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HAND DELIVERED

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of the US District Court for the District of Columbia
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Re: Government Disclosure of Exculpatory Information in Criminal Cases:
Comment on Proposed Local Rule Change

Dear Chairman Aldock:

We submit these comments on behalf of Centurion Ministries and myself to support adoption of the proposed Local Rule on government disclosure of exculpatory information in criminal cases.[1] The central thrust of the Rule is an important improvement in the law, and only a few suggestions are warranted.

I. "MATERIALITY" REQUIREMENT PROPERLY ELIMINATED

The chief virtue of the proposed disclosure rule is that it eliminates the requirement of "materiality" before exculpatory information must be disclosed.

A. There are continuing good faith disagreements over the meaning of "material" in the constitutional standard. *See, e.g.,* *Wearry v. Cain*, __ U.S. ___, 84 USLW 4125 (March 7, 2016) (7-2);[2] *and compare* *Wearry* with *In re Andrew Kline*, ___

[1] Centurion Ministries (CM) is a non-profit, public interest organization founded in 1983 in Princeton, New Jersey. The sole mission of CM is to free from prison those innocent individuals who had absolutely nothing whatsoever to do with the crimes for which they were convicted and sentenced to either death or life in prison. While its cases include some that are DNA related, the bulk of CM's cases are "non-DNA" cases that require a "boots-on-the-ground" street investigation. *See* www.centurionministries.org. Ten years of *pro bono* work seeking *Brady* reforms in the District of Columbia, starting with a court-appointed case in the United States District Court for the District of Columbia, led the undersigned Edwin E. Huddleson to appreciate how important *Brady* reforms are, and how difficult they are to achieve.

[2] In *Wearry*, the Court held that a death row inmate's *Brady* rights were violated when the State failed to turn over evidence that eroded the credibility of its star witnesses and undermined confidence in the jury's rejection of the defendant's alibi defense. The opinion for seven Justices states: "To prevail on his *Brady* claim, Wearry need not show that he 'more likely than not' would have been acquitted had the new

A.3d __ (DC App. April 9, 2015).[3] The standard in the proposed local USDC, DDC rule is more straightforward, less convoluted, and easier to understand and apply.

B. Extensive experience has confirmed that "materiality" is often difficult for prosecutors to determine. There are many reasons for this, including: prosecutors have a natural desire to win their cases, the inexperience of some prosecutors, the complexity of cases, overworked prosecutors who lack adequate preparation time because of excessive case loads, lack of training in *Brady* compliance, conceptual difficulties in defining "materiality" (a retrospective inquiry), and prosecutors' lack of specific knowledge of the defense case.

C. Ethical responsibilities of prosecutors, independent of the Constitution, already require a prosecutor to disclose exculpatory information to the defendant in criminal cases, whether or not it is "material." *See In re Andrew Kline*, __ A.3d __ (DC App. April 9, 2015) ("Rule 3.8(e) requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirements of *Bagley*, *Kyles*, and their progeny.").

There are differences between a prosecutor's constitutional duties under *Brady* and her ethical duties under Rule 3.8(e).[4] Yet the proposed new Local Rule is clearly

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evidence been admitted. He must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." 84 USLW at 4127 (citations omitted). "Given this standard, Wearry can prevail even if, as the dissent suggests, the undisclosed information may not have affected the jury's verdict." *Id*. at n.6. Two Justices in dissent recited a different word formula: "The failure to turn over exculpatory information violates due process only 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 84 USLW at 4128 (Alito and Thomas, JJ., dissenting).

[3] The opinion in *Kline* states (slip opin at 9- 10): The "'material-to-outcome'standard * * * was first formally adopted * * * in *United States v. Bagley*, 473 US. 667 (1985). * * * While the Supreme Court in *Brady* promulgated a definition of exculpatory material for disclosure purposes – evidence that is 'material to guilt or innocence' – it was not until *Bagley* that the term 'material' was defined as prejudice sufficient to support a belief that had the information been disclosed, the outcome of the trial likely would have been different. *See id*. at 674-75." We respectfully submit that the US Supreme Court's most recent interpretation of "material" in *Wearry* is different from, and more pro-disclosure than, the interpretation of "material" by our local Court of Appeals in *Kline*. This strongly underlines the point that there are continuing good faith disagreements over the meaning of "material" in the constitutional standard.

