ADVISORY COMMITTEE
ON
CRIMINAL RULES

Monterey, CA
May 6-7, 2004

CRIMINAL RULES COMMITTEE MEETING

May 6-7, 2004
Monterey, California

I PRELIMINARY MATTERS

A. Chair's Remarks, Introductions, and Administrative Announcements

B. Review and Approval of Minutes of October 2003, Meeting in Gleneden Beach, Oregon

C. Status of Criminal Rules: Report of Rules Committee Support Office.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rule Amendments Approved by Standing Committee, Judicial Conference & Pending Before Supreme Court

1. Rules Governing § 2254 and § 2255 Proceedings (Memo).

2. Official Forms Accompanying Rules Governing § 2254 and § 2255 Proceedings.

3. Rule 35; Proposed Amendment re Added Definition of Sentencing.

B. Proposed Amendments Under Consideration Following Publication and Public Comment

1. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed Amendment Regarding Sanction for Defense Failure To Disclose Information (Memo).

2. Rules 29, 33 and 34; Proposed Amendments Re Rulings By Court On Motions to Extend Time for Filing Motions Under Those Rules (Memo).

3. Rule 32, Sentencing; Proposed Amendment Re Allocution Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies (Memo).

4 Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed Amendments to Rule Concerning Defendant's Right of Allocution (Memo).

5. Rule 59; Proposed New Rule Concerning Rulings By Magistrate Judges (Memo).

C. Proposed Amendments to Rules Under Active Consideration; Carried Over from October 2003 Meeting.

1. Report of Subcommittee on Rules 3, 4, 5.1, 32.1, 40, 41 & 58. (Memo)

2. Rule 29; Proposed Amendment Regarding Appeal for Judgments of Acquittal (Memo).

D. Proposed Amendments to Criminal Rules to Implement E-Government Act (Memo).

E. Other Proposed Amendments to Rules.

1. Rule 11(c)(1); Proposed Amendment Regarding Provision Barring Court from Participating in Plea Agreements (Memo).

2. Rule 11 & Rule 16; Proposed Amendment Regarding Disclosure of *Brady* Information; Report of Subcommittee.

3. Rule 15; Discussion of Variance in Rule and Committee Note Regarding Payment of Costs (Memo).

4. Rule 16(a)(1)(B)(ii); Proposed Amendment Regarding Defendant's Oral Statements (Memo).

5. Rule 31; Proposal to Permit Less Than Unanimous Verdicts (Memo).

6. Rule 32; Proposed Amendment Regarding Requirement That Sentencing Judge Resolve Contested Information in Presentence Report (Memo).

III. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER ADVISORY COMMITTEES.

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure.

B. Other Matters

IV. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

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April 2004

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April 15, 2004
Projects

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April 15, 2004
Projects

[DRAFT] MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 15-16, 2003
Gleneden Beach, Oregon

The Advisory Committee on the Federal Rules of Criminal Procedure met at Gleneden Beach, Oregon on October 15 and 16, 2003. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Wednesday, October 15, 2003. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. James P. Jones
Hon. Anthony J. Battaglia
Hon. Reta M. Strubhar
Mr. Robert B. Fiske, Jr.
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Mr. Jonathan Wroblewski, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts; Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Ms. Laural Hooper of the Federal Judicial Center; Judge John Roll and Magistrate Judge Tommy Miller, former members of Committee; and Mr. George Leone, Chief, Appeals Division, United States Attorney's Office, D.N.J. Prof. Nancy J. King participated by telephone.

Judge Carnes recognized Judges John M. Roll and Tommy E. Miller and thanked them for their six years of dedicated service on the Committee. He also noted that Judge Tashima's term on the Standing Committee had ended in September 2003, and welcomed

Judge Kravitz, of the Standing Committee, as the new liaison member to the Criminal Rules Committee.

Judge Carnes also welcomed the two new members of the Committee: Judges James Jones and Anthony Battaglia.

II. APPROVAL OF MINUTES

Mr. Goldberg moved that the minutes of the Committee's meeting in Santa Barbara, California, in April 2003 be approved. The motion was seconded by Judge Bucklew and, following corrections to the Minutes, carried by a unanimous vote.

