THE
PUBLIC
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SERVICE
for the District of Columbia

CHAMPIONS OF LIBERTY

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July 6, 2010

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, N.E.
Washington, DC 20054

Re: Rule 16 of the Federal Rules of Criminal Procedure

Dear Judge Tallman,

We write on behalf of the Public Defender Service for the District of Columbia to support amending Federal Rule of Criminal Procedure 16 to require the disclosure of all favorable information to the defense well in advance of trial. We fully endorse the letter of the Honorable Emmet G. Sullivan to the Advisory Committee dated April 8, 2009, eloquently expressing the need for such a change in the Rule. In our view, the requirement that prosecutors disclose favorable or exculpatory evidence to the accused well in advance of trial, without regard to materiality, and in a format useful to the defense, should be the law. Disclosure of all favorable evidence is critical to the fairness of our criminal justice system. Indeed, the consequence of failing to disclose may be the wrongful conviction of the innocent. It is too important to entrust to prosecutors' necessarily blinkered pretrial assessments of what may prove material to the case's outcome. Similarly, the timing of disclosures must be clearly mandated. Otherwise the decision when to disclose can, and too often does, fall victim to the adversarial desire for competitive advantage at trial.

We also write to share the Public Defender Service's unique experience of federal discovery practice in a local criminal court. The United States Attorney for the District of Columbia prosecutes all serious local crimes allegedly committed by adults (and for some serious felony offenses, children sixteen or older). These prosecutions take place in the Superior Court of the District of Columbia. Assistant United States Attorneys are therefore the regular opponents of Public Defender Service attorneys.

By statute, the "Superior Court shall conduct its business according to ... the Federal Rules of Criminal Procedure ... unless it prescribes or adopts rules which modify those Rules." D.C. Code § 11-946. Rules that modify the Federal Rules must be submitted for approval to the District of Columbia Court of Appeals and cannot take effect until approved by that court. *Id.* Although over the years there have been some modifications of the Federal

Rules to conform to local practice, most Superior Court Rules of Criminal Procedure are identical to, or nearly identical to, their federal counterparts. So it is with Rule 16, where the Superior Court Rule differs from the Federal Rule only slightly and not in any manner relevant to the amendments under consideration.

The Public Defender Service thus has a special vantage point for witnessing the *Brady* practices of the largest United States Attorney's Office in the United States operating under a rule of criminal procedure nearly identical to Federal Rule 16 (and likely to change in conformity with any change to the Federal Rule). We have paid keen attention to whether the 2006 change in the United States Attorney's Manual – a change which forestalled the last serious effort to amend Rule 16 – improved the *Brady* practice in the Superior Court. We must report that it has not. Nor have we witnessed a significant change in the government's *Brady* practice as a result of the Department of Justice's renewed commitment to guidance and training. What is needed, in our view, is reform with the force of law.

We provide below details of five prosecutions in the Superior Court where trial judges have vacated convictions or dismissed prosecutions as a consequence of *Brady* violations by Assistant United States Attorneys. These provide a window on a much larger problem. For every example of a case that was dismissed or a new trial ordered as a result of *Brady* violations, we know of several others in which lesser remedies such as day-of-trial or mid-trial continuances were granted. And, importantly, far more *Brady* violations may go undetected than are ever revealed.[1]

Most of the cases listed below reflect *Brady* violations that occurred or continued *after* the United States Attorney's Manual was updated on October 19, 2006. They therefore reflect poorly on the argument that those revisions made amendment to Rule 16 unnecessary. For every case described we have the transcripts or orders from which the descriptions are drawn. We would, of course, be more than willing to make them available to this Committee.

United States v. Dwight Grandson

On May 11, 2010, the Honorable Rhonda Reid Winston explained in a written order why she vacated Dwight Grandson's convictions for premeditated murder, obstruction of justice, and related offenses and ordered a new trial.[2] Judge Winston wrote that "[a]though this Motion turns

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[1] The former Chair of this Committee explained the difficulty in arriving at the "true measure of the scope of the problem," because *Brady* violations by their very nature are hidden. *United States v. Jones*, 620 F. Supp. 2d 163, 172 (D. Mass. 2009) (quoting the 2007 Report of the Chair of the Advisory Committee to the Standing Committee on Rules of Practice and Procedure at 20). As Chief Judge Mark L. Wolf explains:

> The defense is, by definition, unaware of exculpatory information that has not been provided by the government. Although some information of this nature comes to light by chance from time to time, it is reasonable to assume in other similar cases such information has never come to light.

Id.

[2] *United States v. Dwight Grandson,* Criminal Number F 5751-04, Order (May 11, 2010).

on materiality, it is imperative that this Court begin with the history of repeated, blatant *Brady* violations and misrepresentations by the prosecutor in this case."[3] Her order details that history of misrepresentations and *Brady* violations by the Assistant United States Attorney.

