American College of Trial Lawyers

PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16

Approved by the Board of Regents
March, 2003

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PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16*

BACKGROUND AND SUMMARY

In the 1963 landmark decision of *Brady v. Maryland*,[1] the Supreme Court held that prosecutors have a constitutional duty to turn over "evidence favorable to an accused. …. where the evidence is material either to guilt or to punishment."[2] Four decades later, Federal Rules of Criminal Procedure 11 and 16, which govern federal plea negotiations and criminal discovery respectively, still do not address, let alone require, the government to timely disclose favorable information to the defendant that is material to either guilt or sentencing.

Without a clear definition of favorable evidence nor a disclosure timetable, prosecutors have interpreted the constitutional discovery obligation inconsistently and too often disclosed favorable information on the eve, during or after trial or not at all. Timely disclosure of favorable information can greatly impact the plea decision, trial strategy, the presentation of evidence and sentencing.

Since approximately ninety-five percent of federal criminal cases are resolved through pleas of guilty,[3] the timely disclosure of information favorable to punishment is particularly important to fair and open plea negotiations and the honest and consistent implementation of the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"). Information that tends to diminish the degree of the defendant's culpability or Offense Level under the Guidelines can significantly affect a defendant's punishment. Still, prosecutors have recently sought to require defendants to enter into knowing and voluntary plea agreements in which the defendants have not received information favorable to punishment or worse, have been required to waive the constitutional right to exculpatory material without knowing what favorable evidence may exist. This practice threatens to deprive defendants and courts of information critical to a fair and honest sentencing process.

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[1] 373 U.S. 83 (1963).

[2] *Id.* at 87.

[3] United States Sentencing Guidelines (U.S.S.G.), Ch. 1, Pt. A.; *Judicial Business of the United States Courts, Annual Report of the Director* (2000) (available at: http://www.uscourts.gov/judbus2000/contents.html).

Nothing is more essential to a fair criminal trial or sentence than the disclosure of information favorable to the defendant in sufficient time for the defendant to receive due process as guaranteed by the Fifth Amendment, and effective assistance of counsel as guaranteed by the Sixth Amendment. No defendant should be forced to go to trial or plead guilty without having access to favorable information as to guilt or sentencing. Any system of jurisprudence which fails to require as much condones and "shapes a trial that bears heavily on the defendant"[4] and lays the groundwork for wrongful conviction of the innocent and unfair sentencing of the guilty.

The proposed amendments to Federal Rules of Criminal Procedure 11 and 16 will ensure that defendants receive the full and consistently applied benefit of the Supreme Court's pronouncements in *Brady* and its progeny. They codify the rule of law first propounded in *Brady v. Maryland,* clarify both the nature and scope of favorable information, require the attorney for the government to exercise due diligence in locating information and establish deadlines by which the United States must disclose favorable information.

This Committee believes that the constitutional mandate of *Brady v. Maryland* has been undermined by varying prosecutorial interpretations of "favorable information," delayed disclosure of this information in both guilt and punishment stages, and recent government plea policies that have the potential to deprive defendants of information essential to the sentencing process. The amendments will not only promote greater fairness and integrity in criminal discovery generally, but also foster earlier, forthright plea negotiations and a more balanced and informed administration of the Guidelines. Specifically, the Committee proposes amendments to Fed. R. Crim. P. 11 and 16 which:

1. define favorable information to an accused;

2. require, upon a defendant's request, that the government disclose in writing within fourteen days, all known favorable information to the defense;

3. impose a due diligence obligation on the government attorney to consult with government agents and locate favorable information; and

4. require disclosure of all favorable information to a defendant fourteen days before a guilty plea is entered.

Part I of this report discusses the background and evolution of the Supreme Court's decision in *Brady v. Maryland.* Part II summarizes federal criminal discovery practice under Rule 16 as it currently exists. Part III discusses Rule 11(e) and federal plea negotiations. Finally, Part IV contains the proposed Rule 11(e)(7) and Rule 16(f) amendments and a discussion of their key provisions.

[4] 373 U.S. at 87.

I. ***BRADY v. MARYLAND* BACKGROUND**

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.
>
> Justice William O. Douglas
> Brady v. Maryland, 373 U.S. 83, 87 (1963)

A. ***Brady v. Maryland***

Brady v. Maryland represented the first time the Supreme Court created a bright-line constitutional duty on the part of prosecutors to turn over "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment[.]"[5] In *Brady*, the defendant had been convicted of first degree murder and sentenced to death.[6] Although he had admitted to participating in the crime, Brady maintained that his accomplice had done the actual killing, and therefore asked to be spared the death penalty.[7] In an attempt to prove as much, Brady's lawyer requested that the prosecution show him several of defendant's accomplice's statements.[8] Despite this request, a statement in which Brady's accomplice admitted to the actual homicide was not provided.[9] The government's behavior prompted Justice Douglas to comment:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. [...] A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice[.][10]

The Court held "[T]he 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."[11]

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[5] *Id.*

[6] *Id.* at 84.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 87-88.

[11] *Id. See also Moore v. United States*, 408 U.S. 786, 794-95 (1972).

B. ***Brady*** **Evolution**

Five major Supreme Court cases since *Brady* have construed the prosecutor's obligation to disclose favorable evidence to a criminally accused. In *Giglio v. United States*,[12] the Court applied *Brady*'s mandate to impeachment evidence as well as classically exculpatory evidence.[13] Giglio had been convicted of passing forged money orders, and while his appeal was pending, his attorney learned that the government had failed to disclose a promise of immunity made to its key witness.[14] Chief Justice Burger ordered a new trial as a result of the prosecution's misconduct, stating that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within" the rule of *Brady*.[15]

In *United States v. Agurs*,[16] the Court reviewed for *Brady* violations the second-degree murder conviction of a defendant whose sole defense had been self-defense. The defendant had not requested, and the government had not disclosed, evidence that the victim possessed a criminal record which included prior convictions for assault and possession of deadly weapons.[17] The Court found that a prosecutor's constitutional duty to disclose favorable evidence was not limited to situations in which the defendant had specifically requested the evidence.[18] Nevertheless, noting that "the prudent prosecutor will resolve doubtful questions in favor of disclosure,"[19] Justice Stevens observed:

> [T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice be done.' He is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.[20]

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[12] 405 U.S. 150 (1972).

[13] *Id.* at 153-54.

[14] *Id.* at 150.

[15] *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

[16] 427 U.S. 97 (1976).

[17] *Id.* at 101.

[18] *See also United States v. Bagley*, 473 U.S. 667, 682 (1985), discussed *infra* at text accompanying notes 23 through 27, holding that regardless of whether a request had been made, the suppression of material evidence favorable to an accused is unconstitutional.

[19] 427 U.S. at 108.

[20] *Id.* at 110-11 (citations omitted).

The Court concluded that undisclosed evidence would be deemed material, and therefore violative of *Brady*'s dictates, if it "create[d] a reasonable doubt that did not otherwise exist."[21] It nonetheless upheld the conviction because the trial judge remained convinced of the defendant's guilt notwithstanding the newly discovered evidence.[22]

In *United States v. Bagley*,[23] the Supreme Court revisited the issue of "materiality" and held that undisclosed evidence is "material" for purposes of a *Brady* violation where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[24] Bagley, charged with violations of federal narcotics and firearms statutes, filed a motion requesting "any deals, promises or inducements to witnesses in exchange for their testimony."[25] In response, the government provided affidavits from two government witnesses who asserted that their statements had been given without any threats, rewards, or promises of reward.[26] Following his conviction, Bagley filed a Freedom of Information Act request with the Bureau of Alcohol, Tobacco and Firearms and learned that the agency had entered into contracts with the two witnesses under which the government had promised to pay them money for their cooperation.[27] Finding that the prosecutor's response had misleadingly induced defense counsel into believing the witnesses could not be impeached on the basis of bias, the Court remanded the case to the trial court to decide whether there was a "reasonable probability" that had the evidence been disclosed to the defense, the result might have been different.[28]

A decade later in *Kyles v. Whitley*,[29] the Court, in construing *Brady*, explained that the materiality standard does not require a defendant to demonstrate that disclosure of the suppressed material would have ultimately resulted in his acquittal.[30] Instead, such a standard requires a defendant to show that suppression of the relevant evidence caused him to receive a trial which did not "result[] in a verdict worthy of confidence."[31] In *Kyles*, the defendant faced first-degree murder charges for the alleged shooting of an elderly woman in a grocery store parking lot.[32] When his counsel filed a lengthy *Brady* motion requesting "any exculpatory or impeachment evidence," the government responded that there was "no exculpatory evidence of any nature."[33] In fact, however, the prosecution knew of no fewer than seven key pieces of

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[21] *Id.* at 112.

