

SDNY Ruling Warns Parties To Heed Amended Disclosure Rule

By **John Siffert and Brandon Davis** (December 12, 2023)

On Nov. 27, a federal judge fired a warning shot over the government's bow, stating that "the Court will not tolerate ... shoddy noncompliance with amended Rule 16."^[1]

Recently amended Federal Rule of Criminal Procedure 16 now requires robust pretrial disclosure of proffered testimony of an expert witness.

The vigorous views of U.S. District Judge Jed Rakoff expressed in *U.S. v. Mrabet* should put prosecutors on notice that courts will take seriously the disclosure requirements of Rule 16(a)(1)(G)(iii) that were implemented to address decades of convictions premised on debunked junk science.

Judge Rakoff's opinion also gives fair warning that courts are likely to enforce the provisions of Rule 16(b)(1)(C)(iii) that require defense counsel to provide reciprocal disclosures of defense expert witnesses.

This article will review the requirements of amended Rule 16. It will set forth the reasons why Rule 16 was amended and the formulation that was adopted. Next, it will address the facts of the *Mrabet* case and analyze why Judge Rakoff exercised restraint, notwithstanding his own involvement in the rulemaking and the prosecutors' failure to comply with the new amendment.

Finally, it will forecast why defense counsel should take immediate note of the new disclosure requirements that amended Rule 16 imposes upon them, given the defendant's right to remain silent under the Fifth Amendment.

Rule 16(a)(1)(G) and 16(b)(1)(C)

In 2022, Federal Rule of Criminal Procedure 16(a)(1)(G) was amended to mirror the expert discovery rules in civil cases.^[2]

The amended Rule 16 specifies the following four items that prosecutors must disclose pretrial before an expert may provide opinion testimony: (1) "a complete statement of all opinions" that will be elicited; (2) "the bases and reasons for them"; (3) "the witness's qualifications, including ... all publications authored" in the last 10 years; and (4) a list of all other cases in the last four years where the witness has testified as an expert at a trial or a deposition.^[3]

The rule also mandates that the district judge set a pretrial deadline for the disclosures.

Rule 16(b)(1)(C) similarly provides that the defense must disclose the same four items pretrial, at deadlines fixed by the district judge.



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The Reason Rule 16 Needed to Be Amended and the Chosen Formulation

The amendment to Rule 16 was proposed by the Advisory Committee on Criminal Rules. One of this article's authors, John Siffert, served on the committee from 2012 to 2018 and was involved in the amendment process.

The Advisory Committee on Criminal Rules explained that the amendment "is intended to facilitate trial preparation, allowing parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed."^[4]

While the previous rule only required a brief written summary of the testimony — which Judge Rakoff aptly characterized as "woefully inadequate"^[5] — the new rule outlines specific information that must be disclosed to allow each party to adequately prepare.

As Judge Rakoff noted in his Nov. 27 Mrabet ruling, "[D]etailed specificity is required as to bases for those [expert] opinions before a court can adequately assess their admissibility or a defendant can contest their weight and meaning before a judge or jury."^[6]

It was Judge Rakoff who initially suggested that the advisory committee consider amending Rule 16 out of concerns that the old Rule 16 did not afford defendants the opportunity to test the bona fides of a government expert or the reliability of the opinion that the expert expressed on the witness stand.

The Advisory Committee on Criminal Rules considered studies that had been conducted by various organizations, including the Innocence Project. According to the Innocence Project, "[m]isapplied forensic science [has] contributed to ... nearly a quarter of all wrongful conviction cases since 1989."^[7]

Similarly, the National Registry of Exonerations has found that New York has seen 53 exonerations based on false or misleading forensic evidence in that time period.^[8]

Of the 233 exonerations nationwide in 2022, 44 of them involved such evidence.^[9]

While acknowledging that the amended Rule 16(a)(1)(G) will not solve this issue alone, the rules committee resolved that it was a step in the right direction to improve defense counsel's ability to prepare for government expert witnesses by requiring the government to outline what the expert will testify to and why they are qualified to do so.

