CRIMINAL LAW REFORM:

Brady/Giglio

1. Centurion Ministries: USDC, DDC proposed local rule on Government Disclosure of Exculpatory Information in Criminal Cases (March 28, 2016)

2. NACDL: Codifying the Brady Rule (May 2013)

3. Improving the Operations of Government on Brady Compliance (April 22, 2010)

4. US DOJ Memorandum for Department Prosecutors (January 4, 2010)

5. USDC Judges Emmet G. Sullivan and Mark L. Wolf (2009): Amending F.R.Crim.P. 16 to require disclosure of exculpatory information to the defense

6. NACDL Report on Government Brady Operations (October 26, 2007)

   Affidavits: Centurion Ministries

   Mid-Atlantic Innocence Project

   Center on Wrongful Convictions/Northwestern

7. Establishing a DC Innocence Commission (January 26, 2011)

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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*, ___

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[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. Parker*, 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
Legal Director, Centurion

[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.

Codifying the Brady Rule

NACDL devised a model statute that would codify the Brady rule. The Fairness in Disclosure of Evidence Act does not attempt to reform criminal discovery generally, but it does seek to clarify and implement the Brady rule in each respect that case law development has made problematic.

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In his separate opinion criticizing the breadth of the majority's language, Justice White described Justice Douglas's opinion in *Brady v Maryland*[1] as creating "in constitutional form a broad rule of criminal discovery."[2] Sadly, White's caricature of the majority's opinion was not to be vindicated. To the contrary, for 50 years defense lawyers have had to fight to make the critically important Due Process right affirmed in *Brady* meaningful for their clients. Part of this struggle was a decade-long effort to incorporate *Brady*'s disclosure obligation into the discovery provisions of the Federal Rules of Criminal Procedure. That campaign reached a frustrating conclusion in 2007, when the amendment came within a few votes of success in the Federal Judicial Conference Standing Committee on Rules of Procedure, after narrowly passing the Advisory Committee on Criminal Rules. The failure of that effort led NACDL to turn its energies to a new strategy: codifying the *Brady* rule, for federal cases at least, in the form of a statute.

NACDL's objective, of course, was not to codify post-*Brady* case law and practices. Despite becoming a powerful tool for justice in countless cases, the *Brady* doctrine from the first has faced resistance. In addition to outright violations, the decision was — and continues to be — narrowly and begrudgingly interpreted by most prosecutors and many courts. As a result, NACDL created a task force to devise a model statute that would supplement the rules of procedure, while overturning the key misinterpretations of *Brady* and unwarranted restrictions that have arisen. Timing was to prove fortuitous: The NACDL Board of Directors adopted the task force's proposal on May 20, 2011.[3] Less than a year later, the *United States v. Stevens* scandal created an occasion for the introduction by Sen. Lisa Murkowski (R. Alaska) and a bipartisan group of five co-sponsors on March 15, 2012, of S. 2197, the Fairness in Disclosure of Evidence Act. As introduced, S. 2197 was based almost entirely on the NACDL proposal. While the bill died in committee with the end of the 112th Congress, it will be reintroduced in the new Congress, and NACDL will press for passage.

The Fairness in Disclosure bill does not attempt to reform criminal discovery generally, but it does seek to clarify and implement the *Brady* rule in each respect that case law development has made problematic over the years. Among these issues are the pervasive misuse of the term "exculpatory" to define the doctrine's focus, the insertion of a "materiality" requirement, application of the doctrine to preliminary matters, interaction with "Jencks Act" (Rule 26.2) restrictions and CIPA, whether disclosable material must constitute "evidence," the matter of timing (including the problem of guilty plea cases), the related questions of defense diligence and prosecutorial "suppression," waiver and enforcement, including remedies for noncompliance, and the standard of appellate review.

'FAVORABLE' VERSUS 'EXCULPATORY'

First, the proposed Act would correct two major misinterpretations of the *Brady* principle that have crept into the case law and popular understandings. The Act would eliminate any suggestion that the doctrine's coverage is limited to information that can be described as "exculpatory," in the sense of "exonerating." The *Brady* majority itself never used the term "exculpatory" to describe the limits of its concern. Instead, it referred to material which "would *tend to* exculpate [the accused] *or reduce the penalty*,"[4] using the term "favorable" three times to capture the essential characteristic of the covered material.[5] It was only Justice White's separate concurring opinion, expressly criticizing the majority for going too far in its holding, which used the expression (and even then, just quoting the Maryland Supreme Court's opinion) "material evidence exculpatory to an accused."[6]

As has been frequently noted, the Justice Department guidance on *Brady* obligations, as well as much of the case law, generally understates the prosecutor's obligations in this regard. The Act remedies that misunderstanding by defining "covered information" broadly as including matters that "may reasonably appear to be favorable to the defendant."[7] The error in the Justice Department's overly limited focus on

"exculpatory evidence" is apparent from the fact that *Brady* was itself a sentencing case. The undisclosed information in *Brady* was a prior statement by the cooperating co-conspirator that was relevant only to whether the jury would choose to impose a death sentence (was it John Brady or his cooperating co-defendant Donald Boblit who strangled the victim of the robbery-murder they admittedly committed together?[8]). The narrow holding in the Supreme Court, after all, was actually unfavorable to John Brady: that he was entitled on Due Process grounds to a remand for resentencing only, as the Supreme Court of Maryland had held, and not to a new trial, as he contended. The Act thus makes explicit that favorable information is disclosable even if it is not "exculpatory" at all, as long as it may be favorable to the defendant "with respect to ... the sentence to be imposed."[9]

A further innovation of the Fair Disclosure Act is the express extension of the *Brady* doctrine to "preliminary matters," in addition to the issues of guilt and punishment. In other words, information favorable to the defendant with respect to issues bearing on a detention hearing, a suppression motion, or the like would now be unambiguously covered. Case law on the subject is sparse and inconsistent.

ABANDONING THE 'MATERIALITY' STANDARD

The other most common obstruction to proper *Brady* disclosure is prosecutors' insistence that the rule only applies to "material" information, that is, information creating a reasonable probability, by itself, of changing the outcome of the proceedings by producing an acquittal or a lower sentence. This interpretation comes from an inappropriate transference of the standard for reversal after conviction, or for a grant of habeas relief, to become the standard for disclosure before trial.[10] Articulating a statutory rule to govern pretrial disclosure, the Act abandons the "materiality" standard entirely. No one can reliably say, before the fact, what effect a given piece of information might have on the investigation of a case, or predict its overall impact on a jury; there is no reason the rule should encourage prosecutors, as the "materiality" limitation does, to withhold evidence in the necessarily ill-informed belief (or hope) that the effect would be minor. (This viewpoint also sometimes misleads prosecutors into holding back information that seems to them to lack credibility or to be otherwise unpersuasive.) Under the proposed Act, if the information "may reasonable appear to be favorable," it must be disclosed, without any attempt to predict in advance whether its nondisclosure would change the outcome of the case.

COVERED 'INFORMATION,' NOT EVIDENCE

Another unduly restrictive reading of the *Brady* doctrine that has crept into practice, but which would be overthrown by the proposed legislation, is based on a literal reliance on the Supreme Court's use of the term "evidence" in its own summary of its holding, which refers to "*evidence* favorable to the accused."[11] There is nothing in the purposes of the *Brady* due process doctrine to tie it with admissibility; leads to favorable information and material useable only on cross-examination are just as important. Moreover, a

limitation to admissible evidence would be inconsistent with the Act's application (as it is with the *Brady* doctrine's application) to sentencing, where the rules of evidence do not apply.[12] Accordingly, the Act does not speak in terms of "evidence" (except in its title, as a kind of shorthand) but rather defines "covered information" as "information, data, documents, evidence or objects" without further limitation.[13]

DISCLOSURE WITHOUT DELAY

Because the *Brady* disclosure obligation has never been codified in the federal discovery rules,[14] the question of timing for required disclosures had to be addressed in the Act. Case law has been unhelpful, speaking of disclosure in time to be useful, which in effect has been taken by many prosecutors as encouraging them to seek advantage by waiting until the last possible moment. The Act tackles this problem head on by making disclosure obligatory "without delay after arraignment and before the entry of any guilty plea."[15] No triggering demand by the defense is made a prerequisite to the prosecutor's duty. Later-discovered information would have to be disclosed "as soon as is reasonably practicable upon the existence of the covered information becoming known, without regard to whether the defendant has entered or agreed to enter a guilty plea."[16]

If the prosecutor perceives a need for relief from the prompt disclosure requirement, the Act allows an application for a protective order. Thus, if information is favorable to the accused only because of its impeachment value, and early disclosure would endanger the witness who made the statement (and if no defendant already knows the identify of that witness), then the government may seek a protective order until a date nearer to trial, but generally not less than 30 days prior to the scheduled trial date. Proceedings to obtain a protective order could be conducted under seal, but not *ex parte*, with disclosure to defense counsel in the form of a summary.[17]

INTERACTION WITH JENCKS ACT

This prompt-disclosure requirement under the Act would also overcome the bogus interpretation of *Brady* that has sometimes led prosecutors to claim, or judges to rule, that the restrictions of the Jencks Act[18] and/or Fed. R. Crim. P. 26.2 prevent disclosure of *Brady* material contained in statements of a witness until the witness has completed his or her direct examination. The Act expressly provides that its timing rule applies notwithstanding these other provisions.[19]

DEFENSE DUE DILIGENCE

Another aspect of *Brady* case law that is peculiar to the appellate context in which precedent is made, but which has been inappropriately imported into some courts' and prosecutors' views of how the disclosure obligation should be carried out before trial, is the notion that the defense must have exercised its own due diligence in seeking out favorable evidence. Under the Act, by contrast, prosecutors are not excused from their disclosure duties by any notion that the defense could find out the same information by undertaking a more energetic defense investigation. Such thinking is simply irrelevant to whether the prosecutor has a duty of disclosure. Relatedly, the Act would be violated by a failure of required disclosure, without regard to whether that nondisclosure could be described as "suppression" of the covered information. That the Supreme Court did not mean to limit the due process right to cases of "suppression" as contrasted with nondisclosure[20] is clear from the Court's pointed inclusion in its stated holding of the phrase, "irrespective of the good faith or bad faith of the prosecution."[21] In any event, the Act imposes no such requirement.