With respect to two *Brady* violations, one that came to light inadvertently during the defendant's case, the second that was not discovered until after trial, the Court concluded: "[T]he defendant has met his burden of proving that, but for the nondisclosure and tardy disclosure of exculpatory evidence by the government in this case, there is a reasonable probability the outcome of the trial would have been different." [4]

The first *Brady* violation concerned the defendant's access to the murder weapon. The prosecutor had sought permission to elicit testimony that a witness had seen the defendant with a black handgun several days before the homicide for the purpose of suggesting to the jury that he was carrying the murder weapon. At the time of the Court's ruling, the prosecutor knew, but the Court and defense counsel did not, that a witness had testified in the grand jury that the weapon the defendant was known to carry could not have been the murder weapon.[5] Judge Winston learned of the favorable evidence by chance when she sought to review the grand jury testimony of the witness whom the defense wished to call. She wrote, "The Court can say with almost absolute certainty that the government would have *never* divulged it to the defense." [6] The Court explained its significance: "Evidence that [the defendant] carried a .25 caliber gun was exculpatory in light of the ballistics evidence at trial that the decedent was shot with a .45 caliber semi-automatic weapon."[7]

The second *Brady* violation was discovered after trial in similarly fortuitous circumstances. The government failed to disclose that its key witness expected a $25,000 reward if her testimony led to a conviction. Defense counsel learned of this *Brady* evidence after trial when he viewed a local television news program which aired a story on the witness's request for assistance in obtaining the reward she said she had been promised. The trial prosecutor opposed defense counsel's motion to vacate the conviction based on the newly discovered evidence of the witness's expectation of a substantial payment for her testimony, asserting that "the United States is not aware of any promises of reward money to [the witness]."[8] The United States later acknowledged that the prosecutor had actual knowledge of the witness's expectation of a reward at the time that he opposed the motion.[9] Further, the detectives testified at evidentiary hearings that they had known before trial of the witness's expectation of a reward.[10] The Court concluded

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[3] *Id.* at 27.

[4] *Id.* at 1.

[5] *Id.* at 36.

[6] *Id.* at 36 (emphasis in original).

[7] *Id.* at 38.

[8] *Id.* at 3.

[9] *Id.* at 23, 38.

[10] *Id.* at 20, 23-24.

that there was "no doubt that the prosecutor ... could easily have discovered the evidence," assuming he did not already know it, and that his failure to disclose it thus violated *Brady.*[11]

Mr. Grandson's case was not the only one affected by the government's *Brady* violations. The United States agreed to substantial reductions in the sentences of both Jerome Holliway and Danielle Adams, two co-defendants who were separately tried by the same prosecutor, in exchange for dismissal of their post-conviction motions after an evidentiary hearing on the *Brady* allegations was held.[12]

United States v. Joseph Harrington

Here, too, an experienced Superior Court Judge, the Honorable Frederick H. Weisberg, vacated a jury's verdict for first-degree murder and ordered a new trial for *Brady* violations.[13] This case illustrates the unhelpful role that arguments regarding the materiality of favorable evidence can play in justifying *Brady* violations. The prosecutor suppressed the identity, police statements and grand jury testimony of a witness, Ms. Gibson, who contradicted the account of the government's key witness, Ms. Matchem, and provided an alternative exculpatory version of critical events. The evidence came to light only after the verdict and in response to a letter to the Court from the defendant himself. The prosecutor argued in post-trial motions that there had been no *Brady* violation because she doubted the reliability of the witness, making the exculpatory testimony not material. The Court disagreed. Judge Weisberg found particular cause for concern in the fact that the trial prosecutor made the decision not to disclose in consultation with others in her office.

Judge Weisberg's oral ruling on April 17, 2009, deserves extended quotation:

> As far as I can tell ... the information about Ms. Gibson's identity and her information and her grand jury testimony and her police statement was withheld from the defense consciously, deliberately and as a tactic, because I think the Government probably recognized it as not particularly favorable to their case, at a minimum, and may have recognized it as something that could be mischievous in the hands of a good defense lawyer.
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> I was struck at one of the earlier hearings, that [the prosecutor] said that this issue was discussed with several others within her office before making the decision not to disclose it.
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> In my opinion, it was patently disclosable, not a debatable point. And if it were debatable, it would have had to be disclosed to me, in any event, which it was not.

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[11] *Id.* at 37-38.

[12] *United States v. Jerome Holliway,* Criminal No. F-5753-04 (April 14, 2009); *United States v. Danielle Adams,* Criminal No. F-5752-04 (April 14, 2009).

[13] *United States v. Joseph Harrington,* Criminal No. 2007-CF1-22855 (April 17, 2009).