[22] *Id.*

[23] 473 U.S. 667 (1985).

[24] *Id.* at 682.

[25] *Id.* at 669.

[26] *Id.* at 670.

[27] *Id.* at 671.

[28] *Id.* at 684.

[29] 514 U.S. 419 (1995).

[30] *Id.* at 434.

[31] *Id.*

[32] *Id.* at 423, 428.

[33] *Id.* at 428.

exculpatory evidence, including substantial evidence affirmatively inculpating its star witness.[34] After analyzing the prosecution's failure to disclose this evidence, the Court reversed the defendant's conviction and death sentence, finding that "fairness [could not] be stretched to the point of calling this a fair trial."[35] The *Kyles* Court held that the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[36]

In *Strickler v. Greene*,[37] the Supreme Court reviewed a prosecutor's failure to disclose in a capital murder case exculpatory materials in police files consisting of detective notes about a key witness and a letter written by the witness.[38] Justice Stevens clarified that "there are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[39] Finding that no prejudice had ensued from the non-disclosure, the Court declined to reverse the defendant's conviction.

C. The Special Role of the Prosecutor in Ensuring a Fair Trial

In *Berger v. United States*,[40] Justice Sutherland outlined the unique role and responsibilities of the federal prosecutor:

> 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[41]
>
> (Emphasis supplied.)

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[34] *Id.* at 447.

[35] *Id.* at 454.

[36] *Id.* at 437.

[37] 527 U.S. 263 (1999).

[38] *Id.* at 266.

[39] *Id.* at 281-82.

[40] 295 U.S. 78 (1935).

[41] *Id.* at 88.

Woven throughout each of the major Supreme Court decisions construing *Brady* has been the theme that responsibility for ensuring the accused receives a fair trial rests not with the judge, jury, defense counsel, police, or some combination thereof, but with the prosecutor. In *Kyles*, the Court made clear that the prosecution has the "responsibility to gauge the likely net effect of all [favorable] evidence and make disclosure when the point of 'reasonable probability' is reached."[42] This meant, stated the Court, that individual prosecutors are required to learn:

> of any favorable evidence known to the others acting on the government's behalf in the case, including the police [... for] since ... the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.[43]

The *Kyles* Court further observed that:

> [u]nless ... the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result. This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence ... And (disclosure) will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.[44]

Both the American Bar Association ("ABA") Standards of Criminal Justice and the Model Rules of Professional Conduct recognize the unique role of the prosecutor and the importance of timely disclosure of favorable evidence to the defense. The ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d Ed. 1993) provide:

> A prosecutor should not intentionally fail to make *timely* disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.
>
> (Emphasis supplied)

[42] *Kyles*, 514 U.S. at 437.

[43] *Id.* at 437-38.

[44] *Id.* at 439 (citations omitted).

The ABA Model Rule of Professional Conduct 3.8(d) (1984) provides:

> 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 mitigate the offense.
>
> (Emphasis supplied)

Thus, the two most pertinent ethical guidelines to address criminal discovery make clear that timely disclosure of favorable evidence by the prosecution is essential in a criminal case.

Codification of *Brady v. Maryland* will assist federal prosecutors and law enforcement officers in better understanding the disclosure responsibility, instill far greater confidence that this constitutional obligation is being uniformly satisfied and, above all, work to ensure that wrongful convictions and unlawful sentences do not occur. Because the prosecutor alone can know and weigh what is undisclosed,[45] he is faced with the serious and possibly conflicting responsibility of deciding what is exculpatory and, if so, whether it should be disclosed to the accused, and finally when to disclose this information. A rule of criminal procedure can only provide welcome guidance in carrying out a responsibility that ensures fair trials and sentencings.

II. FEDERAL DISCOVERY PRACTICE

A. Federal Rule of Criminal Procedure 16 Does Not Address, Let Alone Require, Disclosure of Favorable Information

Unlike the Federal Rules of Civil Procedure, which provide for wide-ranging discovery and disclosure in the form of depositions, disclosure statements, requests for production, inspections and requests for admissions, interrogatories and expert reports, the Federal Rules of Criminal Procedure afford the defendant extremely limited access to government information.

Federal Rule of Criminal Procedure 16 governs discovery in federal criminal cases.[46] It requires, upon a defendant's request, disclosure of statements made by the defendant within the government's possession, control or custody,[47] disclosure of the defendant's prior criminal record,[48] inspection and copying of documents and tangible objects intended to be used by the government at trial or material to the defendant's defense,[49] inspection of physical and

[45] *Id.* at 438.

[46] Fed. R. Crim. P. 16 is reprinted in its entirety in Appendix A.

[47] Fed. R. Crim. P. 16 (a)(1)(A).

[48] *Id.* at 16 (a)(1)(B).

[49] *Id.* at 16 (a)(1)(C).

mental examinations and scientific tests,[50] and summaries of any expert testimony that the government intends to offer in its case-in-chief.[51] The rule affords the government reciprocal discovery upon its compliance with and request of the defendant.[52] Rule 16 also imposes a continuing duty to disclose if prior to or during a trial a party discovers additional evidence or material previously requested or ordered and subject to discovery or inspection under the rule.[53] Over its fifty-year evolution, Federal Rule of Criminal Procedure 16 has metamorphosed the spectacle of the criminal trial from a game of "blind man's bluff"[54] into a "serious inquiry aiming to distinguish between guilt and innocence."[55]

Although Rule 16 has gradually expanded the scope of discovery required in criminal cases,[56] it still does not address, let alone require, the government to timely disclose favorable information to the defendant that is material either to guilt or sentencing. This limited disclosure makes the defense of a federal criminal case especially difficult, considering the government's ability to control the flow of information to the defendant, attributable largely to the close relationships between the prosecutor and law enforcement, and the inability of the defense to compel disclosure.

In addition to disclosure under Rule 16, criminal defense lawyers can try to obtain Brady and Giglio material by filing a motion with the court. Most criminal defense lawyers file a *Brady-Giglio* motion as a matter of course in federal and state court proceedings. Some file a general request for exculpatory evidence while others tailor the discovery motion to the particulars of the case. Types of information not only favorable, but essential, to the defense in a criminal trial and at sentencing include:

- promises of immunity or other favorable treatment to government witnesses;[57]

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[50] *Id.* at 16 (a)(1)(D).

[51] *Id.* at 16(a)(1)(E).

[52] *Id.* at 16(b).

[53] *Id.* at 16(c).

[54] *See* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 Wash. U. L. Q. 1, 3 (1990) (citing Justice Douglas' opinion in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958), in which Justice Douglas noted that tools which result in broad discovery "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent").

[55] *See* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U. L. Q. 279 (1963) (quoting Williams, *Advance Notice of the Defense*, 1959 Crim. L. Rev. (Eng.) 548, 554 (1959)).

[56] See, e.g., the 1966 Amendment to the Rule (noting that "[t]he rule has been revised to expand the scope of pretrial discovery"), the 1974 Amendment ("Rule 16 is revised to give greater discovery to both the prosecution and the defense."), and the 1993 Amendment ("New subdivisions ... expand federal criminal discovery[.]")