The task of gaining unanimity among the members of the advisory committee was made easier because the proposed amendment to the Criminal Rules mirrored the existing civil rule for expert discovery.

A quick glance at Federal Rule of Civil Procedure 26(a)(2)(B) and the amended Federal Rule of Criminal Procedure 16(a)(1)(G)(iii) will reveal a marked similarity in most of the requirements.

And it is no coincidence that the U.S. Department of Justice endorsed the Rule 16 amendment when the advisory committee decided to import a similarly bolstered reciprocal disclosure requirement on criminal defendants.

The Mrabet Case

Mounir Mrabet was charged with one count of narcotics conspiracy in violation of Title 21 of the U.S. Code, Section 846; two counts of narcotics distribution in violation of Title 21 of the U.S. Code, Sections 812, 841(b)(1)(A) and (B), and Title 18 of the U.S. Code, Section 2; and one count of possession with a firearm in furtherance of a drug trafficking crime in violation of Title 18 of the U.S. Code, Sections 924(c)(1)(A)(i) and 2.[10]

The charges stemmed from the overdoses of three individuals who had checked into the Grand Hyatt Hotel in Manhattan and ingested a bag of powder found in the hotel room closet.[11]

Subsequent investigation led to Mrabet being identified as the suspect. Searches of a storage unit in his name, his cell site location information, his iCloud data and, eventually, his residence yielded evidence of methamphetamine and fentanyl distribution.[12]

At trial, the government introduced expert testimony from Alfred Hernandez, a special investigator and assistant inspector general at the New York City Department of Investigation and a task force officer at the U.S. Drug Enforcement Administration.

Hernandez testified to the slang used by buyers and sellers of illegal narcotics, the typical packaging of the narcotics for distribution and the pricing of narcotics.[13]

Then, "when the government ... attempted to elicit testimony from Mr. Hernandez about the sourcing of methamphetamine and fentanyl ... defense counsel objected," arguing that such testimony was out of the scope of Hernandez's expertise.[14]

This prompted Judge Rakoff to review the government's Rule 16(a)(1)(G) disclosures. Finding those disclosures inadequate, Judge Rakoff, with the government's consent, struck the sourcing testimony and precluded additional expert testimony from Hernandez.[15]

On Nov. 9, a jury in the U.S. District Court for the Southern District of New York found Mrabet guilty of all four counts.[16]

On Nov. 27, Judge Rakoff published an opinion elaborating on his ruling regarding Hernandez's testimony. He admonished the prosecution for a Rule 16(a)(1)(G) disclosure that did not come close to satisfying the amended rule's requirements.[17]

The government's disclosure consisted of a "broad statement that Mr. Hernandez will testify, 'based on his training and experience,' regarding seven broadly and briefly described categories," with little expansion on each category.[18]

As to the bases and reasons for Hernandez's expertise, the disclosure was one sentence citing "his training, education, and experience, including his 37 years as a law enforcement officer." [19]

Judge Rakoff noted that, had defendant made a pretrial objection, a lengthier disclosure would have been required.[20]

Despite the late objection and the government's voluntary narrowing of Hernandez's testimony, Judge Rakoff wanted to put "the Government on notice that in the future the Court will require the Government to produce to the Court in advance of trial its expert disclosures under Rule 16, so that the Court can timely assess their adequacy." [21]

Cautionary Warning for Defense Counsel

Judge Rakoff was not presented in *Mrabet* with the issue of the defendant's obligation to produce reciprocal discovery. Nonetheless, his decision gives some insight into how the courts are likely to deal with expected challenges to the constitutionality of the Rule 16(b)(1)(c) mandate that a defendant produce reciprocal disclosures of their own expert witnesses once they demand such disclosure of the government's witnesses.[22]