III. STATUS OF PROPOSED AMENDMENTS TO RULES

Judge Carnes, Professor Schlueter, and John Rabiej informed the Committee that the package of amendments submitted to the Standing Committee in June 2003 (Rules Governing § 2254 Proceedings, Rules Governing § 2255 Proceedings, and the Official Forms Accompanying those Rules, and Rule 35) had been approved by the Judicial Conference and would be transmitted to the Supreme Court in the next month or so. They pointed out that at the request of the Department of Justice, the Standing Committee had decided not to forward at this time the Committee's proposed amendments to Rule 41 (tracking device warrants, etc.), so that the Department could again review the need, scope, and purpose of the proposed amendments.

Mr. Rabiej stated that the amendments proposed for public comment (Rules 12.2, 29, 32, 32.1 33, 34, 45, and 59) had been published and that a hearing on those amendments had been set for January 23, 2004, in Atlanta, Georgia.

IV. PROPOSED AMENDMENTS TO RULES UNDER ACTIVE CONSIDERATION

A. Rule 29. Proposed Amendment Regarding Appeal of Judgments of Acquittal.

Judge Carnes noted that at the Committee's meeting in April 2003, the Department of Justice had asked the Committee to consider an amendment to Rule 29 that would require a judge to defer ruling on a motion for a judgment for acquittal until after the jury had returned a verdict. Following discussion at that meeting, the Committee had asked the Federal Judicial Center to conduct some additional research on the issue.

Mr. Wroblewski responded by stating that the Department had continued to address some of the questions raised at the Spring 2003 meeting. He continued by stating that the Department had been concerned about problems stemming from the inability to

appeal what it believed to be erroneous rulings on Rule 29 motions for a judgment of acquittal, and that about five years ago, it began to study the issue in more detail. He introduced Mr. George Leon, from the United States Attorney's office in New Jersey, who had conducted more extensive research on the point.

Mr. Leon provided an extensive background on Rule 29 and emphasized that it is the only rule that provides for a dispositive ruling that is not appealable, although the Supreme Court has indicated that a ruling may be appealable as long as it is consistent with the Double Jeopardy Clause. In contrast, he said, in the Civil Rules, all rulings are appealable. He recognized that in 1994 the Committee had amended Rule 29 to permit judges to defer ruling on the motion, but in those cases where the judge decided the motion before verdict, the Department was aware of cases where the judge had clearly abused his or her discretion in granting the motion. He cited several examples. He also noted that several appellate courts have encouraged trial judges to defer their rulings. Despite that, according to his statistics, approximately 71% of Rule 29 rulings are still made prior to the verdict. He recognized that the Department's data is largely anecdotal, but in post-verdict grants of the motion, there is reversal in approximately 50% of the cases. He continued by noting that it would thus be reasonable to conclude that a similar percentage of pre-verdict rulings would also be defective.

Mr. Leon highlighted what he thought were the advantages of the amendment. First, it would protect the government's right to appeal a district court's ruling on the motion. He cited the legislative history of the rule which showed an intent to remove all non-constitutional barriers to an appeal. The amendment would also promote accurate results, the very purpose of the criminal justice system. Second, he pointed out, the amendment would permit the appellate process to work. Third, it would avoid the necessity of a second trial, thus the government's and defendant's interests would be protected. Fourth, it would permit the jury to fulfill its function. Fifth, it would prevent the waste of time and resources. In short, he said, the benefits of the amendment would outweigh any disadvantages.

Ms. Laural Hooper, of the Federal Judicial Center, commented along the lines of the written report that she had provided to the Committee prior to the meeting, which included in part, a study of the rules and practices in the State courts.