WAIVING *BRADY* RIGHTS

The Act as drafted seeks to discourage efforts by the government to evade its protections by routinely seeking waiver of statutory *Brady* rights in plea agreements. While the drafting task force considered attempting to prohibit such waivers, the group felt that position was not achievable, and clearly the NACDL Board agreed when it adopted the report. Thus, while the Act would allow its provisions to be the subject of a knowing, intelligent and voluntary waiver,[22] two unusual protections are included. First, a *Brady* waiver, to be valid, must be entered into "in open court."[23] And second, the judge must find that "the interests of justice require the proposed waiver."[24] As few if any other provisions of a plea agreement require such special attention and endorsement from the court, the Act should be read as disapproving routine inclusion of such provisions, even though the Supreme Court allows them.[25]

REMEDIES AND APPELLATE REVIEW

If a violation of the Act is discovered prior to the entry of judgment, the Act provides a show-cause procedure for the trial court to make inquiry into the alleged violation, and then to make appropriate findings.[26] Upon a finding of noncompliance, the court can order any of an array of appropriate remedies, tailored to the nature and circumstances that it may find, ranging from a continuance to dismissal.[27] Upon finding a violation, the court also has discretion to order recovery of excess defense costs, including attorney's fees. An award of attorney's fees is to be without regard to the terms of any fee agreement (that is, even if the attorney has been paid a flat fee) and can be ordered paid to a Defender Organization or the CJA Fund.[28]

The Act ends with a section on the standard of appellate review. Since the Act is intended to implement a constitutional right, the law if enacted would provide that a violation could not be found harmless on appeal unless the government can meet the standard that applies to constitutional violations — harmlessness beyond a reasonable doubt.[29] Following the lead of the NACDL task force, the proposed legislation does not address any other issues concerning enforcement of the *Brady* right on appeal, or in postconviction proceedings. Nor does the Act address the question of when, if ever, the prosecutor's *Brady* obligation may cease while a case remains open, or even after it is closed.

WRITTEN RULES REQUIRED

If *Brady v. Maryland* had been embraced by prosecutors over the last 50 years as a reminder that the objective of the criminal justice system is to see that the process is fair, that truth is pursued, and that justice is done, and if judges had interpreted, developed, and applied *Brady*'s principle accordingly, there would be no need for regulatory implementation. But in the real world, written rules are needed. Procedural issues governing court cases are almost always better addressed in the rulemaking process than in legislation. But having been let down by the Judicial Conference with respect to implementation of *Brady*, NACDL will continue to push for a legislative solution. Perhaps enough members of Congress, having seen the tragic results of massive *Brady* violations in the ill-considered prosecution of one of their own, will rally around the Fairness in Disclosure of Evidence Act and ensure that it is enacted this year.

NOTES

1. 373 U.S. 83 (1963).
2. *Id.* at 91 (separate opinion of White, J., concurring in the judgment).
3. The task force proposal was drafted principally by Mark Mahoney, Peter Goldberger, and Irwin Schwartz, with valuable input from Ellen Yaroshefsky and others.
4. 373 U.S. at 88 (emphasis added).
5. *Id.* at 86–87.
6. *Id.* at 91.
7. S. 2197 (112th Cong.), § 2 (creating proposed new 18 U.S.C. § 3014(a)(1)).
8. *See* 373 U.S. at 88.
9. Proposed § 3014(a)(1)(C).
10. As articulated by the Supreme Court in *Brady* itself, affirming the judgment of the Maryland Supreme Court, "We now hold that that the suppression by the prosecution of evidence favorable to the 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. at 87. This

is the stated standard for reversal on appeal, not the articulation of a pretrial disclosure rule to govern prosecutors.

11. 373 U.S. at 87.
12. *See* Fed. R. Evid. 1101(d)(3) (Evidence Rules do not apply at sentencing, except rule with respect to privileges); *see also* 18 U.S.C. § 3661; 21 U.S.C. § 850 (information admissible in aid of sentencing without limitation, except on constitutional grounds).
13. Proposed § 3014(a)(1). The Act does provide, however, that covered material which would be subject to the Classified Information Procedures Act is to be handled under the provisions of the latter law. *Id.* § 3014(d)(2).
14. It has been argued persuasively that most if not all *Brady* material should be understood as covered by the Fed. R. Crim. P. 16(a)(1)(E)(i) obligation to disclose "papers" and other "tangible objects" (including "portions of" these) that are "material to preparing the defense." Unfortunately, most prosecutors and judges do not seem to agree with that reading of the existing Rule.
15. Proposed § 3014(c)(1). This obligation, insofar as it refers to guilty pleas, would supersede the adverse Supreme Court decision in *United States v. Ruiz*, 536 U.S. 622 (2002).
16. Proposed § 3014(c)(2).
17. *Id.* (e).
18. 18 U.S.C. § 3500.
19. *Id.* (d)(1). The make this doubly clear, the Act provides for a conforming amendment to the Jencks Act. S. 2197, § 3(b). The contrary "Jencks-trumps-*Brady*" view is transparently wrong in any event, since *Brady* is a constitutional rule, while Rule 26.2 (or the Jencks Act) is merely statutory in weight. Subsection (d)(1) was necessary in the Act, however, not only to remove any excuse for withholding *Brady* material in supposed reliance on the Jencks Act but also because the early-disclosure provision in subsection (c)(1), to the extent deemed merely statutory, would not necessarily have greater authority than the Rule 26.2. *See also* 28 U.S.C. § 2072(b) (Rules Enabling Act, describing relationship of Rules and statutes on matters of procedure).
20. *See* note 9 *ante* (quoting Supreme Court's use of term "suppression" in its statement of the holding in *Brady*).
21. 373 U.S. at 87.
22. Proposed § 3014(f)(2)(A).
23. Proposed § 3014(f)(1).
24. Proposed § 3014(f)(2)(B).
25. See *United States v. Ruiz*, 536 U.S. 622, 629 (2002).
26. Proposed § 3014(g).
27. Proposed § 3014(h)(1).

28. Proposed § 3014(h)(2).
29. Proposed § 3014(i).

EXPLORE KEYWORDS TO FIND INFORMATION

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

Chambers of
Henry H. Kennedy, Jr.
United States District Judge

April 30, 2010

Edwin E. Huddleson, III
1250 Connecticut Ave, NW
Suite 200
Washington, DC 20036

Dear Mr. Huddleson:

I write to acknowledge the letter and accompanying materials that you recently sent me expressing your support for the proposal that the United States District Court adopt a local rule that would improve *Brady* compliance in this jurisdiction. Thank you for your interest and observations, which will be shared with the other members of the United District Court's Rules Committee as well as the Rules Advisory Committee, which is chaired by John Aldock.

Again, thank you for sharing your observations with us.

Sincerely yours,

Henry H. Kennedy, Jr.

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Admitted: California
District of Columbia
Maryland
New York

April 22, 2010

Honorable Henry H. Kennedy, Jr.
United States District Court
for the District of Columbia
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Improving the Operations of Government on *Brady* Compliance

Dear Judge Kennedy:

I am writing to support the adoption of Local Rules by the United States District Court for the District of Columbia to improve *Brady* compliance in this jurisdiction.

You might be interested in the enclosed materials from the National Association of Criminal Defense Lawyers (NACDL) seeking reforms in the operations of the United States Department of Justice (DoJ) in complying with *Brady/Giglio*. Written in 2007, these materials were the result of over ten (10) years of *pro bono* work I spent on the issue, starting with a court-appointed case in the United States District Court for the District of Columbia. I was very pleased to see that recently DoJ adopted some of the suggestions in our NACDL report, by requiring federal prosecutors to receive annual training in *Brady* compliance principles, broadly defining the prosecution team, and setting out specific guidelines to help prosecutors comply with *Brady*. *See* DoJ's January 4, 2010 Guidance for Prosecutors Regarding Criminal Discovery (enclosed).

Earlier this month, at the April 9, 2010 DC Judicial and Bar Conference, a distinguished panel of Judges and lawyers discussed "*The Duty to Disclose: Reexamining Prosecutors' Obligations Under Brady v. Maryland.*" This session identified several useful reforms that could be adopted to improve *Brady* compliance, including dispensing with "materiality" as a strict requirement in F.R.Crim.P. 16; more frequent judicial involvement in sorting out *Brady* issues at the outset of a case (before they become a problem); and encouraging "open file" disclosure by prosecutors where practicable (perhaps involving the Judge, at the outset, to sort out the issues that arise in the cases (a small minority?) where there are countervailing values to "open file" disclosure, such as victim/witness security, privilege, privacy, or national security issues).