Making a criminal defendant do anything pretrial brushes up against the protections of the Fifth Amendment and the defendant's right against self-incrimination. Counsel hoping to preserve this constitutional issue should be aware that the U.S. Supreme Court already upheld the constitutionality of Rule 16 expert disclosures in 1970 in *Williams v. Florida*. [23]

Although the amended rule's reciprocal disclosure requirement is significantly more robust than its predecessor, Judge Rakoff's vigorous enforcement of the disclosure requirements forecasts that the requirement for reciprocal discovery is unlikely to upend the Supreme Court's conclusion that "the privilege against compulsory self-incrimination [does not guarantee] the defendant the right to surprise the State." [24]

Although the *Mrabet* decision underscores that the disclosure requirements of amended Rule 16 will be enforced by courts, the new rule contains ample leeway for judges to exercise discretion and for defense counsel to maneuver.

By its terms, judges may impose stringent deadlines or permit lenient extensions as circumstances present themselves. [25]

The advisory committee's note to the 2022 amendment explains that "[t]he court retains discretion under Rule 16(d) consistent with the provisions of the Speedy Trial Act to alter deadlines to ensure adequate trial preparation."

The note echoes the sentiments of Rule 16.1, which speaks in terms of crafting discovery orders that will "facilitate preparation for trial." [26]

This suggests that judges will craft bespoke discovery orders that balance the competing interests of both sides.

On the one hand, defense attorneys need to have robust disclosure of the expected testimony of government experts.

But on the other hand, there may well be situations where the interests of justice call for allowing the government flexibility in identifying the name and expertise of expert witnesses — for example, when the expert is expected to be called to testify in another trial that conflicts with the current schedule.

Conclusion

Amended Rule 16 represents an important change to the existing disclosure practice by criminal attorneys in federal court.

Judge Rakoff's opinion in *U.S. v. Mrabet* has ensured that prosecutors and defense counsel are now forewarned that their disclosure obligations will be rigorously enforced by trial courts, and counsel should be mindful that these rules will be implemented going forward.

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[1] United States of America v. Mounir Mrabet, No. 23-cr-69 (JSR), __ F. Supp. 3d __, 2023 WL 8179685, at *3 (S.D.N.Y. Nov. 27, 2023).

[2] Fed. R. Civ. P. 26(a)(2).

[3] Fed. R. Cr. Pro. 16(a)(1)(G)(iii).

[4] Fed. R. Cr. P. 16 Advisory Committee's Note to 2022 Amendment.

[5] Supra note 1 at *4.

[6] Id.

[7] Misapplication of Forensic Science, The Innocence Project, <https://innocenceproject.org/misapplication-of-forensic-science/> (last visited November 30, 2023).

[8] Exonerations by State, The National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited November 30, 2023).

[9] 2022 Annual Report, The National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202022.pdf> (May 8, 2023).

[10] Superseding Indictment, United States of America v. Mounir Mrabet, No. 23-cr-69 (JSR), Dkt. 10.

[11] United States of America v. Mounir Mrabet, No. 23-cr-69 (JSR), 2023 WL 6390619, at *1 (S.D.N.Y. Sept. 29, 2023).

[12] Id. at *3–*6.

[13] Supra n.1 at *1.

[14] Id. at *2.

[15] Id. at *2.

[16] Verdict as to USA v. Mournir Mrabet, United States of America v. Mounir Mrabet, No. 23-cr-69 (JSR), Dkt. 47.

[17] Supra n.1 at *4-*5.

[18] Id. at *4.

[19] Id. at *5.

[20] Id. at *6.

[21] Id.

[22] Fed. R. Cr. P. 16(b)(1)(c)(i).

[23] Williams v. Florida, 399 U.S. 78 (1970).

[24] Id. at 86.

[25] See Fed. R. Cr. P. 16(a)(1)(G)(ii) and (b)(1)(C)(ii).

[26] Fed R. Cr. P. 16.1.