Rick Jones
President

February 1, 2018

VIA DELIVERY AND EMAIL
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Re: Comments on the United States District Court for the District of Columbia's Revised Proposed Disclosure Rule

Dear Mr. Hodges,

I write on behalf of the National Association of Criminal Defense Lawyers ("NACDL") to provide NACDL's comments on the revised proposed disclosure rule recently published for notice and comment by the United States District Court for the District of Columbia. While NACDL commends the Court and the *ad hoc* committee for their efforts to ensure that the government timely discloses favorable information in its possession to the defense in every criminal case – consistent with the government's constitutional obligations to do so – for the reasons discussed below, NACDL urges the Court not to adopt the current version of the proposed disclosure rule.

NACDL's Commitment to Fairness in the Context of Criminal Discovery

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crimes or other misconduct and to promote the proper and fair administration of justice. Founded sixty years ago, NACDL currently has approximately 9,200 direct members in 28 countries, and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the

current judicial system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

Consistent with its mission, NACDL strongly supports the constitutional right of criminal defendants to receive favorable information pursuant to the due process rule of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Strict adherence to this constitutional right is fundamental to the fair administration of justice. There can be no confidence in our criminal justice system if prosecutors fail to meet their disclosure obligations.

Unfortunately, prosecutors do sometimes fail to meet their obligations under *Brady*, and it cannot be said that such occurrences are rare. *See*, *e.g.*, *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) ("*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.") (Kozinski, C.J., dissenting) (citing cases); *see also United States v. Parker* 2015 U.S. App. LEXIS 10760 (4th Cir. June 25, 2015) (vacating the defendant's conviction because federal prosecutors failed to disclose that key witness was under investigation by the SEC for fraud); *United States v. Mazzarella*, 784 F.3d 532 (9th Cir. 2015) (finding *Brady* violations (but no prejudice) where federal prosecutors failed to disclose bias information for several government witnesses, including an informal promise of immunity and communications about potential employment with the FBI); *United States v. Taverna*, 719 F.3d 705, 714 (6th Cir. 2013) (vacating conviction based on *Brady* violations where federal prosecutors failed to disclose plainly exculpatory and material statements by government witness); *United States v. Bartko*, 728 F.3d 327, 338 (4th Cir. 2013) (finding *Brady* violation (but no prejudice) where federal prosecutors did not disclose proffer agreements with two government witnesses); *United States v. Sedaghaty*, 728 F.3d 885, 892 (9th Cir. 2013) (concluding "that the government violated its obligations pursuant to *Brady v. Maryland* . . . by withholding significant impeachment evidence relevant to a central government witness" and remanding for a new trial); *United States v. Mahaffy*, 693 F.3d 113, 133 (2d Cir. 2012) ("The government's failures to comply with *Brady* were entirely preventable. On multiple occasions, the prosecution team either actively decided not to disclose the SEC deposition transcripts or consciously avoided its responsibilities to comply with *Brady*."); *In re Special Proceedings*, 825 F. Supp. 2d 203, 204 (D.D.C. 2011) ("In the fall of 2008 in highly-publicized proceedings before this Court, then-U.S. Senator Theodore F. Stevens was indicted, tried and found guilty of making false statements, by failing to disclose gifts he received on his Senate Financial Disclosure Forms, in violation of 18 U.S.C. § 1001(a)(1) and (2). During the course of the five-week jury trial and for several months following the trial, there were serious allegations and confirmed instances of prosecutorial misconduct that called into question the integrity of the criminal proceedings against Senator Stevens. On April 1, 2009, after acknowledging some of the misconduct and specifically admitting two instances in which the prosecution team had failed to produce

exculpatory information to the defense in violation of the government's constitutional obligations, the Department of Justice moved to set aside the verdict and dismiss the indictment of Senator Stevens with prejudice."). *See also* Mark Berman & Leah Sottile, "Judge dismisses federal charges against Nevada rancher Cliven Bundy," Washington Post, Jan. 8, 2018 (available at: https://www.washingtonpost.com/news/post-nation/wp/2018/01/08/judge-dismisses-federal-charges-against-nevada-rancher-cliven-bundy-who-calls-himself-a-political-prisoner/) (reporting that a federal judge dismissed the case after ruling that the prosecution had "suppressed key evidence that would have been favorable to the defendant's case").