The speakers at the April 9th session stated that the United States District for the District of Columbia had formed a committee, with you as the chairman, that was considering adopting *Brady* reforms by Local Rule. The speakers also stated that this Court clearly has the authority to adopt appropriate *Brady* reforms by Local Rule.

I support the adoption of appropriate *Brady* reforms by Local Rule of this Court. Ten years of *pro bono* work seeking *Brady* reforms led me to appreciate both how important *Brady* reforms are, and how difficult they are to achieve. Two reforms, in particular, warrant consideration. ***First***, our Local Rules should dispense with the practice that a prosecutor must find "materiality" before his duty of *Brady* disclosure arises. Extensive experience has confirmed that prosecutors have a natural desire to win their cases, and that for this and other reasons (including 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) "materiality" is often difficult for a prosecutor to determine. All evidence favorable to the accused should be disclosed by the prosecutor, whether or not he thinks it is "material." *See* Judge Emmet G. Sullivan's April 28, 209 letter on the Rules of Criminal Procedure (enclosed). ***Second***, I suggest adoption of a Local Rule that encourages "open file" disclosure by prosecutors, by requiring prosecutors in every criminal case EITHER to certify that they have provided "open file" disclosure OR to file both a public certificate of *Brady* compliance (with DoJ's January 4, 2010 Guidance for Prosecutors Regarding Criminal Discovery) and an *in camera* submission to the Judge alone, at the outset of each criminal case, specifically identifying the "countervailing values" to "open file" disclosure that exist in that criminal case.

. Everyone has a stake in the fair administration of justice. I urge the United States District Court for the District of Columbia to adopt appropriate *Brady* reforms by Local Rule.

Thank you for your consideration of these comments.

Sincerely,

Edwin E Huddleson

Edwin E. Huddleson

Chief Judge Royce C. Lamberth
Hon. Emmet G. Sullivan
Hon. Paul L. Friedman

Hon. Harry T. Edwards

National Association of Criminal Defense Lawyers

MEMORANDUM FOR DEPARTMENT PROSECUTORS

Monday, January 4, 2010

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Guidance for Prosecutors Regarding Criminal Discovery

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. *See* USAM §9-5.001. In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the Department has adopted the guidance for prosecutors regarding criminal discovery set forth below. The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. *See United States v. Caceres*, 440 U.S. 741 (1979).

The guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group received comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility. The working group produced this consensus document intended to assist Department prosecutors to understand their obligations and to manage the discovery process.

By following the steps described below and being familiar with laws and policies regarding discovery obligations, prosecutors are more likely to meet all legal requirements, to make considered decisions about disclosures in a particular case, and to achieve a just result in every case. Prosecutors are reminded to consult with the designated criminal discovery coordinator in their office when they have questions about the scope of their discovery obligations. Rules of Professional Conduct in most jurisdictions also impose ethical obligations on prosecutors regarding discovery in criminal cases. Prosecutors are also reminded to contact the Professional Responsibility Advisory Office when they have questions about those or any other ethical responsibilities.

Department of Justice Guidance for Prosecutors Regarding Criminal Discovery

Step 1: Gathering and Reviewing Discoverable Information [1]

A. Where to look–The Prosecution Team

Department policy states:

It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM §9-5.001. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady and Giglio* issues and avoid surprises at trial.

Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context. Accordingly, the Department expects to issue additional guidance for such cases. Prosecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges. This evaluation should consider circuit and district precedent and include consultation with national security experts in their own offices and in the National Security Division.

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed [3]. The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions [4], the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted. [5] Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

Prosecutors should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a qui tam case, the civil case files should also be reviewed.

5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

Prosecutors should also remember that with few exceptions (*see, e.g.*, Fed.R.Crim.P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in USAM §9-5.100 whenever necessary before calling the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining *Giglio* information from state and local law enforcement officers.

7. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements (possibly including inconsistent attorney proffers, *see United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008))
- Statements or reports reflecting witness statement variations (see below)
- Benefits provided to witnesses including:
- Dropped or reduced charges
- Immunity
- Expectations of downward departures or motions for reduction of sentence
- Assistance in a state or local criminal proceeding
- Considerations regarding forfeiture of assets

- Stays of deportation or other immigration status considerations
- S-Visas
- Monetary benefits
- Non-prosecution agreements
- Letters to other law enforcement officials (*e.g.* state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
- Relocation assistance
- Consideration or benefits to culpable or at risk third-parties
- Other known conditions that could affect the witness's bias such as:
- Animosity toward defendant
- Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
- Relationship with victim
- Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)
- Prior acts under Fed.R.Evid. 608
- Prior convictions under Fed.R.Evid. 609
- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews [5]should be memorialized by the agent [6]. Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio*information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM §9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). *See, e.g., United States v. Clark*,
385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vallee*, 380 F.Supp.2d 11, 12-14
(D. Mass. 2005).

Step 2: Conducting the Review

Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying *potentially*discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

Step 3: Making the Disclosures

The Department's disclosure obligations are generally set forth in Fed.R.Crim.P. 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady, and Giglio*(collectively referred to herein as "discovery obligations"). Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors should be aware that Section 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady*and *Giglio*. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.

A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. The Working Group determined that practices differ among the USAOs and the components regarding disclosure of ROIs of testifying witnesses. Prosecutors should be familiar with and comply with the practice of their offices.

Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, *e.g.* agent notes or internal memos, that the court may deem to have been part of the "file."

When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. *See* USAM §9-5.001. Section 9-5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

Prosecutors should consult the local discovery rules for the district in which a case has been indicted. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame, unless a court order has been entered delaying discovery, as is common in complex cases. Prosecutors must comply with these local rules, applicable case law, and any final court order regarding discovery. In the absence of guidance from such local rules or court orders, prosecutors should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors should also ensure that they disclose Fed.R.Crim.P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed.R.Crim.P. 16(b)(1).

Discovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.

C. Form of Disclosure: There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

Step 4: Making a Record

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

Conclusion

Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution. This guidance does not and could not answer every discovery question because those obligations are often fact specific. However, prosecutors have at their disposal an array of resources intended to assist them in evaluating their discovery obligations including supervisors, discovery coordinators in each office, the Professional Responsibility Advisory Office, and online resources available on the Department's intranet website, not to mention the experienced career prosecutors throughout the Department. And, additional resources are being developed through efforts that will be overseen by a full-time discovery expert who will be detailed to Washington from the field. By evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources, prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a just and final result in every criminal prosecution. Thank you very much for your efforts to achieve those most important objectives.

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[1]For the purposes of this memorandum, "discovery" or "discoverable information" includes information required to be disclosed by Fed.R.Crim.P. 16 and 26.2, the Jencks Act, *Brady*, and *Giglio*, and additional information disclosable pursuant to USAM §9-5.001.

[2]How to conduct the review is discussed below.

[3]Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to a non-testifying source's files.

[4]Nothing in this guidance alters the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM §9-5.100.

[5]"Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed above.

[6]In those instances in which an interview was audio or video recorded, further memorialization will generally not be necessary.

The Washington Post

AN INDEPENDENT NEWSPAPER

EDITORIALS

Disclosing evidence

The Justice Department must learn to share.

OVER THE PAST year, the Justice Department's failure to turn over exculpatory evidence to defense lawyers has led to setbacks in high-profile cases involving former senator Ted Stevens (R-Alaska) and Blackwater contractors accused of murdering Iraqis. Attorney General Eric H. Holder Jr. asked a federal court to toss out the corruption conviction against Mr. Stevens; a D.C. federal trial judge dismissed the charges against the guards.

The failures also led to changes in the way the department approaches its obligation to turn over exculpatory information, including a review of policies and practices and increased training for staff and lawyers. Mr. Holder deserves credit for confronting the department's lapses. But a deeper and more permanent fix is needed.

The Supreme Court has ruled that prosecutors have an obligation to disclose any "material" evidence that could benefit a defendant, including information that points to a different culprit or contradictory statements by government witnesses. Prosecutors must comb through evidence and determine which pieces have to be turned over. In other words, decisions about what could benefit the defense are left to the prosecutor's judgment. The vast majority of prosecutors are conscientious, but even those acting in good faith may miss an important piece of evidence that a defense lawyer might have seized on.

Judge Emmet G. Sullivan, who presided over the Stevens case, has proposed that prosecutors have to turn over all potentially exculpatory information — not just that which is deemed "material." Another proposal is "open file discovery," which, with certain restrictions, would allow defense lawyers to review all evidence and make their own assessments. State prosecutors who have adopted this approach report increased efficiency in litigating cases and few, if any, problems.

The Justice Department has resisted broader disclosure requirements. Prosecutors worry about the protection of witnesses and national security information, but existing provisions in the law address these. Instead of fighting change, the department should work constructively with defense lawyers and judges to craft fair rules.

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

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

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[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.

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[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).

