CARDOZO LAW REVIEW
de•novo

ENFORCING COMPLIANCE WITH CONSTITUTIONALLY-REQUIRED DISCLOSURES: A PROPOSED RULE

Hon. Emmet G. Sullivan†

TABLE OF CONTENTS

INTRODUCTION

I am of the opinion that the rules of federal criminal procedure should be amended to explicitly incorporate constitutionally-required disclosures. Specifically, Federal Rule of Criminal Procedure 16 governs discovery and inspection, but it does not incorporate the

† The Honorable Emmet G. Sullivan is a U.S. District Judge in the District Court for the District of Columbia.

requirements of *Brady v. Maryland*[1] and its progeny to require the government to provide exculpatory and impeachment evidence to the defendant. Although there have been efforts over the years to amend the federal rules to affirmatively codify these constitutional disclosure requirements, they have not been successful, in part due to resistance from the U.S. Department of Justice (DOJ).[2] Some of the ninety-four district courts nationwide have taken action on their own and have adopted local rules and/or standing orders setting forth the disclosure requirements for prosecutors practicing before those courts. Further, some judges issue standing *Brady* Orders for each criminal case on their respective dockets.

There are many reasons to support this rule change. First and foremost, greater compliance with the disclosure requirements would result in fewer unlawful convictions and unlawful sentencings, important aspects of overall reform in the criminal justice system.[3] Second, a single federal rule that affirmatively codifies the disclosure requirements would be enforceable against non-compliant prosecutors. Third, given that the overwhelming majority of criminal cases are resolved by plea agreements, it is imperative that the government interprets its constitutional obligation broadly and discloses exculpatory evidence to defendants during plea negotiations. An explicit disclosure requirement would ensure that the defendant's waiver of the right to trial is both knowing and voluntary. Fourth, although local disclosure rules and standing orders are laudable, they create the opportunity for inconsistency in federal prosecutions across the ninety-four districts nationwide.

To provide a striking example of the need for a federal disclosure rule, in Part I, I briefly summarize a report on the discovery abuses that occurred in the case of *United States v. Theodore F. Stevens*.[4] In Part II, I describe efforts beginning in 2003 to amend Rule 16. In Part III, I provide an overview of the local district court disclosure rules and standing orders nationwide. Part III also provides the proposed rule now being considered for adoption by the United States District Court for the District of Columbia.

---

1 373 U.S. 83 (1963).

2 *See infra* Part II.

3 Readers interested in criminal justice reform may wish to read an opinion I recently issued in two cases where I was confronted with a request to approve deferred prosecution agreements for corporate defendants. *See* United States v. Saena Tech Corp., No. 14-66 (EGS), 2015 WL 6406266 (D.D.C. Oct. 21, 2015); United States v. Intelligent Decisions, Inc., No. 14-211 (EGS), 2015 WL 6406266 (D.D.C. Oct. 21, 2015).

4 United States v. Stevens, No. 1:08-cr-00231 (EGS) (D.D.C. Mar. 15, 2012).

I. DISCLOSURE ABUSES IN *UNITED STATES V. STEVENS*

In 2008, Senator Theodore "Ted" Stevens (R-AK) was running for re-election for his seventh term.[5] He was also a criminal defendant in a case over which I was presiding.[6] After a four week trial, and about one week prior to election day, a jury found Senator Stevens guilty of lying on Senate disclosure forms.[7] He lost the election, a Democrat replaced him, and the balance of power shifted in the Senate.[8] This consequential chain of events may well have turned out differently had the government followed the law because during the course of post-trial proceedings, it became clear that the *Stevens* prosecution was permeated by systematic concealment of evidence favorable to the Senator in violation of the law, the Constitution, and the prosecutors' ethical duties.

About six months after the verdict was returned, then-Attorney General Eric H. Holder, Jr. moved to dismiss the indictment against Senator Stevens with prejudice.[9] As it appeared to me that prosecutorial misconduct had tainted the proceedings in my courtroom, where I have sworn, for over thirty years on the bench, that every defendant will receive a fair trial, I appointed a highly regarded lawyer and former Assistant United States Attorney, Henry F. Schuelke, III, to investigate what went wrong in the investigation and prosecution of the *Stevens* case, and to recommend whether there was a basis to prosecute the prosecutors for criminal contempt of court.[10]

After an investigation of nearly three years, during which both Senator Stevens and one of the attorneys who prosecuted him died, and following extensive collateral proceedings, Mr. Schuelke's report was made public. Based on his exhaustive investigation, Mr. Schuelke and his colleague William Shields concluded that "[t]he investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated [his] defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness."[11] Mr. Schuelke further found that at least

---

[5] *See, e.g.*, Adam Clymer, *Ted Stevens, Longtime Alaska Senator, Dies at 86*, N.Y. TIMES (Aug. 10, 2010), http://www.nytimes.com/2010/08/11/us/politics/11stevens.html?_r=0. At the time of his death in 2010, Senator Stevens (R-AK) had been the longest-serving Republican senator in history. *Id.*

[6] *See Stevens*, No. 1:08-cr-00231 (EGS) (D.D.C. Mar. 15, 2012).