> And had it been disclosed to me, I would have immediately turned it over to the defense.
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> In opposing the motion, which [the prosecutor] does at great length and with great vigor, the Government attempts to argue that the evidence was not material for many different reasons[.] *** In my view, the Government's attempt to explain away the evidence that is, in my view obviously favorable to the accused, is unavailing largely for the reason pointed out by [defense counsel]. It's not for [the prosecutor] to decide whether Ms. Gibson would be believable, or for that matter whether Ms. Matchem would be believable; it's for the jury to decide it after hearing from both of them.[14]

United States v. Theresa Green

On November 14, 2008, the Honorable Brian Holeman dismissed with prejudice this robbery and simple assault case.[15] The suppressed evidence included a statement given by the complaining witness to the police that the Court concluded was "material to the case [and] beneficial to Defendant."[16] Judge Holeman writes with undisguised dismay of the length of time that passed and the numerous court hearings that were held while the *Brady* information remained undisclosed: "The complaining witness gave her statement to the police on October 16, 2004, yet this information was not provided to Defendant until *a year and a half* later. In the interim, there were eleven (11) status hearings, four (4) trial dates and a court order requiring that Government produce any additional *Brady* information."[17]

The government also failed to disclose a radio run and event report detailing police activity on the day of the alleged incident that was *Brady* information. Defense counsel made numerous requests for an explanation for the absence of a police report on the day the robbery was said to have taken place. The Court found that the government failed to conduct "a good faith investigation and evaluation of its own files," to timely learn the answer.[18] Instead, it simply responded that it had no information. When finally disclosed, the radio run and event chronology revealed that the officer who responded to the scene did not take a report from the complainant because she "was *intoxicated* and because she reported *three different versions* of the incident, which, if true, created a substantial credibility issue damaging to the Government's case."[19] But by the time of disclosure, the officer could no longer recall the three versions of the

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[14] *Id.* Transcript at 7-13.

[15] *United States v. Theresa Green aka Tracy Tobin,* Criminal No. 2004 FEL 6457, Memorandum and Order (November 14, 2008).

[16] *Id.* at 10.

[17] *Id.* at 10 (emphasis in original).

[18] *Id.* at11.

[19] *Id.* at 10-11 (emphasis in original).

event the complainant had provided. The Court concluded that "the late disclosure prejudiced Defendant, and was a violation of the Government's duty under the *Brady* doctrine." [20] It ordered that the case be dismissed with prejudice as a remedy for the government's *Brady* violations.

United States v. Leonardo Delacruz

The Honorable Wendell P. Gardner dismissed this assault on a police officer case with prejudice during trial on August 7, 2008. The government suppressed until just before the close of the defense case an exculpatory witness statement that was consistent with the defense theory of the case. The existence of statements taken of witnesses at the scene did not come to light until cross-examination of the government's sole witness, the complaining officer. Trial was suspended to allow the government to produce the witness statements. Once produced, Judge Gardner ruled that an eyewitness's "statement certainly is *Brady* information. She's sort of giving their [the defense] version, that it was an uncalled-for attack."[21] Judge Gardner ruled that the government should have turned over the information "a long time ago."[22] He concluded that dismissal of the case was the only appropriate remedy for the government's failure to timely provide the *Brady* information.

United States v. Antonio Linder

On November 28, 2006, the Honorable Erik Christian granted a mistrial of this second-degree murder case where the government suppressed information that undermined a key witness's identification of the defendant as the perpetrator.[23] The government failed to disclose that the eyewitness expressed doubts about his selection of the defendant's photograph to the detective within days of the identification procedure and that he reiterated those doubts to the grand jury. In the grand jury, in October 2005, over one year before trial, the witness testified regarding his identification, "I wanted to retrace [sic] it ... I thought I picked the wrong guy."[24] Judge Christian stated, "[T]his is clearly exculpatory."[25] "This is *Brady* information." [26] "This should have been disclosed to [defense counsel] early on."[27] The prosecutor argued that the disclosure during trial as Jencks material was timely.[28] The Court disagreed. To be "effectively used at

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[20] *Id.* at 12.

[21] *United States v. Leonardo Delacruz*, Criminal No. 2008-CF2-10259, Transcript at 108 (August 7, 2008).

[22] *Id.* at 112.

[23] *United States v. Antonio Linder,* Criminal No. F-5706-05, Transcript at 35 (November 28, 2006).

[24] *Id.* at 8.

[25] *Id.* at 14.

[26] *Id.* at 12.

[27] *Id.* at 9.

[28] *Id.* at 18.

trial," defense counsel should have had the information in advance in order to investigate the matter.[29] The Court also observed that the government had not disclosed the fact that the witness believed he might have picked the wrong photo during the identification suppression hearing. Judge Christian granted a mistrial.

These cases illustrate the enormous waste of judicial resources and the serious risk of injustice that can occur in the absence of amendments to Rule 16 of the kind under consideration. Such amendments will go a long way to ensure that decisions regarding what favorable evidence to disclose, when to disclose it, and in what format are not left to "the prosecutor's private deliberations." *Kyles v. Whitley,* 514 U.S. 419, 440 (1995). Instead, they will help preserve the criminal trial "as the chosen forum for ascertaining the truth about criminal accusations." *Id.*

We hope this information proves useful to your important work. Thank you for your consideration.

Very truly yours,

Avis E. Buchanan
Director

Sandra K. Levick
Chief, Special Litigation Division

cc: The Honorable Emmet G. Sullivan

[29] *Id.* at 11.