[4] Three major differences were noted by the Court in *Kline* (slip opin at 24): First, "in order to violate Rule 3.8(e), there must be evidence that a prosecutor intentionally failed to disclose exculpatory evidence. However, a *Brady* violation can be "inadvertent." *See Strickler*, 527 U.S. at 281-82. Second, Rule 3.8(e) only requires disclosure of evidence about which the prosecutor has actual knowledge, while under *Brady* potentially exculpatory evidence known by other government actors is imputed to the prosecution. Third, a violation of Rule 3.8(e) requires a finding that the prosecutor knew or reasonably should have known that the evidence tended to negate the guilt of the accused or mitigate the offense, whereas a *Brady* violation is not focused on the conduct of the prosecutor, only whether the evidence was potentially exculpatory and whether the outcome of the trial was seriously affected. In sum, Rule 3.8(e), by its very terms, cannot be read as being coextensive with *Brady* and we doubt seriously whether local prosecutors would support such an interpretation of the rule."

supported by ethical considerations: It simplifies and clarifies the law, appropriately reflecting the direction signaled by the US Supreme Court's most recent decision on "materiality" in *Wearry*. It favors ethical practice and more open disclosure that will better ensure that criminal defendants in the District of Columbia receive a fair trial.

D. Wrongfully withheld *Brady* material has been identified as a cause of wrongful convictions in several recent highly-publicized cases,[5] showing that there is a clear and present need for this new Local Rule. To be sure, the United States Department of Justice recently has made salutary efforts to improve the education and training of prosecutors on *Brady* compliance issues.[6] But those efforts have fallen short of eliminating *Brady* violations. For example, comments from the Public Defender Service for the District of Columbia listed eight recent cases, "a non-exhaustive list," in which relevant information was disclosed late or not at all. *See "Getting prosecutors to share what they know: A modest reform could help prevent wrongful convictions*" (Washington Post Editorial, p.A16, Monday, March 21, 2016). Throughout the country, *Brady* violations are still occurring with disturbing frequency.[7]

For all these reasons, the Court should adopt the proposed Local Rule on government disclosure of exculpatory information in criminal cases.

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[5] *See, e.g., United States v. Stevens*, 08-CR-231 EGS, 2009 WL 6525926 (DDC April 7, 2009) (vacating jury's guilty verdict against Senator Ted Stevens on corruption charges where prosecution failed to produce exculpatory evidence until nearly five months after the trial and after Senator Stevens narrowly lost his reelection bid); *Limone v. United States*, 497 F.Supp.2d 143 (D.Mass. 2007) (court awards $101 million damages for FBI misconduct in framing prisoners, including wrongfully withholding *Brady* material); *Eastridge v. United States*, 372 F.Supp.2d 26 (DDC 2005) (court overturns criminal convctions because of *Brady* violations and new evidence brought out by the practicing Bar). The system-wide importance of being able to discover wrongfully withheld *Brady* material was noted in *United States v. Sampson*, 275 F.Supp.2d 49, 57 (D.Mass. 2003): "A recent study of capital cases from 1973 to 1995 reported that one of the two most common errors prompting the reversal of state convictions in which the defendant was sentenced to death was the improper failure of police or prosecutors to disclose important evidence that the defendant was innocent or did not deserve to die."

[6] *See* US DoJ's voluntary (non-binding) *Guidance for Prosecutors Regarding Criminal Discovery* (January 4, 2010).

[7] *See, e.g., United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from the denial of rehearing *en banc*) ("*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testimony to this unsettling trend.") (citing cases); *United States v. Parke*r, 2015 U.S.App.Lexis 10760 (4th Cir. June 25, 2015) (vacating criminal conviction because prosecutors failed to disclose that a key prosecution witness was under investigation by the SEC for fraud); *United States v. Tavera* 719 F.3d 705, 714 (6th Cir. 2013) (vacating criminal conviction based on *Brady* violations where prosecutors failed to disclose material exculpatory statements by government witness); *United States v. Sedaghaty*, 728 F.3d 885, 892 (9th Cir. 2013) (court remands for new criminal trial, because government violated *Brady* by "withholding significant impeachment evidence relevant to a central government witness"); *United States v. Mahaffy*, 693 F.3d 113, 133 (2d Cir. 2012) ("The government's failures to comply with *Brady* were entirely preventable. On multiple occasions, the prosecution team either actively decided not to disclose the SEC deposition transcripts or consciously avoided its responsibilities to comply with *Brady*").