[7] Clymer, *supra* note 5.

[8] *Id.*

[9] I granted that motion. Order, *Stevens*, No. 1:08-cr-00231 (EGS), 2009 WL 6525926 (D.D.C. Apr. 7, 2009).

[10] Order, *Stevens*, No. 1:08-cr-00231 (EGS) (D.D.C. Apr. 8, 2009).

[11] Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's

some of the concealment was willful and intentional, and related to many of the issues raised by the defense during the course of the *Stevens* trial.[12]

Despite his findings of significant, widespread, and, at times, intentional misconduct, Mr. Schuelke did not, however, recommend prosecution for criminal contempt. This was because he found that the court had not issued an order specifically instructing prosecutors to obey the law by turning over any exculpatory evidence. Noting that, "[i]t should go without saying that neither Judge Sullivan, nor any District Judge, should have to order the Government to comply with its constitutional obligations, let alone that he should feel compelled to craft such an order with a view toward a criminal contempt prosecution, anticipating its willful violation," Mr. Schuelke nevertheless recommended that, without disobedience of a "clear and unequivocal" order, the prosecutors not be charged with criminal contempt.[13]

As a result of the *Stevens* trial and its aftermath, I suggested that an amendment to Rule 16 be revisited to require the government to disclose exculpatory evidence to the defense, as set forth in *Brady* and its progeny. I have also suggested that certain changes to the local rules of the District Court for the District of Columbia would ensure that the government is fully aware of its disclosure obligations. Finally, I now issue a standing *Brady* Order in each criminal case on my docket, which I update as the law in the area progresses. I discuss each of these efforts below.

II. EFFORTS TO AMEND FEDERAL RULE OF CRIMINAL PROCEDURE 16 TO INCORPORATE THE REQUIREMENTS OF *BRADY* AND ITS PROGENY

There have been concerted efforts to amend the federal rules to incorporate *Brady*'s disclosure requirements, but to date they have not resulted in an amendment to Rule 16.[14] The Judicial Conference of the United States' Advisory Committee on the Rules of Criminal Procedure (Advisory Committee or Committee) first began considering an amendment to Rule 16 that would "require the government to disclose exculpatory and impeaching evidence 14 days before trial" based on a

---

Order, dated April 7, 2009, *In re* Special Proceedings, Misc. No. 09-0198 (1:08-cr-00231 (EGS)), ECF No. 435 at 1 (D.D.C. Mar. 15, 2012).

12 *See generally id.*

13 *Id.* at 513.

14 The federal judiciary is authorized to set forth the rules of practice, procedure, and evidence for the federal courts, subject to Congressional rejection, modification, or deferral of those rules. Rules Enabling Act, 28 U.S.C. §§ 2071–2077. A detailed description of this rulemaking process is available at http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public.

proposal submitted to the Committee by the American College of Trial Lawyers in 2003.[15] Although DOJ opposed the amendment, the Advisory Committee voted at its April 2005 meeting in favor of amending the rule.[16] The Committee and its Rule 16 Subcommittee worked on the language of the amendment to address concerns expressed by DOJ, with the intention of taking final action on the proposal in April 2006.[17]

At the April 2006 meeting, DOJ presented to the Committee proposed revisions to the United States Attorneys' Manual (USAM), which it offered as an alternative to amending Rule 16.[18] DOJ stated "that the revision of the Manual would promote prosecutorial uniformity and regularity nationwide, would allow for early disclosure of exculpatory and impeaching evidence, and would encourage prosecutors in most cases to exceed the disclosure requirements mandated by" *Brady* and *Giglio*.[19] One Committee member expressed concern about whether the proposed revisions would require disclosures regardless of materiality and DOJ responded that "prosecutors . . . would be encouraged to construe materiality broadly."[20] Another member expressed concern that without the rule amendment, "conflicting local rules would emerge."[21] As the revisions to the manual were presented as an alternative to the rule change, DOJ informed the Committee that it "would vigorously oppose the proposed Rule 16 amendment at the Standing Committee and beyond, if necessary."[22] Committee members who were "proponents of a rules change noted that the provisions of the USAM are not judicially enforceable, and they also stressed the importance of having a judge, rather than a prosecutor, determine whether disclosure of exculpatory or impeaching material is warranted in a given case."[23] In the end, the Committee, by a vote of seven to six, voted to table, until September 2006, consideration of the proposed amendment in light of DOJ's

---

15 HON. SUSAN C. BUCKLEW, ADVISORY COMM. ON FED. RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES 7 (Dec. 8, 2005), http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-criminal-procedure-december-2005.

