

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT  
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HON. REENA RAGGI

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Chambers of  
CHRISTINA REISS  
Chief Judge

February 9, 2012

12-CR-A

Hon. Reena Raggi  
2nd Circuit Court of Appeals  
United States Courthouse  
225 Cadman Plaza East  
Brooklyn, NY 11201-1818

Dear Judge Raggi,

I hope this letter finds you well. At the suggestion of Judge Brock Hornby (for whom I clerked), I am writing to you in your capacity as chair of the Criminal Rules Committee. I know your committee is at the forefront of all important criminal rule changes. I have authored the enclosed article, *Closing Fed. R. Crim. P. 16(a)'s Loopholes: Why Criminal Defendants Are Entitled to Discovery of All of Their Statements*, which I hope your Committee will consider. The article will be published by American University in 2012.

As a former Vermont trial court judge, I presided in a state where the prosecution has a pretrial duty to disclose all of a criminal defendant's statements that may be used at trial. The rule was simple, straightforward, and easily administered. Upon becoming a federal judge in 2009, I was surprised to discover that in federal court, a defendant has no such right and may discover the existence of such statements for the first time from the witness stand at trial. Since then, on numerous occasions, I have been called upon to rule on the prosecution's disclosure obligations. In doing so, I have found that the interpretation and implementation of Fed. R. Crim. P. 16(a) varies widely among the federal courts. Indeed, it would not be an exaggeration to state that a criminal defendant's discovery rights in federal court depend upon the court in which he or she appears.

My article examines the pragmatic and policy considerations that weigh heavily in favor of a revised Rule 16(a) which requires pretrial disclosure of all of the accused's own statements. It examines Rule 16's history, analyzes the current version of the rule,

and highlights the absence of uniform application among the federal courts. In addition, the article addresses the lack of detriment to the prosecution in granting defendants full access to their own statements, as compared to the substantial disadvantage to defendants of limited discovery of these crucial statements. The article advocates in favor of broader discovery of an accused's own statements as a means of achieving greater judicial economy, uniform application of the rule, and, most importantly, the fair and expeditious resolution of criminal matters through broader pretrial disclosures.

Thank you for your time and consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Christina Reiss', written over a circular stamp or seal.

Christina Reiss, Chief Judge  
United States District Court

## Closing Fed. R. Crim. P. 16(a)'s Loopholes: Why Criminal Defendants Are Entitled to Discovery of All of Their Statements

Hon. Christina Reiss

### I. Overview.

The Sixth Amendment guarantees a criminal defendant the right “to be confronted with the witnesses against him.” U.S. CONST. amend. VI. The most formidable witnesses criminal defendants may face at trial are often themselves. The government may be expected to present as evidence all confessions, incriminating statements, and damaging stray remarks allegedly made by the defendant in preparation for a crime, in its commission, in its concealment, and in its investigation. In federal court, however, a criminal defendant’s right to pre-trial disclosure of his or her own statements is severely constrained. Because Rule 16(a) is laden with loopholes, the court must undertake a complex inquiry with regard to each such statement to determine whether the prosecution bears a duty to disclose it. Too often the conclusion is that no such duty exists.

Unlike many state court discovery rules,<sup>1</sup> Fed. R. Crim. P. 16(a) requires the government to disclose only certain types of the accused’s own statements, and then only upon the accused’s

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<sup>1</sup> See, e.g., Ariz. R. Crim. P. 15.1 (requiring prosecution to disclose defendant’s recorded statements no later than thirty days after arraignment); Ill. S. Ct. R. 412(a)(ii) (ordering prosecution to disclose “any written or recorded statements and the substance of any oral statements made by the accused” upon defense counsel’s written motion); Ky. R. Cr. 7.24(a) (obligating the commonwealth to disclose “the substance, including time, date, and place, of any oral incriminating statement . . . to have been made by a defendant to any witness” upon his or her written request, as well as to permit the defendant to inspect and copy any relevant “written or recorded statements or confessions made by the defendant . . . that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth”); Ohio R. Cr. P. 16(B) (ordering disclosure upon written request of “[a]ny written or recorded statement by the defendant . . . including police summaries of such statements, and including grand jury testimony by . . . the defendant . . .”); RI Super. R. Crim. P. 16(a)(1) (requiring state, upon written request, to disclose “all relevant written or recorded statements or confessions, signed or unsigned, or written summaries of oral statements or confessions made by the

request.<sup>2</sup> A criminal defendant is *not* entitled to disclosure of three broad categories of his or her own statements. First, a defendant is not entitled to his or her statements made to third parties, unless they were written or recorded. Second, a defendant is not entitled to his or her oral statements unless, at the time of making the statement: (a) the defendant knew he or she was speaking to a government agent, and (b) the defendant made the statements in response to interrogation. And third, a defendant is not entitled to his or her oral, written, or recorded statements made to state agents prior to the commencement of a federal investigation or prosecution. Even if the government is aware of these statements long before trial, and even if disclosure compromises no aspect of the prosecution, Rule 16 does not require disclosure to the accused.

If criminal defendants have a constitutional right to confront the witnesses against them, shouldn't this right extend to their own incriminating statements? If the prosecution is aware of a defendant's damaging statements in advance of trial, what values are protected by non-disclosure other than the element of surprise? The statements are not the prosecutor's or government agent's work product, and they are not privileged. Unquestionably, the statements

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defendant, or copies thereof"); Tenn. R. Crim. P. 16(a) (instructing the state, upon request, to disclose "the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at trial," as well as defendant's written or recorded statements within the state's control of which the state's attorney is aware); and Vt. R. Crim. P. 16(a)(2)(A) (requiring disclosure of "any written or recorded statements and the substance of any oral statements made by the defendant").

<sup>2</sup> See *United States v. Brown*, 345 F. Supp. 2d 358, 359 (S.D.N.Y. 2004) ("Other than exculpatory evidence, the Government is not required by Federal Rule of Criminal Procedure 16 to provide a defendant with advance notice of any statements that it intends to offer into evidence, unless the defendant made a request for such information.").

are not only often “relevant,”<sup>3</sup> but frequently the most critical evidence against the accused. Accordingly, full disclosure should be “dictated by the fundamental fairness of granting the accused equal access to his own words, no matter how the Government came by them.” *United States v. Caldwell*, 543 F.2d 1333, 1353 (D.C. Cir. 1974).

Although Fed. R. Crim. P. 16(a) was intended to provide more liberal discovery in criminal cases, its loopholes prevent criminal defendants from adequately preparing to confront the evidence against them at trial. They may also inadvertently provide an incentive for government agents to forego written or recorded preservation of some of the most damaging evidence against the accused, thereby diminishing its reliability.<sup>4</sup> Finally, nondisclosure may entice government witnesses to fabricate and embellish from the witness stand, free from any concern that their own veracity, poor recall, and motives will be exposed to the jury.

Because non-disclosure of a criminal defendant’s own statements is arguably unsupported by any legitimate public policy concern, the rationale for Rule 16(a)’s byzantine loopholes is difficult to discern. Ultimately they reflect federal resistance to the proposition that discovery in criminal cases advances the fair, prompt, and inexpensive administration of justice.<sup>5</sup>

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<sup>3</sup> See *United States v. Caldwell*, 543 F.2d 1333, 1352 n.93 (D.C. Cir. 1974) (“As applied to the accused’s own damaging statements, the requirement of relevance ‘seems superfluous in view of the obviously vital importance of the material sought.’”) (quoting 8 J. MOORE, FEDERAL PRACTICE ¶ 16.05(1) at 16-32 (2d ed. 1965)).

<sup>4</sup> Inevitably, this practice prejudices not only the defense but also the prosecution. Any incentive to forego preservation of a witness’s statements may ultimately hinder the prosecution’s ability to refresh the witness’s recollection, cabin the witness’s statements to those which the government can verify and corroborate, and transfer the case to another prosecutor who may not have knowledge of unrecorded oral statements allegedly attributed to the accused.

<sup>5</sup> Fed. R. Crim. P. 2 requires all federal criminal procedural rules to be “interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”

This article examines the history of Rule 16(a), its current provisions, and the policy considerations for and against modifications to it. It then suggests how Rule 16(a) should be revised so that it produces the salutary effects of pre-trial discovery, without compromising the investigation and prosecution of crimes.