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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)

United States District Court

Boston, Massachusetts 02210

MARK L. WOLF
CHIEF JUDGE

June 23, 2009

Honorable Richard C. Tallman
United States Court of Appeals
902 William Kenzo Nakamura
United States Courthouse
1010 Fifth Avenue
Seattle, WA 98104-1195

Dear Judge Tallman:

I am writing to endorse Judge Emmet G. Sullivan's April 28, 2009 request that the Advisory Committee on the Rules of Criminal Procedure (the "Advisory Committee") again recommend that Rule 16 of the Federal Rules of Civil Procedure be revised to require the disclosure of all exculpatory information to defendants. As you know, I was a member of the Advisory Committee in 2007, when this recommendation was made to the Standing Committee on Rules of Practice and Procedure (the "Standing Committee"). The Department of Justice opposed the proposed amendment. The Standing Committee rejected the Advisory Committee's recommendation in part "to obtain information about the experience with the Department of Justice's recent revisions to its U.S. Attorneys' Manual," which for the first time added a section on the prosecutor's duty to disclose material exculpatory information.[1] Regrettably, my recent experience, like the recent experience of Judge Sullivan and other judges, indicates that the revision of the United States Attorneys' Manual has not prevented problems that threaten the fairness of federal criminal prosecutions and, when discerned, injure the reputations of even well-meaning prosecutors who do not properly understand or perform their duties.

In United States v. Jones, 2009 WL 1396385 (D. Mass. May 18, 2009), I describe another admitted failure of a federal prosecutor to produce material exculpatory information to a defendant despite the efforts by judges of the District of Massachusetts to minimize

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[1]September, 2007 Committee on Rules of Practice and Procedure Report to Judicial Conference, available at http://www.uscourts.gov/rules/reports/ST09-2007.pdf.

such problems by adopting Local Rules that codify existing obligations under Brady v. Maryland, 373 U.S. 83 (1964) and its progeny, and that provide a road map for the proper discharge of a prosecutor's responsibilities concerning discovery. While I have not made a systematic study, it is evident that United States v. Stevens is not the only recent case involving comparable misconduct. In April, 2009, District Judge Alan Gold sanctioned the government and the prosecutors individually for a wide array of misconduct, including violations of the duty to disclose material exculpatory evidence. See United States v. Shaygan, 2009 WL 980289, at *6, *15-*16, *19, *25-*27 (S.D. Fl. Apr. 9, 2009). The Judge imposed sanctions that included an order that the government pay approximately $600,000 of the defendant's legal fees under the Hyde Amendment. Id. at 49. In United States v. W.R. Grace, CR 05-07-M-DWM (D. Mont. April 28, 2009) (Order at 6), in response to "clear and admitted violations of... Brady and Giglio [405 U.S. 150 (1972)]," District Judge Donald Molloy instructed the jury to disregard the testimony of an important witness concerning one defendant. The jury ultimately found all of the defendants not guilty.

In 2007, the Department of Justice persuaded the Standing Committee to reject the Advisory Committee's recommendation that Rule 16 be revised. The new leadership of the Department of Justice, however, may have a different view of the matter. Attorney General Eric Holder's request that Senator Stevens' conviction be vacated indicates that he recognizes that the failure to disclose material exculpatory information is serious misconduct that injures the public interest, either by contributing to a wrongful conviction or by allowing a guilty person to escape punishment. The Attorney General subsequently established a Department of Justice working group to review the need for improvements in the government's discharge of its discovery obligations.[3] Perhaps this process will lead to a reversal of the Department's opposition to amending Rule 16.

However, regardless of the Department of Justice's position, I agree with Judge Sullivan that this matter is sufficiently important to be revisited now. The Advisory Committee had compelling reasons to recommend that Rule 16 be revised in 2007. The need for the amendment has not diminished. The proposed amendment to Rule 16 would clarify and highlight the government's

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[3]See April 14, 2009 Department of Justice Press Release: Attorney General Announces Increased Training, Review, Process for Providing Materials to Defense in Criminal Cases, available at http://www.usdoj.gov/opa/pr/2009/April/09-opa-338.html.

discovery obligations, promote fairness in the prosecution of criminal cases, and protect prosecutors from inadvertently making errors which, if discovered, damage their reputations.

I know that the Advisory Committee has many matters on its agenda. Therefore, I thank you for your consideration of this request and for what I hope will be your renewed attention to amending Rule 16.

With best wishes,

Sincerely yours,

Mark L. Wolf

cc: Attorney General Eric H. Holder

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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Board Approves *Brady* Report, Judicial Conduct

The Board of Directors approved two significant items during its fall meeting in Key West, Fla., on Oct. 20. The Board approved a draft of a report to the Justice Department's Office of Professional Responsibility (OPR) suggesting corrections to the haphazard ways that DOJ and various government agencies handle evidence and other material favorable to the defense in criminal cases, also known as Brady/Giglio material. According to NACDL's outside Freedom of Information Act counsel Edwin E. Huddleson, there is no internal DOJ check on department Brady violations that do not involve reckless or willful violations. DOJ needs to create clear guidelines to correct systemic Brady problems when they come to light, Huddleson said. Huddleson prepared a draft letter to OPR that was presented for Board approval and gave a presentation on DOJ's Brady policies — such as they are — by speakerphone at the meeting. The Board approved the draft and it was sent to OPR in November.

National Association of Criminal Defense Lawyers

November 9, 2007

Honorable Marshall Jarrett
Office of Professional Responsibility
United States Department of Justice
950 Pennsylvania Avenue, N.W., Room 3529
Washington, D.C. 20530

Re: OPR oversight of *Brady/Giglio* compliance

Dear Mr. Jarrett:

We are writing to you on behalf of the National Association of Criminal Defense Lawyers (NACDL) to request reforms in the operations of the Department of Justice (DoJ) in complying with *Brady/Giglio*. OPR-DoJ records (attached) indicate that there is no internal DoJ check on *Brady* violations that do not involve reckless or willful violations by prosecutors. Government reform is needed to create a system within OPR-DoJ to correct other systemic *Brady* problems that come to light.

Enclosed please find a NACDL report on government *Brady* operations, which suggests the following corrective measures, in particular:

(1) OPR-DoJ should take steps to ensure that all elements of the prosecution team (including FBI and FDIC investigators) understand their *Brady* obligations. OPR-DoJ should recognize its oversight responsibility for investigators, as well as DoJ attorneys, and take appropriate action (*e.g.*, disclosure, education, discipline) where investigators fail to forward *Brady* material to prosecutors.

(2) OPR and all components of DoJ should recognize that wrongfully withheld *Brady* material must be FOIA produced if it is prejudicial.

Whether a withholding of *Brady* material was deliberate or merely negligent, and whether or not the withholding of *Brady* material is so prejudicial that it amounts to a Constitutional violation, it is important to assess and correct errors in the operations of government causing a *Brady* problem. Whenever a federal court orders a hearing on

Brady issues, OPR should investigate and assess the issue, and take appropriate corrective action to try to ensure that the problem does not persist in case after case.

Thank you for your consideration. We look forward to OPR's response.

Sincerely,

Carmen D. Hernandez
President

Edwin E. Huddleson

Edwin E. Huddleson
Counsel for NACDL

Encl: NACDL Report on Government Brady Operations

October 26, 2007

NACDL REPORT ON GOVERNMENT *BRADY* OPERATIONS

Wrongfully withheld *Brady* material [1] has been identified as a cause of wrongful convictions in several recent highly-publicized cases.[2] To study the operations of government in producing (or failing to produce) *Brady* material, NACDL supported suits under the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.*, to obtain wrongfully-withheld *Brady* material from a case where a federal Court had ordered a 2255 hearing on *Brady* issues.[3] The outcome was mixed, leaving open several important questions about the operations of government on *Brady* issues, and the FOIA availability of wrongfully-withheld *Brady* material. *See* Martin v. DoJ, 488 F.3d 446 (D.C.Cir.2007); NACDL v. DoJ, 2006 WL 2583691 (DDC 2006).[4]

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[1] Wrongfully withheld *Brady* material exists after the time for proper disclosure of *Brady* material has gone by, without disclosure being made by prosecutors. *See, e.g.*, United States v. Bagley, 473 U.S. 667 (1985) (Court considers *Brady* issue that was discovered – and could only be discovered – through the Freedom of Information Act (FOIA)); Bright v. Ashcroft, 259 F.Supp.2d 502 (E.D.La. 2003) (court overrides claims of X7(C) and orders FOIA disclosure of *Brady* material); Butler v. DoJ, 1994 WL 55621 (DDC 1994)(same).

[2] *See, e.g.*, 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 (D.D.C. 2005) (court overturns criminal convictions because of *Brady* violations and new evidence brought out by the practicing Bar).

[3] Two distinct public interests support the use of the FOIA to obtain wrongfully withheld *Brady* material. One is the possibility of uncovering (and correcting) a wrongful conviction. The other is the public interest in uncovering (and correcting) errors in the systemic operations of government for producing *Brady* material, whether or not such errors are sufficient to "spring the jailhouse door" in any particular individual case.

[4] Our judgment, and that of the Innocence Projects, is that the issues raised in the *Martin/NACDL* cases, about the FOIA availability of *Brady* material, are best presented to the United States Supreme Court in a case involving a factually innocent person. Because the criminal justice system is a human endeavor, there will be such cases. The Court of Appeals decision in *Martin* can be read to deny FOIA relief only in situations in which there is no "live" *Brady* issue that might overturn a criminal conviction. *See* Martin v. DoJ, 488 F.3d 446 (D.C.Cir. 2007). The opinion in *Martin* states that whether *Brady* material is available under the FOIA remains an open question in the D.C. Circuit. *Id.* at 458. This issue is best pursued in the context of a fresh new case. *See* Taylor v. Blakey, 490 F.3d 965 (D.C.Cir. 2007).