NACDL has long been active in the area of criminal discovery reform. For example, in 2012, NACDL's Board of Directors approved model legislation that would require disclosure of all evidence favorable to the accused, regardless of any assessment of whether the evidence was material. NACDL later worked to support enactment of the Fairness in Disclosure of Evidence Act, legislation introduced in 2012 by Senator Lisa Murkowski (R-AK), that would have codified that standard. In 2014, NACDL's Board of Directors approved a model open-file discovery law to promote nationwide discovery reform and improve the fairness of the criminal justice system by ensuring that the defense receives, promptly after arraignment and before entry of any guilty plea, all information generated during the law enforcement and prosecutorial investigation of a charged offense. This model law is the product of NACDL's extensive research, discussion, and revision and draws from best-practice provisions around the country.

NACDL's efforts to bring about criminal discovery reform are not academic. The organization's members – private criminal defense attorneys, public defenders, active U.S. military defense counsel, law professors and judges – have experienced firsthand the damage done when the government fails to timely disclose favorable information to the defense. While a number of high profile cases over the last decade have exposed serious instances of prosecutorial negligence and/or misconduct in this area, NACDL members are familiar with many more such cases that do not make the news.

In fact, the frequency with which disclosure violations occur and the role they play in wrongful convictions led to a joint study by NACDL and the VERITAS Initiative of Santa Clara University School of Law that analyzed the role that judicial review plays in the disclosure of favorable information to the accused. The study took a random sample of *Brady* claims litigated in federal courts over a five-year period and analyzed the quality and consistency of judicial review of the claims. The sample included 620 decisions in which a court ruled on the merits of a *Brady* claim. Key findings in the report, titled *Material Indifference*: *How Courts are Impeding Fair Disclosure in Criminal Cases* ("*Material Indifference* study") include:

- The materiality standard produces arbitrary results and overwhelmingly favors the prosecution. Even in circumstances where the favorable information was withheld in remarkably similar factual situations, the courts' outcomes on the question of materiality were different. Moreover, in only 14 percent of the cases did the court deem the undisclosed favorable information material and find that a *Brady* violation occurred.

- Late disclosure of favorable information is almost never found to be a *Brady* violation. The study included 65 cases in which the prosecution disclosed favorable information late, and in only one case did the court hold that the prosecution's late disclosure violated *Brady*.

- The prosecution almost always wins when it withholds favorable information. In 90 percent of the decisions in which the prosecution withheld favorable information – either disclosed it late or not at all – the defense lost the case. Meanwhile, the courts held that the prosecution's withholding of the favorable information violated *Brady* in just 10 percent of these decisions.

As the authors noted, the study "provides empirical support for the conclusion that the manner in which courts review *Brady* claims has the result, intentional or not, of discouraging disclosure of favorable information." *See Material Indifference* study at xii. Copies of the complete report, executive summary, and corresponding fact sheet are available at www.nacdl.org/discoveryreform/materialindifference.

Based on its extensive work in the area of criminal discovery reform, NACDL believes that the enforcement of *Brady* and its progeny requires the adoption of rules that provide clear and specific obligations to ensure that the government fulfills its duty to disclose favorable information to the defense in a timely manner and in every case. These bright-line rules increase compliance by adding certainty and clarity to the discovery process in criminal cases, even for prosecutors who are already adhering in good faith to their discovery obligations as they understand them. Moreover, an appropriate local rule requiring timely disclosure of favorable information would help ameliorate some of the arbitrary and unfair results found in the *Material Indifference* study discussed above.

The Revised Proposed Disclosure Rule

In January 2016, the U.S. District Court for the District of Columbia published for notice and comment a proposed disclosure rule that would have required the government to "make available to the defense any non-trivial

information known to the government that tends to negate the defendant's guilt, mitigate the charged offense(s), or reduce the potential penalty[]" ("2016 proposed disclosure rule"). While not perfect, NACDL believes the 2016 proposed disclosure rule was a very good rule that would promote fairness and due process in the criminal justice system. In March 2016, NACDL and the ACLU wrote a joint letter to the Advisory Committee on Local Rules in support of the 2016 proposed disclosure rule. A copy of that letter is enclosed.

