Speaking to a group of public defenders on June 24, 2009, Attorney General Eric Holder outlined the Department of Justice's agenda for addressing chronic problems in indigent criminal defense work. He emphasized that the Department of Justice will "put a premium on truth seeking." Given the prominence of disclosure violations in the prosecutions of former Senator Ted Stevens, reputed mob figures Vincent Farrara and Pasquale Barone, and members of the Duke Lacrosse team, prosecutorial disclosure practices should have a prominent place on this agenda. Specifically, we hope Attorney General Holder and the Department of Justice will make disclosure of exculpatory information in the guilty plea context an essential component of their commitment to improve the justice system.

If a defendant goes to trial, a prosecutor must disclose "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment." (*Brady v. Maryland*, 373 U.S. 83, 87 (1963).) But what if a defendant pleads guilty? More than 45 years after the *Brady* decision, the answer to this question remains uncertain despite the fact that well over 90 percent of federal and state criminal cases are resolved through guilty pleas. In this column, we urge Congress and state legislatures to amend their criminal procedure rules to require disclosure of exculpatory evidence prior to a guilty plea.

The Department of Justice under the Bush administration opposed such an amendment to Federal Rule of Criminal Procedure 11 and took a

very restrictive attitude toward prosecutorial disclosure in the guilty plea context in *United States v. Ruiz*, 536 U.S. 622 (2002), the first and only U.S. Supreme Court case to address *Brady* disclosure in the guilty plea context. We encourage Attorney General Holder and the current Department of Justice to rethink its position on guilty plea disclosure and support the amendment of Rule 11.

### Why Require Disclosure?

Attorney General Holder reminded his audience that "the prosecutor is a special kind of adversary" with a special obligation to justice. A prosecutor's failure to disclose exculpatory evidence in the guilty plea context is simply incompatible with such an obligation to justice, as the following hypothetical illustrates.

D, an African American college football player, is charged with the forcible rape of a young woman at a fraternity party. V, the alleged victim, is white and an exotic dancer hired by the fraternity to perform at the party. D has no prior record and the prosecutor feels the case is weak because she fears that V will not be a convincing or sympathetic witness. The case has generated significant publicity and the prosecutor, who is white, is running for office in an area with a primarily white population and a history of racial conflict. The prosecutor offers D a two-year suspended sentence if he pleads guilty. D is innocent but knows that, if convicted, he would likely receive a significant jail sentence that would end his college football career and eliminate any chance of being drafted by a professional team. D's lawyer tells D he is likely at trial to encounter a hostile local jury and judge. D decides to accept the guilty plea offer. Prior to entry of the guilty plea, the prosecutor obtains a DNA report indicating that semen recovered from V on the night of the alleged rape does not match D's DNA. Must the prosecutor disclose the DNA report prior to the guilty plea?

Prosecutors have a special obligation to avoid convicting an innocent person. Because disclosure in this hypothetical is critical to the defendant's plea decision and to avoiding a wrongful conviction, the prosecutor should be required to reveal the DNA report regardless of whether the



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procedural mechanism for conviction is a guilty plea or a trial. The strength of the argument for disclosure here is reflected in the fact that the prosecutors in *United States v. Ruiz* drafted the *Brady* waiver in that case so that it retained an obligation to turn over “information establishing the factual innocence of the defendant.” (536 U.S. at 625.)

DNA exonerations have revealed a litany of factors that contribute to wrongful convictions. These include eyewitness identification error, inadequate legal representation, inadequate access to scientific expertise and resources, misuse of scientific evidence, coerced confessions, the psychological phenomenon of escalation of commitment, the misuse of jailhouse informants, and failure of police and prosecutors to reveal exculpatory evidence. These risk factors operate in both the trial and guilty plea contexts and thus we should be concerned about wrongful convictions in both contexts.

Just as a suspect may falsely confess to the police during an interrogation—a common factor in wrongful convictions—a defendant entering a guilty plea may admit to a crime he or she did not commit. The hypothetical above illustrates one such situation, when the defendant knows he did not commit a crime but is willing to plead guilty to gain advantages offered by a guilty plea, such as avoiding incarceration or the death penalty. In 1989, for example, to avoid the death penalty Christopher Ochoa falsely pled guilty in a Texas court to rape and murder charges, later to be exonerated and released through the work of the Innocence Project.

There are also situations in which defendants may erroneously conclude that they are guilty of a crime and plead guilty due to lack of knowledge. In *State v. Gardner*, 855 P.2d 144 (Idaho Ct. App. 1994), the prosecutor withheld an exculpatory eyewitness statement explaining that a tire blowout and not the defendant’s reckless driving had caused an auto accident resulting in a death. The prosecutor failed to disclose the exculpatory statement and the defendant in *Gardener*, unaware of the tire blowout, simply assumed that his reckless driving had caused the accident as the prosecution alleged. In another case involving a car crash resulting in a death, the prosecutor provided the teenage defendant and her lawyer with an accident reconstruction report concluding that the defendant’s alleged speeding and careless driv-

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The following articles provide thorough examination of the issue of prosecutorial disclosure in the context of guilty pleas:

- Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE WESTERN RES. L. REV. 651 (2007);
- Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1 (2002);
- John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001);
- Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989);
- Eleanor J. Ostrow, *The Case for Pre-Plea Disclosure*, 90 YALE L.J. 1581 (1981).

ing had caused the crash and the death. (*Carroll v. State*, 474 S.E.2d 737 (Ga. St. App. 1996).) The prosecution failed to disclose that the report had been prepared by an officer who lacked sufficient training and that a second accident reconstruction report, prepared by a qualified expert, showed that the first report was incorrect. The second report demonstrated that the first report’s conclusions about speed were erroneous and that the defective design of the road, rather than the driver’s conduct, caused the crash. Though no crime had been committed, the defendant, deprived of the exculpatory material in the second report, nonetheless pled guilty relying on the faulty first report provided by the prosecution.