16 *Id.*

17 *Id.*

18 ADVISORY COMM. ON CRIMINAL RULES, MINUTES 9–11 (Apr. 3–4, 2006), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-criminal-procedure-april-2006.

19 *Id.* at 9.

20 *Id.* at 9–10.

21 *Id.* at 10.

22 *Id.*

23 HON. SUSAN C. BUCKLEW, ADVISORY COMM. ON FED. RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES 14 (May 20, 2006), http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-criminal-procedure-may-2006.

proposed revisions to the USAM.[24]

In September 2006, the Advisory Committee met in a special session to discuss DOJ's proposed revisions to the USAM and to determine whether, in light of those revisions, it should nonetheless forward the draft Rule 16 amendment to the Standing Committee.[25] At that meeting, DOJ reported that it had made improvements to the USAM provisions since the April 2006 Committee meeting.[26] DOJ explained that the policy, which was at that point fully approved, exceeded the disclosure requirements of *Brady* and *Giglio*, required supervisory approval to delay disclosure of impeachment or exculpatory information, and clarified that the policy applied to sentencing and the guilt-innocence phases of a case.[27] In contrast to its position at the April 2006 meeting, DOJ stated that the USAM revisions would go into effect even if the Committee voted to forward the draft Rule 16 amendment to the Standing Committee.[28]

Although the Committee was appreciative of the improvements that DOJ made to the USAM provisions, it was concerned about: (1) the discretion given to the prosecutor to determine whether impeachment material is "significant" or "substantial"; (2) the fact that the policy only applied to prosecutors; and (3) the lack of judicial enforceability of the policy.[29] In the end, the Committee voted eight to four to approve the Rule 16 amendment and forward it to the Standing Committee.[30] The proposed amendment created a new subsection requiring the government to provide exculpatory or impeaching information, without imposing the requirement under *Brady* that the information be material to the defendant's guilt or punishment.[31]

The Standing Committee considered the proposed rule amendment at its June 2007 meeting.[32] Members the Advisory Committee presented

---

[24] *Id.*

[25] ADVISORY COMM. ON CRIMINAL RULES, MINUTES 1 (Sept. 5, 2006), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-criminal-procedure-september-2006.

[26] *Id.* at 2.

[27] *Id.*

[28] *Id. See also* U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL §§ 9-5.001, 9-5.100 (2016) (noting the policy regarding disclosure of exculpatory and impeachment information, and disclosure to prosecutors of potential impeachment information concerning law enforcement agency witnesses, respectively).

[29] HON. SUSAN C. BUCKLEW, ADVISORY COMM. ON FED. RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES 5 (Dec. 18, 2006), http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-criminal-procedure-december-2006.

[30] *Id.*

[31] The proposed amendment and commentary are provided at Appendix 1.

[32] *See generally* COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES 31–40 (June 11–12, 2007), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-june-2007. At this juncture, the role of the Standing Committee is to determine whether the proposed rule should be published for comment.

the proposed amendment as the culmination of four years of intensive study by the Committee, including a survey of all relevant local rules and standing orders in the district courts nationwide.[33] Advisory Committee members had also reviewed case law addressing *Brady* issues, relevant articles, the American Bar Association's model rules, and correspondence from federal defenders.[34] With regard to the changes made to the USAM elaborating on the government's disclosure obligations, the Advisory Committee determined that changes to the manual could not take the place of a rule change because: (1) "as a practical matter, the committee would have no way to monitor the practical operation of the changes or even to know about problems that might arise in individual cases[;]" and (2) the manual would not be judicially enforceable.[35]

DOJ expressed its opposition to the proposed amendment to the Standing Committee. It argued that the proposal: (1) "goes well beyond what is required by the Constitution and federal statutes"; (2) conflicts with the rights of victims and would cause insecurity among witnesses; (3) was inconsistent with current federal discovery procedures; and (4) "would inevitably generate a substantial amount of litigation on such matters as whether exculpatory or impeachment information is 'material.'"[36] DOJ suggested that the Standing Committee wait to see how the revisions to the USAM worked, or in the alternative the rule should be referred back to the Advisory Committee to address the issues outlined by DOJ.[37]

The Standing Committee declined to approve the publication of the proposed amendment "with the understanding that the advisory committee will be free to study the topic matter further and take such further action as it deems appropriate at some future date."[38] The Standing Committee was concerned that the proposed amendment was too broad and believed it best to wait to see how the revisions to the USAM addressed the issues.[39]

I thought the appropriate time for "further action" was in April 2009—after the *Stevens* case had been dismissed, and after the USAM revisions had been in place for a period of time—and I urged the Advisory Committee to again consider proposing the 2007 amendment to Rule 16. In my letter to Judge Richard C. Tallman, then-Chair of the

---

33 *Id.* at 31.
34 *Id.*
35 *Id.* at 32.
36 *Id.* at 34.
37 *Id.* at 35.
38 *Id.* at 39.
39 COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE 29 (September 2007), http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2007.

