

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE: THE DUE PROCESS PROTECTIONS
ACT, P.L. NO. 116-182, 134 STAT. ANN. 894
(OCT. 21, 2020), AMENDING FEDERAL RULE
OF CRIMINAL PROCEDURE 5

GENERAL ORDER NO. 153

The Due Process Protections Act, P.L. No. 116-182, 134 Stat. 894 (Oct. 21, 2020), amended Federal Rule of Criminal Procedure 5 to add subsection (f)(1), providing as follows:

In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law.

Further, subsection (f)(2) of amended Federal Rule of Criminal Procedure 5 provides that the judicial council of each circuit shall prepare and promulgate for the use of each court in the circuit a model order to implement the provisions of subsection (f)(1).

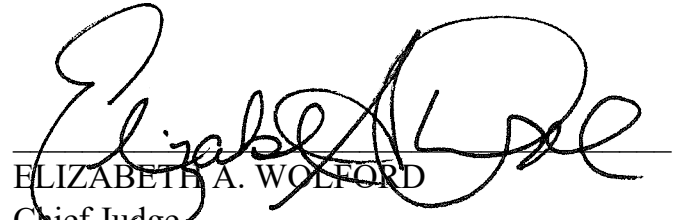
The Judicial Council of the Second Circuit has prepared and promulgated the model oral and written orders appended hereto as Exhibits A and B, respectively, in compliance with Federal Rule of Criminal Procedure 5(f)(2). The Judges of this Court have approved the use of these model orders.

It is accordingly hereby ORDERED that in each proceeding in this Court as to which subsection (f)(1) of Federal Rule of Criminal Procedure 5 applies, language in substantially the form set forth in Exhibit A shall be incorporated into an oral order stated on the record,

and a written order in substantially the form set forth in Exhibit B shall be entered on the docket, and it is further

ORDERED that this General Order supersedes and replaces the Interim General Order pertaining to this subject entered on November 5, 2020.

SO ORDERED.



ELIZABETH A. WOLFORD
Chief Judge
United States District Court

DATED: January 20, 2022
Rochester, New York

EXHIBIT A

DEC 08 2020

C/E

RULE 5(f) ORAL ORDER

I direct the prosecution to comply with its obligation under *Brady v. Maryland* and its progeny to disclose to the defense all information, whether admissible or not, that is “favorable to” the defendant, “material either to guilt or to punishment,” and known to the prosecution. Possible consequences for non-compliance may include dismissal of individual charges or the entire case, exclusion of evidence, and professional discipline or court sanctions on the attorneys responsible. I will be entering a written order more fully describing this obligation and the possible consequences of failing to meet it, and I direct the prosecution to review and comply with that order. Does the prosecution confirm that it understands its obligations and will fulfill them?

EXHIBIT B

DEC 08 2020

C/E

UNITED STATES DISTRICT COURT

DISTRICT OF _____

UNITED STATES OF AMERICA,

-v-

XX-CR-XXX (XXX)

ORDER

_____,
Defendant(s).

_____, United States District/Magistrate Judge:

This Order is entered, pursuant to Federal Rule of Criminal Procedure 5(f) and the Due Process Protections Act, Pub. L. No 116–182, 134 Stat. 894 (Oct. 21, 2020), to confirm the Government’s disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, and to summarize the possible consequences of violating those obligations.

The Government must disclose to the defense all information “favorable to an accused” that is “material either to guilt or to punishment” and that is known to the Government. *Id.* at 87. This obligation applies regardless of whether the defendant requests this information or whether the information would itself constitute admissible evidence. The Government shall disclose such information to the defense promptly after its existence becomes known to the Government so that the defense may make effective use of the information in the preparation of its case.

As part of these obligations, the Government must disclose any information that can be used to impeach the trial testimony of a Government witness within the meaning of *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny. Such information must be disclosed sufficiently in advance of trial in order for the defendant to make effective use of it at trial or at such other time as the Court may order.¹

¹ This Order does not purport to set forth an exhaustive list of the Government’s disclosure obligations.

The foregoing obligations are continuing ones and apply to materials that become known to the Government in the future. These obligations also apply to information that is otherwise subject to disclosure regardless of whether the Government credits it.

In the event the Government believes that a disclosure under this Order would compromise witness safety, victim rights, national security, a sensitive law-enforcement technique, or any other substantial government interest, it may apply to the Court for a modification of its obligations, which may include in camera review or withholding or subjecting to a protective order all or part of the information otherwise subject to disclosure.²

For purposes of this Order, the Government has an affirmative obligation to seek all information subject to disclosure under this Order from all current or former federal, state, and local prosecutors, law enforcement officers, and other officers who have participated in the prosecution, or investigation that led to the prosecution, of the offense or offenses with which the defendant is charged.

If the Government fails to comply with this Order, the Court, in addition to ordering production of the information, may:

- (1) specify the terms and conditions of such production;
- (2) grant a continuance;
- (3) impose evidentiary sanctions;
- (4) impose contempt or other sanctions on any lawyer responsible for violations of the Government's disclosure obligations, or refer the matter to disciplinary authorities;
- (5) dismiss charges before trial or vacate a conviction after trial or a guilty plea; or
- (6) enter any other order that is just under the circumstances.

² The Classified Information Procedures Act sets forth separate procedures to be followed in the event that the Government believes matters relating to classified information may arise in connection with the prosecution. *See* 18 U.S.C. app. 3 §§ 1 *et seq.*

SO ORDERED.

Dated: [DATE]
[LOCATION OF COURT]

United States District/Magistrate Judge