II. COURT SUPERVISION, TIMELY DISCLOSURES, REDACTIONS

The only suggestions we have for improving the proposed Local Rule concern court supervision, the timeliness of disclosing impeachment information, and redactions to eliminate concerns about national security, witness safety, sensitive law-enforcement techniques, or any other substantial government interest,

A. Court Supervision: On-the-Record Colloquy; In Camera Review of Withheld Exculpatory Information. U.S.Court of Appeals Judge Alex Kozinski supports the "good idea" that "during pretrial hearings and before a defendant enters a guilty plea, the trial judge would have a conversation with the prosecutor on the record, asking him such questions as, "Have you reviewed your file . . . to determine if [it] includes information that is favorable to the defense?" and "Have you identified information that is favorable to the defense, but nonetheless elected not to disclose [it] .....?" *See "Judge Kozinski on what judges can do to improve the criminal justice system,"* The Volokh Conspiracy (July 20, 2015) (commenting favorably on this idea that appeared in an article by Professor Jason Kreag in the Stanford Law Review Online, *The Brady Colloquy*, 67 Stan.L.Rev.Online 47 (2014))). Judge Kozinski continues: "There is nothing like having to face a judge on the record to impress upon lawyers the need to scrupulously comply with their professional obligation. But the questions must be sufficiently specific and detailed to avoid the mantra, "We're aware of our *Brady* obligations and we've met them." *Id.*

To adopt this "good idea," the Advisory Committee should consider adding a new section (g) in the proposed Local Rule that reads in substance: "The Court shall inquire of the prosecutor on the record whether she has reviewed her file to determine if it includes information favorable to the defense, and whether that information has been disclosed to the defense or instead withheld for any reason. The Court may examine any withheld exculpatory information *in camera*."

B. Timely Disclosures. Section (c) states that "As impeachment information described in (b)(4) is dependent on which witnesses the government intends to call at trial, this rule does not require the government to disclose such information before a trial date is set." There are many cases, however, where the Government knows precisely the identity of its witnesses, at the much earlier time of the criminal defendant's initial appearance. This is true particularly in cases where the defendant's initial appearance is on an indictment, as opposed to a criminal complaint, and in cases where an informant and/or cooperating witness is the source of the incriminating evidence against the defendant. In the experience of Centurion Ministries, impeachment evidence often serves as the foundation to the discovery of evidence demonstrating the falsity of witnesses' testimony and/or the veracity of the prosecution's case. Centurion investigates, across the nation, claims by inmates that they are actually innocent and often major breaks in an investigation will be the result of in-depth digging into the particulars of what is classified as "impeachment" information. Delay in disclosing impeachment information

puts the defense at a distinct disadvantage in investigating the information disclosed and in assessing the strength of the Government's case.

Accordingly, the Advisory Committee should consider amending section (c) to read in substance as follows: "Where the government knows the identity of its witnesses, at the time of the defendant's initial appearance, impeachment information should be disclosed at that time, or as soon thereafter as it decides upon the identity of its witnesses, but in no event later than the time a trial date is set."

C. Redactions. Section (d), concerning countervailing values that weigh against wide-open disclosure, should be modified to encourage appropriate redactions, in order to allow criminal defense counsel access to exculpatory information where appropriate redactions in records can eliminate concerns about national security, witness safety, sensitive law-enforcement techniques, or any other substantial government interest, without removing the exculpatory aspects of the information.[8] Similarly, the Court may want to consider the option of an order for confidential disclosure to the defense. Accordingly, the Advisory Committee should consider modifying section (d) to read:

> (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. ***Such modifications may include appropriate redactions to exculpatory records or an order for confidential disclosure to the defense.***

Thank you for considering these comments. We look forward to the Court's adopting the final version of this proposed Local Rule on government disclosure of exculpatory information in criminal cases.

Sincerely yours,

Edwin E. Huddleson

Kate Germond
Executive Director, Centurion Ministries

Paul Casteleiro
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[8] This principle was observed in a criminal case in this jurisdiction, which Chief Judge Lamberth speaks about, where he made redactions to records to eliminate a threatened "graymail" defense by a criminal suspect who threatened to release national security information to the public as part of his defense.