## **II. The History of Fed. R. Crim. P. 16(a).**

### **A. The 1944 Adoption: Codifying a Limited Practice of Disclosure.**

In 1944, Rule 16 was adopted against a backdrop of judicial concern that discovery in a criminal case might be impermissible, *see United States v. Rosenfeld*, 57 F.2d 74, 76-77 (2d Cir. 1932) (expressing doubt whether discovery rights in civil cases “could be stretched to cover criminal proceedings”), and was not mandated by the Constitution. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (concluding that “[t]here is no constitutional right to discovery in a criminal case”). Some courts, however, allowed the defendant to inspect his or her own seized documents and property on the theory that, but for the government’s seizure, these items would have been available to the defendant. *See United States v. B. Goedde & Co.*, 40 F. Supp. 523, 534 (E.D. Ill. 1941) (allowing defendant access to and examination of her own documents before trial). “The entire matter [was] left within the discretion of the court.” Fed. R. Crim. P. 16, Advisory Committee Notes, 1944 Adoption. As originally adopted, Rule 16, titled “Discovery and Inspection,” provided:

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

There was no requirement that the government provide the defendant with his or her own statements in any form.<sup>6</sup>

**B. The 1966 Amendment: Recognizing a Defendant's Proprietary Interests.**

In 1966, Rule 16 was amended to permit, among other things, disclosure of a defendant's own written or recorded statements and grand jury testimony. The rule did not limit disclosure to statements made to a known government agent. It largely left the entire matter to the trial courts' discretion:

Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence, may become known, to the attorney for the government, (2) [results of physical and mental exams]; and (3) recorded testimony of the defendant before a grand jury.

Fed. R. Crim. P. 16(a) (1966 Amendment). The 1966 amendment followed a wake of criticism regarding the limited discovery allowed in a federal criminal case. Acknowledging that, "[t]he extent to which pretrial discovery should be permitted in criminal cases is a complex and controversial issue[,]” the Advisory Committee noted that most of the recent legal literature had been “in favor of increasing the range of permissible discovery.” Fed. R. Crim. P. 16, Advisory Committee Notes, 1966 Amendment (citing eleven articles on the subject). The Advisory Committee further observed that, “[d]iscovery of statements and confessions is in line with what

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<sup>6</sup> Courts, however, on occasion authorized disclosure of an accused's own grand jury testimony upon a showing of either “compelling circumstances” or “particularized need.” See *United States v. Johnson*, 215 F. Supp. 300, 318 (D. Md. 1963) (ruling that one congressman was not entitled to disclosure of his own grand jury testimony because he failed to make the requisite showing, whereas other congressman's “poor physical condition at the time he testified [was] supported not only by his own affidavit but by the certificate of the attending physician to the Congress,” thus demonstrating “a particularized need”).

the Supreme Court has described as the 'better practice,' and with the law in a number of states." *Id.* (quoting *Cicenia v. LaGay*, 357 U.S. 504, 511 (1958)).<sup>7</sup>

According to the Committee, "[f]ull judicial exploration of the conflicting policy considerations" could be found in four New Jersey Supreme Court cases: *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953); *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958); *State v. Murphy*, 36 N.J. 172, 175 A.2d 622 (1961); and *State v. Moffa*, 36 N.J. 219, 176 A.2d 1 (1961). The New Jersey cases are instructive, as they reveal the slow accretion of judicial recognition that disclosure of an accused's own statements is not only fundamentally fair, but does nothing to tip the prosecution's hand or compromise its case.

In 1953, *Tune* examined whether a trial court judge abused his discretion by permitting an accused to examine his own confession. In affidavits, the defendant's attorneys averred that the defendant could not recall what he said and claimed his confession was the product of prolonged questioning, the use of force, and threats of violence, thus rendering it involuntary. The trial court authorized disclosure, observing that, "[n]o reasons appear for believing that the prosecutor will be hampered in his preparation for the trial or that there will be a failure of justice, or that the public interest will be adversely affected, if the inspection of defendant's confession is permitted." *Tune*, 13 N.J. at 221, 98 A.2d at 891.

In a 4 to 3 split, the New Jersey Supreme Court reversed, finding that the trial court's approach placed an unfair burden on the prosecution. *Id.* at 222, 98 A.2d at 891. It observed that the accused, rather than his attorneys, must provide an affidavit that supported his motion which

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<sup>7</sup> The Advisory Committee identified the following states as requiring disclosure: Delaware, Illinois, Maryland, Arizona, California, Louisiana, Michigan, Mississippi, New Jersey, and New York.



could thereafter be used against him at trial.<sup>8</sup> *Id.* at 224, 98 A.2d at 892. The majority cited with approval the withering jurisprudence of Judge Learned Hand, who described pre-trial discovery as an attempt to mollicoddle criminal defendants whose guilt was all but certain:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly and foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formulism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

*Id.* at 212-13, 98 A.2d at 886 (quoting *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923)).<sup>9</sup>

The *Tune* majority begrudgingly recognized that a defendant's own confession could hardly be regarded as the work product of the prosecution. *Id.* at 214, 98 A.2d at 886. It also

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<sup>8</sup> Some courts retain this requirement. See *United States v. Boone*, 2003 WL 21488021, at \*6 (S.D.N.Y. June 27, 2003) (defendant's discovery request for all statements reduced to writing by police and made by him in debriefing session at police station prior to *Miranda* warnings was not supported by defendant's own affidavit and thus must be denied); see also *Cash v. Superior Court In and For Santa Clara Cnty.*, 346 P.2d 407, 408 (Cal. 1959) (allowing defendant to inspect and copy recordings or transcriptions of his statements made to an undercover officer upon a showing, supported by affidavit, that court should grant the request in the interest of a fair trial); *Kreuter v. United States*, 376 F.2d 654, 657 (10th Cir. 1967) (affirming denial of defendant's request for disclosure of all statements he made to government agents where affidavit in support of the motion only stated defendant was unable to remember his oral statement).

<sup>9</sup> As the *Tune* majority noted, Judge Hand's elevation to the Second Circuit did nothing to temper his views:

The defendants seem to suppose that they had the privilege of roaming about at will among any memoranda made by the prosecution in preparation for trial: that indeed is not an uncommon illusion, but it has nothing whatever to support it.

*Tune*, 13 N.J. at 213, 98 A.2d at 886 (quoting *United States v. Dilliard*, 101 F.2d 829, 837 (2d Cir. 1938)).

noted that one state, Louisiana, mandated disclosure of an accused's confession, while "many other jurisdictions" allowed disclosure solely as a matter of judicial grace. *Id.* at 218, 98 A.2d at 889.<sup>10</sup> Concluding that "[t]o grant a defendant the unqualified right to inspect his confession before trial would be to give him an opportunity to procure false testimony and to commit perjury at the expense of society[.]" *id.* at 226, 98 A.2d at 893, and noting "long experience has taught the courts that often discovery will not lead to honest fact-finding, but on the contrary to perjury and the suppression of evidence," *id.* at 210, 98 A.2d at 884, the *Tune* court concluded that the trial court's disclosure order was an abuse of discretion.

Not surprisingly, the *Tune* dissent pointed out that the New Jersey courts had virtually no experience, much less "long experience," with discovery in criminal cases, and that the same parade of horrors beginning and ending with perjury was raised in opposition to civil discovery only to be shown, by long experience, to be baseless. *Id.* at 227, 98 A.2d at 894. The dissent decried the fundamental unfairness of denying an accused access to his or her own statements:

It shocks my sense of justice that in these circumstances counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case, could not be denied. . . . In the ordinary affairs of life we would be startled at the suggestion that we should not be entitled as a matter of course to a copy of something we signed, . . . [h]ow possibly can we say that counsel for the accused should be denied a copy in face of the affirmative findings by [the trial judge], certainly supported by what was before him, that neither the public interest nor the prosecution of the State's case will suffer? . . . It is said that the accused "better than anyone else knows its contents" and that his representation to his counsel that he does not is "unbelievable." Even if that is our belief, why are we to say that [the trial court's] contrary conclusion was not reasonably founded? I should think it was entirely reasonable for [the trial court]

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<sup>10</sup> The *Tune* court rejected the defense's invitation to look across the pond for judicial guidance, observing that although England allowed "full discovery in criminal matters," it relied upon a system of private prosecution of crimes, had a far more advanced system of crime detection and investigation, and "the law-abiding instincts of the [English] population are in marked contrast to the disrespect for the law which has long characterized the American frontier and which has not yet disappeared as the criminal statistics indicate in certain segments of the population." *Tune*, 13 N.J. at 219, 98 A.2d at 889.

not to disbelieve that assertion in face of the circumstances under which the confession was taken, the “conversations” over five hours of the early morning and the fact that it is not the accused’s composition but the “narrative” written down by the police officer. . . . To shackle counsel so that they cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seriously imperils our bedrock presumption of innocence.