Mr. Campbell observed that the central theme of the Department's proposal was the view that if a few judges are abusing their discretion, then all are abusing their discretion. He also emphasized that this was an important subject; even if the accused was not technically subjected to "double jeopardy," the defendant would be exposed to extended jeopardy. A defendant should not have to respond until the government has put on its case. The inability of the government to appeal some Rule 29 motions is not an anomaly, as suggested by the Department. He pointed out that all but three states use the procedure currently used in the Federal system and that there are other rulings that are practically dispositive, for example, rulings on arguments. In his view, the amendment would not fix the problems identified by the Department. If some judges have committed

acts amounting to misconduct, there are other avenues for dealing with those issues. He also pointed out that the biggest problems would arise in those cases involving multiple counts and multiple defendant cases and that it is important for the judge to be able to weed out weak allegations earlier, rather than later, in the case. Mr. Campbell pointed out that the premise supporting the amendment is that the system can trust the prosecutors, but not the judges.

Judge Bucklew questioned whether there were any statistics on those cases where some, but not all of the counts were dismissed. Mr. Rabiej responded that that data could probably be retrieved. Judge Bucklew observed that from a judge's standpoint, it is easier to grant the motion in a high-profile case at the end of the government's case, and before the jury retires to deliberate.

Mr. Fiske supported the proposed amendment and said that the statistical data supports the need for a change in the rule.

Judge Battaglia agreed with Mr. Campbell that the Rule was not an anomaly. Instead, the instances cited by the Department to support the amendment seemed to be an anomaly.

Judge Friedman stated that he agreed with Judge Bucklew that it is very difficult to grant a motion for a judgment of acquittal after the jury as returned a guilty verdict and that he does not have confidence in the statistics presented by the Department, considering the recent history of the Department presenting misleading statistics to Congress in support of the Feeney Amendment. Nonetheless, he could support some portions of the amendment, if certain revisions were adopted. For example, there must be an opportunity for a Rule 29 acquittal when the jury cannot reach a verdict. He also observed that recently he has perceived a lack of appropriate discretion and judgment in the prosecution of cases, and said that he has a conceptual problem with an amendment that would potentially limit the trial judge's role.

Judge Roll was skeptical about the amendment, but was impressed with the Department's statistics. He had continuing concerns about the problem of the case involving multiple counts, where it seems very clear that one or more of them should not be presented to the jury.

Professor King, participating by telephone, believed that the Rule did not need "fixing." In her view, the Department had not presented sufficient evidence to show that there was a problem that needed to be remedied. She also questioned a number of the statistical findings in the Department's memo. For example, the 50% reversal rate reflected only the number of cases handled by the appellate divisions. Second, she questioned whether the error rate would be the same for post-verdict rulings. She thought that the error rate might be higher in those cases going to verdict, because those would probably reflect cases involving "close calls." She expressed agreement with the

comments by Judges Bucklew, Friedman, and Roll and stated that in her view she did not believe that accuracy in results would be increased with the amendment.

Judge Kravitz expressed concern about the multi-count cases, especially where the judge believes that going to the jury with all of the counts may simply confuse the jury.

Judge Carnes recognized that there may be judges who clearly abuse their discretion in granting the motion, but it is not clear how many judges are actually involved. Mr. Leon noted that their records tended to show some repetition, perhaps 30 judges. In response, Judge Carnes wondered whether an amendment was required where it would only affect a small percentage of judges. He also expressed concern about the "big case" and the perception of the public and observed that there is a cost for government appeals of Rule 29 appeals—continued jeopardy for the defendant.

Judge Trager stated that on a philosophical level, the concept of double jeopardy is very different in some European countries where the criminal justice system is integrated. He said that the real problem seems to be that some judges are hostile to the prosecution and that the amendment would not solve the problem where the judge makes a "creative" evidentiary ruling that in effect ends the prosecution. Nonetheless, he strongly supported the amendment.

Judge Jones said that the amendment presented a close question but that he could be persuaded of the need for the amendment. He shared Judge Friedman's concern about the ability of the judge to grant a Rule 29 motion in those cases where the jury cannot reach a verdict. But, he also recognized the problems associated with multi-count cases.

Mr. Goldberg observed that the rules will never deter egregious behavior by judges and noted that the statistics show that less than one tenth of one percent of the cases are involved in this debate. He stated that he opposed the amendment, noting that the current practice works well in both the federal and state systems.

Judge Strubhar was concerned that the amendment would focus on only a few judges but that she was not opposed to publishing an amendment for public comment.