As we understand it, in response to opposition from the United States Department of Justice to the 2016 proposed disclosure rule, the proposed disclosure rule was revised to require:

> Unless the parties otherwise agree and where not prohibited by law, the government shall disclose to the defense, upon a defense request, all information "favorable to an accused" that is "material either to guilt or to punishment" under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and that is known to the government.

See Amended Notice of Proposed Brady Rule and Opportunity to Comment (December 22, 2017) ("2017 proposed disclosure rule").

NACDL cannot support the 2017 proposed disclosure rule and urges the Court not to adopt that version of the proposed rule. In NACDL's view, the 2017 proposed disclosure rule is contrary to the United States Constitution and the relevant precedent from the United States Supreme Court and the law in the District of Columbia. The 2017 proposed disclosure rule would represent a significant and severe step backwards in the important effort to increase fairness in the criminal discovery process. Specifically, NACDL opposes the adoption of the 2017 proposed disclosure rule unless two important changes from the 2016 proposed disclosure rule are eliminated.

1. Tying the Disclosure Requirement to a "Defense Request" Is Contrary to Law and That Change Must Be Eliminated.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court addressed the government's disclosure obligation and in that case a request for such information had been made by the defense. However, the Supreme Court has clearly held that the government has a duty to disclose favorable evidence "even though there has been no request by the accused[.]" *See, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)); *see also United States v. Borda*, 848 F.3d 1044, 1066 (D.C. Cir. 2017) (same).

Because the 2017 proposed disclosure rule makes the government's disclosure obligation contingent on a request by the defense, it contravenes this controlling

Supreme Court precedent and constricts an accused's constitutional right to receive favorable information from the government regardless of whether the defense has made a request for that information. The "upon a defense request" clause must be eliminated from the proposed rule.

2. Narrowing the Disclosure Obligation to Favorable Information that is "Material" to the Outcome of the Case is Contrary to Law and That Change Must be Eliminated.

The 2016 proposed disclosure rule would require the government to disclose any favorable information that is "non-trivial." NACDL suggested eliminating the "non-trivial" modifier, but supported the proposed rule even with the modifier. *See* enclosure at 4. NACDL continues to support the 2016 proposed disclosure rule, even with the "non-trivial" language.

The 2017 proposed disclosure rule, however, limits the government's disclosure obligation to favorable information that is "material" rather than "non-trivial." This limitation is contrary to Supreme Court precedent, the law in the District of Columbia Circuit, and is inconsistent with the prosecutor's ethical obligations under the governing rules of professional conduct. The "material" limitation must be eliminated from the proposed rule. As the authors of the *Material Indifference* study explained:

> [U]se of *Brady* as the pre-trial standard for determining disclosure obligations is fundamentally flawed. It is flawed because it asks a prosecutor to assess the materiality of information in relation to the 'whole case' before there is a 'whole case' to measure the information against. It is impossible to weigh the material value of information in a case before it is tried, before the issues are known, and without the benefit of the defense theory. The job of correctly assessing materiality prospectively, when materiality can only accurately be measured retrospectively, is guesswork under the best of circumstances.
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> Further, the problem is compounded by the cognitive biases inherent in human nature. In the prosecutor's dual roles of advocate and minister of justice, with the difficult job of deciding what information to disclose to her opponent, cognitive bias takes on exceptional importance. Confirmation bias is a type of cognitive bias that signifies the tendency to seek or interpret information in ways that support existing beliefs, expectations, or hypotheses.

> A prosecutor reviewing a case file for the first time is testing the hypothesis that the defendant is guilty and is looking for information to confirm that expectation. Because the police or agents have "solved" the case, there will undoubtedly be information in the file to support the guilt hypothesis. Thus, as a result of confirmation bias, the prosecutor that expects to become convinced of guilt then engages in selective information processing, accepting as true information that is consistent with guilt and discounting conflicting information as unreliable or unimportant. Information discounted as unpersuasive, unreliable, or unimportant will rarely rise to the level of "material" in the mind of that prosecutor.

See Material Indifference study at 21-22 (internal footnotes omitted).

The 2017 proposed disclosure rule's "material" limitation improperly transposes the post-conviction or appellate test for a "*Brady* violation" – which hinges on a finding that the withheld information was "material" – to the pre-trial context and invites the problems identified in the study. "Materiality" is not the standard for determining what information must be disclosed pretrial. As a widely-cited decision from this very Court artfully articulated it:

> The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed – with the benefit of hindsight – as affecting the outcome of the trial. The question before the trial is not whether the government thinks that disclosure of the information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed. . . . The only question before (and even during) trial is whether the evidence at issue may be "favorable to the accused"; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.