[57] *See United States v. Butler*, 567 F.2d 885 (9th Cir. 1978) (conviction reversed where prosecution's key witness lied about the nature of his deal with the prosecution); *United States v. Pope*, 529 F.2d 112 (9th Cir. 1976) (conviction reversed where prosecution failed to disclose plea bargain with key witness in exchange for immunity while arguing to jury that witness had no motive to lie); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (prosecution concealed evidence that key witness was coerced into testifying against defendant and/or argued to the jury that no one had threatened the witness); *United States v. Gerard*, 491 F.2d 1300 (9th Cir. 1974) (convictions reversed where defendants were deprived of evidence reflecting promises of leniency).

- prior criminal records of government witnesses;[58]
- prior inconsistent statements of government witnesses regarding the defendant's alleged criminal conduct;[59]
- prior perjury or false testimony of government witnesses;
- monetary rewards or inducements to government witnesses;
- confessions to the crime in question by others;
- information reflecting bias or prejudice by government witnesses against the defendant;
- witness statements that others committed the crime in question;
- information about mental or physical impairments of government witnesses;[60]
- inconsistent or contradictory examinations or scientific tests;[61] and
- the failure of any percipient witnesses to make a positive identification of the defendant.

Brady-Giglio motions, however, often fail to unearth evidence which is critical to the defense. Federal prosecutors, largely keying on the word "exculpatory," have interpreted the *Brady* disclosure obligation in a variety of ways. A number of prosecutors have interpreted *Brady* narrowly and believe that a prosecutor's *Brady* obligation is limited to turning over information that someone other than the defendant has confessed to the crime at issue. Many prosecutors do not focus on the critical language of the *Brady* decision that requires disclosure of evidence that *tends to* exculpate or reduce one's penalty.[62] Others, knowing of favorable evidence, have tried to predict its effect on the outcome of the case in deciding whether to disclose it. Still others do not view *Giglio* or impeachment material as part of the *Brady*

[58] *See Carriger v. Stewart*, 132 F.3d 463, 479-82 (9th Cir. 1997) (conviction reversed where prosecution failed to disclose witness's prior criminal history); *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) *cert denied*, 489 U.S. 1032 (1989) (same); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) (prosecutor's lack of knowledge of witness' criminal record was no excuse for *Brady* violation).

[59] *See United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994) (kidnapping conviction reversed where government failed to disclose key witness' letter which seriously undermined her credibility); *United States v. Herberman*, 583 F.2d 222 (5th Cir. 1975) (*Brady* violation found for failure to disclose grand jury testimony contradicting testimony of government witnesses).

[60] *See United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995) (new trial granted where government failed to reveal drug use and dealing by prisoner-witnesses during trial).

[61] *See United States v. Fairman*, 769 F.2d 386 (7th Cir. 1985) (prosecutor's ignorance of ballistics worksheet indicating that gun defendant was accused of firing was inoperable did not excuse failure to disclose); *United States v. Poole*, 379 F.2d 645 (7th Cir. 1966) (conviction reversed where government failed to disclose FBI report of victim's physical examination).

[62] 373 U.S. at 87.

exculpatory disclosure obligation. And yet others have separated the timing of the disclosure of exculpatory or guilt evidence from the disclosure of mitigating or punishment evidence.

The majority of this Committee's members practice in federal courts, and based on their experiences, believe that across the country federal prosecutors routinely defer *Brady* disclosures unless ordered by the trial court and often reply to both general and case-specific *Brady-Giglio* motions with boilerplate responses such as "none known," or "the government is aware of its obligations" - often producing little, if any, favorable information for months, in some cases not until trial is underway and in other cases not at all. Without a procedural rule containing a clear definition of *Brady* material, requiring prosecutors to consult with law enforcement officers, and mandating a firm compliance timetable, the duty to disclose favorable information has become blurred and at best of secondary importance to the explicit discovery obligations and procedures found in Rule 16.

It is anomalous that in civil cases, where generally all that is at stake is money, access to information is assured; however, in contrast, in criminal cases, where liberty is at issue, the defense is provided far less information. More significantly, in a civil case, violation of the discovery rules is punishable in extreme cases by dismissal. There is no comparable sanction in criminal cases. The amendments proposed here are consistent with the unique role of the prosecutor in ensuring that the accused receives a fair trial.

B. Most Local Rules Do Not Fully Address the Disclosure of Favorable Information

Most local rules that address *Brady-Giglio* disclosure obligations neither define the nature and/or scope of favorable information, nor require consultation with law enforcement officers, nor provide clear pre-trial or pre-plea deadlines for disclosure.[63] The most notable exception is the District of Massachusetts[64] which in 1998 promulgated the most extensive local

[63] Some local criminal rules require attorneys for the government and defense to confer with respect to a schedule for disclosure and provide that, in the absence of a stipulation, the court may intervene. *See, e.g.*, N.D. Ca. Criminal Local Rule 16-1(a). Many are silent as to *Brady* obligations (*see, e.g.*, E.D. Tn. L.R. 16.2 (Pre-trial Conferences in Criminal Cases); S.D. Tx. Criminal Rule 12 (Criminal Pretrial Motion Practice); S.D. Ca. Criminal Rule 16.1 (Pleadings and Motions Before Trial, Defenses and Objections); and M.D. Ala. L. Cr. R. IV (Arraignment and Preparation for Trial)), or address Federal Rule Criminal Procedure 16 obligations only. *See, e.g.*, E.D. Pa. Criminal Rule 16.1 (Pretrial Discovery and Inspection); D.Wy. L. Cr. R. 16.1. Still others encourage parties to meet and confer on discovery topics beyond Fed. R. Crim. P. 16 but not *Brady* material. *See, e.g.*, N.D. Ill. L. Cr. R. 16.1 (Pretrial Discovery and Inspection). Finally, some federal courts have no local criminal rules. *See, e.g.*, D.S.D. Local Rules of Practice.

[64] The Southern District of Florida has also promulgated extensive local criminal discovery rules which addresses *Brady* information. *See* S.D. Fla. General Rule 88.10 (requiring the government to disclose, within fourteen days of arraignment, not only the information required under Federal Rule Criminal Procedure 16, but also "all information ... favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland* ... and *United States v. Agurs*," as well as "the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of *Giglio v. United States* . . . and *Napue v. Illinois*").

criminal discovery rules in the nation. Massachusetts Local Rule 116.2[65] was enacted in response to federal prosecutors' indifference to pre-trial discovery obligations.

United States v. Mannarino,[66] frequently credited with precipitating the enactment of Massachusetts's Local Rule 116.2, decried "a pattern of sustained and obdurate indifference to, and unpoliced subdelegation of, disclosure responsibilities by the United States Attorney's Office."[67] *Mannarino* addressed a police officer's destruction of a star informant's self-authored narrative of his criminal history, before it could be produced to defendants, and in violation of the Jencks Act.[68] Calling the case "yet another example of concerted indolence in pursuing disclosure by the United States Attorney's Office and a willful blindness to the failure of its agents who had disclosure duties to fulfill them,"[69] Judge Woodlock cited a decade's worth of case law detailing "lame," "sloppy," "negligen[t]," "illusory," and "insensitiv[e]" criminal discovery practices by the U.S. Attorney's Office in Boston.[70] Declining to enter a judgment of acquittal, the court ordered the deposition of the government's key witness to be taken by defense counsel, to be followed by a new trial.[71] *Mannarino* highlights the practice of some prosecutors of ignoring the constitutional obligation to disclose favorable information material to guilt and punishment in a timely fashion.[72]

The Massachusetts local criminal rules establish a series of "automatic" discovery obligations imposed upon prosecutors and defendants alike.[73] The rules also require the government to disclose, under a mandated timeframe, any information that could "cast doubt" on the defendant's guilt, the admissibility or credibility of any evidence, or the degree of the defendant's culpability under the Guidelines.[74] This information expressly includes, *inter alia*, inducements rendered to government witnesses to testify, criminal records of and cases pending against such witnesses, and the failure of any such witnesses to positively identify the defendant.[75] The rules further require the government to inform "all federal, state, and local law enforcement agencies formally participating in the criminal investigation" of the local rules'

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[65] Massachusetts Local Rule 116.2 is reprinted in its entirety in Appendix B.