Advisory Committee, I argued that the compelling reasons for eight of the twelve members of the Rules Committee to support the proposed rule amendment in 2006 were no less compelling in 2009 after the *Stevens* trial and I walked him through the litany of problems in that trial that we were aware of at that time.[40]

It was fortuitous that the Supreme Court issued its decision in *Cone v. Bell*,[41] on the day I sent my letter to Judge Tallman, giving me the opportunity to rely on that decision in which the Supreme Court reiterated the principles articulated in *Brady* and the *Strickler v. Greene*,[42] *Kyles v. Whitley*,[43] and *United States v. Bagley*[44] decisions. Although the *Cone* Court observed that the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure,[45] I suggested to Judge Tallman that a federal rule of criminal procedure requiring all exculpatory evidence to be produced to the defense in a timely manner and in a useable format would eliminate the need to rely on a "prudent prosecutor" deciding to "err of the side of transparency," and would go a long way towards furthering the search for the truth in criminal trials and ensuring that justice is done.[46] In response, Judge Tallman appointed a subcommittee to reconsider the amendment to Rule 16.[47]

At the same time that the subcommittee was reconsidering the amendments, and in the aftermath of the *Stevens* trial, DOJ launched a number of initiatives aimed at improving the compliance of federal prosecutors with their discovery obligations. These initiatives included: (1) appointing a working group on discovery issues; (2) conducting annual mandatory prosecutor training on discovery; (3) requiring each district to designate a discovery expert to advise prosecutors; and (4) creating a new position in Washington, DC to oversee these efforts.[48]

DOJ told the Committee that it would not oppose amending Rule 16 to codify the disclosure requirements of *Brady*, but that it would object to any proposed amendment that went beyond *Brady*.[49] My response to DOJ's efforts was two-fold. First, while the steps it was

---

[40] *See* Appendix 2.

[41] 556 U.S. 449, 469–70 (2009).

[42] 527 U.S. 263 (1999).

[43] 514 U.S. 419 (1995).

[44] 473 U.S. 667 (1985).

[45] *Cone*, 556 U.S. at 470 n. 15.

[46] Appendix 2 at 4.

[47] ADVISORY COMM. ON CRIMINAL RULES, MINUTES 5 (Oct. 13, 2009), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-criminal-procedure-october-2009.

[48] HON. RICHARD C. TALLMAN, ADVISORY COMM. ON FED. RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES 2 (Dec. 11, 2009), http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-criminal-procedure-december-2009.

[49] *Id.*

taking were laudable, efforts it took such as revising the USAM are not enforceable and could be weakened or discarded when an Attorney General with a different agenda is appointed by a successive President. Second, the government should not be able to unilaterally make the decision of what constitutes material information to be turned over to the defendant, and a Rule 16 amendment would change that.

Over a period of two years, the subcommittee held consultative sessions with judges, prosecutors, defense counsel, academics, agency counsel, and crime victims' representatives.[50] It also worked with the Federal Judicial Center to prepare a nationwide survey of judges, prosecutors, and the defense bar, which collected views on issues, problems, or concerns surrounding pretrial discovery and disclosure.[51] Fifty-one percent of the judges responding to the survey favored amending Rule 16.[52]

Despite these efforts, in April 2011, the Advisory Committee voted six to five not to move forward with an amendment.[53] The Committee cited the following reasons for its decision. First, the results of the FJC survey reflected a lack of consensus throughout the judiciary as to whether an amendment was needed.[54] Second, while the Committee was impressed with the institutional structural changes in policies, procedures, and training implemented by DOJ since the *Stevens* case, it was not convinced that a rule change was needed to ensure that those changes would continue in subsequent administrations.[55] Finally, the Committee stated that it "was not convinced that the problem is so severe as to warrant a rule change when existing Supreme Court authority on a prosecutor's disclosure obligations is clear and for which substantial sanctions are available for non-compliance."[56] While the Advisory Committee's consideration of amendments to Rule 16 did not result in a proposed amendment at that time, it did influence a new section in the 2013 edition of the FJC's Bench Book covering *Brady*

---

[50] *See, e.g.*, HON. RICHARD C. TALLMAN, ADVISORY COMM. ON FED. RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES 34 (May 19, 2010), http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-criminal-procedure-may-2010.

[51] *Id.* at 35.

[52] ADVISORY COMM. ON CRIMINAL RULES, MINUTES 12 (Apr. 11–12, 2011), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-criminal-procedure-april-2011 [hereinafter *April 2011 MINUTES*].

[53] HON. RICHARD C. TALLMAN, ADVISORY COMM. ON FED. RULES OF CRIMINAL PROCEDURE, REPORT OF THE CRIMINAL ADVISORY COMMITTEE 10 (May 12, 2011), http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-criminal-procedure-may-2011 [hereinafter *May 2011 REPORT*].