See United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) (internal citations omitted).

Of course, in reaching his holding in *Safavian*, Judge Friedman relied on Supreme Court precedent. For example, in *Strickler*, the Supreme Court explained that the materiality inquiry is separate from the question of whether evidence is exculpatory or otherwise favorable, and thus required to be disclosed. *Strickler*, 527 U.S. at 281 (recognizing that the prosecutor's "special status" in our criminal justice

system "explains both the basis for the prosecution's broad duty of disclosure and [the Court's] conclusion that not every violation of that duty necessarily establishes that the outcome was unjust."). In other words, a prosecutor can violate his or her disclosure obligations under *Brady* and its progeny by failing to disclose favorable evidence even if, on appeal from a conviction, the accused cannot establish that the withheld information was material to the outcome of the case and therefore no "*Brady* violation" was committed for purposes of obtaining a post-conviction remedy.[1]

This distinction between the pre-trial disclosure obligation and the post-trial materiality analysis has been recognized by several Supreme Court justices over the years. *See*, *e.g.*, Tr. of Oral Argument in *Smith v. Cain*, 565 U.S. 73 (2012) at 49 (Justice Kennedy: "You don't determine your *Brady* obligation by the test for the *Brady* violation. You're transposing two very different things."); *id*. at 51-52 (Justice Scalia: "Of course, it should have been turned over. I think the case you're making is that it wouldn't have made a difference . . . [T]hat's a closer case, perhaps, but surely it should have been turned over.").[2] The government's position is equivalent to a court's suggesting that it may deliberately commit error, so long as it anticipates that the error would be held harmless, were there later to be an appeal.

The United States Court of Appeals for the District of Columbia Circuit has also recognized that the government is required to disclose favorable information to the defense regardless of whether the evidence is material such that the failure to disclose it would require a new trial. For example, in numerous cases, the D.C. Circuit has discussed the government's disclosure obligations under *Brady* and its progeny and then gone on to analyze whether a violation of those obligations requires reversal of the conviction at issue. *See*, *e.g.*, *United States v. Davis*, 863 F.3d 894, 908 (D.C. Cir. 2017) ("Under *Brady* and its progeny, the government must timely disclose exculpatory or impeachment evidence to the defendant. Reversal of a conviction is warranted when the withheld evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." (internal citations and quotation marks omitted)); *United States v. Straker*, 800 F.3d 570, 604 (D.C. Cir. 2015) (noting that "prosecutorial misbehavior alone does not a *Brady* violation make."); *United States v. Pasha*, 797 F.3d 1122, 1133 (D.C. Cir. 2015) (finding the government's disclosure delays "inexcusable" and then going on to

[1] The government's reliance on *United States v. Bagley*, 473 U.S. 667 (1985) in support of its argument that the proposed disclosure rule should include a "materiality requirement" is misplaced. *See* Justice Department's Comments Concerning Proposed D.C. Disclosure Rule at 1, 4. *Bagley* predates and has been abrogated by *Agurs* and *Strickler*.

[2] Available at www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-8145.pdf.

"resolve . . . the third component of a *Brady* violation: that is, whether any Defendant was prejudiced by the government's failure to comply with its duty."); *see also United States v. Wilson*, 605 F.3d 985, 1007 (D.C. Cir. 2010) (recognizing that the government "had a duty under *Brady* to make a timely pretrial disclosure to the defense" of the impeachment information at issue, but determining that there was not a reasonable probability of a different outcome had the information been disclosed); *United States v. Bowie*, 198 F.3d 905, 909, 912 (D.C. Cir. 1999) (finding that the government's "nonfeasance" in failing to disclose favorable information was "clear" because it "had a duty, under *Brady*, to provide defense counsel" with the information, but nevertheless determining that it had not been shown that "if the evidence wrongfully withheld had been disclosed, there was a reasonable probability the jury would have acquitted him").