(a) Wrongful Convictions. NACDL's study of *Brady* issues is informed by a recent broad-scale study of wrongful conviction rates (factual innocence determined by DNA exonerations) that finds a 3.3% minimum factual wrongful conviction rate for capital rape-murders in the 1980s. Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J.Crim.L. & Crim. ___ (2007) (attached) (awaiting publication). While wrongful conviction rates vary for different types of crimes,[5] the study's author submits that this wrongful conviction rate is characteristic of other capital cases (at least where perpetrator identification is the main contestable issue). The study points out that wrongfully withheld *Brady* material is only one cause, among many causes, of wrongful convictions.

(b) The System for Brady Production. The case law across a wide spectrum of issues—from *M'Naghten's Case* to *Gideon* to *Mapp v. Ohio* to *McNabb-Mallory* to *Miranda* to *Hamdan* and many others – shows that what happens in a single criminal case can illuminate the systemic operations of government as a whole on criminal justice issues. There is no reason to think that cases presenting *Brady* issues are any different.

The operations of government on *Brady* issues, which need reform, as brought out by the *Martin/NACDL* cases, include the following:

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[5] The study says "The universe of criminal convictions is almost certainly heavily substructured in regard to factual innocence rates."(p.19) "First, in regard to other capital murder prosecutions resulting in the imposition of the death penalty, there seems to be no strong reason to believe that the rate was (or is) significantly lower." (p.21) "All in all, there seems to be no good reason to believe that the factual innocence rate for non-capitally sentenced murder convictions properly 'analogous' to capital murder, when the central issue is the identity of the defendant as the perpetrator, are substantially lower than the capital rape-murder innocence rate in the 1980s" (pp.22-23). "What is true for capital cases in general and for non-capital 'analogous' murders, however, may not necessarily be very persuasively true for other kinds of crime. I suspect that the wrongful conviction rate for many kinds of crimes of interpersonal violence (robbery, for example) may be at least as high, while that for white collar crimes may be much lower." (p.23).

- Throughout these FOIA cases, there has been sharp conflict within the government about what rules apply to FOIA requests for *Brady* material. This issue calls for clarification and systemic government reform.

  The Court of Appeals did not decide the issue in Martin v. DoJ, 488 F.3d 446 (D.C.Cir. 20007). But in the *Martin* case, DoJ properly conceded in open court in the Court of Appeals that wrongfully withheld *Brady* material ***must*** be FOIA produced if it is prejudicial. [Transcript of April 11, 2002 oral argument in the Court of Appeals pp.25-27] This view accords with the decision of the Solicitor General not to appeal in Bright v. Ashcroft, 259 F.Supp.2d 502 (E.D.La. 2003) (court orders FOIA production of *Brady* material over objections based on X7(C)). This concession may be constitutionally compelled. *See* ABA Standards for Criminal Justice:Discovery p.33 (3d ed. 1996) ("prosecuting attorneys should generally disclose all material that is possibly exculpatory of the defendant. If the prosecution becomes aware, after trial, of exculpatory materials not previously produced, that information, too, should be promptly produced to the defendant"). And this important benchmark ought to be recognized by the government on a systemic, government-wide basis.

- Two investigative agencies, the FBI and FDIC, asserted in the *Martin/NACDL* cases that they have no responsibility for ensuring compliance with *Brady*.[6] These assertions are contrary to federal Court rulings in *Martin*[7] and other cases (*see, e.g.*, Limone v. United States, 497 F.Supp.2d 143 (D.Mass. 2007) (court awards $101 million damages for FBI actions in framing prisoners, including withholding *Brady* material)); they are contrary to American Bar Association standards of sound prosecution practice (*see* n.11); and they call for open public discussion and systemic government reform and correction.

- OPR-DoJ records (attached) indicate that there is no internal DoJ check on *Brady* violations that do not involve reckless or willful violations. Government reform is needed to create a system within OPR-DoJ to address and correct other systemic *Brady* problems that come to light.

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[6] *See* Declaration of FBI's David M. Hardy (USDC dkt #16) ¶18 in *NACDL* (stating that the FBI's disclosure of wrongfully withheld *Brady* material in its possession "would not shed light on how" the FBI performs its statutory duties); FDIC R.Br. [USDC #177] p.4 in *Martin* (claiming that FDIC "was never in a position to produce *Brady* materials because it was not a party to [Harold Martin's] criminal prosecution"); FDIC Reply [USDC #14] p.2 in *NACDL* (claiming FDIC could not have wrongfully withheld *Brady* material because only prosecutors and the courts decide whether a document is *Brady* material).

[7] "It would set a dangerous precedent to allow one government agency, such as the FDIC, to immunize another branch of the federal government, the United States Attorney's Office, from complying with the mandate of *Brady* simply by not taking an active role in a particular case." Texas Court's Opinion p. 8 (July 23, 1998) in United States v. Martin (USDC, ND Texas, 3:93-CR-316-6; 3-97-CV-963-G). *Accord*: Strickler v. Greene, 527 U.S. 263, 281 (1999); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Brooks, 966 F.2d 1500, 1500-1504 (D.C.Cir. 1992); the standards of the American Bar Association (*see* n.11).

The only way to discover a *Brady* violation may be through the FOIA, in cases where *Brady* material is wrongfully withheld through negligence, or because of systemic problems in government procedures (as opposed to recklessly or intentionally by an individual prosecutor). *See, e.g.*, United States v. Bagley, 473 U.S. 667 (1985) (Court considers *Brady* issue that was discovered – and could only be discovered – through the FOIA). The FOIA and the members of the practicing Bar play a critically important role in such cases, in safeguarding *Brady* rights and ensuring the basic fairness of our system of justice. *Cf.* Eastridge v. United States, 372 F.Supp.2d 26 (D.D.C. 2005) (overturning criminal convictions because of *Brady* violations and new evidence brought out by the practicing Bar).

- In *Martin*, the District Court held that, despite this, *Brady* material can ***never*** be obtained under the FOIA. The Court of Appeals criticized these District Court rulings in the first *Martin* appeal, while remanding the case for further proceedings.[8] Martin v. DoJ, 38 F.App'x 17 (D.C.Cir. 2002). On remand, the District Court again ruled that, for a variety of reasons, by definition, *Brady* material can ***never*** be obtained under the FOIA. These sweeping rulings were not accepted by the Court of Appeals on appeal the second time around. The Court of Appeals said, instead, that the question remains open in the D.C. Circuit whether *Brady* material can be obtained under FOIA. Martin v. DoJ, 488 F.3d 446, 458 (D.C.Cir. 2007). Throughout the country, the sound rule of law and practice is that the FOIA can be used to obtain wrongfully withheld *Brady* material. *See, e.g.*, *Bagley*; *Bright*; *Butler*; sworn affidavits of the Innocence Projects (attached).

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[8] The sweeping *per se* rulings of the District Court have no basis in the statutory text, structure, history or purposes of the FOIA. They conflict with the standards of *Favish* and law and practice throughout the United States. If accepted, they would impede the correction of wrongful convictions, undercut *Brady* rights, and improperly cut off public scrutiny of the operations of government on *Brady* production. As Court of Appeals Judge Harry Edwards noted during the 2002 oral argument in the first *Martin* appeal :

THE COURT: How can the District Court be right in the suggestion that whenever – I'm not even sure how to characterize it, but I'll do the best I can – to the extent that *Brady* is implicated, FOIA can't come into play? Who said that? We can't endorse that. That can't be right. * * * [Transcript of April 11, 2002 oral argument before the Court of Appeals p.22]

THE COURT: * * * I thought the District Court said rather preemptively that it can't happen if *Brady* is implicated. I'm not sure why. And I'm curious to know whether the government purports to defend that, because that makes no sense to me. Why would that be the case? Where does that come from? That's not a weighing. * * * [*Id.* at p.23]

THE COURT: I just don't understand what that statement means. It's not your burden, you didn't write it, but I was wondering whether you somehow endorse that – "Courts have consistently found *Brady* violations to be outside the scope." I don't know what that means. If someone comes in and says, as this Plaintiff does, that "I'm looking for information. Why? What's my public interest? Well, I think there're legitimate *Brady* concerns that I have and I'm trying to get as much information as I can to support the claim we're going to make." That's impermissible? [*Id.* at p.24]

The suits in *Martin/NACDL* brought out these *Brady* issues that need clarification/reform.

2. Our basic assumption, in studying the operations of government on *Brady* compliance, was that many *Brady* violations are caused by negligence or inadvertence.[9] This appears to be true at least in some cases like United States v. Bagley, 473 U.S. 667 (1985), and other cases NACDL has studied (including the *Martin* case), which seem to involve investigators' negligent failure to communicate *Brady* material to prosecutors.

The FBI and other federal investigators filed court papers in the *Martin/NACDL* cases stating that "it would not shed light on" how they were performing their statutory duties if courts ordered them to FOIA-produce reasonably identified wrongfully withheld *Brady* material. But the courts generally have not accepted such claims. The common practice throughout the country is that the FOIA can properly be invoked to obtain wrongfully withheld *Brady* material. *See, e.g.*, sworn affidavits of the Innocence Projects.