[54] *Id.* Although 51 percent of the judges responding to the survey favored amending Rule 16, 60 percent said that they were not aware of any *Brady* violations within the past five years. *April 2011 MINUTES*, *supra* note 52, at 14.

[55] *May 2011 REPORT*, *supra* note 53, at 10.

[56] *Id.*

and *Giglio* obligations, which provides a wealth of relevant information for judges.[57] My colleague Judge Paul Friedman took the lead in drafting this section of the Benchbook.[58]

Although efforts to amend Rule 16 have not been successful thus far, it is my firm belief that the Advisory Committee will revisit this issue and that a proposed amendment will at the very least be published for public comment. In recent years, public dialogue has begun to focus on ways in which the criminal justice system can be reformed to reduce over-incarceration of individuals for non-violent crimes, especially drug crimes. Codifying these constitutional disclosure requirements, particularly in view of the high percentage of criminal cases that result in guilty pleas,[59] is a critical aspect of criminal justice reform. I submit that it is difficult to see how a criminal defendant could knowingly and voluntarily waive his or her constitutional right to trial without being made aware of exculpatory evidence in the government's possession.

III. EFFORTS TO INCORPORATE THE REQUIREMENTS OF *BRADY* AND ITS PROGENY/REQUIRE DISCLOSURE OF EXCULPATORY EVIDENCE AT THE FEDERAL DISTRICT COURT LEVEL

In addition to efforts to codify the requirements of *Brady* and its progeny at the national level, some district courts have adopted local rules and/or standing orders that address the government's duty to disclose. Approximately twenty-eight of the ninety-four federal district courts nationwide have promulgated rules regarding the disclosure obligations of prosecutors who appear in those courts,[60] and eight more districts have issued standing orders governing those obligations.[61]

---

[57] *See* FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 5.06 (6th ed. 2013), http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf.

[58] *Id.* at iv.

[59] MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2012 - STATISTICAL TABLES 2 (2015).

[60] *See, e.g.*, SD ALA LR 16; N.D. Cal. Crim. L.R. 16-1, 17-1; N.D. Fla. Loc. R. 26.2; S.D. Fla. L.R. 88.10; LCrR 16.1, NDGa; S.D. Ga. LCrR 16.1; D. Haw. CrimLR 16.1; CDIL-LR 16.1; N.D. Ill. LCrR. 16.1; D.N. Mar. I. LCrR 17.1.1; LR, D. Mass 116.1, 116.2; D. Minn. LR 12.1(a); D. Mont. L.R. CR 16.1; D.N.H. LCrR 16.1; D.N.M.LR-Cr. 16.1, 16.2; N.D.N.Y. L. R. Cr. P. 14.1; E.D.N.C. Local Criminal Rule 16.1; M.D.N.C. LCrR 16.1; E.D. Okla. LCrR 16.1; W.D. Okla. LCrR 16.1; W.D. Pa. LCrR 16; M.D. Tenn. LCrR 16.01; Western District of Texas Rule 16; D. Vt. L.Cr. R. 16; Local Rules W.D. Wash. CrR 16; N.D. W. Va. LR Cr P 16.05, 16.06; S.D. W. Va. LR CR P 16.1; E.D. Wis. Crim. R. 16.

[61] *See, e.g.*, Standing Order on Criminal Discovery, Cr. Misc. No. 534 (M.D. Ala. Feb. 4, 1999); Standing Order on Discovery, L. Cr. R. App. 145 (D. Conn. Dec. 1, 2009); *In re* Revised Criminal Procedure Order, Gen. Order No. 242 (D. Idaho Mar. 1, 2010); General Order of Discovery and Scheduling (D. Kan. June 12, 2012); *In re* Standing Order for Discovery and Inspection and Fixing Motion Cut-Off Date in Criminal Cases, Admin. Order No. 03-AO-027 (E.D. Mich. Sept. 30, 2003); Standing Order Regarding Discovery in Criminal Cases, Admin.

These local rules vary in their scope and amount of detail. The U.S. District Court for the District of Massachusetts has promulgated one of the broadest rules for disclosure of exculpatory information.[62]

The U.S. District Court for the District of Columbia, at the request of Judge Friedman and myself, convened an ad hoc committee of judges, prosecutors, and members of the defense bar, which spent the past year drafting a proposed disclosure rule. The proposed rule provides as follows:

> (a) Unless the parties otherwise agree, the government shall make available to the defense any non-trivial information known to the government that tends to negate the defendant's guilt, mitigate the charged offense(s), or reduce the potential penalty. This requirement applies regardless of whether the information would itself constitute admissible evidence. The information, furthermore, shall be produced, where not prohibited by law, in a readily usable form unless that is impracticable; in such a circumstance, it shall be made available to the defense for inspection and copying.
>
> The government shall make good-faith efforts to promptly disclose the information to the defense beginning at the defendant's initial appearance before the court, and this obligation shall remain ongoing throughout the criminal proceeding.
>
> (b) The information to be disclosed includes, but is not limited to:
>
> > (1) Information that is inconsistent with or tends to negate the defendant's guilt as to any element, including identification, of the offense(s) with which the defendant is charged;
> >
> > (2) Information that tends to establish an articulated and legally cognizable defense theory or recognized affirmative defense to the offense(s) with which the defendant is charged;
> >
> > (3) Information that casts doubt on the credibility or accuracy of any evidence, including witness testimony, the government anticipates using in its case-in-chief at trial; and
> >
> > (4) Impeachment information, which includes: (i) information regarding whether any promise, reward, or inducement has been given by the government to any witness it anticipates calling in its case-in-chief; and (ii) information that identifies all pending criminal cases against, and all criminal convictions of, any such witness.
>
> (c) As impeachment information described in (b)(4) is dependent on which witnesses the government intends to call at trial, this rule does

Order No. 06-085 (W.D. Mich. Aug. 28, 2006); *In re* Criminal Trial Scheduling and Discovery, Standing Order No. 15-2 (D.N.J. Sept. 22, 2015); *In re* Criminal Discovery, Standing Order No. 2015-5 (D. Or. Mar. 16, 2015).

[62] LR, D. Mass 116.2, http://www.mad.uscourts.gov/general/pdf/LC/2015%20LOCAL%20RULES.pdf.

> not require the government to disclose such information before a trial date is set.
>
> (d) In the event the government believes that a disclosure under this rule would compromise witness safety, national security, a sensitive law-enforcement technique, or any other substantial government interest, it may apply to the Court for a modification of the requirements of this rule.
>
> (e) For purposes of this rule, the government includes federal, state, and local law-enforcement officers and other government officials participating in the investigation and prosecution of the offense(s) with which the defendant is charged. The government has an obligation to seek from these sources all information subject to disclosure under this Rule.
>
> (f) The Court may set specific timelines for disclosure of any information mentioned in this rule.

Pursuant to our local rules, the court provided notice of the proposed local rule change and solicited comments, which were due no later than March 28, 2016. The ad hoc committee and the court will consider the comments received, and the court will ultimately vote on whether to adopt the rule.

In addition to local court rules and standing orders, individual judges may issue standing orders in the cases before them. Following the *Stevens* case, I have issued a standing *Brady* Order for each criminal case on my docket, updating it in reaction to developments in the law.[63] For example, I recently revised my standing order to explicitly require prosecutors to disclose exculpatory evidence during plea negotiations.[64]

CONCLUSION

In advocating against any rule modification, the government argues that the number of cases involving discovery abuse is so small that no need exists to amend Rule 16. I acknowledge that the vast majority of prosecutors are dedicated honorable public servants. Nevertheless, the need for a rule change should not be determined by the small number of cases that demonstrate discovery abuse—and after people are caught

---

[63] My standing *Brady* order is provided at Appendix 3.

[64] Federal circuits are split on whether *Brady* and its progeny require the government to disclose exculpatory evidence during the plea bargaining stage, and the question has not been addressed by the United States Court of Appeals for the District of Columbia Circuit. That said, one of my colleagues on the District Court here in the District of Columbia, in 2013, allowed a defendant to withdraw his guilty plea because the prosecution had suppressed exculpatory evidence before the defendant pled guilty. United States v. Nelson, 979 F. Supp. 2d 123, 135–36 (D.D.C. 2013).

abusing the process. Rather, a rule change would: (1) help to avoid unlawful convictions and unlawful sentencings; (2) be judicially enforceable; (3) help to ensure that a defendant's waiver of the right to trial is both knowing and voluntary; and (4) bring more consistency to compliance with disclosure obligations in federal prosecutions nationwide.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

(a) **Government's Disclosure.**

(1) ***Information Subject to Disclosure.***

* * * * *

(H) *Exculpatory or Impeaching Information.* Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

* * * * *

Committee Note

Subdivision (a)(1)(H). New subdivision (a)(1)(H) is based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory or impeaching information known to the prosecution. The requirement that exculpatory and impeaching information be provided to the defense

also reduces the possibility that innocent persons will be convicted in federal proceedings. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.11(a) (3d ed. 1993), and ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.8(d) (2003). The amendment is intended to supplement the prosecutor's obligations to disclose material exculpatory or impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999), and *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

The rule contains no requirement that the information be "material" to guilt in the sense that this term is used in cases such as *Kyles v. Whitley*. It requires prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt.

The amendment distinguishes between exculpatory and impeaching information for purposes of the timing of disclosure. Information is exculpatory under the rule if it tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment or information.

Because the disclosure of the identity of witnesses raises special concerns, and impeachment information may disclose a witness's identity, the rule provides that the court may not order the disclosure of information that is impeaching but not exculpatory earlier than 14 days before trial. The government may apply to the court for a protective order concerning exculpatory or impeaching information under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time.