The Reporter noted that in 1994 the Committee had addressed the concerns raised by the Department and that at that time, the amendment, which gave the judge the discretion to defer the ruling, was viewed as a reasonable and balanced approach to the problem. He also pointed out that a good argument could be made that a rule should not be amended to affect only a few isolated cases.

Mr. Wroblewski responded to the observations of the Committee and pointed out that first, he believes that the current rule is still inconsistent with the spirit of the statutory view that the government should have a right to appeal. Second, it was not accurate to say that the amendment would remove the judge's discretion. The intent

behind the amendment, he said, is to have the jury hear the case. He recognized the problems of hung juries and multi-count cases, but was confident that those issues could be addressed in any amendment.

Mr. Leone noted that the proposed amendment was not an idea generated by the current administration and that the issue had been discussed within the Department for a number of years. He also stated that he believed the issues of hung juries and multi-count cases could be addressed although drafting suitable language to address multi-count cases might not be feasible. Mr. Leone added that there is no real constitutional impediment to the amendment and that the possibility of an appeal would keep trial judges from acting improperly. He also observed that it could be equally difficult for a judge to grant a pre-verdict motion in a high profile case and that the amendment is not just about a few number of judges, it is about obtaining accuracy in the outcome of a case.

Mr. Fiske urged the Committee not to let the experience of the Feeney Amendment to affect its decision to consider the amendment to Rule 29. In his view, the amendment would not dilute the judge's authority and the amendment would also address the problem of the well-intentioned judge who errs in ruling on the motion.

Judge Friedman again commented on the problem of the hung jury and that the problems associated with the jury's inability to reach a verdict did not fit into the model proposed by the Department.

Mr. Wroblewski moved that the Committee approve in concept the proposed amendment. Judge Trager seconded the motion, which carried by a vote of 7 to 4. Judge Carnes asked Mr. Wroblewski to work on the amendment and attempt to address the concerns raised in the discussion, in particular the multi-count case and cases involving hung juries.

B. Rule 32.1. Revoking Or Modifying Probation Or Supervised Release; Proposed Amendment To Remove Requirement For Production Of Certified Copies Of Judgment.

The Reporter noted that at its April 2003 meeting, the Committee had discussed a proposal from Magistrate Judge Sanderson, who had recommended that Rule 32.1 be amended to remove the requirement that the government provide certified copies of the judgment. At that meeting, he continued, Judge Miller had agreed to poll other magistrate judges to determine if there were other similar problems that needed to be addressed. Judge Miller reported that he had done so and that he had discovered other similar issues that probably deserved attention. For example, he noted, facsimile copies of documents were being used, not only for search warrants under Rule 41, but also for *Gerstein v. Pugh* probable cause decisions under Rules 3 and 4, and bail-jumping proceedings under Rule 40. Judge Battaglia informed the Committee that on a typical weekend, a magistrate judge in his district (San Diego, California) might consider 30 to 35 *Gerstein* facsimile proffers from law enforcement personnel.

Following additional discussion, Judge Carnes asked Judge Battaglia, Mr. Campbell, and Mr. Wroblewski to study the issue further, poll magistrate judges, if necessary, and prepare some draft language for the Committee to consider at its Spring 2004 meeting.

C. Rule 41. Amendment Regarding Tracking Device Warrants and Delayed Notification

1. Tracking-Device Warrants.

Judge Carnes provided some additional background information on the status of the proposed amendments to Rule 41 (noted above). At the Spring 2003 meeting the Committee had considered the public comments submitted on the proposed amendments to Rule 41 that would have addressed procedures to be used in issuing tracking-device warrants. The Committee had made several minor changes to the proposed language and had voted to send the amendment to the Standing Committee, with a recommendation to approve it and forward it to the Judicial Conference. At the Standing Committee meeting the Committee initially voted to approve the amendment. But after the meeting, the Deputy Attorney General, who had abstained on the vote, requested that the Standing Committee defer forwarding the amendment until the Department had had a chance to review the matter and present its concerns to the Committee. That request was granted. Judge Carnes continued by noting that from a jurisdictional viewpoint, the proposed amendment was still before the Standing Committee for its consideration and that the Criminal Rules Committee had not been asked to formally reconsider its proposal. Judge Kravitz agreed with that assessment.