*Tune*, 13 N.J. at 234, 98 A.2d at 896-97 (Brennan, J., dissenting).

Five years after *Tune*, in *State v. Johnson*, a chastened New Jersey Supreme Court acknowledged that Justice William Brennan’s dissent in *Tune* had been echoed by three law review articles that tacitly concluded that *Tune* had been wrongly decided. *See Johnson*, 28 N.J. at 136, 145 A.2d at 315 (citing 53 COL. L. REV. 1161, 1163 (1953); 29 N.Y.U. L. REV. 1140, 1141-1142 (1954); 39 VA. L. REV. 976, 978 (1953)).<sup>11</sup> Although purporting to follow *Tune*, the court announced that it would “start with the premise that truth is best revealed by a decent opportunity to prepare in advance for trial[.]” *id.*, and that “[i]t is difficult to understand why a defendant should be denied pretrial inspection of his own statement in the absence of circumstances affirmatively indicating disservice to the public interest.” *Id.* at 137, 145 A.2d at 315.

In addition to its departure from *Tune*, *Johnson* reflected other major evolutions. First, the court acknowledged that the accused’s own statements were likely to be the core of the state’s case, and “[s]imple justice requires that a defendant be permitted to prepare to meet what thus looms as the critical element of the case against him.” *Id.* at 137, 145 A.2d at 316. Second, the court conceded that it is “no answer to say that a defendant ‘must remember’ what he said” because as “every trial lawyer knows, witnesses do not recall their statements with precision or

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<sup>11</sup> As one commentator observed in reviewing *Tune*: “If the trial court’s order was an abuse of discretion in this case, it is difficult to conjure a fact situation where a New Jersey judge could, in the exercise of his discretion, allow inspection of an accused’s confession.” *Pre-Trial Discovery of Criminal Defendant’s Confession*, 53 COLUM. L. REV. 1161, 1163 (1953).

detail.” *Id.* at 138, 145 A.2d at 316. Third, the court refused to allow the specter of perjury to color its decision, noting that “a defendant who will dispute a truthful confession hardly needs a preview to aid him.” *Id.* And finally, after a criminal defendant makes an initial showing of need, the court found the burden of persuasion should shift to the state, which must demonstrate “extraordinary circumstances” in opposition to disclosure. *Id.* at 142, 145 A.2d at 318.

### **C. The 1974 Amendments & 1975 Enactment: A Sea Change With a Twist.**

1974 and 1975 ushered in sweeping changes to discovery in a criminal case, largely in response to the American Bar Association’s (“ABA”) comprehensive and influential Project on Minimum Standards of Criminal Justice.<sup>12</sup> The ABA’s House of Delegates’ “Standards Relating to Discovery and Procedure Before Trial” served as the benchmark for the Advisory Committee’s discussions regarding proposed amendments to Rule 16.

The ABA described its proposals as “revolutionary” and proposed “more permissive discovery practices for criminal cases than [was] provided by applicable law in any jurisdiction in the United States.” ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARD RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 1 (tent. draft 1969) (“ABA Project for Minimum Standards”). Noting that its recommendations were unanimously approved, the ABA pointed out that “[w]hat united the . . . Committee was the view that broad pretrial disclosure of the prosecution’s case was the key to satisfying procedural objectives of

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<sup>12</sup> In 1963, the Institute of Judicial Administration at New York University Law School proposed to the ABA that it formulate minimum standards in the field of criminal justice, building upon a similar project that had occurred twenty-five years earlier. In early 1964, the Institute conducted a pilot study led by a committee headed by Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit. The committee authorized a three year project focused on “the entire spectrum of the administration of criminal justice, including the functions performed by law enforcement officers, by prosecutors and by defense counsel, and the procedures to be followed in the pretrial, trial, sentencing and review stages.” ABA PROJECT ON MINIMUM STANDARDS at vi. Pre-trial discovery and pre-trial procedures were combined in a single study because of their interrelation. *Id.* at vii.

overriding significance to criminal justice.” *Id.* at 1-2. These procedural objectives, in turn, were defined as the need to “lend more finality to criminal dispositions, to speed up and simplify the process, and to make more economical use of resources.” *Id.* at 2.

In the course of its recommendations, the ABA “reappraised” traditional grounds for opposing broad discovery and concluded as follows:

One, the advantages to the prosecution of surprise in the relatively few cases going to trial, was deemed an inappropriate consideration. Another, the fear of subversion of law enforcement by perjury, tampering with or intimidation of witnesses, or by premature disclosure of the identity of informants or details of ongoing investigations, was seen as a matter which occurred in only a minority of prosecutions and thus to be dealt with under the circumstances of particular cases, rather than serving as a barrier to discovery in all cases. Finally, the argument that some defense counsel are untrustworthy was viewed as exaggerated or anachronistic, and in any event as a matter more appropriately treated as a bar disciplinary problem than as a basis for deprivation of the values of discovery to the system.

*Id.* at 2-3. Accordingly, it proposed almost unlimited discovery in a criminal case:

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security.

*Id.* at 34. The ABA recognized that this represented a sizable shift from the “grudging” approach to disclosure reflected in the federal rules and would require “disclosure of nearly everything, subject to certain narrow exceptions as to the type of information and to certain safeguards as they are needed in a particular case.” *Id.* at 40. The ABA, however, rejected the notion that the accused’s right to disclosure should be conditioned upon his or her disclosures to the prosecution. *Id.* at 43, 45 (rejecting reciprocal disclosure based on threat of “perjury or intimidation of witnesses” or on the notion that the “accused has every advantage” due to the government’s burden of proving guilt beyond a reasonable doubt and the prohibition against inferring guilt from the accused’s decision not to testify).

Compared to the ABA, the Advisory Committee and Congress approached the expansion of criminal discovery far more gingerly and with a decided twist. They accepted many of the ABA's recommendations, including that disclosure should be mandatory, not subject to a "good cause" requirement, and accomplished by the parties with limited judicial intervention. Fed. R. Crim. P. 16, Advisory Committee Notes, 1974 Amendment. However, they resisted any broader disclosure obligations by the prosecution without a commensurate expansion of the defendant's discovery obligations. *Id.* "The majority of the Advisory Committee [was] of the view that the two—prosecution and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution." *Id.*<sup>13</sup>

With regard to an accused's own statements, rather than impose a rule of broad disclosure, the Advisory Committee and Congress settled upon a series of loopholes and exceptions, leaving how to interpret and harmonize them to the courts.<sup>14</sup> Even the ubiquitous term "statement" was not defined.

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<sup>13</sup> This article does not address the constitutionality of requiring criminal defendants to provide discovery that may later be used against them. It focuses, instead, on the absence of a reasonable justification for denying a criminal defendant access to all of his or her allegedly incriminating statements, regardless of whether they are oral, written, or recorded, and regardless of to whom and in what circumstances they were made.

<sup>14</sup> The 1975 version of Rule 16(a) as enacted provided:

Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged.

The Advisory Committee opted for an approach that limited disclosure to statements that fell within narrow exceptions, rather than the broad policy of disclosure advocated by the ABA, even though it acknowledged that the United States Supreme Court had observed that pre-trial disclosure of a defendant's statements "may be the better practice." *Id.* (citing *Cicenia*, 357 U.S. at 511). Indeed, it limited disclosure in the face of its own recognition of the salutary effects of pre-trial discovery:

[D]iscovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence.

*Id.* As a result, contrary to a rising tide of opinion that broad discovery in criminal cases advanced rather than impeded the administration of justice, Rule 16(a) became riddled with exceptions with regard to disclosure of the defendant's own statements. Without imposing a straightforward *quid pro quo*, it also conditioned broader disclosure by the prosecution upon broader disclosure by the defendant.<sup>15</sup>

After the sea change in 1974 and 1975, only two amendments to Rule 16(a) have altered the scope of disclosure of an accused's own statements.