United States District Court
for the District of Columbia
Washington, D.C. 20001

Attachment 2

Chambers of
Emmet G. Sullivan
United States District Judge

(202) 354-3260

April 28, 2009

VIA FACSIMILE AND FEDEX
The Honorable Richard C. Tallman, Chair
Judicial Conference Advisory Committee
on the Rules of Criminal Procedure
Attn: Rules Committee Support Office
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20054

Dear Judge Tallman:

I write to urge the Advisory Committee on the Rules of Criminal Procedure (the "Rules Committee") to once again propose an amendment to Federal Rule of Criminal Procedure 16 requiring the disclosure of all exculpatory information to the defense. My understanding is that on September 5, 2006, the Rules Committee voted eight to four to forward such an amendment to the Standing Committee on Rules of Practice and Procedure (the "Standing Committee").[1] However, the Department of Justice ("DOJ") strongly opposed the amendment and argued that a modification to the United States Attorneys' Manual – which added, for the first time, a section addressing federal prosecutors' disclosure obligations – would obviate the need for an amendment to the federal rule.

There were compelling reasons for eight of the twelve members of the Rules Committee to support the proposed amendment in September 2006. Those reasons are no less compelling today. Moreover, it has now been nearly three years since the United States Attorneys' Manual was modified to "establish[] guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligations as set out in *Brady v. Maryland* and *Giglio v. United States* and its obligation to seek justice in every case."[2] While I recognize and respect the commitment and hard work demonstrated by federal prosecutors every day in courtrooms throughout the country, it is

---

[1] *See* Minutes of September 5, 2006 Special Session at 7, *available at* http://www.uscourts.gov/rules/Minutes/CR09-2006-min.pdf.

[2] *See* United States Attorneys' Manual § 9-5.000, Comment, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.

uncontroverted that *Brady* violations nevertheless occur.

Earlier this month, Attorney General Eric H. Holder, Jr., for whom I have the highest regard, took the highly unusual, if not unprecedented, step of moving to set aside the verdict and dismiss the indictment with prejudice in the case of *United States v. Theodore F. Stevens*, Criminal Action No. 08-231 (EGS) (D.D.C.). At a hearing on that motion, the government informed me that during the course of investigating allegations of misconduct, which included several discovery breaches, and preparing to respond to the defendant's post-trial motions, a new team of prosecutors had discovered what the government readily acknowledged were two serious *Brady* violations:

> THE COURT: All right. Let me ask you this, Counsel, and I need a very precise answer to this question. The Government counsel will concede, will it not, that the failure to produce the notes or information from the April 15, 2008 interview with Bill Allen in which he did not recall having a conversation with Bob Persons about sending a bill to the Senator was a *Brady* violation.
>
> MR. O'BRIEN: It was a *Brady* violation. It was impeaching material, and the Court knows that *Giglio* is a subset of *Brady.*
>
> THE COURT: Right.
>
> MR. O'BRIEN: Also, there was – I failed to mention this and I should have. The Court did mention it, but there was also information about the value of the work that was performed.
>
> THE COURT: And that was going to be the second question. Indeed, was that a *Brady* violation as well?
>
> MR. O'BRIEN: I believe that it was. At a minimum, it was favorable evidence to the Defense that should have been turned over pursuant to the instructions that Your Honor previously mentioned.

Motion Hrg. Tr. 13-14 (Apr. 7, 2009). These *Brady* violations – revealed for the first time five months after the verdict was returned – came to light only after an FBI agent filed a complaint alleging prosecutorial and other law enforcement misconduct, a new Attorney General took office, and a new prosecutorial team was appointed to respond to the defendant's post-trial motions. Attorney General Holder's response to these issues has been commendable, and I understand that he has since discussed instituting training for prosecutors regarding their discovery obligations and has publicly reminded prosecutors that their obligations to fairness and justice are paramount to all other concerns.[3] These developments provide further support for such an amendment.

---

[3] *See* Nedra Pickler, *U.S. Attorneys Told to Expect Scrutiny; Senator's Case Leaves Taint, Holder Says*, The Boston Globe, Apr. 9, 2009, at 8 ("'Your job as assistant U.S. attorneys is not to convict people,' said Holder. 'Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do

An amendment to Rule 16 that requires the government to produce all exculpatory information to the defense serves the best interests of the court, the prosecution, the defense, and, ultimately, the public. Such a rule would eliminate the need for the court to enter discovery orders that simply restate the law in this area, reduce discovery disputes, and help ensure the integrity and fairness of criminal proceedings. Moreover, such a rule would also provide clear guidance to the prosecutor and indeed protect prosecutors from inadvertent failures to disclose exculpatory information. Finally, a federal rule of criminal procedure mandating disclosure of such information – whether or not the information is requested by the defense – would ensure that the defense receives in a timely manner all exculpatory information in the government's possession.

