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Advisory Committee on Criminal Rules
ATTN: Rebecca Womeldorf, Esq.
Administrative Office of the U.S. Courts
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544

To the Chair and Members of the Criminal Rules Committee:

I am writing to support Hon. Donald Molloy's recommendation that the Advisory Committee amend Rule 16 of the Federal Rules of Criminal Procedure in the face of the recently enacted Due Process Protection Act ("DPPA") that created Rule 5(f) mandating that federal courts inform prosecutors of their Brady obligations.

The fact that Rule 5(f) was enacted without consultation with or input from the Rules Committee is sufficiently significant to require the Rules Committee's attention, including on the need for a uniform, national Brady order. The Advisory Committee should address the question with a sense of urgency because federal judges already are issuing Brady orders regardless whether the various judicial councils officially have promulgated model orders.

The DPPA calls for the individual districts to devise their own rule. I agree with Judge Molloy that it makes enormous sense for the Rules Committee to create a national standard.¹

Judge Molloy's proposal makes sense, and it should not be controversial. The DPPA resolves the controversial issues of whether courts should always enter a Brady order and whether a Brady order should be entered at the commencement of a criminal case. The DPPA requires the courts to issue such Brady orders at the commencement of every criminal case.

What the DPPA did not resolve is what the Brady order should say, leaving that issue to be resolved by the various districts in their own discretion. The Advisory Committee should not leave the can that Congress kicked down the road in the haphazard place where it happened to land

¹ That said, I can conceive of a situation where a district could adopt a rule different than the rule adopted by the Rules Committee. It is also conceivable that such a district could choose to follow the standard that its judicial council adopted in response to the DPPA. This could create a situation where the Supreme Court would have to decide whether a district rule adopted pursuant to the DPPA can stand in the face of a rule change made by the Rules Committee. Because a Judicial Conference rule can become effective only after the Supreme Court approves and Congress does not disapprove, I do not think this scenario is anything other than hypothetical. It is far more likely that all of the districts will adopt a Rule 16 amendment.

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depending on the district. The Advisory Committee should pick up the can and move it to the place it ought to be. What is at stake is a clear embrace by the courts of the prosecutors' Brady obligations that are rooted in the due process clause.

Judge Molloy's proposal can be fairly characterized as doing nothing more than requiring courts to articulate what courts consistently have interpreted Brady to mean. The proposal is derived from an existing rule that has been in place in the District of Columbia for approximately three years. I trust that the reporters will confirm whether there has been any claim by the Department of Justice that the District of Columbia standing order is at odds with what the DOJ understands its obligations to be and whether its implementation has led to any untoward outcomes. To the extent that the Brady orders issued pursuant to the DPPA may contain language or approaches that also should be considered, I am equally confident that the reporters will bring any acceptable alternative language to the committee's attention.

Because the proposal to amend Rule 16 is careful to retain the ability of the government to request that the court "opt out" of requiring production of Brady material in any given case if it is in the interests of justice, it has the virtue of leaving ultimate discretion in the hands of the district court and is consistent with the second paragraph of the DPPA.

I see no benefit from having prosecutors in different districts be held to different standards. Nor should defendants tried in different districts have different remedies if exculpatory evidence is wrongfully withheld. As difficult as the task may be, I expect that the members of the Advisory Committee can come to a common understanding of how a prosecutor's obligations should be expressed at the outset of every case.

Bottom line, I think Judge Molloy's proposal is timely and terrific.

Respectfully,



John S. Siffert

JSS:ac