[66] 850 F. Supp. 57, 59 (D. Mass. 1994).

[67] *Id.* at 59. *See also id.* at 71 (stating that repeated prosecutorial discovery violations are "of sufficient concern that the District of Massachusetts has determined to review its present local rules governing criminal discovery with a view toward increased prescriptiveness in discovery responsibilities").

[68] *Id.* at 59. *See also* 18 U.S.C. § 3500 (Jencks Act).

[69] 850 F. Supp. at 71.

[70] *Id.* at 71-72 (citations omitted). The court went on to call the government's current discovery practices "unwilling[]" and "rescusan[t]," among other adjectives. *Id.* at 72.

[71] *Id.* at 73.

[72] *See, e.g.*, Moushey, *Hiding The Facts Readout; Discovery Violations Have Made Evidence-Gathering A Shell Game*, Pittsburgh Post-Gazette, November 24, 1998, at A-1; Goldberg, *Your Clients'* Brady-Giglio *Rights Are Not Protected*, 22 Champion 41 (September/October 1998).

[73] *See* D. Mass. L.R. 116.1-117.1, *infra*, Appendix B. The rules require the government to provide not only all materials required by Fed. R. Crim. P. 16, but also the fruits yielded from any search warrants, electronic surveillance, and investigative identification procedures, as well as the names of all unindicted co-conspirators. *See id.* at 116.1(C).

[74] *Id.* at 116.2.

[75] *Id.*

discovery obligations, to obtain from such law enforcement agencies any information they have which would be subject to disclosure, and to require participating law enforcement agencies to preserve their "notes" and other relevant documents.[76] Finally, Massachusetts Local Rule 1.3 provides that failure to comply with any obligation or direction set forth by the rules of the district may result in dismissal.[77]

III. FEDERAL PLEA PRACTICE

A. Federal Rule of Criminal Procedure 11(e) Does Not Address Let Alone Require Disclosure of Favorable Information

The vast majority of federal criminal cases are resolved by pleas of guilty under Fed. R. Crim. P. 11. Plea agreements are governed by the law of contracts.[78] Most pleas are negotiated and involve bargained for consideration. The parties - the United States and the defendant(s) - may bargain for particular charges, sentences, sentencing ranges or the application of USSG guidelines, policies, factors or provisions.

Federal Rule of Criminal Procedure 11(e) governs the conduct of the government and the defendant during plea negotiations. Rule 11[79] establishes guidelines to ensure that a guilty plea is made knowingly and voluntarily.[80] Before accepting a plea of guilty, a court must address the defendant personally in open court and inform the defendant that he has a right to plead not guilty, the right to be tried by a jury and at that trial he has the right to assistance of counsel, the right to confront and cross examine adverse witnesses and the right against compelled self-incrimination.[81] A waiver of an important constitutional or statutory right must be known and voluntary to be valid,[82] but Rule 11 does not require the court to specify each and every constitutional right that the defendant waives by pleading guilty.[83]

A defendant who acknowledges his plea is knowingly and voluntarily entered at his plea hearing must overcome a strong presumption of voluntariness when he subsequently seeks to challenge that plea.[84] A plea entered into without the benefit of *Brady* information is inherently suspect in this regard. Without *Brady* information, the defendant and counsel may not

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[76] *Id.* at 116.8, 116.9. Massachusetts's local rules promote enforcement by requiring the magistrate and presiding judges to hold at least three pre-trial conferences designed to effect compliance with the local rules.

[77] D. Mass. L.R. 1.3.

[78] *See Santobello v. New York*, 404 U.S. 257, 262 (1971).

[79] Fed. R. Crim. P. 11(e) is reprinted in its entirety as Appendix C.

[80] Fed. R. Crim. P. 11(c)-(d).

[81] Fed. R. Crim. P. 11(c)(3).

[82] *See United States v. Mezzanatto,* 513 U.S. 196 (1995).

[83] Fed. R. Crim. P. (c)(4). *See, e.g., Brady v. United States*, 357 U.S. 742, 748 (1970) (waiver of the constitutional rights to a trial and to remain silent); *McMann* v. *Richardson*, 397 U.S. 759, 766 (1970) (waiver of the right to contest the admissibility of evidence the government may have offered against the defendant).

[84] *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

be able to make informed decisions about whether and when to plead guilty. The common argument that a defendant knows whether he is guilty and whether there is mitigating evidence is simply not true in many cases.[85] A defendant may not know all the elements of an offense or understand that certain evidence known only to the prosecutor may negate an essential element. Further, a defendant may not know of facts that establish a legal defense and without disclosure a defendant's counsel may not become aware of facts that establish a legal defense.[86] A defendant with limited mental faculties or a significantly reduced mental capacity may not be able to fully communicate with counsel or appreciate the importance of facts critical to the defendant's guilt or innocence.

The federal circuits are split on whether *Brady* applies to plea negotiations. The Fifth[87] and Eighth[88] circuits have held that defendants waive their rights to *Brady* material in pleading. However, the Second,[89] Sixth,[90] Ninth[91] and Tenth[92] circuits have held that *Brady* does apply to guilty pleas. The Ninth Circuit in *Sanchez*, taking the strongest position, has concluded that a plea "*cannot* be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution."[93]

B. Federal Plea Agreement Policies Which Require the Defendant to Waive the Right to *Brady* Material Undermine the Due Process Goal of Ensuring a Fair Sentencing Process

A closely related question is whether a defendant can waive his right to receive *Brady* information. Some United States Attorneys Offices, notably the Southern and Northern District of California, have expressly incorporated into plea agreements a *Brady* waiver. A representative sample states:

> The defendant understands that discovery may have been completed in this case, and that there may be additional discovery to which he would have access if he elected to proceed to trial. The defendants agree to waive his right to receive additional

[85] Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery Waivers"*, 51 Stan. L. Rev. 567 (1999).

[86] *Id.*

[87] *Matthew v. Johnson*, 201 F.2d 363 (5th Cir. 2000).

[88] *Smith v. United States*, 876 F.2d 655 (8th Cir. 1989).

[89] *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988).

[90] *Campbell v. Marshall*, 769 F.2d 313 (6th Cir. 1985), *cert. denied* 475 U.S. 1058 (1986).

[91] *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995).

[92] *United States v. Wright*, 43 F.3d 491 (10th Cir. 1994).

[93] 50 F.3d at 1453 (emphasis added).

> discovery which may include, among other things, evidence tending to impeach the credibility of potential witnesses.[94]

In *United States v. Ruiz* the Supreme Court held that the Constitution does not require the government to disclose material impeachment evidence to a defendant prior to entering a plea agreement.[95] In *Ruiz*, the defendant rejected a plea offer from the U.S. Attorney's Office in the Southern District of California which required her to waive her rights to *Brady* material in exchange for a downward departure at sentencing.[96] The trial court refused to grant the departure following her subsequent guilty plea made without a plea agreement.[97]

The Ninth Circuit in *Ruiz* had found that plea agreements and any waiver of *Brady* rights contained therein "cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution."[98] In reversing the Ninth Circuit, the Supreme Court focused on impeachment evidence rather than exculpatory or mitigating evidence. It pointed out that in *Ruiz's* proposed plea agreement, the government had agreed to provide "any information establishing the factual innocence of the defendant."[99]

The difficulty with a complete *Brady* waiver is that a defendant cannot knowingly waive something that has not been made known to him and that may exclusively be in the possession of the government. The Supreme Court has made clear that there must be an "intentional relinquishment or abandonment of a known right or privilege."[100] When a plea is made without the knowledge of all its direct consequences, it may not stand.[101]

In an analogous situation to the waiver of *Brady* material, many federal prosecutors have insisted that defendants also waive the right to appeal a sentence as part of a plea agreement even though a sentence has yet to be imposed. In this context, a District of Columbia district court held that "a defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed and about which the defendant had no knowledge as to what will occur at the time of sentencing."[102]

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[94] Banoun, *Preface: The Year in Review, reprinted in* White Collar Crime 2000, at x (ABA 2000) (quoting San Francisco U.S. Attorney's Office plea agreement provision).