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Fed. R. Crim. P. 16, Pub. L. No. 94-64, 89 Stat. 375.

<sup>15</sup> As the Advisory Committee explained, the revised rule:

enlarges the right of government discovery in several ways: (1) it gives the government the right to discovery of lists of defense witnesses as well as physical evidence and the results of examinations and tests; (2) it requires disclosure if the defendant has the evidence under his control and intends to use it at trial in his case in chief, without the additional burden, required by the old rule, of having to show, in behalf of the government, that the evidence is material and the request is reasonable; and (3) it gives the government the right to discovery without conditioning that right upon the existence of a prior request for discovery by the defendant.

*Id.*

#### **D. The 1991 & 1994 Amendments: A Small Step Forward.**

With regard to written or recorded statements of the defendant, the 1991 amendments to Rule 16 eliminated the requirement that conditioned disclosure upon the prosecution's intention to offer the statement at trial. "The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecution's intent to make any use of the statements." Fed. R. Crim. P. 16(a), Advisory Committee Notes, 1991 Amendment. The revised rule also required the government to produce, upon the defendant's request, "that portion of any written record containing the substance of any oral statement" made by the defendant during interrogation. Finally, the revised rule compelled the prosecution to produce any relevant oral statement by the defendant that it intends to use at trial, even if only for impeachment.

Through its broad definition of "defendant," the 1994 amendments clarified that disclosure obligations run to and from organizational defendants. It also recognized that an organization may be bound by its agents' statements and is entitled to the prosecution's disclosure of all statements which the prosecution contends may be attributable to the organization's agents.

Together, the 1991 and 1994 amendments reflect the most recent revisions to Fed. R. Crim. P. 16(a)'s disclosure obligations insofar as they pertain to the defendant's own statements.

#### **III. Examining Fed. R. Crim. P. 16(a)'s Loopholes.**

Fed. R. Crim. P. 16(a) imposes upon the government an obligation to disclose three types of statements by the accused upon his or her request: (1) oral statements made to known government agents in response to interrogation; (2) written and recorded statements known to the



government and in its possession, custody, or control; and (3) grand jury testimony. All three categories require the statements to be “relevant.”<sup>16</sup> All three categories contain loopholes.

**A. Oral Statements Made to Known Government Agents.**

Under Rule 16(a), the government must disclose, upon the defendant’s request, “the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.” Fed. R. Crim. P. 16(a)(1)(A). Accordingly, the prosecution’s disclosure obligation requires the presence of seven “triggers,” each of which presents a corresponding loophole.

First, the defendant must request the statement. Second, the statement must be “relevant.” Third, the defendant must make the statement either before or after arrest, and, at least arguably, not during.<sup>17</sup> Fourth, the defendant must make the statement in response to “interrogation.” Fifth, a “government agent” must initiate the “interrogation.” Sixth, the

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<sup>16</sup> In this context, “relevancy” is typically defined in accordance with Fed. R. Evid. 401 to mean “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1993) (relevance is to be interpreted broadly so that the rule gives a “defendant virtually an absolute right to his own recorded statements in the absence of highly unusual circumstances that would otherwise justify a protective order.”) (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 253, at 46-47 (1982)) (internal quotation marks omitted); see also 8 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 16.05(1), at 16-32 (2d ed. 1965) (as applied to the accused’s own damaging statements, the requirement of relevance “seems superfluous in view of the vital importance of the material sought.”).

<sup>17</sup> According to Rule 16(a)’s plain language, the disclosure requirement pertains only to oral statements made “before or after arrest[.]” Fed. R. Crim. P. 16(a)(1)(A); see also *Smith v. United States*, 285 F. App’x 209, 211-12, 214 (6th Cir. 2008) (even though court found “incredible” police officer’s trial testimony that defendant made an oral statement that she received gun “from her supplier” which officer thereafter failed to record, circuit court found statement was not made in response to functional equivalent of interrogation but was a statement “normally attendant to arrest and custody” and thus was not subject to Rule 16(a) disclosure) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

defendant must know the government agent is a “government agent.”<sup>18</sup> And finally, the government must intend to use the statement at trial.

Rule 16(a) does not define the term “government agent.” In the course of drafting this loophole, no explanation was given for requiring the statements to be given to a known government agent.<sup>19</sup> The courts typically define a “government agent” as a person employed by or acting on behalf of a *federal* agency after a *federal* prosecution or investigation has

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<sup>18</sup> This requirement alone provides fertile grounds for non-disclosure regardless of the statement’s materiality and its use at trial. It also provides ample grounds for a factual dispute regarding what an accused knew. For example, in *United States v. Siraj*, 533 F.3d 99, 101-02 (2d Cir. 2008), in a case of first impression, the Second Circuit ruled that written police reports that memorialize oral statements made by a defendant to an undercover officer need not be produced where the defendant was unaware of the government agent’s status at the time of making the statement. Similarly, in *United States v. Tavarez*, 518 F. Supp. 2d 600, 603 (S.D.N.Y. 2007), the defendant asked the government to provide the date, time, place, and circumstances that the government’s complaint alleged that the defendant made a statement to a confidential source, as well as any written summaries of that statement. The court rejected the request without analysis, noting that the Second Circuit did not require disclosure of oral statements made to individuals who were, but who were not known to be, government agents. *Id.*; see also *United States v. Taylor*, 417 F.3d 1176, 1181-82 (11th Cir. 2005) (ruling criminal defendant was not entitled to disclosure of his alleged jailhouse confession to the charged offenses because it was not made to a government agent even though the government was aware of the alleged confession six months before the start of trial and called the federal prisoner to whom it was made as a witness at trial); *United States v. Singleton*, 53 F. App’x 384, 384 (7th Cir. 2002) (government is not required to disclose defendant’s statement that he could also sell her crack cocaine to undercover officer during a cocaine sale, because he did not know at the time that officer was a government agent); *United States v. Johnson*, 562 F.2d 515, 518 (8th Cir. 1977) (finding no Rule 16 violation where no interrogation took place and government agent did not identify himself as such).

<sup>19</sup> “Neither the House Report nor the House Conference Report accompanying the amendments explain why disclosure was limited to only those oral statements made in response to interrogation [by] a person known to be a government agent. Two representatives objected, stating that ‘[t]here is no justification for this limitation: the defendant should be able to obtain any statement he made if the government intends to use it at trial.’” *United States v. Hoffman*, 794 F.2d 1429, 1431 n.3 (9th Cir. 1986) (citing H.R. REP. NO. 94-247, at 35 (1975), reprinted in 1975 U.S.C.C.A.N. 674, 707 (separate views of Ms. Holtzman and Mr. Drinan)).

commenced. See *United States v. Griggs*, 111 F. Supp. 2d 551, 554 (M.D. Pa. 2000).<sup>20</sup> Rule 16(a) thus arguably exempts from disclosure an accused's statements made to state, municipal, and local law enforcement officers. *Id.*; see also *United States v. Ramos*, 27 F.3d 65, 71-72 (3d Cir. 1994) (municipal police officers are not "governmental agents" under Rule 16(a), and the court may not order disclosure of accused's statements to them); but see *United States v. Burns*, 15 F.3d 211, 214 (1st Cir. 1994) (observing that "government agent" includes persons with law enforcement responsibilities and not just federal agents).

Pursuant to the plain language of Rule 16(a), the term "government agent" is not limited to those working on behalf of the *federal* government. Moreover, this imputed limitation is capable of working a senseless injustice. As the *Griggs* court observed:

We are constrained to note, however, the fundamental unfairness which the operation of Rule 16(a)[ ] works in this case. If [the defendant] had made his statement to a DEA agent or an FBI agent [instead of a Pennsylvania state trooper], . . . it would be discoverable . . . . [T]his defendant is not entitled under Rule 16 to discovery material which would be available to other defendants in similar situations, with the only difference being the employer of the person to whom a statement is given. That is, another defendant may be arrested in the same manner as [the defendant], be charged with the same crime as [the defendant], give the same statement in response to the same questions during interrogation, and have the arresting agent take the same notes, and yet the notes are discoverable in one case and not the other.