Finally, in the District of Columbia, a prosecutor violates his or her ethical obligations under District of Columbia Rule of Professional Conduct 3.8(e) by failing to disclose favorable information regardless of the information's materiality. [3] In 2015, the District of Columbia Court of Appeals considered the Board of Professional Responsibility's recommendation that an Assistant United States Attorney, Andrew Kline, be suspended for violating Rule 3.8(e) after he intentionally failed to disclose exculpatory information to the defense. Kline argued that he did not violate Rule 3.8(e) because his ethical duties were coextensive with the obligations imposed under *Brady v. Maryland* and because he had not believed the information – that the shooting victim in the first interview with police told the police that he did not know who had shot him – was evidence that would be material to the outcome of the trial. *See In re Kline*, 113 A.3d 202, 206 (D.C. 2015).

The Court of Appeals rejected Kline's argument. Instead, the court concluded that "[r]etrospective analysis, while it necessarily comports with appellate review, is wholly inapplicable in pretrial prospective determinations." *Id.* at 208 (citations omitted). The court went on to find:

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[3] The District of Columbia is not alone in this regard. For example, California Rule of Professional Conduct 5-110, *Special Responsibilities of a Prosecutor*, requires, in part, "timely disclosure to the defense of all evidence known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]" Notably, the "discussion" to the rule states that "[t]he disclosure obligations [in the rule] are not limited to evidence or information that is material as defined in *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny." Calif. Rule 5-110 and D.C. RPC 3.8(e) are binding on federal prosecutors pursuant to 28 U.S.C. § 530B ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.").

> [E]thical rules are designed to guide behavior, whereas appellate review of criminal cases is to ensure, after the fact, that a criminal defendant has received a fair trial. Thus, to the extent that the Rule 3.8(e) commentary suggests a materiality test, we reject it. We see no logical reason to base our interpretation about the scope of a prosecutor's ethical duties on an ad hoc, after the fact, case by case review of particular criminal convictions.

Id. at 210. Finally, the court held that: "Rule 3.8(e) requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirements of *Bagley*, *Kyles*, and their progeny." *Id*. at 213. Because Rule 3.8(e) already requires that federal prosecutors in the District of Columbia disclose "all potentially exculpatory information" regardless of materiality, the 2016 proposed disclosure rule, which did not contain a materiality limitation, would be consistent with and no broader than the prosecutor's existing ethical obligations. The current proposal, by contrast, could be interpreted as repealing or at least retreating from the ethical standard that now properly binds prosecutors in this District.

The 2017 proposed disclosure rule's limitation of the disclosure obligation to "material" information is inconsistent with all of this precedent and unlawfully constricts the accused's constitutional right to timely receive from the government favorable information of which the government is aware. The "material" limitation in the 2017 proposed disclosure rule must be eliminated.

3. The 2016 Proposed Disclosure Rule Does Not Violate the Rules Enabling Act and, in Fact, the 2017 Proposed Disclosure Rule Potentially Does Violate the Rules Enabling Act by Imposing Burdens on the Defense That Do Not Exist in the Constitution or the Law.

In response to the 2016 proposed disclosure rule, DOJ argued, in part, that "aspects" of the proposed rule exceed the Court's authority to enact local rules and that the Rules Enabling Act permits a district court only to enact local rules if those rules are consistent with federal statutes and rules. *See* Justice Department's Comments Concerning Proposed D.C. Disclosure Rule ("DOJ Comments") at 13. NACDL respectfully disagrees with any suggestion that the 2016 proposed disclosure rule would run afoul of the Rules Enabling Act. Moreover, because the 2017 proposed disclosure rule constricts the accused's constitutional right to timely receive from the government favorable information known to the government, the 2017 proposed disclosure rule may well run afoul of the Rules Enabling Act.

A local rule is considered presumptively valid unless it conflicts with an act of Congress or a federal rule of procedure, is constitutionally infirm, governs subject

matter not within the power of the district court to regulate, or is unnecessary and irrational. *See Whitehouse v. U.S. Dist. Ct. for Dist. of R.I.*, 53 F.3d 1349, 1355-56 (1st Cir. 1995). Fed. R. Crim. P. 57(a)(1) dictates that "[a] local rule must be consistent with—but not duplicative of—federal statutes and rules." "The proper method for determining whether a local rule is inconsistent with a federal rule of procedure is to inquire, first, whether the two rules are textually inconsistent and, second, whether the local rule subverts the overall purpose of the federal rule." *Whitehouse*, 53 F.3d at 1363 (citing *Hawes v. Club Ecuestre Comandante*, 535 F.2d 140, 144 (1st Cir. 1976)).

