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Safeguarding Liberty, Justice & the Rule of Law

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March 14, 2016

John Aldock, Esq.
Chairman, Advisory Committee on Local Rules
Goodwin Procter LLP
901 New York Avenue NW
Washington, D.C. 20011

Dear Chairman Aldock:

[The Constitution Project](#) (TCP) strongly supports the proposed rule published in the *Daily Washington Law Reporter* on January 29, 2016. TCP makes this recommendation based on its extensive work with a range of criminal justice stakeholders, including those with experience as judges, prosecutors, public defenders, law enforcement officers, policymakers, victim advocates and scholars.

TCP was founded in 1997 as a nonpartisan organization that promotes and defends constitutional safeguards. We bring together legal and policy experts from across the political spectrum to promote consensus-based solutions to pressing constitutional issues. Our work includes reforming the nation's broken criminal justice system, strengthening access to justice, protecting civil liberties, and ensuring government transparency and accountability. TCP undertakes original research; develops policy recommendations; issues reports, statements, and policy briefs; files *amicus* briefs; testifies before Congress; and holds regular briefings with legislative staff and policymakers.

Meaningful discovery and adherence to the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963), is a cornerstone of a fair and impartial justice system. Open and timely discovery policies protect innocent individuals from wrongful convictions and ensure that a person who is the subject of a criminal prosecution has the opportunity for a full and fair hearing. Presently, the constitutional obligation to disclose exculpatory evidence is anything but clear. Even when prosecutors are acting in good faith, the inconsistent, shifting and sometimes contradictory standards for criminal discovery have made compliance with *Brady* difficult. Even more, many violations often go uncovered unless discovered by defense counsel. Although it is impossible to know how often *Brady* violations occur, groups and individuals across the political spectrum have noted that these violations occur with enough frequency and with significant human costs that reform is necessary.

As you already know, the proposed disclosure rule would regulate the government's discovery obligation set out by the Supreme Court in *Brady*. Most significantly, it imposes specific timelines on prosecutors and defines for the first time what constitutes "favorable information" under *Brady* – both of which are important guidelines in complying with *Brady* and to ensure that innocent defendants are not convicted.

TCP has followed a troubling number of cases involving failures to disclose exculpatory evidence to the defense. Consequently, we have been advocating for criminal discovery reform for decades through the work of our bipartisan, blue-ribbon committees, two of which are mentioned below. TCP's committee members have prosecuted, defended and adjudicated criminal cases and their recommendations on criminal discovery reform are informed by their collective expertise and extensive experience.

In 2009, TCP's [National Right to Counsel Committee](#) released its seminal report, [Justice Denied](#), which includes important recommendations on strengthening discovery policies. The Committee – which is chaired by former North Carolina Chief Justice Rhoda Billings; Robert M. A. Johnson, former President of the National District Attorneys Association; and former federal prosecutor and U.S. Court of Appeals for the Third Circuit Judge Tim Lewis – advocated for open and timely discovery to comply with the Sixth Amendment right to counsel.

As outlined in *Justice Denied*, discovery policies have a direct impact on defender workloads and competent and diligent representation of indigent defendants. When evidence subject to *Brady* and other disclosure obligations is not provided, defense attorneys must spend additional time, resources, and costs to obtain the same information that is already in the possession of the prosecution. The additional time and process leads to higher costs for courts and prosecution, as defense counsel must file and litigate motions, delay plea deals, or even proceed to trials that could have been avoided. Most troubling, innocent clients are more likely to be convicted due to the inability of their attorneys to present a proper defense. Thus, a critical component of a fair federal criminal justice system is a prosecutor's adherence to discovery requirements and appropriate remedies when a prosecutor fails to do so.

Additionally, over a decade ago, TCP convened a [Death Penalty Committee](#) chaired by former Florida Supreme Court Chief Justice Gerald Kogan, former Texas Governor Mark White, and Special Prosecutor in the Oklahoma City Bombing case, Beth Wilkinson. The Committee released a major report in 2014, [Irreversible Error](#), which emphasizes, in part:

Although the adoption of full discovery principles in some jurisdictions will challenge accepted norms, the Committee believes that the provision of full discovery will be of great benefit to the prosecution in assuring the public of the fairness both of the process and of finality. It will eliminate questions about whether all favorable information has been supplied. Moreover, providing full discovery will minimize challenges on appeal to the scope and nature of discovery that was provided in the trial phase.

In addition to the recommendations issued by our committees, TCP has also advocated for legislative changes and stronger case law regarding criminal discovery policies. In 2012, after Senator Murkowski introduced the Fairness in Disclosure of Evidence Act, TCP [released a statement](#) from nearly 150 criminal justice experts, including more than 100 former federal prosecutors, urging changes in the federal criminal discovery process. In addition, TCP has organized [several friend-of-the court briefs](#) arguing for clearer disclosure rules.

Given our decades of experience and advocacy on this issue and our work with stakeholders throughout the criminal justice system, we urge the United States District Court for the District of Columbia to adopt the proposed rule.

Sincerely,



Virginia E. Sloan