*Griggs*, 111 F. Supp. 2d at 554-55.<sup>21</sup>

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<sup>20</sup> See also *United States v. Brazel*, 102 F.3d 1120, 1150 (11th Cir. 1997) (stating "possession of the government" for Rule 16 does not "normally extend to that of local law enforcement officers.") (internal quotation marks omitted); *Thor v. United States*, 574 F.2d 215, 220-21 (5th Cir. 1978) (denying defendant's Rule 16 discovery request because evidence "was not in the government's control, but in the control of the Oregon county police"); *United State v. Chavez-Vernaza*, 844 F.2d 1368, 1375 (9th Cir. 1987) (rejecting argument in a federal case initially investigated by state and federal authorities that Rule 16 requires prosecution to obtain items from state authorities even if prosecution was aware of the documents but they were not in federal agents' control or possession).

<sup>21</sup> The *Griggs* court ultimately held that, pursuant to its inherent authority, it would require the statements to be disclosed. 111 F. Supp. 2d at 555.

Rule 16(a) also does not define the term “interrogation.” Courts typically define the term in accordance with *Rhode Island v. Innis* to refer “not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect[.]” 446 U.S. at 301. Accordingly, the government is not required to disclose an accused’s spontaneous oral statements no matter how incriminating.<sup>22</sup>

Finally, Rule 16 does not define the term “statement,” leaving the “development of a definition to the courts on a case-by-case basis.” *In re United States*, 834 F.2d 283, 284 (2d Cir. 1987). In summary, in addition to grappling with undefined terms, a court must find all seven “triggers” present in order to find a duty to disclose. As a result, many of an accused’s most incriminating statements that are indisputably the product of government initiated interrogation are immune from pre-trial discovery. In addition, at least one circuit has expressly held that the Rule 16(a) requires a *written record* of a defendant’s oral statement made to a known government agent as a further precondition to disclosure even though the appellate court

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<sup>22</sup> See *United States v. Kusek*, 844 F.2d 942, 948-49 (2d Cir. 1988) (concluding “the government is not required to provide discovery of a defendant’s unrecorded, spontaneous oral statements not made in response to interrogation” under Rule 16); see also *United States v. Cooper*, 800 F.2d 412, 416 (4th Cir. 1986) (government not required to disclose statement, “Not yet, I’m not finished,” made by prisoner to correctional officer who ordered him to cease assaulting another inmate because statement was not made in response to interrogation); *United States v. Scott*, 223 F.3d 208, 212 (3d Cir. 2000) (defendant’s post-arrest oral protestations of innocence regarding gun possession and “Oh, shit” response to bullet falling out his pants were not discoverable under Rule 16(a) as they were not made in response to interrogation); *United States v. Navar*, 611 F.2d 1156, 1158 (5th Cir. 1980) (holding defendant’s statement “was made to a person known by the declarant to be a government agent, but it was voluntary, spontaneous, and not in response to interrogation, and thus did not come within Fed. R. Crim. P. 16(a)(1)(A).”); *United States v. Green*, 548 F.2d 1261, 1267 (6th Cir. 1977) (rejecting defendant’s argument that the court should “equate his own spontaneous, unsolicited admissions, made within hearing of an undercover police officer, to a defendant’s responses to direct questions posed by a government agent during a criminal investigation.”).

acknowledged that Rule 16(a) does not expressly impose this requirement.<sup>23</sup> Rule 16(a) thus exempts from disclosure a vast array of oral statements made by criminal defendants, regardless of their evidentiary value to either side.<sup>24</sup>

### **B. Defendant's Written or Recorded Statements.**

Under Rule 16(a), the government must disclose, upon the defendant's request, three categories of written or recorded statements by the defendant. The first category is "any relevant written or recorded statement by the defendant, if: [1] the statement is within the government's possession, custody, or control; and [2] the attorney for the government knows—or through due diligence could know—that the statement exists[.]" Fed. R. Crim. P. 16(a)(1)(B)(i). For such statements, there is no requirement that the statements be intended for use at trial.

There is also no requirement that the statements be the product of interrogation by a known government agent. See *United States v. Matthews*, 20 F.3d 538, 550 (2d Cir. 1994) ("Statements covered by Rule 16(a)(1)[B] include written correspondence to third persons that come into the possession of the government."); *Caldwell*, 543 F.2d at 1352-53 (duty to disclose extends to the defendant's letters to friends written from jail which were given to prosecution by a fellow inmate).

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<sup>23</sup> See *United States v. Fantoy*, 146 F. App'x 808, 817 n.5 (6th Cir. 2005) (holding government did not violate disclosure obligations when government agent testified to the contents of an unrecorded, undisclosed conversation with the defendant regarding defendant's participation in the narcotics trade because statement was not contained in a written record, even though court acknowledged its holding "is not entirely consistent with both the language and the purpose of current or prior Rule 16(a)(1)(A)."); *United States v. Holmes*, 975 F.2d 275, 284 (6th Cir. 1992) (Rule 16 "requires only that any written record of oral statements . . . be turned over to a defendant who so requests.").

<sup>24</sup> *United States v. Edwards*, 214 F. App'x 57, 63 (2d Cir. 2007) (holding criminal defendant is not entitled to disclosure of his own oral statements to co-conspirators even if they form the factual basis for the conspiracy charge against him).

Finally, “[t]he right of a defendant under Rule 16 to his own recorded statements is presumptive . . . [and] [h]e need not show that the statements are material or exculpatory.” *United States v. Pesaturo*, 519 F. Supp. 2d 177, 189 (D. Mass. 2007).

Rule 16(a)’s second category of disclosure for written or recorded statements pertains to that “portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent[.]” Fed. R. Crim. P. 16(a)(1)(B)(ii). Accordingly, this provision of the rule requires: (1) a written record; (2) containing the substance of an oral statement; (3) made before or after an arrest; (4) in response to interrogation; (5) by a government agent; and (6) whom the defendant knew to be a government agent. Disclosure is further cabined by Rule 16(a)’s overarching relevancy requirement. By its terms, this provision of Rule 16(a) does not require the statements to be known to the attorney for government, or within the government’s possession, custody, or control.<sup>25</sup> The rule also arguably does not require disclosure of statements made *during* arrest even if they are written or recorded.

The courts are not in agreement as to what types of “written records” are covered by the rule. *See United States v. Vallee*, 380 F. Supp. 2d 11, 13 (D. Mass. 2005) (“Notwithstanding the apparently clear command of the rule, there is a considerable diversity of opinion among the courts”). Practitioners appear to take equally divergent approaches, causing one court to illustrate the number of ways the rule is circumvented:

The language of Rule 16 plainly, and unambiguously, requires the production of any handwritten notes of government agents containing the substance of anything

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<sup>25</sup> Although it is likely that the government will be aware of a defendant’s oral statements made to a government agent that are reflected in a writing, the duty of disclosure apparently exists even in the absence of such awareness and even if the government neither possesses nor has a ready means of acquiring an original or copy of the written record.

said by the defendant during interrogation. Notably, the rule requires disclosure of “*any* written record” containing “the substance of *any* relevant oral statement.” It is thus not limited to a typed, formalized statement. It is not limited to a verbatim or near-verbatim transcription. It is not limited to the clearest, most readable version of the defendant’s statement. Nor does the rule contain any limitations on the nature of the statement (for example, that it be exculpatory) or its intended use (for example, that the government intends to use it at trial), other than the command that it be “relevant.”

*Id.* at 12.

Other courts have required the production of *a* record containing the accused’s statements but not *every* record,<sup>26</sup> even where there are minor discrepancies between the agent’s handwritten notes and his or her report.<sup>27</sup> Still other courts have imposed requirements that have no arguable basis under Rule 16(a).<sup>28</sup>

With regard to an accused’s oral and written statements, Rule 16(a) provides a labyrinth of triggers and loopholes requiring prosecutors, defense counsel, and courts to carefully parse whether disclosure is required for reasons that have little to do with the use of the statement, its materiality, the ease of disclosure, and its facilitation of a fair and just resolution of the case.

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<sup>26</sup> See, e.g., *United States v. Brown*, 303 F.3d 582, 589-91 (5th Cir. 2002) (government complies with Rule 16(a) when it “discloses a . . . report that contains all of the information contained in the [government agent’s] interview notes”); *United States v. Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997) (“A defendant is not entitled to an agent’s notes if the agent’s report contains all that was in the original notes.”).