[95] 122 S. Ct. 2450 (June 24, 2002).

[96] 241 F.3d 1157, 1160-61 (9th Cir. 2001).

[97] *Id.* at 1161.

[98] *Id.* at 1164 (quoting *Sanchez*, 50 F.3d at 1453).

[99] *Id.* at 2451-2452.

[100] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

[101] *Brady v. United States*, 397 U.S. 742 (1970).

[102] *United States v. Raynor*, 989 F. Supp. 43 (D.D.C. 1998). *But see United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990) (permitting waiver of sentence appeals).

In sum, the bargaining leverage of the United States in plea negotiations is enormous. The government drafts the plea agreement, usually dictates the factual basis for the plea and often pronounces *de facto* office plea policies, e.g., that the defendant must waive his right to all *Brady* material or his right to appeal a sentence. There is no compelling reason to ignore or make a defendant waive his constitutional right to information favorable to guilt or sentencing. Indeed, any policy that discourages disclosure of exculpatory material may well encourage prosecutors to elicit guilty pleas improperly.[103]

IV. ***BRADY V. MARYLAND*** **AND FEDERAL SENTENCING**

Even though *Brady v. Maryland* explicitly requires disclosure of favorable information relevant to punishment, prosecutors frequently focus only on favorable information relevant to the guilt or trial phase and view a defendant's decision to plead as extinguishing the right to favorable evidence.[104] Ironically, *Brady* involved a situation in which favorable evidence as to punishment and not guilt was at issue. Disclosure of favorable evidence as to punishment is arguably even more critical today as a result of the United States Sentencing Guidelines.

A comprehensive review of the United States Sentencing Guidelines' structure and methodology is beyond the purpose and scope of this report. However, there is no doubt that federal prosecutors wield enormous influence in determining what sentence a convicted defendant receives under the Guidelines. In particular, government attorneys at the outset calculate the offense level which is designed to "measure the seriousness of the crime."[105] They routinely formulate the specific offense characteristics such as an offense involving sophisticated means[106] or a loss exceeding certain dollar levels[107] that can significantly increase the defendant's period of incarceration. They frequently argue that for offenses committed by more than one participant, the court should consider the defendant's aggravating[108] or mitigating[109] role in the offense. In each of these instances, government attorneys may have access to, and in some cases the only access to, favorable information that diminishes the defendant's culpability or lowers the offense level under the Guidelines.

For example, witnesses may differ in describing the role of a defendant as a manager, supervisor, organizer or leader[110] - designations that can greatly affect the ultimate sentence. Similarly, government witnesses may dispute whether the loss claimed by the United

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[103] *Sanchez*, 50 F.3d at 1453.

[104] Joy & McMunigal, *Disclosing Exculpatory Material in Plea Negotiations*, 15 FALL Crim. Just. 41 (2001).

[105] Bowman, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutor Indiscipline*, 29 Stetson L. Rev. 79 (1999).

[106] U.S.S.G. § 3B1.1(b)(8)(C).

[107] U.S.S.G. § 2B1.1(b)(1).

[108] U.S.S.G. § 3B1.1.

[109] U.S.S.G. § 3B1.2.

[110] U.S.S.G. § 3B1.1.

States was "reasonably foreseeable pecuniary harm,"[111] and the final calculation of the actual losses in fraud cases similarly affects a sentence.[112] Because witnesses who have provided exculpatory evidence to the government are less likely to make themselves available to the defendant or his counsel, there is a serious risk that absent disclosure by the prosecution, the defense may never learn of material exculpatory evidence that would mitigate the offense or reduce the punishment.

Timely disclosure of favorable information can not only diminish the degree of the defendant's culpability or Offense Level under the Guidelines, its receipt or the government's certificate in writing that none exists, can lead to an earlier decision to plead guilty whereby he receives credit for that plea by the court.[113] Thus, when the government denies a defendant *Brady* information at an early stage of the process, it may well deny him the opportunity to prove to the government that a lesser sentence is fair based on evidence in the government's possession and that he is also then entitled to receive significant credit for acceptance of responsibility in timely pleading to the offense.

V. PROPOSED AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16 AND OFFICIAL COMMENTARY

A. Proposed Amendment to Rule 16

Fed. R. Crim. P. 16(f)

(f) Information Favorable to the Defendant as to Guilt or Punishment.

(1) Within fourteen days of a defendant's request, attorney(s) for the government shall disclose in writing all information favorable to the defendant which is known to the attorney(s) for the government or to any government agent(s), law enforcement officers or others who have acted as investigators from any federal, state or local agencies who have participated in either the investigation or prosecution of the events underlying the crimes charged. Information favorable to the defendant is all information in any form, whether or not admissible, that tends to: a) exculpate the defendant; b) adversely impact the credibility of government witnesses or evidence; c) mitigate the offense; or d) mitigate punishment.

(2) The written disclosure shall certify that: a) the government attorney has exercised due diligence in locating all information favorable to the defendant within the files or knowledge of the government; b) the government has disclosed and provided to the defendant all such information; and c) the government acknowledges its continuing obligation until final judgment is entered: i) to disclose such information; and ii) to furnish any additional information favorable to the defendant immediately upon such information becoming known.

[111] U.S.S.G. § 3B1.1, Commentary 2.

[112] U.S.S.G. §2B1.1(B)(1).

[113] See U.S.S.G. § 3E1.1 (Acceptance of Responsibility).

Official Commentary

This amendment is intended to codify and clarify the prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and *Kyles v. Whitley*, 514 U.S. 419 (1995). These Supreme Court precedents and others require the prosecutor to provide to the defense not only directly exculpatory evidence (*Brady*) but also evidence impeaching the credibility of the Government's witnesses (*Giglio*); not only evidence specifically requested by the defense (*Brady*) but also that which is not requested (*Agurs*); not only evidence relevant to guilt or innocence (*Giglio*) but also evidence relevant to sentencing (*Brady*); and not only evidence known to the prosecutor (*United States v. Bagley*, 473 U.S. 667 (1985)) but also evidence known to agents of law enforcement (*Kyles*). Proposed Rule 16(f) creates a necessary analytical and procedural framework for the prosecution to carry out its constitutional responsibilities.

Examples of favorable information include but are not limited to: promises of immunity (*see, e.g., United States v. Butler*, 567 F.2d 885 (9th Cir. 1978)); prior criminal records (*see, e.g., United States v. Auten*, 632 F.2d 478) (5th Cir. 1980) and *United States v. Owens*, 933 F. Supp. 76, 87-88 (D. Mass. 1996)); prior inconsistent statements of government witnesses (*see, e.g., United States v. Payne*, 63 F.3d 1200, 1210 (2d Cir. 1995)); *United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994); *United States v. Herberman*, 583 F.2d 222 (5th Cir. 1975)); information about mental or physical impairment of government witnesses (*see, e.g., United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995)); inconsistent or contradictory scientific tests (*see, e.g., United States v. Fairman*, 769 F.2d 386 (7th Cir. 1985)); pending charges against witnesses (*see, e.g., United States v. Bowie*, 198 F.3d 905, 909 (D.C. Cir. 1999)); monetary inducements (*see, e.g., United States v. Mejia*, 82 F. 3d 1032, 1036 (11th Cir. 1996); *United States v. Fenech*, 943 F. Supp. 480, 486-87 (E.D. Pa. 1996)); bias (*see, e.g., United States v. Schledwitz*, 169 F.3d 1003 (6th Cir. 1999)); proffers of witnesses and documents relating to negotiation process with the government (*see, e.g., United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1203 (C.D. Ca. 1999)); and the government's failure to institute civil proceedings against key witnesses (*see, e.g., United States v. Shaffer*, 789 F.2d 682, 690-91 (9th Cir. 1986)).

