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.
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> MR. O'BRIEN: It was a *Brady* violation. It was impeaching material, and the Court knows that *Giglio* is a subset of *Brady.*
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> THE COURT: Right.
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> 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.
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> THE COURT: And that was going to be the second question. Indeed, was that a *Brady* violation as well?
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> 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.
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> 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)