<sup>27</sup> See *United States v. Coe*, 220 F.3d 573, 583 (7th Cir. 2000) (concluding trial court did not err in denying discovery request where, despite “certain minor discrepancies between the notes and the report . . . the report was an adequate summation of the notes for Rule 16 purposes.”).

<sup>28</sup> See, e.g., *Boone*, 2003 WL 21488021, at \*6 (defendant’s discovery request for all statements reduced to writing and made by him in debriefing session by police at police station prior to *Miranda* warnings was not supported by defendant’s own affidavit and thus must be denied).

Indeed, Rule 16(a)'s exceptions preserve the potential for unfair surprise at trial with no corresponding gain.<sup>29</sup>

### **C. Defendant's Grand Jury Testimony.**

The final category of recorded or written statements required to be disclosed is refreshingly straightforward and unambiguous: "the defendant's recorded testimony before a grand jury relating to the charged offense." Fed. R. Crim. P. 16(a)(1)(B)(iii). As defendants who do not plan to cooperate with the government rarely testify before grand juries, such disclosures are relatively rare. However, in the event of cooperation, disclosure of grand jury testimony frequently proves useful as it may be used in plea negotiations to provide a factual basis for a plea. It is also useful at sentencing to determine drug quantities and other disputed factual issues and to establish the extent of a defendant's cooperation and substantial assistance to the government. No court has apparently found the burden upon the government imposed by this portion of the rule either onerous, unreasonable, or unfair.

Having examined Fed. R. Crim. P. 16(a)'s loopholes, their history and derivation, and how the courts have struggled to interpret and implement them, this article next examines whether there is a legitimate explanation for their continued existence.

## **IV. Revisiting Disclosure.**

### **A. Pragmatic Considerations.**

The first question to be answered in revisiting Fed. R. Crim. P. 16(a)'s loopholes is "why now?" From a purely pragmatic perspective, the present is a perfect time for undertaking this

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<sup>29</sup> Non-disclosure often becomes the subject of a request for a mistrial or at least a prolonged bench conference in the midst of trial *after* a witness has testified to the statement in question. Because there is no shortcut to determining whether an oral or written statement should have been disclosed and no panacea for remedying the potential prejudice if pre-trial disclosure should have occurred, the failure to disclose is inexorably disruptive.



effort. The federal government's correctional facilities are overburdened and underfunded.<sup>30</sup> The federal Judiciary, like all branches of government, is struggling with budget cuts in the face of increasing demands for its services. Federal judicial vacancies are being filled at a desultory pace, with some districts operating continuously in crisis mode. U.S. Attorney's Offices and Federal Public Defender's Offices are subject to a hiring freeze. Despite all of this, crime marches on. Any mechanism that speeds the processing of a criminal case without sacrificing the quality of the administration of justice should be examined. Here, the courts and commentators are in universal accord that pre-trial discovery aids in the prompt and just resolution of criminal cases. Indeed, over forty years ago, this was the primary rationale for the ABA's advocacy in favor of a policy of virtually unlimited pre-trial prosecutorial disclosure.

When considering the disclosure of an accused's own statements, the pragmatic advantages of more complete disclosure are even more compelling. Criminal defendants who are confronted with their statements as potential evidence against them are in a much better position to weigh the advantages and disadvantages of a negotiated plea and the risks and benefits of going to trial. Expanded pre-trial disclosure may thus enhance the likelihood that criminal defendants will engage in more meaningful and more timely plea negotiations, having seen the strengths of the government's case against them. It will also better ensure that such negotiations are the product of a fully informed decision, thereby reducing requests to vacate a plea, claims of ineffective assistance of counsel, or efforts to seek post-conviction relief as the result of a late discovered discovery violation.

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<sup>30</sup> As Justice John Paul Stevens recently observed: "In the years between 1972 and 2007, the nation's imprisonment rate more than quintupled—increasing from 93 to 491 per 100,000 people . . . these figures suggest to me that the current system of criminal law and enforcement (like too many of our citizens) has grown obese." Stevens, J., *Our "Broken System" of Criminal Justice*, N.Y. TIMES BOOK REVIEW, Nov. 17, 2011, at 56.

If plea negotiations are not successful, disclosure assists in flagging evidentiary issues before trial. The parties will then be able to fully brief those issues prior to trial. If an evidentiary hearing is required, the court may set it in a timely manner without carving into trial time. Disclosure also assists in more effective cross-examination. "And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). More expansive pre-trial disclosure of a defendant's own statements thus furthers the very objectives for which Rule 16(a) was promulgated:

Rule 16's mandatory discovery provisions were designed to contribute to the fair and efficient administration of justice by providing the defendant with sufficient information upon which to base an informed plea and litigation strategy; by facilitating the raising of objections to admissibility prior to trial; by minimizing the undesirable effect of surprise at trial; and by contributing to the accuracy of the fact-finding process.

*United States v. Lanoue*, 71 F.3d 966, 976 (1st Cir. 1995), *abrogated on other grounds by United States v. Watts*, 519 U.S. 148 (1997).

Courts that discount these pragmatic considerations often grossly understate the disruption that inevitably occurs when a prosecutor fails to disclose an accused's statement pre-trial and then later uses the statement at trial. At a minimum, the court must generally stop the presentation of evidence and hear from both sides outside the presence of the jury. The court must then generally ascertain the nature and content of the statement in question, the circumstances in which it was made and to whom, its materiality, and any prejudice. It must thus analyze the byzantine contours of Rule 16(a) and decide whether, when, and how the government should have been disclosed it. It must also analyze whether there are other grounds for disclosure. In the majority of criminal cases, the *Brady* doctrine, set forth in *Brady v.*

*Maryland*, 373 U.S. 83 (1963),<sup>31</sup> the Jencks Act, 18 U.S.C. § 3500,<sup>32</sup> *Giglio v. United States*, 405 U.S. 150, 154 (1972),<sup>33</sup> and Fed. R. Crim. P. 16 “exhaust the universe of discovery to which the defendant is entitled.” *United States v. Presser*, 844 F.2d 1275, 1285 n.12 (6th Cir. 1988).

Thereafter, the court must make the necessary factual findings and conclusions of law regarding whether disclosure was required and by what rule or law. Properly performed, this is a time-consuming and painstaking process.

If the court determines that disclosure was mandated by Rule 16(a) or some other requirement of law, the court must then decide whether to grant a continuance, declare a mistrial, hold a suppression hearing if that is requested, impose sanctions, give a curative instruction,<sup>34</sup> or proceed by finding no prejudice. Rule 16(a) provides no guidance in determining how this analysis should proceed and further complicates the inquiry by failing to define critical terms, leaving such definitions to a highly divergent and ever changing body of case law.

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<sup>31</sup> The *Brady* doctrine requires the government to produce exculpatory evidence which is material to guilt or punishment. *See Brady*, 373 U.S. at 87.

<sup>32</sup> The Jencks Act requires the government to produce statements of a witness after the witness has testified on direct examination. Some courts hold that the Jencks Act actually prohibits a court from ordering disclosure of Jencks material before a witness has testified on direct examination. *See* 18 U.S.C. § 3500(a); *see also In re United States*, 834 F.2d at 284-86. Nothing precludes a prosecutor from turning over such material earlier. *See United States v. Watson*, 787 F. Supp. 2d 667, 674 (E.D. Mich. 2011) (“Given that the government has stipulated to turn over ‘impeachment material’ and Jencks Act material ten days before trial, there appears to be no basis for withholding any other material that would qualify as *Brady* material.”). Fed. R. Crim. P. 26.2 imposes this duty of disclosure on both the prosecution and the defense.

<sup>33</sup> *Giglio* requires the government to produce evidence that may be used to impeach the credibility of any of the government’s witnesses in time for effective use at trial. *Giglio*, 405 U.S. at 154.

<sup>34</sup> Which, in turn, poses the question of whether a court can fashion a curative instruction regarding non-disclosure that is fair to both the prosecution and the defense. If the court frames the instruction so that it reflects a violation of the prosecutor’s duty, need the court also disclose whether the violation was in good or bad faith? Should the court note that the defendant is being confronted with this evidence for the first time and has not had an opportunity to test its accuracy? If the court imposes a sanction, should it be disclosed to the jury?