The importance of the government's disclosure obligations cannot be overstated. Indeed, as articulated by the U.S. Supreme Court in *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999):

> In *Brady,* this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. [83, 87 (1963)]. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs,* 427 U.S. 97 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682; *see also Kyles v. Whitley,* 514 U.S. 419, 433-434 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Id.* at 438. In order to comply with *Brady,* therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles,* 514 U.S. at 437.
>
> These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

---

something other than that is to be ignored. Any policy that is in tension with that is to be questioned and brought to my attention. And I mean that.'" (quoting remarks by Attorney General Holder at a swearing-in ceremony)).

In a decision issued today, the Supreme Court reiterated these principles in equally strong terms. Both the language used by the Supreme Court, and the fact that the Court was faced with yet another case raising important *Brady* issues, strongly countenance in favor of the Rule 16 amendment previously proposed by the Rules Committee:

> Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, 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. *See Kyles*, 514 U.S. at 437 ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993)"). *See also* ABA Model Rule of Professional Conduct 3.8(d) (2008) ("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"). As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure. *See Kyles*, 514 U.S., at 439; *U.S. v. Bagley*, 473 U.S. 667, 711, n. 4 (1985) (STEVENS, J., dissenting); *United States v. Agurs*, 427 U.S. 97, 108 (1976).

Cone v. Bell, No. 07-1114, slip. op. at 21 n.15 (U.S. Apr. 28, 2009).

A federal rule of criminal procedure requiring all exculpatory evidence to be produced to the defense would eliminate the need to rely on a "prudent prosecutor" deciding to "err on the side of transparency," *id.*, and would go a long way towards furthering "the search for the truth in criminal trials" and ensuring that "justice shall be done." *Strickler*, 527 U.S. at 281. I welcome the opportunity to discuss this issue further.

Respectfully,

Emmet G. Sullivan

cc: Members of the Advisory Committee on the Rules of Criminal Procedure (via facsimile)
The Honorable Eric H. Holder, Jr. (via facsimile)
Counsel of record in *United States v. Theodore F. Stevens*, Criminal Action No. 08-231 (EGS) (D.D.C.) (via ECF)

ORDER

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, the government has a continuing obligation to produce all evidence required by the law and the Federal Rules of Criminal Procedure. *See id.* at 87 (holding that due process requires disclosure of "evidence [that] is material either to guilt or to punishment" upon request); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (holding that the obligation to disclose includes evidence "known only to police investigators and not to the prosecutor," and that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf ..., including the police."); *United States v. Agurs*, 427 U.S. 97, 107 (1976) (holding that the duty to disclose exculpatory evidence applies even when there has been no request by the accused); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (holding that *Brady* encompasses impeachment evidence); *see also* Fed. R. Crim. P. 16(a) (outlining information subject to government disclosure); *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998) (holding that the disclosure requirements of Fed. R. Crim. P. 16(a)(1)(C) apply to inculpatory, as well as exculpatory, evidence).

The government's obligation to provide exculpatory evidence pursuant to *Brady* in a timely manner is not diminished either by the fact that such evidence also constitutes evidence that must

be produced later pursuant to the Jencks Act, 18 U.S.C. § 3500, or by the fact that such evidence need not be produced according to Rule 16. *See United States v. Tarantino*, 846 F.2d 1384, 1414 n.11 (D.C. Cir. 1988); *see also* Advisory Committee Note to Fed. R. Crim. P. 16 (1974) ("The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled."). Where doubt exists as to the usefulness of the evidence to the defendant, the government must resolve all such doubts in favor of full disclosure. *See United States v. Paxson*, 861 F.2d 730, 737 (D.C. Cir. 1988).

Accordingly, the Court, *sua sponte*, directs the government to produce to defendant in a timely manner – including during the plea bargaining stage[1] – any evidence in its possession that is favorable to defendant and material either to defendant's guilt or punishment. The government is further directed to produce all discoverable evidence in a readily usable form. For example, the government must produce documents as they are kept in the usual course of business or must organize and label them clearly. The government must also produce electronically stored information in a form in which it is ordinarily maintained unless the form is not readily usable, in which case the government is directed to

[1] *United States v. Ohiri*, 133 Fed.Appx. 555, 562 (10th Cir. 2005); *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988) *Campbell v. Marshall*, 769 F.2d 314, 322-24 (6th Cir. 1985); *U.S. v. Nelson*, 979 F.Supp. 2d 123, 135-136 (D.D.C. 2013); *Buffey v. Ballard*,782 S.E. 2d 204 (W.Va. 2015).

produce it in a readily usable form. If the information already exists or was memorialized in a tangible format, such as a document or recording, the information shall be produced in that format. If the information does not exist in such a format and, as a result, the government is providing the information in a summary format, the summary must include sufficient detail and specificity to enable the defense to assess its relevance and potential usefulness.

Finally, if the government has identified any information which is favorable to the defendant but which the government believes not to be material, the government shall submit such information to the Court for *in camera* review.