In addition to truth seeking, other pragmatic concerns support a rule requiring disclosure of exculpatory evidence in the guilty plea context. Such a rule would encourage prosecutors to dismiss charges in cases such as *Carroll*, *Gardener*, and our hypothetical. Dismissal in such cases is proper because of lack of evidence and would save both public and private resources spent prosecuting, defending, and adjudicating those cases. A clear disclosure rule would also avoid the costs of future litigation over this issue. The uncertainty surrounding *Brady* disclosure in the guilty plea context has generated trial and appellate litigation in both federal and state courts over the past several decades.

## Why Legislate Disclosure?

Why should the legislature enforce disclosure of exculpatory material through a procedural rule rather than leaving disclosure to courts to decide as a constitutional matter? In his June 24 speech, Attorney General Holder addressed the related issue of access to DNA evidence. Noting that the Supreme Court had recently held that there is no due process right to access to DNA evidence in postconviction proceedings, he stated that the Department of Justice “distinguishes what is constitutional from what is good policy” and that “we have maintained that in a full and fair system, it is good policy to permit such access.” Similarly, disclosure of exculpatory information in the guilty plea context is good policy despite the Supreme Court’s restrictive view of a due process right to such disclosure in *United States v. Ruiz*.

The Supreme Court has long held that there is no constitutional right to discovery. Accordingly, disclosure in the criminal justice system both by prosecutors and defense lawyers has been primarily the province of the legislature. For example, rules and statutes created by Congress—Rules 16 and 26.2 and the Jencks Act—largely govern federal prosecutorial disclosure. The *Brady* rule, which has been greatly restricted by a narrow materiality requirement, provides the sole constitutional dimension to what is otherwise an area controlled by federal and state legislatures.

It makes sense on a number of grounds for legislatures to shape public policy regarding prosecutorial disclosure. Unlike a court, a legislature can hold hearings to gather facts relevant to creating new criminal procedure rules. It can summon experts and those with firsthand experience to hear their views. Legislative committees have professional staff to collect data and study an issue. Though courts can rely on published data and the views of experts conveyed through the filings of parties or amicus briefs, courts typically have an ability inferior to the legislature to gather and no ability to generate this sort of information. Because legislatures unlike courts are not bound by the principle of *stare decisis*, they are generally in a better position to keep the law in touch with current needs and developments, such as the weaknesses in our criminal justice system revealed by DNA exonerations.

Legislatively created disclosure rules found in criminal procedure codes are also likely to be more accessible and clearer than disclosure rules

developed in opinions over time by judges through the process of constitutional adjudication, an insight that drove the codification of evidence law. Prosecutors, judges, and defense counsel are more likely to be aware of a disclosure obligation set forth in a criminal procedure rule they have ready access to and regularly consult than one set forth in constitutional case law.

A legislative rule on disclosure would also clarify the law regarding the timing of disclosure. Leaving the issue of guilty plea disclosure to courts to articulate through constitutional adjudication over the past five decades simply has not worked well. The current law regarding guilty plea disclosure is mired in confusion and uncertainty. Courts in some states and federal circuits have not dealt with the issue, while those that have dealt with the issue have divided on whether disclosure of exculpatory evidence prior to the entry of a guilty plea is constitutionally required. The Supreme Court’s *Ruiz* opinion, in part because of its ambiguity and in part because of the unusual circumstances of the case, has left an unacceptable amount of uncertainty on this important issue relating to the accuracy of our criminal justice system’s primary mechanism for establishing guilt.

## Conclusion

Despite the fact that DNA evidence has exonerated 241 wrongfully convicted people in the United States, reforms to address the underlying causes of these miscarriages of justice have been agonizingly slow to materialize. The current U.S. Supreme Court does not view itself as responsible for addressing these weaknesses through constitutional adjudication, making it all the more important for legislatures to address them.

Suppression of exculpatory evidence by police and prosecutors has played a role in a significant percentage of wrongful convictions and thus merits careful attention. In addition to enforcement of the duty to disclose exculpatory material, an important task is clarifying the scope of the prosecutor’s disclosure obligation. Having a jurisdiction’s criminal procedure rules clearly mandate prosecutorial disclosure of exculpatory evidence regardless of whether a defendant is convicted through a trial or a guilty plea will clarify an aspect of that disclosure obligation that has been ambiguous for far too long. It will also reduce the likelihood of wrongful convictions and bolster public confidence in our criminal justice system. ■