Post-conviction, a new trial will be ordered to cure a discovery violation only upon a showing of “substantial prejudice.” See *Matthews*, 20 F.3d at 550 (“If the government has failed to meet its obligations under Rule 16(a)(1)(A), a new trial will be required only if the defendant can show that the failure to disclose caused him substantial prejudice.”) (citation and internal quotation marks omitted); *United States v. Thomas*, 239 F.3d 163, 167 (2d Cir. 2001) (ordering a new trial after a Rule 16 violation only if defendant shows “that the failure to disclose caused him substantial prejudice.”); *United States v. Heath*, 580 F.2d 1011, 1021 (10th Cir. 1978) (finding no basis for a new trial where government’s failure to disclose defendant’s statement did not “constitute[] either direct or substantial prejudice”); *United States v. Enigwe*, 1993 WL 276966, at \*9 (E.D. Pa. July 13, 1993) (refusing to order new trial where defendant failed to show substantial prejudice stemming from government’s non-disclosure of Rule 16 material). Arguably, Rule 16(a)’s loopholes incentivize non-disclosure.

In summary, nonchalant observations that “[s]urprising moments and unexpected statements made from the witness stand are par for the course in any trial, and even more so in a relatively lengthy criminal proceeding,” *United States v. Santiago*, 135 F. App’x 816, 821 (6th Cir. 2005) (excusing government’s inadvertent failure to disclose recording of defendant’s oral admissions that he sold cocaine), substantially understate the disruption caused by untimely disclosures, the complexity of the court’s task at trial when the issue arises, and the enormity of the prejudice the accused inevitably experiences when he or she is confronted, for the first time, with his or her own materially incriminating statements. Rule 16(a) is thus unnecessarily difficult to interpret, inconsistently and arbitrarily implemented, and, if not followed, the ensuing prejudice is almost impossible to cure. From a purely pragmatic standpoint, this is an opportune time to eliminate its loopholes.

## **B. Policy Considerations.**

A criminal defendant has a near absolute right “to be confronted with the witnesses against him.” U.S. CONST. amend. VI. In *Pointer*, the United States Supreme Court held “that the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding[.]” *Pointer*, 380 U.S. at 407. This is pointedly not the case with regard to a criminal defendant’s own statements. Many states have long required the disclosure of the accused’s own statements,<sup>35</sup> while federal courts limit disclosure to only those statements that make it through the gauntlet of Fed. R. Crim. P. 16(a)’s loopholes. An equal opportunity for pre-trial discovery in state and federal court reflects society’s commitment to afford fundamental fairness to criminal defendants regardless of the forum in which they are prosecuted.

“Fundamental fairness” also requires heightened procedural safeguards when the information in question is “material in the sense of a crucial, critical, [or] highly significant factor.” *Boykins v. Wainwright*, 737 F.2d 1539, 1544 (11th Cir. 1984) (addressing the exclusion of evidence at trial); *see also Caldwell*, 543 F.2d at 1353 (“We believe, too, that [disclosure of an accused’s written communications with third parties] is dictated by the fundamental fairness of granting the accused equal access to his own words, no matter how the Government came by them.”). It is hard to conceive of information that is more “crucial, critical, or highly significant” than the accused’s own statements that tend to prove that he or she committed the offense charged. As the United States Supreme Court has observed: “A confession is like no other evidence. Indeed, ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him . . . . [T]he admissions of a defendant come from the

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<sup>35</sup> *See supra* note 1.

actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.” *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968)). It borders on flippant to justify non-disclosure by asserting that the defendant must already know what he or she said,<sup>36</sup> or by permitting disclosure in the nation’s state courts while prohibiting it in its federal courts.

Finally, there are few, if any, countervailing public policies served by nondisclosure. As the Ninth Circuit observed over forty years ago:

When a person is attempting to discover his own statements some of the reasons for not allowing discovery are eliminated. There is no danger to government informants; there is no fishing expedition; there is no unfairness in giving the defendant the right to discovery (a right not available to the government because of the Fifth Amendment)[.]

*Loux v. United States*, 389 F.2d 911, 922 (9th Cir. 1968). Broad pre-trial discovery is the rule in civil cases.<sup>37</sup> Fundamental fairness supports equally broad pre-trial discovery with regard to a criminal defendant’s own statements. There is no rational justification for a contrary approach.<sup>38</sup>

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<sup>36</sup> See *United States v. Jett*, 18 F. App’x 224, 237 (4th Cir. Sept. 18, 2001) (holding defendant was not substantially prejudiced by the nondisclosure of his own statements because he “could not have been ‘unduly surprised’ by the statements, since he himself made them”); see also *United States v. Rivera*, 944 F.2d 1563, 1566 (11th Cir. 1991) (concluding defendant was not prejudiced by nondisclosure of his own statement because the “testimony involved [defendant’s] own statement which he should have had some knowledge of making.”).

<sup>37</sup> See *Ramos*, 27 F.3d at 67-68 (“Criminal pretrial discovery is, of course, vastly different from discovery in civil cases. In contrast to the wide-ranging discovery permitted in civil cases, Rule 16 . . . delineates the categories of information to which defendants are entitled in pretrial discovery in criminal cases, with some additional material being discoverable in accordance with statutory pronouncements and the due process clause of the Constitution.”).

<sup>38</sup> To the extent that witness protection is an issue, the Federal Rules of Criminal Procedure adequately address such concerns:

The government has two alternatives when it believes disclosure will create an undue risk of harm to the witness: it can ask for a protective order under [Fed. R. Crim. P. 16](d)(1). . . . It can also move the court to allow the perpetuation of a particular witness’s testimony for use at trial if the witness is unavailable or later

### C. Judicial Uniformity.

Rule 16(a)'s loopholes should be eliminated for the further reason that the federal courts have demonstrated a marked inability to apply them uniformly. The rule was intended to minimize judicial intervention in pre-trial discovery. The abundance of case law attempting to harmonize the rule's various permutations suggests that this has not been the case.

Almost four decades ago, the Advisory Committee explained that "[t]he rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases." Fed. R. Crim. P. 16, Advisory Committee Notes, 1974 Amendment. Courts, however, even disagree regarding the permissible degree of departure from Fed. R. Crim. P. 16(a)'s express terms.

On the one hand, courts are deemed to have the inherent authority to order expanded criminal discovery and to alter the timelines for existing discovery obligations.<sup>39</sup> Rule 16 itself

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changes his testimony. The purpose of the latter alternative is to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury.

Fed. R. Crim. P. 16, Advisory Committee Notes, 1974 Amendment.

<sup>39</sup> See, e.g., *Watson*, 787 F. Supp. 2d at 673 (ruling that *Brady* material and government's witness list must be disclosed before trial even in the absence of a right to such pre-trial disclosures); *United States v. Kendricks*, 623 F.2d 1165, 1168 (6th Cir. 1980) (per curiam) (district court may order pre-trial disclosure of government's witness even though "[it] is well recognized that defendants cannot obtain lists of prosecution witnesses as a matter of right[.]"); *United States v. Jackson*, 508 F.2d 1001, 1006 (7th Cir. 1975) (district court may order both parties to disclose witnesses before trial); *United States v. Baum*, 482 F.2d 1325, 1331 (2d Cir. 1973) (noting that "[o]rdinarily it is disclosure, rather than suppression that promotes the proper administration of justice," and in that case "[t]here were no valid considerations to justify the concealment of [a government witness's] identity as a prospective witness"); *United States v. Jordan*, 466 F.2d 99, 101 (4th Cir. 1972) (stating that "[t]he court in its discretion may order the government to produce such a list [of government witnesses] under Rule 16"); *United States v. Richter*, 488 F.2d 170, 174 n.15 (9th Cir. 1973) (recognizing "[t]he trend beyond the present [R]ule 16 appears to be toward even greater liberality. Proposed amendments to the rule would

provides that a court “may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.” Fed. R. Crim. P. 16(d)(1).