Within the last ten years, in response to recent exonerations of numerous wrongfully convicted individuals, in significant part because of *Brady* issues, the American Bar Association has adopted policies that address now-recognized weaknesses in the criminal justice system. They say that the failure to follow *Brady* is a significant cause of wrongful convictions,[10] and that all elements of the prosecution team (including investigators) should understand their *Brady* obligations.[11]

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9 Professor Richard Moran's New York Times Op-Ed, *The Presence of Malice* (August 2, 2007) (attached) states: "My recently completed study of the 124 exonerations of death row inmates in America from 1973 to 2007 indicated that 80, or about two-thirds, of their so-called wrongful convictions resulted not from good-faith mistakes or errors but from intentional, willful, malicious prosecutions by criminal justice personnel. (There were four cases in which a determination could not be made one way or another)." He calls these convictions "unlawful convictions, not wrongful ones." OPR-DoJ focuses on detecting, correcting and deterring these kinds of unlawful convictions.

10 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

Our system of justice should work as follows: The courts in FOIA cases should apply the standards of National Records & Archives Administration v. Favish, 541 U.S. 157 (2004) (*Favish*) to determine, in the first instance, whether wrongfully withheld *Brady* records can be located and produced in an FOIA case. When the FOIA unearths wrongfully withheld *Brady* material – as happened in *Bagley* and *In re Pratt*[12] and *Butler* and *Bright* and over a dozen other specific cases listed in the sworn affidavits of the Innocence Projects, where FOIA-obtained *Brady* material helped free innocent, wrongly convicted persons –then the courts in criminal case proceedings can determine whether that *Brady* material is prejudicial enough to overturn a conviction.

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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."

[11] *See* ABA Approved innocence Resolutions, "Prosecution Practices" ¶3 (ABA Midyear Meeting 2004) available at http://www.abanet.org/crimjust/news/home.html.

[12] *See* In re Pratt, 82 Cal.Rptr. 260, 69 Ca.App.4th 1294 (Cal.App.2Dist. 1999), after 112 Cal.App.3d 795, 170 Cal.Rptr. 80 (1980).

THE NEW YORK TIMES **OP-ED** THURSDAY, AUGUST 2, 2007

The Presence of Malice

By Richard Moran

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SOUTH HADLEY, Mass.

LAST week, Judge Nancy Gertner of the Federal District Court in Boston awarded more than $100 million to four men whom the F.B.I. framed for the 1965 murder of Edward Deegan, a local gangster. It was compensation for the 30 years the men spent behind bars while agents withheld evidence that would have cleared them and put the real killer — a valuable F.B.I. informant, by the name of Vincent Flemmi — in prison.

Most coverage of the story described it as a bizarre exception in the history of law enforcement. Unfortunately, this kind of behavior by those whose sworn duty it is to uphold the law is all too common. In state courts, where most death sentences are handed down, it occurs regularly.

My recently completed study of the 124 exonerations of death row inmates in America from 1973 to 2007 indicated that 80, or about two-thirds, of their so-called wrongful convictions resulted not from good-faith mistakes or errors but from intentional, willful, malicious prosecutions by criminal justice personnel. (There were four cases in which a determination could not be made one way or another.)

Yet too often this behavior is not singled out and identified for what it is. When a prosecutor puts a witness on the stand whom he knows to be lying, or fails to turn over evidence favorable to the defense, or when a police officer manufactures or destroys evidence to further the likelihood of a conviction, then it is deceptive to term these conscious violations of the law — all of which I found in my research — as merely mistakes or errors.

Mistakes are good-faith errors — like taking the wrong exit off the highway, or dialing the wrong telephone number. There is no malice behind them. However, when officers of the court conspire to convict a defendant of first-degree murder and send him to death row, they are doing much more than making an innocent mistake or error. They are breaking the law.

Perhaps this explains why, even when a manifestly innocent man is about to be executed, a prosecutor can be dead set against reopening an old case. Since so many wrongful convictions result from official malicious behavior, prosecutors, policemen, witnesses or even jurors and judges could themselves face jail time for breaking the law in obtaining an unlawful conviction.

Strangely, our misunderstanding of wrongful convictions is compounded by the very people who work to uncover them. Although the term "wrongfully convicted" is technically correct, it also has the potential to be misleading. It leads to the false impression that most inmates ended up on death row because of good faith imperfect criminal justice system — not by malicious or unlawful behavior.

For this reason, we need to reframe the argument and shift our language. If a death sentence is overturned because of malicious behavior, we should call it for what it is: an un-

Richard Moran is a professor of sociology and criminology at Mount Hol-

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imperfect criminal justice system — not by malicious or unlawful behavior.

For this reason, we need to reframe the argument and shift our language. If a death sentence is overturned because of malicious behavior, we should call it for what it is: an unlawful conviction.

In the interest of fairness, it is important to note that those who are exonerated are not necessarily innocent of the crimes that sent them to death row. They have simply had their death sentences set aside because of errors that led to convictions, usually involving the intentional violation of their constitutional right to a fair and impartial trial. Very seldom does the court go the next step and actually declare them innocent.

In addition, some of these unlawful convictions resulted from criminal justice officials trying to do the right thing. (A police officer, say, plants evidence on a defendant he is convinced is guilty, fearing that the defendant will escape punishment otherwise.) In cases like these, officers or prosecutors have been known to "frame a guilty man."

> Many wrongful convictions are not caused by 'errors.'

The malicious or even well-intentioned manipulation of murder cases by prosecutors and the police underscores why it's important to discard, once and for all, the nonsense that so-called wrongful convictions can be eliminated by introducing better forensic science into the courtroom.

Even if we limit death sentences to cases in which there is "conclusive scientific evidence" of guilt, as Mitt Romney, the presidential candidate and former governor of Massachusetts has proposed, we will still not eliminate the problem of wrongful convictions. The best trained and most honest forensic scientists can only examine the evidence presented to them; they cannot be expected to determine if that evidence has been planted, switched or withheld from the defense.

The cause of malicious unlawful convictions doesn't rest solely in the imperfect workings of our criminal justice system — if it did we might be able to remedy most of it. A crucial part of the problem rests in the hearts and souls of those whose job it is to uphold the law. That's why even the most careful strictures on death penalty cases could fail to prevent the execution of innocent people — and why we would do well to be more vigilant and specific in articulating the causes for overturning an unlawful convic-

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *Plaintiff,*	)	Civil Action No. 04-697 (PLF)
v.	)	FREEDOM OF INFORMATION ACT
UNITED STATES DEPARTMENT OF JUSTICE and FEDERAL DEPOSIT INSURANCE CORPORATION, *Defendants.*	)	

SWORN AFFIDAVIT OF KATE HILL GERMOND
CENTURION MINISTRIES

This sworn affidavit is submitted by me, Kate Hill Germond, Assistant Director, Investigator and Advocate with Centurion Ministries, to set out facts concerning our experience at Centurion Ministries in seeking and obtaining *Brady* material[1] under the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.*

1. Centurion Ministries, Inc. is a non-profit organization dedicated to vindicating and freeing from prison those who are completely innocent of the crimes for which they have been unjustly convicted and imprisoned for life or death. We also assist our clients, once they are freed, with reintegration into society on a self-reliant basis. Headquartered in Princeton, New Jersey, Centurion Ministries has a full-time staff of five (5) employees. We are assisted by a national network of attorneys and forensic experts, and a dedicated and loyal group of volunteers from the Princeton community.

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[1] "*Brady* material" refers to exculpatory and impeachment materials, and earlier statements of government trial witnesses, that a prosecutor is obligated to disclose to a defendant in a criminal case. *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667 (1985); Banks v. Dretke, 540 U.S. 668 (2004) (impeachment materials come within *Brady*).

2. Centurion Ministries was officially founded in 1983 by James C. McCloskey, who is Executive Director and Board President of the organization. I joined Centurion Ministries in January of 1987. Together with Mr. McCloskey, I co-manage Centurion Ministries and work in developing cases as well as selecting and investigating cases that Centurion Ministries decides to take.

3. Our website – http://www.centurionministries.org – contains a wealth of other information about Centurion Ministries, including a brief description of some of the many cases where we have assisted in freeing wrongly imprisoned persons. We have assisted in overturning the criminal convictions of several individuals, based on prosecutorial misconduct and wrongful withholding of *Brady* material. These cases include Rene Santana (Newark, NJ); Clarence Chance and Benny Powell (Los Angeles, CA); Edward Ryder (Philadelphia, PA); Elmer "Geronimo" Pratt (Los Angeles, CA); Kerry Max Cook (Tyler, TX); Timothy Howard and Gary James (Columbus, OH); Ellen Reasonover (St.Louis, Missouri); and James Driskell (Winnipeg, Canada); among others. A recent case in Washington, D.C. where we assisted in overturning a conviction, based on part on *Brady* violations, was Eastridge v. United States (USDC, DDC, Civil #00-3045).

4. Our opinion at Centurion Ministries is that the FOIA provides a valuable tool in unearthing the truth, and in discovering *Brady* violations. Because our experience at Centurion Ministries is that *Brady* violations are frequently an element in the wrongful conviction of our clients, we almost invariably suggest to people seeking our assistance or advice that they file a FOIA request for information about their criminal case. We have found it can be a great tool to get documents either overlooked by their trial attorney

or wrongfully withheld at the time of trial. One of the individuals we have been corresponding with, Christopher Emerson, a former Texas inmate, advised us recently that he was released from prison in large part because he followed our advice and filed a FOIA request and received documents that the court considered *Brady* material.

I swear and affirm that the foregoing statement is true and correct. In witness thereof, I have subscribed my name to this three-page affidavit on the date indicated.