Despite the fact that *Brady v. Maryland* recognized the prosecutor's duty to disclose evidence favorable to the defense in 1963, the decades since then have seen repeated instances of prosecutors overlooking or ignoring this obligation. *See, e.g., Boyette v. Lefevre*, 246 F.3d 76 (2d Cir. 2001) (granting habeas petition after state failed to produce evidence impeaching the victim's identification, statements of other eyewitnesses, and reports regarding other possible suspects); *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991) (overturning appellant's cocaine possession conviction because prior criminal record of prosecution witness was not turned over to the defense); *United States v. Pelullo*, 105 F.3d 117 (3d Cir. 1997) (reversing denial of collateral relief from wire fraud and RICO convictions upon showing that the government had withheld evidence of prior inconsistent statements by a key witness, there were changes to FBI incident reports, and contradictions existed regarding the appellant's attendance at a

particular meeting); *Spicer v. Roxbury*, 194 F.3d 547 (4th Cir. 1999) (upholding petition for writ of habeas corpus because state failed to turn over evidence of conflicting statements by main prosecution witness); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (prosecution concealment of coerced testimony of key witness); *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (granting petition for writ of habeas corpus when petitioner showed that the prosecution failed to turn over a report indicating that a key witness could not positively identify the petitioner as the shooter in a murder case); *Carriger v. Stewart*, 132 F.3d 463, 479-482 (9th Cir. 1997) (reversing conviction where prosecution failed to disclose witness's prior criminal history); *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992) (overturning drug trafficking convictions for government's *Brady* violation in not turning over a law enforcement official's report that raised serious doubts regarding the truthfulness of the prosecution's key witness); *United States v. Pope*, 529 F.2d 112 (9th Cir. 1976) (prosecution's failure to disclose immunity to key witness); and *United States v. Scheer*, 168 F.3d 445 (11th Cir. 1999) (overturning conviction for misuse of banking funds because of the failure to disclose prosecutorial intimidation of witnesses).

The proposed Rule 16(f) requires the prosecutor to turn over all information favorable to the defendant within 14 days of the date the defendant requests it. Timely disclosure of favorable information to the defense is essential to meaningful compliance with *Brady*. *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d Ed. 1993) and ABA Model Rule of Professional Conduct 3.8(d) (1984). It is anticipated that, like many other discovery deadlines, this one can be extended by agreement of the parties, and if necessary, the government may apply to the court for a protective order, under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time. The proposed rule requires a request from the defense in order to trigger the 14-day time frame, but the rule is not intended to obviate the prosecution's obligation to provide information favorable to the defense even in the absence of a defense request, *United States v. Agurs*, *supra*.

The drafters anticipate that before or at the time of guilty pleas, government attorneys will furnish to the defense favorable information that mitigates the offense or punishment. As a result of the promulgation of the United States Sentencing Guidelines and the increased importance of even minor facts that can affect punishment by diminishing the degree of a defendant's culpability or Offense Level, the drafters believe that timely production of *Brady* information in the sentencing context is far more significant and critical today than ever before.

Proposed Rule 16(f) requires government attorney(s) to turn over "all information, in any form, whether or not admissible . . ." The rule thus contemplates disclosure of not only written documents but also of tape recordings, computer data, electronic communications, and oral information acquired through interviews or any other means. The proposed rule does not burden the government with the responsibility of assessing whether information is likely admissible.

The proposed Rule 16(f) contains no requirement that the information be "material" to the defense. The drafters believe that the Rule's definition of "Information favorable to the defendant" is sufficiently clear to guide the government attorneys at the pre-trial stage. A materiality standard is only appropriate in the context of an appellate review since determinations of materiality are best made in light of all the evidence addressed at trial. A materiality analysis cannot realistically be applied by a trial court facing a pre-trial discovery request. *See, e.g., United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *United States v. Sudikoff*, 39 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999). In cases where a failure to disclose favorable information is uncovered after the trial or sentencing, of course, the reviewing court will presumably employ concepts of materiality in determining the degree of prejudice, if any, suffered by the defense as a result of the government's failure.

Proposed Rule 16(f)'s requirement of a written disclosure and certification by the government attorney is, the drafters believe, critical to its operation. It is anticipated that government attorneys will describe the disclosures being made in sufficient detail to permit the defense to investigate the information. Likewise, the government's certification should specifically confirm that the attorney signing it has exercised due diligence in locating and attempting to locate all information favorable to the defendant within the files or knowledge of the government. There is due diligence precedent in three sections of Rule 16: Rule 16(a)(1)(A), Statement of Defendant: Rule 16(a)(1)(B), Defendant's Prior Record, and Rule 16(a)(1)(D), Reports of Examinations and Tests.

It may be prudent for the government to maintain a record of the manner in which this due diligence inquiry was conducted so as to facilitate its response in any post-trial proceedings, but the Rule does not require this nor does it require the government to turn any such record over to the defense at the time of the certification. The drafters anticipate that in the event any government agency refuses to respond to a request from the prosecutor for information favorable to the defendant, the prosecutor's certification will identify the refusing agency and official so as to permit the defense to investigate and, if necessary, seek redress from the court.

The proposed rule contains no separate provision for sanctions for intentional violations or inadvertent noncompliance. The drafters anticipate that the full range of remedial and punitive sanctions, ranging from a trial or sentencing continuance to dismissal of the indictment, is already available to the court under Rule 16(d)(2) as is the Court's general supervisory power to craft a remedy or punishment appropriate to the circumstances. Few courts have dismissed criminal charges as a result of *Brady* violations. *See, e.g., United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998). The drafters believe that the far more common remedy of a new trial for *Brady* violations has in many instances proven impractical and ineffective for two reasons. First, many defendants are simply unable to afford a retrial while the cost to the government of a retrial is under most circumstances inconsequential. Second, the remedy of a new trial does not adequately discourage prosecutors from committing improper, incompetent or prejudicial discovery violations.

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1. Discussion

a. Definition of Favorable Evidence

Proposed Language:

> Information favorable to the defendant is all information in any form, whether or not admissible, that tends to: 1) exculpate the defendant; 2) adversely impact the credibility of government witnesses or evidence; 3) mitigate the offense; or 4) mitigate punishment.

Without a clear definition of what constitutes *Brady* material, prosecutors have exercised a hodgepodge of judgments about the nature and extent of favorable information to be disclosed to defendants.[114] A clear definition of favorable information will help eliminate disparate interpretations of the *Brady* obligation by both prosecutors and defense counsel and give prosecutors clear guidance, thereby promoting equal treatment of similarly situated defendants under the law.

The definition clarifies the nature and scope of favorable information by providing that favorable information includes evidence or information, whether or not admissible, that tends to: 1) exculpate the defendant; 2) adversely impact the credibility of government witnesses or evidence; 3) mitigate the offense; or 4) mitigate the punishment. The first category addresses classic *Brady* or exculpatory evidence. The second category makes clear that *Giglio* or impeachment material must also be produced. Categories three and four are intended to cover the disclosure of evidence favorable to punishment or sentencing. This definition makes clear that the admissibility and nature or form of the information, i.e., written, oral or electronic, is irrelevant in the determination of both its exculpatory nature and disclosability.

There may be instances where fairness requires that the defense make specific *Brady* requests for information from the government. Such requests must be sufficiently clear and directed to give reasonable notice about what is sought and why the information may be material to the case.[115] Absent specific defense requests the government may, notwithstanding the proposed definition, be able to fully respond to *Brady* requests and provide responsive material.

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[114] Section II.A., *infra*.

[115] *United States v. McVeigh*, 954 F. Supp. 1441, 1451 (D. Colo. 1997).

b. Timing of Disclosure

Proposed Language:

> Within fourteen days of a defendant's request, attorney(s) for the government shall disclose in writing and provide all information favorable to the defendant.

Absent local rules with a *Brady* disclosure timetable, there is no uniformity as to when federal defendants receive exculpatory information as to guilty or punishment. The Judicial Members of the District of Massachusetts Committee that recommended the local criminal rule changes observed that "cases too often go to trial without legally required discovery having been provided."[116] Almost invariably *Brady* material is disclosed well after the explicit Rule 16 obligations have been satisfied by the government. A major criticism of the current federal discovery practice is that prosecutors too often disclose favorable information at a stage well after it can benefit the defense. Unfortunately, the case law has left the prosecution and defense with little precise timing guidance.