Judge Miller expressed concern that the Department of Justice, which had originally proposed the amendments, had later requested the Standing Committee not to forward the amendment to the Judicial Conference. Mr. Wroblewski responded that subsequent to the Committee's approval of the amendments at the Spring 2003 meeting, the Deputy Attorney General had raised some significant concerns that the amendment might require a finding of probable cause before issuing a tracking-device warrant. Mr. Wroblewski indicated that various entities in the Department were being polled for additional information on the need for an amendment to Rule 41 and expressed hope that the matter would be soon resolved. Professor King pointed out that in response to the Department's earlier concerns about the probable cause requirement, the Committee had redrafted a portion of the Committee Note to make it clear that the amendment did not address the issue of whether probable cause was required, thus leaving that particular issue for the case law.

Mr. Rabiej added that apart from the proposed amendments to Rule 41, Congress was considering a possible change to the notice provision in 18 U.S.C. § 3103a(b). He said that he would continue to monitor those possible changes.

2. Proposed Amendment to Address Warrants for Electronic Files

The Reporter presented a proposal from Magistrate Judge B. Janice Ellington to amend Rule 41 to address explicitly the validity of issuing search warrants for out-of-state electronic files. In her proposal she noted that there seems to be a conflict between 18 U.S.C. § 2703(a), which requires a search warrant for certain electronic files, and Rule 41(b), which permits out-of-district search warrants only in terrorism cases. The Reporter pointed out that at its April 2002 meeting, the Committee had discussed the question of whether Rule 41 should be amended to incorporate some of the provisions in the USA Patriot Act, and in particular the question of whether the rule should contain guidance on search warrants for electronic files. Finally, he pointed out that upon recommendation of the Rule 41 subcommittee chaired by Judge Miller, the Committee decided not to include that provision. Judge Miller added that nothing since that meeting indicated a need to amend Rule 41 and that the language of § 2703 permitted such search warrants, although Rule 41 was silent. He also noted that that provision had a sunset provision.

Following additional discussion, Mr. Fiske moved that Rule 41 not be amended as requested. Judge Trager seconded the motion, which carried by a unanimous vote.

3. Rule 24(b). Discussion Regarding Number of Peremptory Challenges in Capital Case.

The Reporter informed the Committee that Judge Ellis, a member of the Appellate Rules Committee, had sent an inquiry to Mr. Rabiej concerning the language in restyled Rule 24(b). He had concluded that the amended Rule contained a substantive change that had not been identified as such in the accompanying Committee Note; he pointed out that the former rule provided that each side had 20 peremptory challenges "if the offense charged is punishable by death..." While the caption of the restyled rule refers to "Capital case," the text provides 20 peremptory challenges to the government when the death penalty actually is being sought.

During the discussion which followed, the members were of the view that the new language probably accurately reflected the case law and the amended rule did not reflect a substantive change in practice.

Judge Friedman moved that no action be taken on the matter. Mr. Fiske seconded the motion, which carried by a unanimous vote.

V. OTHER PROPOSED AMENDMENTS TO THE RULES — PENDING AND DEFERRED AS LISTED ON CRIMINAL RULES DOCKET

The Reporter stated that according to the Criminal Rules Docket, maintained by the Rules Committee Support Office, a significant number of proposed amendments to the Criminal Rules were listed either as pending or deferred, or as having been referred to the Chair and Reporter for possible action. He recommended that the Committee discuss the list with a view to disposing of those proposals.