Date: 7/29/05

Kate Hill Germond
Centurion Ministries

Witness:
Date: 7/29/05

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,	:	
Plaintiff,	:	Civil Action No. 04-697 (PLF)
v.	:	FREEDOM OF INFORMATION ACT
UNITED STATES DEPARTMENT OF JUSTICE and FEDERAL DEPOSIT INSURANCE CORPORATION,	:	
Defendants.	:	

SWORN AFFIDAVIT OF DONALD P. SALZMAN
MID-ATLANTIC INNOCENCE PROJECT

This sworn affidavit is submitted by Donald P. Salzman, President of the Board of Directors of the Mid-Atlantic Innocence Project ("the Project"), to set out facts concerning our experience at the Project in seeking and obtaining information, including *Brady* material, in particular, under the Freedom of Information Act ("FOIA") or similar public records laws.

1. I have served on the Board of Directors of the Mid-Atlantic Innocence Project since 2002 and have been President of the Board since 2003. I am intimately familiar with the Project's cases in Virginia, Maryland and the District of Columbia and have studied wrongful convictions in jurisdictions across the country. I am an attorney admitted to practice in New York, Maryland and the District of Columbia and have practiced as a criminal defense attorney since 1988, representing hundreds of clients on serious felony charges.

2. In the past several decades, hundreds of innocent people – and more than one hundred death row inmates – have been exonerated as a result of DNA testing or other

conclusive evidence of innocence. The Project, a non-profit organization, was formed in 2000 to address this problem in the District of Columbia, Maryland and Virginia, and our mission is to seek the exoneration and release of people who have been convicted of serious crimes they did not commit.

3. Since 2000, the Project has received more than 2000 requests from prisoners seeking our assistance. The Project screens these requests to identify those in which prisoners have compelling claims of innocence based on newly discovered evidence. Potentially promising cases are referred to student groups at area law schools, which investigate the cases under the supervision of experienced lawyers; the Project currently has student groups at American University's Washington College of Law, the Georgetown University Law Center, Catholic University's Columbus School of Law, the University of Virginia School of Law, and the University of the District of Columbia's David Clarke School of Law. We consider cases involving both DNA and non-DNA evidence in which a prisoner's direct appeal has been denied.[1] When our investigation produces sufficiently compelling evidence, we recruit *pro bono* attorneys to represent prisoners on claims of actual innocence in court or during clemency proceedings.

4. In 2003, the Project, along with two other organizations, formed the Innocence Commission for Virginia ("ICVA"), an independent, nonprofit organization whose mission is to study the known, official wrongful convictions in the Commonwealth of Virginia since 1980, to identify the common factors that led to the conviction of innocent people in Virginia, and to propose a series of reforms aimed at preventing wrongful

[1] DNA, as one clear way of proving innocence, has been a powerful factor in criminal justice reform over the past several years. It is not exhaustive, however. The majority of criminal cases in this country do not involve DNA-testable material, but properly performed DNA tests have the ability to definitively exclude someone as the perpetrator of the crime. It therefore has proven scientifically that wrongful convictions are not rare or isolated and has fostered a dialogue about the fallibility of our criminal justice system.

convictions in the future. In March 2005, the ICVA completed its study of the wrongful conviction of eleven innocent men in Virginia and issued *A Vision for Justice: Report And Recommendations Regarding Wrongful Convictions In the Commonwealth of Virginia*.[2]

5. The ICVA report and other studies have identified several factors that lead to the conviction of the innocent. One of these factors is the failure of police and prosecutors to disclose to the defense exculpatory evidence suggesting that (1) the accused may not have committed the crime or (2) another person may have committed the crime. This sometimes occurs because police and prosecutors are simply negligent, failing to appreciate the significance of the exculpatory evidence or failing to adequately search their files for exculpatory evidence. However, the failure to disclose also can be the result of police or prosecutorial misconduct, when police and/or prosecutors fail to disclose evidence they know is exculpatory.

6. Three of the eleven official exoneration cases studied by the ICVA involved the failure of police and prosecutors to disclose significant exculpatory evidence.[3] In two cases studied by the ICVA, defendants used Virginia's Freedom of Information Act to request public records or made similar direct requests to Virginia government agencies after their cases were affirmed on direct appeal. These requests produced significant exculpatory information that had never been disclosed by the Commonwealth before

[2] The ICVA studied two other wrongful conviction cases that did not result in an official exoneration but that exhibited many of the same factors chronicled in the eleven official cases. The ICVA report and related materials, including the ICVA case studies, can be found at www.icva.us.

[3] Jeffrey Cox, Edward Honaker, and Walter Snyder.

trial,[4] and the information ultimately played a significant role in the reversal of these wrongful convictions through writs of *habeas corpus*.

7. In addition, *pro bono* lawyers recruited by the Project currently are investigating a very serious District of Columbia crime in which several individuals might have been wrongfully convicted. In that case, a FOIA request has produced exculpatory evidence that should have been disclosed to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), including evidence suggesting another individual committed the crime.

8. Whenever an innocent person is convicted of a crime, our system of justice has failed. In the vast majority of these cases, the true perpetrator remains free while an innocent person languishes in prison. When innocent people are exonerated, a guilty person frequently is identified and prosecuted. Our experience confirms that FOIA is a significant, powerful tool for unearthing the truth, for discovering exculpatory and impeachment information, and for freeing wrongfully imprisoned persons. When police and prosecutors do not produce exculpatory *Brady* information to the defense, using FOIA to achieve these goals is in the public interest. Using the FOIA to obtain Brady material therefore cannot be characterized as reflecting only the purely private interest of imprisoned persons; rather, it is vital to promote society's interest in a fair and accurate criminal justice system that properly convicts the guilty and clears the innocent.

[4] Jeffrey Cox and Beverly Monroe.

I swear and affirm that the foregoing statement is true and correct. In witness thereof, I have subscribed my name to this four-page affidavit on the date indicated.

Date: October 11, 2005

Donald P. Salzman
President, Board of Directors
Mid-Atlantic Innocence Project

Notary Public: Carol A. Friend
Date: October 11, 2005
My Comm. Expires:

Carol A. Friend
Notary Public, District of Columbia
My Commission Expires 2/28/09

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,	)	
Plaintiff,	)	Civil Action No. 04-697 (PLF)
v.	)	FREEDOM OF INFORMATION ACT
UNITED STATES DEPARTMENT OF JUSTICE and FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Defendants.	)	

SWORN AFFIDAVIT OF KAREN L. DANIEL,
CENTER ON WRONGFUL CONVICTIONS

This sworn affidavit is submitted by me, Karen L. Daniel, Senior Staff Attorney at the Center on Wrongful Convictions at Northwestern University School of Law in Chicago, Illinois, to set out facts concerning our experience at the Center in seeking and obtaining information under the Freedom of Information Act (FOIA).

1. Our web site, http://www.law.northwestern.edu/wrongfulconvictions/, outlines the history of the Center on Wrongful Convictions, as well as the cases we work on, our mission, our staff, and other useful information. Very briefly, the Center on Wrongful Convictions is dedicated to identifying and rectifying wrongful convictions and other serious miscarriages of justice.[1] We have three components: representation, research, and community service. Our staff, faculty, cooperating outside attorneys, and

[1] Our web site points out that the phenomenon of wrongful convictions is not new. The first documented wrongful conviction case in the United States (not counting the Salem witch trials) came to light in 1820, when the purported victim of a murder—for which two men had been sentenced to death in Vermont—turned up alive and well in New Jersey. Over the next 181 years, hundreds of additional cases have come to light, including 65 memoralized by Yale Law Professor Edwin Brochard in his 1932 book *Convicting the Innocent*, more than 400 Twentieth Century cases identified by Michael L. Radelet, Hugo Adam Bedau, and Constance E. Putnam in their 1992 book *In Spite of Innocence*, and 18 Illinois cases in which innocent men were exonerated and released from death row during the last 15 years.

Bluhm Legal Clinic students investigate possible wrongful convictions and represent imprisoned clients with claims of actual innocence. Our research component focuses on identifying systemic problems in, and promoting reform of, the criminal justice system. Together with the community service component, our research component develops initiatives designed to raise public awareness of the prevalence, causes, and social costs of wrongful convictions.

2. A basic premise of our work at the Center is that overturning wrongful convictions is in the public interest and not merely a vindication of the private personal interests of the imprisoned individuals. I started work as a Staff Attorney at the Center in 2000. During my tenure there, I have litigated, advised on, and screened hundreds of cases—most of them post-conviction cases—with the objective of identifying and rectifying miscarriages of justice.

3. In my work at the Center on Wrongful Convictions, I frequently use FOIA requests[2] to gain access to police reports and other documents that I cannot conveniently obtain in any other way. This helps me assess innocence claims and begin working on post-conviction cases. Inmates do not have subpoena power, and often post-conviction attorneys do not have it, either. In my experience, and in my opinion, the FOIA is a powerful, important tool in assessing and pursuing innocence claims.

I swear and affirm that the foregoing statement is true and correct. In witness thereof, I have subscribed my name to this three-page affidavit on the date indicated.

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[2] By the term "FOIA request," I mean a request under the relevant statute—which, in my practice, is usually a state statute—that governs requests for information from public agencies in the jurisdiction of interest to me.

Date: October 10, 2005

Karen L. Daniel
Center on Wrongful Convictions

Witness: Zakia S. Holly

Date: October 10, 2005

OFFICIAL SEAL
ZAKIA S HOLLY
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:10/03/07

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Admitted: California
District of Columbia
Maryland
New York

January 26, 2011

Honorable Russell F. Canan
DC Superior Court
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Re: Establishing a D.C. Innocence Commission

Dear Judge Canan:

I am writing to support the creation of a D.C. Innocence Commission. Yesterday, at the DC Bar program "*How Superior Court Works*," you indicated that establishing such a Commission is under consideration by Judges of DC Superior Court.