In *United States v. Coppa*,[117] the Second Circuit recently addressed whether as a general rule due process of law requires that the government, disclose all exculpatory and impeachment material immediately upon demand by a defendant. In reversing a district judge's order to immediately supply this material to the defendants, the Second Circuit noted that as long as a defendant possesses *Brady* evidence in time for its effective use at trial or at a plea proceeding, the government has not deprived the defendant of due process of law.[118] *Coppa* granted the government's mandamus petition and remanded the cause to "afford the District Court an opportunity to determine what disclosure order, if any, it deems appropriate as a matter of case management."[119]

Because disclosure of favorable information affects a defendant's plea decisions, trial strategy, and sentencing, it is critical to the fair administration of justice that this discovery take place as early as practicable in the criminal process. There is no discernible benefit to fair-minded prosecutors in delaying the disclosure of constitutionally-mandated favorable information. To the extent the government has favorable evidence and is required to timely disclose it, the disclosure may affect the government's charging decision and properly lessen its sentencing position. This in turn may cause the defendant and counsel to compromise, to plead and to receive the benefit of acceptance of responsibility under the Guidelines.[120] Thus, prompt disclosure may well foster an earlier exchange of favorable information and guilty plea decisions. Furthermore, a criminal justice system with a *Brady* definition, a due diligence

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[116] *Report of the Judicial Members of the Committee Established to Review and Recommend Revisions of the Local Rules of the U.S. District Court in the District of Massachusetts Concerning Criminal Cases*, at 8 (October 28, 1998).

[117] 267 F.3d 132 (2d Cir. 2001).

[118] *Id.* at 144.

[119] *Id.* at 146.

[120] U.S.S.G. § 3E1.1 (acceptance of responsibility).

requirement, a disclosure timetable and clear sanctions may promote a system that parties have confidence in both the rule's compliance and effective sanctions. Under that system defendants and counsel, who timely have received the required disclosure or have been assured in writing that the United States possesses no exculpatory information, are more likely to reach plea decisions earlier and lessen the congestion of the trial dockets.

While timely disclosure of favorable information is mandated and essential to the defense in all cases, it is of particular importance in complex federal prosecutions where defendants and their counsel can be forced to trial with comparatively inadequate time to prepare. Federal authorities often investigate complex cases for years. The Speedy Trial Act of 1974[121] requires that a trial must begin within seventy days of an indictment or initial appearance. While defense requests for continuances are frequently granted to meet "the ends of justice,"[122] pre-trial defense preparation time is often limited. The United States will in most cases still have had at least twice as long a time to prepare for trial as the defendant. The government usually also has far more investigative resources. Fourteen days following a defense request is not an unreasonable period of time for the government to disclose in writing favorable evidence as to guilt or punishment. By the time of indictment, the government has concluded most of its investigation and is in a position to disclose any information known to be exculpatory or mitigating for the defendant. It will be thereafter under a continuing obligation to disclose additional evidence or material subject to discovery under the rule.[123]

c. <u>Due Diligence</u>

<u>Proposed Language</u>:

> The written disclosure shall certify that: a) the government attorney has exercised due diligence in locating all information favorable to the defendant; b) the government has disclosed and provided to the defendant all such information; and c) the government acknowledges its continuing obligation until final judgment is entered: i) to disclose such information; and ii) to furnish any additional information favorable to the defendant immediately upon such information becoming known.

This due diligence requirement ensures that government attorneys will fully consult with law enforcement agents by the time of indictment about potential favorable information and that the former will address not only federal agents, but law enforcement officers or joint federal-state local investigators about the nature and scope of the information required to be turned over. Several decisions have upheld the duty of the prosecution to consult

[121] 18 U.S.C. §§ 3151-3174 (2000).

[122] *Id.* § 3151(h)(8)(A).

[123] Fed. R. Crim. P. 16(c).

with the appropriate law enforcement personnel or agency[124] as simply determined that the prosecution includes law enforcement officers[125]

The due diligence language requires that government attorneys exercise due diligence in locating all favorable information. The language is intended to avoid *Kyles*-type situations where favorable evidence is known to law enforcement officers, but not to the prosecutor. The due diligence language finds precedent in three sections of Rule 16: Rule 16(a)(1)(A), Statement of Defendant; Rule 16(a)(1)(B), Defendant's Prior Record; and Rule 16(a)(1)(D), Reports of Examinations and Tests.

The certification requirement ensures a clear record of what was disclosed and not disclosed and avoids unnecessary post-trial and post-sentencing litigation about what may have been orally communicated. As important, this requirement conveys to the government attorney the importance of accuracy, consultation and prompt disclosure. This requirement too has precedent in Rule 16(e) Expert Witnesses which requires both parties to provide a written summary of testimony they intend to use.

Finally, the due diligence provision does not mandate an "open file" by the government, as favored by some commentators.[126] Open file cases do not cure *Brady-Giglio* problems,[127] and in particular, do not compel prosecutors to consult with law enforcement agents about the nature or existence of information favorable to the accused[128] or to disclose in writing favorable evidence that has not been memorialized. The provision does not impose upon the court the burden of reviewing government files for favorable information, as recommended by other legal commentators.[129] While such a review might be ideal, courts have neither the time nor the resources for such reviews, and they cannot be expected at the pre-trial stage to be familiar enough with the case or likely trial issues to appreciate which information is favorable.[130]

d. Sanctions

In addressing failures to comply with discovery requests, Fed. R. Crim. P. 16 (d)(2) provides that the court may order a party to permit the discovery or inspection, grant a

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[124] *See, e.g., Kyles*, 527 U.S. at 266; *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995).

[125] *United States v. Boyd*, 833 F. Supp. 1277, 1357 (N.D. Ill. 1993), *aff'd* 55 F.3d 239 (7th Cir. 1995); *see also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

[126] *See* Bass, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 113 (1972).

[127] *See, e.g., United States v. Hsia*, 24 F. Supp. 2d 14, 29-30 (D.C. Cir. 1998) (stating that "open file discovery does not relieve the government of its *Brady* obligations by claiming [the defendant] had access to 600,000 documents and should have been able to find the exculpatory information in the haystack").

[128] *See Strickler*, 527 U.S. 263.

[129] *See, e.g.*, Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 Fordham L. Rev. 391 (Dec. 1984).

[130] *McVeigh*, 954 F. Supp at 1451.

continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. Few courts have dismissed indictments as a remedy for the government's failure to disclose exculpatory information.[131] At present prosecutional misconduct must not only be flagrant, but must prejudice the defendant such that he does not receive a fair trial, or be intended to abort the trial to result in a dismissal.[132] Some circuits do not even permit dismissal of an indictment for a *Brady* violation.[133]. The less drastic and far more common remedy for a *Brady* violation is the granting of a new trial.[134] This remedy has been impractical and ineffective for two reasons. First, many defendants are simply unable to afford a retrial while the cost to the government is under most circumstances inconsequential. Second, a new trial does not adequately discourage prosecutors from committing improper, incompetent or prejudicial discovery violations.[135] For these reasons, the Official Commentary to Rule 16(f) urges courts to consider dismissal of an indictment for failure to comply with Rule 16 upon a showing of substantial prejudice to the defendant or intentional misconduct by the government.

e. Regulation of Discovery.

Rule 16(d) will continue to provide that a party may under a sufficient showing demonstrate that particular discovery or inspection should be denied, restricted or deferred. The government may still seek a protective or modifying order if it can establish that disclosure of exculpatory information within the time contemplated by the amendment will create an unacceptable risk of facilitating obstruction of justice or of discouraging the testimony of witnesses.

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[131] *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998). See generally, *United States v. Carter*, 1 Fed. Appx. 716, 2001 WL 32068 (9th Cir. Jan. 12, 2001) (unpublished); *United States v. Manthei*, 979 F.2d 124, 126-27 (8th Cir. 1992); *United States v. Osorio*, 929 F.2d 753, 763 (1st Cir. 1991); *United States v. Campagnuolo*, 592 F.2d 852, 865 (5th Cir. 1979), discussing the requirements for a defendant to obtain a dismissal of the indictment for a *Brady* violation. *Cf. Demjanjuk v. Petrovsky*, 10 F.3d 338, 356 (6th Cir. 1993) (vacating a denaturalization and extradition order because the government failed to disclose *Brady* information).