Constitutionally-obligated disclosures do not conflict with any federal statute or procedural rule. *Brady*, as a constitutional obligation, "always trumps both Jencks and Rule 16." *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005); *see also United States v. Poindexter*, 727 F. Supp. 1470, 1485 (D.D.C. 1989) ("The *Brady* obligations are not modified merely because they happen to arise in the context of witness statements. The government therefore has the obligation to produce to defendant immediately any exculpatory evidence contained in its Jencks materials."); *United States v. Tarantino*, 846 F.2d 1384, 1415 n.11 (D.C. Cir. 1988) ("Of course, under *Brady v. Maryland*, the government has additional obligations deriving from the Fifth Amendment to disclose exculpatory material, and the limitations on discovery contained in the Jencks Act do not lessen those obligations." (internal citation omitted)). "It is, of course, a fundamental axiom of American law, rooted in our history as a people and requiring no citations to authority, that the requirements of the Constitution prevail over a statute in the event of a conflict." *United States v. Coppa*, 267 F.3d 132, 145–46 (2d Cir. 2001). Therefore, to the extent that the proposed local rule requires disclosure that is consistent with what the Constitution requires, the proposed local rule does not conflict with any statute or procedural rule. To the contrary, a codification of the government's pretrial disclosure obligations in the form of a local rule would be consistent with 28 U.S.C. § 530B and would constitute a helpful implementation and elaboration of Federal Rule of Criminal Procedure 16(a)(1)(E)(i) (requiring discovery of all documents and objects that are "material to preparing the defense," whether or not intended for use by the government in its own case). And by regulating the timing and manner of disclosure, the local rule would be procedural, not substantive in nature, just as are the provisions of Federal Rules 16 and 26.2 (Jencks material).

As for the government's argument that the 2016 proposed disclosure rule violates the Rules Enabling Act because it would eliminate the "materiality" standard, that argument is without merit because, as discussed above, there is no "materiality" limitation to the government's disclosure obligations pre-trial. On the other hand, because the 2017 proposed disclosure rule impinges on an accused's constitutional rights by imposing (1) a limitation that the government's disclosure obligations are contingent on a request by the defense and (2) a "materiality"

limitation on the government's disclosure obligations pre-trial, that rule may well run afoul of the Rules Enabling Act.[4]

NACDL Urges the Court to Adopt a Disclosure Rule That Is Consistent With the Law

NACDL continues to believe that a rule that correctly sets out the government's disclosure obligations is necessary to ensure timely disclosure of all favorable information in every case. Adoption of the 2016 proposed disclosure rule – with or without the "non-trivial" modifier – would accomplish that objective. The revised 2017 proposed disclosure rule, on the other hand – because it limits the government's disclosure obligations to instances where the defense has made a request for favorable information and limits what must be disclosed to information the government deems to be "material" – is harmful, rather than helpful, to the cause of justice and represents a step backwards in our efforts to ensure fairness and due process for the criminally accused. Moreover, nothing in the 2016 proposal conflicted with the Rules Enabling Act or with Federal Rule 57(a). For these reasons, NACDL opposes the 2017 version of the proposed disclosure rule.

Respectfully submitted,

Rick Jones,
President

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[4] The government also argues that by "[e]liminating Rule 16's and *Brady*'s materiality requirements[,]" the 2016 proposed disclosure rule would "create confusion and litigation." DOJ Comments at 7. This argument is without merit. First, NACDL notes that as of 2011, at least three federal judicial districts explicitly eliminated the so-called *Brady* materiality requirement in their local disclosure rules and another seven federal judicial districts implicitly eliminated such a requirement in their local disclosure rules. *See A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Courts: Final Report to the Advisory Committee on Criminal Rules*, Appendix B, Federal Judicial Center (2011), available at https://www.fjc.gov/content/summary-responses-national-survey-rule-16-federal-rules-criminal-procedure-and-disclosure-0. NACDL is not aware of any significant litigation that resulted from the enactment of these local rules. Moreover, because, as discussed *supra*, the 2017 proposed disclosure rule transposes the appellate "materiality" standard to the pretrial context in violation of Supreme Court and D.C. Circuit precedent, it is the 2017 proposed disclosure rule that, if adopted, will almost certainly lead to litigation.

Enclosure