On the other hand, the circuits are divided in determining whether a court may order prosecutorial disclosures beyond the confines of Rule 16(a). The Third Circuit has that held Rule 16 and various federal statutes identify what is discoverable in a criminal case, and a court has *no authority* to expand disclosure beyond them unless the failure to do so would violate Due Process.<sup>40</sup> The Ninth Circuit has taken a similar approach,<sup>41</sup> as has the Sixth Circuit.<sup>42</sup>

In contrast, the Fifth Circuit has held that a district court may take actions which are “reasonably useful to achieve justice” using its “supervisory powers” to “formulate procedural rules not specifically required by the Constitution or Congress . . . to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury.” *United States v. Webster*, 162 F.3d 308, 339 (quoting *United States v. Hastings*, 461 U.S. 499, 505 (1983)); *see also Burns*, 15 F.3d at 214-15 n.2 (concluding

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further expand the scope of discovery. . . . Notably each of these proposals specifically provides for discovery of prosecution witnesses.”) (internal citation omitted).

<sup>40</sup> *United States v. Scott*, 223 F.3d at 212 (noting trial court recognized its error in ordering disclosure beyond that authorized by Rule 16(a) and finding no governmental duty to disclose accused’s statements).

<sup>41</sup> *See Hoffman*, 794 F.2d at 1432 (vacating suppression order where court’s discovery order exceeded the parameters of Rule 16(a)(1)(A) by compelling disclosure of oral statements made by a defendant not in response to interrogation); *but see United States v. Bailleaux*, 685 F.2d 1105, 1115 (9th Cir. 1982) (“Ordinarily, a statement made by the defendant during the course of the investigation of the crime charged should be presumed to be subject to disclosure, unless it is clear that the statement cannot be relevant.”).

<sup>42</sup> *See Presser*, 844 F.2d at 1285 (“[T]he discovery afforded by Rule 16 is limited to the evidence referred to in its express provisions,” and “[t]he rule provides no authority for compelling the pre-trial disclosure of . . . any other evidence not specifically mentioned by the rule.”).



Rule 16 was “intended to prescribe the minimum amount of discovery to which the parties are entitled.”).

The courts are equally divided on the issue of how to address a Rule 16(a) violation once it has occurred. The options, all undesirable, include taking a recess during the trial to hold a hearing on the lack of disclosure,<sup>43</sup> prohibiting the government’s use of the statement at trial (assuming it has not already been revealed to the jury),<sup>44</sup> giving a curative instruction if it has, granting a continuance, declaring a mistrial, or doing nothing.<sup>45</sup>

Appellate review is plagued with a similar selection of undesirable choices as appellate courts are forced to speculate as to how a trial may have been different if disclosure took place in accordance with the rule.<sup>46</sup> *Rivera*, 944 F.2d 1565-66, is instructive. There, the government failed to disclose, until the first day of trial, the defendant’s statement to a customs inspector that a cocaine-laden suitcase belonged to the defendant. Although the appellate court recognized the importance of the statement, it

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<sup>43</sup> See *Kusek*, 844 F.2d at 947-48 (addressing potential Rule 16(a) violation by prosecution by holding an evidentiary hearing outside the presence of the jury after opening statements).

<sup>44</sup> See Fed. R. Crim. P. 16(d)(2) (court may prohibit party from introducing evidence not disclosed if the party “fails to comply with this rule.”).

<sup>45</sup> See *United States v. Kimbrough*, 69 F.3d 723, 731 (5th Cir. 1995) (“We find that any prejudice or technical violation of Rule 16 is insufficient to comprise a deprivation of Kimbrough’s constitutional rights.”).

<sup>46</sup> See *United States v. Bryant*, 439 F.2d 642, 648 n.9 (D.C. Cir. 1971) (observing that it is not “possible to know whether revelation of the evidence would have changed the configuration of the trial—whether defense counsel’s preparation would have been different had he known about the evidence, whether new defenses would have been added, whether the emphasis of the old defenses would have shifted. Because the standard requires this kind of speculation we cannot apply it harshly or dogmatically.”), *overruled on other grounds by Arizona v. Youngblood*, 488 U.S. 51 (1988).

placed the burden of proof on the defendant, faulted defense counsel for failing to anticipate the statement's existence, and found no reason for reversal of the defendant's conviction. The Eleventh Circuit explained:

In order for this court to reverse a conviction based on the government's violation of a discovery order, a defendant must demonstrate that the violation prejudiced his substantial rights. Substantial prejudice is established when the defendant shows that he was unduly surprised and did not have an adequate opportunity to prepare a defense or that the mistake had a substantial influence on the jury. After a review of the record, we find that Rivera has failed to establish either of these requirements.

We do not believe that Rivera could have been surprised by [the inspector's] testimony that Rivera had verbally claimed ownership of his suitcase, . . . In a trial in which all the issues revolved around whether the defendant[] knowingly possessed a cocaine-laden suitcase, it is doubtful that Rivera's counsel would not anticipate or contemplate that such a statement might exist. In addition, the belated disclosure of [the inspector's] testimony involved Rivera's own statement which he should have had some knowledge of making. More importantly, if Rivera had, in fact, been prejudiced by the delayed disclosure of this statement, he should have moved for a continuance. Rivera, however, did not do so and elected to proceed to trial.

*Id.* at 1566 (internal footnotes omitted). The error thus appeared to lie in the defense's lack of preparation rather than the prosecution's lack of disclosure. Such an approach renders a disclosure obligation close to meaningless even when it pertains to the most critical evidence at trial.

Because of a lack of judicial uniformity, criminal defendants in federal court have disparate rights to crucial pre-trial discovery which may have a direct and irremediable impact on the outcome of their cases depending upon how a particular circuit analyzes Rule 16(a). A simple and expansive rule of pre-trial disclosure of an accused's own statements would promote judicial uniformity, ensure all criminal defendants in federal court are afforded the same procedural rights, and eliminate disparities between state and federal practice which have no discernible basis in either logic or public policy.

#### **D. Prosecutorial Uniformity and Increased Professionalism.**

Simple, straightforward, and broad disclosure obligations provide an incentive for law enforcement to document evidence of a crime, including the often critically important statements of an accused. Documentation and preservation of an accused's statements by government agents enhances reliability of those statements at trial, making them less dependent upon the vagaries of memory, less prone to alteration in the face of trial pressures, and better tested through meaningful cross-examination as the result of pre-trial investigation. No rule of criminal procedure should reward lack of documentation as a trade-off for surprise at trial. As the D.C. Circuit Court of Appeals observed:

The right at stake . . . is defendant's discovery of evidence gathered by the Government, evidence whose disclosure to defense counsel would make the trial more a "quest for truth" than a "sporting event." This safeguard of a fair trial is surely an important one; but here it was undercut at the pretrial period by bureaucratic procedures and/or discretionary decisions of Government investigative agents who made no effort to preserve discoverable material.

*Bryant*, 439 F.2d at 644 (footnote omitted). Anything that encourages professionalism and preservation of evidence at the investigative stage enhances the likelihood that a prosecution that unfolds thereafter will be based upon reliable evidence.

In turn, prosecutors who are tasked with a policy of broad disclosure of an accused's statements will gather and produce them at a time when they are more likely to be the product of accurate recall and less likely to be tainted by bias. By full disclosure, prosecutors also immunize themselves from accusations of misconduct and potential sanctions and eliminate the need for judicial intervention in discovery disputes. See *United States v. Johnson*, 525 F.2d 999, 1005 (2d Cir. 1975) (discussing whether to order sanctions and observing: "We think the government should be more careful in complying strictly with orders to produce a defendant's statements . . . [w]hen in doubt the

prosecutor should seek a ruling from the court on whether a particular paper is discoverable.”). A criminal defendant’s right to discover his or her statements prior to trial is thus likely to enhance the evidentiary value of those statements while safeguarding the defendant’s right to fully confront them at trial.

**E. Proposed Revision to Fed. R. Crim. P. 16(a).**

A revision to Rule 16(a) that requires the prosecution to disclose, pre-trial, all statements of the defendant in the government’s possession, custody, or control renders both the prosecution’s and the court’s task simple. It also provides a criminal defendant with the information necessary to engage in effective plea negotiations or prepare for trial. As currently drafted, Rule 16(a)’s loopholes transform what was intended to improve the quality and timeliness of the administration of criminal justice into a series of obstacles a defendant must be overcome in order to discover his or her own statements. “There is something specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence.” *Faretta v. California*, 422 U.S. 806, 822-23 (1975) (quoting 1 J. Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 341-42 (1883)). The time to revisit Fed. R. Crim. P. 16(a)’s loopholes is now as there never was—as is not now—any rational justification for their existence.