[132] *United States v. Vozzella*, 124 F.3d 389 (2d Cir. 1997); *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993); *United States v. McLaughlin*, 89 F. Supp. 2d 617 (E.D. Pa. 2000) (failure to disclose witness' exculpatory grand jury testimony necessitated new trial); *United States v. Patrick*, 985 F. Supp. 543 (E.D. Pa. 1997).

[133] *See, e.g., United States v. Davis*, 578 F.2d 277, 279-80 (10th Cir. 1978) ("[A] violation of due process under *Brady*, does not entitle a defendant to an acquittal, but only to a new trial in which the convicted defendant has access to the wrongfully withheld evidence.").

[134] *See United States v. Blueford*, No. 00-10210, 2002 WL 193023 (9th Cir. Feb. 8, 2002); *United States v. Service Deli, Inc.*, 151 F.3d 938 (9th Cir. 1998); *United States v. Arnold*, 117 F. 3d 1308 (11th Cir. 1997); *United States v. Lloyd*, 71 F.3d 408 (D.C. Cir. 1995); *United States v. Peterson*, 116 F. Supp. 2d 366 (N.D.N.Y. 2000); *United States v. McLaughlin*, 89 F. Supp. 2d (E.D. Pa. 2000).

[135] *United States v. Peveto*, 881 F.2d 844 (10th Cir. 1989) (pattern of United States attorneys not providing exculpatory evidence until very late only warranted two week continuance).

B. Proposed Amendment to Rule 11

Fed. R. Crim. P. 11(e)(7)

(7) Disclosure of Favorable Evidence

The attorney for the government shall disclose in writing to the defendant all exculpatory and mitigating information as provided in Rule 16(f) fourteen days before the defendant enters a plea of guilty or nolo contendere to a charged offense.

Official Commentary

This amendment is intended to ensure that a party intent on pleading guilty timely receives favorable information. The emphasis on *Brady* material by the government is too often focused on the guilt aspect rather than the sentencing impact of mitigating evidence. Since over ninety percent of all federal criminal cases are resolved by plea dispositions, it is essential that prosecutors not only provide information that can significantly affect punishment but also that they do so in time to make the information meaningful at sentencing. Belated disclosure or inadvertent nondisclosure of mitigating evidence undermines the fairness essential to the sentencing process. This proposed amendment reduces the likelihood that favorable evidence will not be disclosed or disclosed too late.

1. Discussion

a. Purpose and Cross Reference

This amendment is designed to ensure that favorable information is made known to the defendant during the plea negotiation process and to the court in the sentencing process. Rather than restate the five-part definition of favorable information, the due diligence obligation and the available sanctions, Rule 11(e)(7) cross references Fed. R. Crim. P. 16(f). The Rule 11(e)(7) amendment is also designed to avoid plea agreements where the United States requires a defendant to waive his right to exculpatory information without knowing what that information is.

b. Timing of Disclosure

Fourteen days is a reasonable period for the government to disclose in writing information favorable to the defendant on either guilt or punishment. As a practical matter, the majority of criminal cases have been investigated by the time of indictment. To the extent that investigation is ongoing, the government is required to only disclose favorable information to the defendant then known through the exercise of due diligence. Any subsequent discovery of additional favorable evidence or material can be later disclosed to the defendant.

Furthermore, to the extent some districts have in place "fast track" programs,[136] there is nothing in Rule 11(e)(7)'s language that prevents the government from providing favorable information to the defendant before an indictment. Thus, the government may still comply with this rule and enable the defendant to plead guilty at the initial arraignment and plea and receive credit under a fast track program. As with the companion Fed. R. Crim. P. 16(f) amendment, the writing requirement ensures a clear record of what was disclosed and not disclosed and avoids unnecessary post-trial and post sentencing litigation about what may have been orally communicated.

c. Sanctions

A guilty plea can be set aside in limited circumstances if a defendant can establish prejudice from prosecutorial misconduct.[137] Normally, the withheld information must be material to the prosecution of the defendant.[138] The proposed Rule 11(e)(7) is silent with respect to sanctions but does cross reference proposed Rule 16(f) which provides for a variety of sanctions, including dismissal.

In most instances the appropriate remedy for non-disclosure of information that reduces punishment will be resentencing. While the Guidelines have a basic objective of enhancing the ability of the criminal justice system to combat crime through an effective, fair sentencing system,[139] they do not at present directly provide a remedy to a defendant who has not been provided mitigating evidence under *Brady v. Maryland*. The only remedy available to federal prisoners who have been deprived of *Brady* evidence favorable to sentencing is a motion under 28 U.S.C. §2255 alleging an error that involves "a fundamental defect which results in a complete miscarriage of justice."[140]

CONCLUSION

The American College of Trial Lawyers respectfully recommends that the Judicial Conference of the United States Committee on Rules of Practice and Procedure amend Federal Rules of Criminal Procedure 11 and 16 to codify *Brady* and its progeny. The proposed amendments will ensure the timely, fair and consistent application of *Brady v. Maryland* and will aid Federal Courts in the sound administration of justice.

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[136] *See Ruiz*, 241 F.2d at 1160-61 ("fast track" programs are designed to minimize the expenditure of government resources and expedite the processing of more routine cases).

[137] *See, e.g., Banks v. United States*, 920 F. Supp. 688 (E.D. Va. 1996)

[138] *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *United States v. Kates*, 174 F.3d 580, 583 (5th Cir. 1999).

[139] U.S.S.G. Ch. 1, Part A - Introduction at 2.

[140] *Davis v. United States*, 417 U.S. 333, 346 (1974).

APPENDICES

A. Federal Rule of Criminal Procedures 16

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(b) The Defendant's Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which

the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's or attorneys.

[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure To Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

B. Federal Rule of Criminal Procedure 11(e)

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant -- or the defendant when acting pro se -- may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will:

(A) move to dismiss other charges; or

(B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any discussions between the parties concerning any such plea agreement.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(!)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court, or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussion, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

C. District of Massachusetts Local Rules 116.02 and 1.3

RULE 116.2 DISCLOSURE OF EXCULPATORY EVIDENCE

(A) Definition. Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to:

(1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;

(2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731;

(3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its, case-in-chief; or

(4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(B) Timing of Disclosure by the Government. Unless the defendant has filed the Waiver or the government invokes the declination procedure under Rule 116.6, the government must produce to that defendant exculpatory information in accordance with the following schedule:

(1) *Within the time period designated in L.R. 116.1(C)(1):*

(a) Information that would tend directly to negate the defendant's guilt concerning any count in the indictment or information.

(b) Information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under 18 U.S.C. 5 3731.

(c) A statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.

(d) A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.

(e) A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.

(f) A written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.

(2) *Not later than twenty-one (21) days before the trial date established by the judge who will preside:*

(a) Any information that tends to cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief.

(b) Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(c) Any statement or a description of such a statement, made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(d) Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.

(e) A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its casein-chief.

(f) A written description of any conduct that may be admissible under Fed. R. Evid. 608(b) known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.

(g) Information known to the government of any mental or physical impairment of any witness whom the government anticipates calling in its case-in chief, that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event.

(3) *No later than the close of the defendant's case:* Exculpatory information regarding any witness or evidence that the government intends to offer in rebuttal.

(4) *Before any plea or to the submission by the defendant of any objections to the Pre-Sentence Report, whichever first occurs:* A written summary of any information in the government's possession that tends to diminish the degree of the defendant's culpability or the defendant's offense Level under the United States Sentencing Guidelines.

(5) If an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production.

RULE 1.3 SANCTIONS

Failure to comply with any of the directions or obligations set forth herein or obligations set forth herein, or authorized by, these Local Rules may result in dismissal, default or the imposition of other sanctions as deemed appropriate by the judicial officer.

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