Wrongful convictions can be caused by several factors, which a D.C. Innocence Commission should have plenary powers to investigate. [*See* attached Washington Post article.] For example: Ten years of *pro bono* work with the Innocence Projects, seeking *Brady* reforms, led me to support the adoption of Local Rules by our federal court to improve *Brady* compliance. [*See* enclosures.] When and if the federal court adopts such rules, DC Superior Court should follow suit, to harmonize the rules for prosecutors and criminal law practitioners in this jurisdiction.

There is a broader need for a fully empowered D.C. Innocence Commission. As noted in the enclosed NACDL report from late 2007 (which I wrote), one recent broad-scale study of wrongful convictions (factual innocence determined by DNA exonerations) suggests a wrongful conviction rate of between 3% and 4% for major crimes (at least where perpetrator identification is the main issue). A D.C. Innocence Commission could help minimize the number of these highly distressing wrongful convictions, and would significantly improve the workings of our criminal law system.

Thank you for considering these comments.

Sincerely,,
Edwin E. Huddleson
Edwin E. Huddleson

cc: Chief Judge Lee Satterfield
Hon. Robert Morin
Hon. Melvin R. Wright
Chief Judge Eric T. Washington
Hon. Annice M. Wagner

JAMES TRAINUM WASHINGTON

A safety net for the innocent

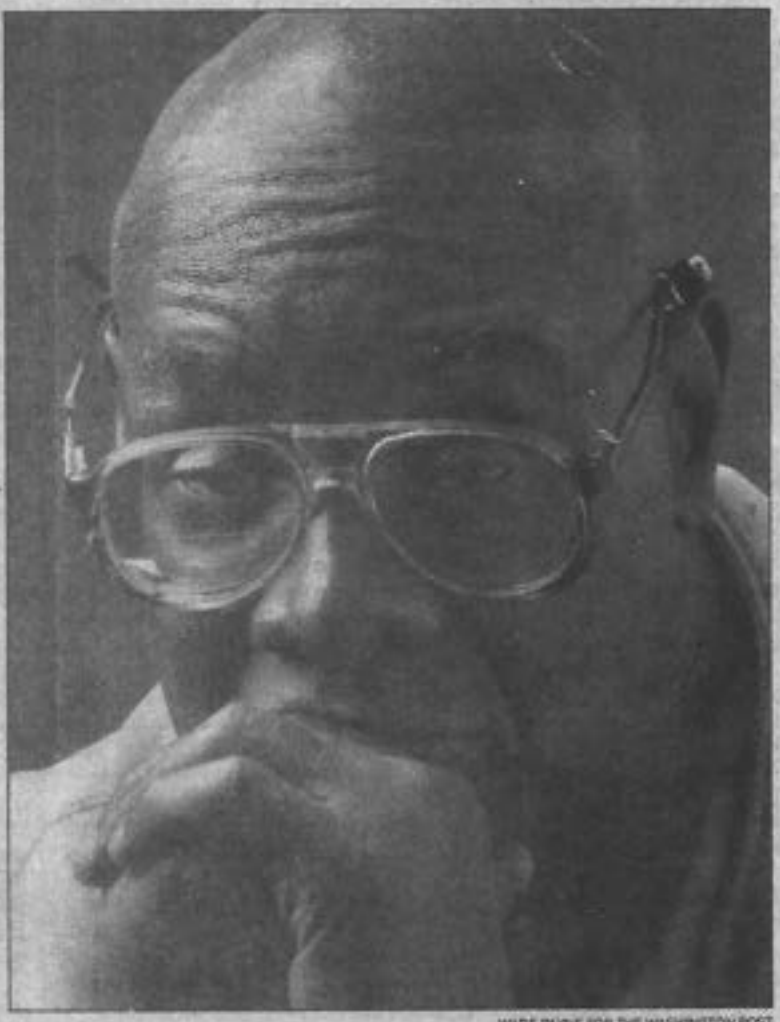
In 1994, as a new homicide detective with the D.C. police, I came close to sending a woman to prison for murder on the basis of a false confession I obtained from her. So I know something about what J. Brooks Harrington, the prosecutor who in 1981 put away Donald E. Gates for a rape and murder he didn't commit, meant when he told The Post this month: "I can't express how sick this has made me feel."

The suspect in my case was luckier than Gates. An unshakable alibi came to light before she could be tried. But even though Gates spent more than a quarter-century behind bars, he was lucky, too. If not for the discovery of a scrap of DNA evidence, long overlooked, he would still be in prison.

As science has advanced, stories like Gates's have become more common, but they are only the tip of the iceberg. Wrongful conviction claims in cases with no DNA evidence remain a nearly impossible uphill climb. Even with overwhelming evidence (including DNA), the adversarial system used in most jurisdictions puts unnecessary obstacles in the way of justice. And in cases where the truth does come to light, rather than learning from its mistakes, law enforcement usually sticks its head in the sand, waits for the bad publicity to go away and returns to business as usual, making the same mistakes again and again.

It shouldn't take luck to reverse this kind of injustice. Gates's case and thousands like it across the country highlight the desperate need for a review of the criminal justice system as a whole. Some jurisdictions have already begun this process by establishing Innocence Commissions.

Set up by legislative act or the judiciary, these commissions are designed to draw upon the experience of prosecutors, defense lawyers, law enforcement officers, judges, legislators, scholars, forensic experts and crime victims and their advocates. In the District, such a commission could operate much like the domestic violence and child fatality review boards already established by the D.C. Council, which analyze the circumstances surrounding deaths in the hope of finding ways to prevent them in the future. A D.C. Innocence Commission could be empowered to conduct a review of any wrongful convictions that come to light, to determine what went wrong and why. It could also study the legal process to find roadblocks on the path to exoneration. To do its job properly, it would need both investigative and subpoena powers to gather documents, witnesses and other evidence. The commission could recommend changes to practices that could be imposed by the D.C. Council or the courts or be made voluntarily by police and prosecutors.



WADE PAYNE FOR THE WASHINGTON POST

Donald Gates after his release from prison in December.

While discussing the Gates case, Harrington described the "institu tional pressure" on prosecutors t win difficult cases. Meant to faci itate the search for truth, our adve sarial justice system often degene ates into a battlefield where wi ning, rather than doing the righ thing, becomes the goal. Mistru on both sides, egos and person and agency agendas can get in th way of justice. The recommenda tions of an Innocence Commissio could create safeguards in this sy tem, building on laws and pr cedures already in place to addres problems related to eyewitness mi identification, faulty forensic sc ence, false confessions and othe areas.

It is also possible to go furthe Some jurisdictions, such as Nort Carolina, have established group modeled after Britain's Crimina Case Review Commission. Thes panels, made up of accomplishe lawyers, investigators, and forensi and other experts, independentl investigate allegations of wrongfu convictions and present their find ings to the appellate court or a pan el of judges for final arbitration. In stead of replacing the current ap peals process, such a commissio could supplement it by providin another option for claimants or o fering independent investigativ and expert support for both sides.

Innocence Commissions are win-win for everyone. When w study our criminal justice syster and work to make it better, we no only reduce the chances of convict ing the innocent but we also in crease our chances of convicting th guilty. We also show the public tha the system is strong enough to rec ognize and fix its own mistakes.

The writer, now retired, was part of the D.C. police's Violent Crime Case Review Project team that located the evidence which led to the overturning of Donald Gates's conviction. He lectures on the causes of investigative failures and how to prevent them.

The Washington Post

AN INDEPENDENT NEWSPAPER

EDITORIALS

Disclosing evidence

The Justice Department must learn to share.

OVER THE PAST year, the Justice Department's failure to turn over exculpatory evidence to defense lawyers has led to setbacks in high-profile cases involving former senator Ted Stevens (R-Alaska) and Blackwater contractors accused of murdering Iraqis. Attorney General Eric H. Holder Jr. asked a federal court to toss out the corruption conviction against Mr. Stevens; a D.C. federal trial judge dismissed the charges against the guards.

The failures also led to changes in the way the department approaches its obligation to turn over exculpatory information, including a review of policies and practices and increased training for staff and lawyers. Mr. Holder deserves credit for confronting the department's lapses. But a deeper and more permanent fix is needed.

The Supreme Court has ruled that prosecutors have an obligation to disclose any "material" evidence that could benefit a defendant, including information that points to a different culprit or contradictory statements by government witnesses. Prosecutors must comb through evidence and determine which pieces have to be turned over. In other words, decisions about what could benefit the defense are left to the prosecutor's judgment. The vast majority of prosecutors are conscientious, but even those acting in good faith may miss an important piece of evidence that a defense lawyer might have seized on.

Judge Emmet G. Sullivan, who presided over the Stevens case, has proposed that prosecutors have to turn over all potentially exculpatory information — not just that which is deemed "material." Another proposal is "open file discovery," which, with certain restrictions, would allow defense lawyers to review all evidence and make their own assessments. State prosecutors who have adopted this approach report increased efficiency in litigating cases and few, if any, problems.

The Justice Department has resisted broader disclosure requirements. Prosecutors worry about the protection of witnesses and national security information, but existing provisions in the law address these. Instead of fighting change, the department should work constructively with defense lawyers and judges to craft fair rules.