A. Rule 4. Proposed Amendment From Magistrate Judge B. Zimmerman re Clarification of Ability of Judges to Issue Warrants via Facsimile Transmission

The Reporter stated that during the comment period on the restyled Criminal Rules, Judge Zimmerman had recommended that Rule 4 be amended to permit judges to issue warrants by facsimile. There was no record that that particular proposal had been voted on by the Committee. He pointed out that the issue had been raised in 1991, when a Subcommittee had considered, and rejected a similar proposal. Several members of the Committee believed that the issue was worthy of further consideration, given the recent interest in using electronic filings and communications throughout the judicial and law enforcement systems. Following additional discussion, Judge Carnes asked a subcommittee, consisting of Judge Battaglia (chair), Mr. Campbell, and Mr. Wroblewski to study the proposal in the context of other proposals concerning use of facsimile transmissions in connection with not only Rule 4, but with other rules as well.

B. Rule 6. Proposed Amendment from ABA to Permit Counsel to Accompany Witness to Grand Jury

The Reporter indicated that a proposed amendment to Rule 6 from the American Bar Association had been referred to the Chair and Reporter during the comment period on the restyling project. The amendment would permit counsel to accompany a witness to the grand jury proceeding. He noted that the issue had been discussed by the Committee on prior occasions but that this particular proposal was listed as pending.

Mr. Goldberg moved that the proposal be given further consideration. Mr. Campbell seconded the motion, which failed by a vote of 2 to 9. The Reporter indicated that the docket sheet would be changed to reflect that the proposal is "completed."

C. Rule 7(b). Proposed Amendment re Effect of Tardy Indictment, Proposed by Congressional Constituent

The Reporter informed the Committee that he and Judge Carnes had received a communication from a constituent for Congressman Jim Gibbons, in which the constituent raised concerns about the interplay between the statute of limitations and Rule 7. The communication did not contain any proposed changes to that Rule. Following a

brief discussion, Judge Carnes stated that it was clear that there was a consensus not to continue any consideration of the issue.

D. Rule 10. Proposal by Magistrate Judge W. Crigler re Guilty Plea at Arraignment

At its Fall 1994 meeting, the Reporter said, the Committee had briefly considered a proposal from Magistrate Judge Crigler (then a member of the Committee) regarding the ability of a magistrate judge to take guilty pleas at arraignments. Although there was apparently an agreement to place the item on a future agenda, it was not directly addressed as an agenda item at any later meeting. Several members pointed out, however, that the issue had been discussed, at least indirectly, in the context of other proposed amendments, including the pending addition of proposed new rule 59. Following brief discussion, Judge Bucklew moved that the proposal be removed from the docket. Judge Battaglia seconded the motion, which carried by a unanimous vote.

E. Rule 11. Proposal by Mr. Richard Douglas, Senate Foreign Relations Committee re Advising Defendant of Collateral Consequences (Immigration) of Guilty Plea

The Reporter indicated that in 2001, Mr. Richard Douglas, a staff member of the Senate Foreign Relations Committee, recommended that the Committee consider an amendment to Rule 11 that would require the judge to inform the defendant that a guilty plea might affect the defendant's immigration status. The Reporter stated that although his specific proposal had not been considered, the issue had been raised on prior occasions, and rejected, as recently as the April 2003 meeting. Judge Friedman spoke on behalf of the proposal and suggested that the Committee reconsider its opposition to the amendment. Following brief discussion, Judge Carnes concluded that a clear consensus had formed to reject the proposal and to change the docket sheet to reflect the fact that the issue had been "completed."

F. Rule 11. Proposal by Judge David Dowd re Determining Whether Plea Agreement was Communicated to Defendant

In 2002, the Reporter stated, Judge Dowd, a former member of the Committee, had written to Mr. Rabiej suggesting that Rule 11 be amended to require that the judge inquire as to whether the prosecution has made a plea offer and whether that offer was ever communicated to the defendant. The matter had been referred to the Chair and the Reporter but had not been discussed at any prior meetings. Mr. Campbell stated that he did not believe that this issue needed to be addressed in a rule; other members noted that similar problems might exist and that it would be difficult to cover all possible contingencies in the rule. Following additional discussion, Judge Carnes stated that there was a consensus to list the proposal as having been "completed," on the docket sheet.

G. Rule 16. Proposal from Judge W. Wilson re Disclosure of Government Witnesses to Defense

Judge Wilson, a former member of the Standing Committee, had written to Judge Davis, the former chair of the Committee, in 1999 asking the Committee to once again address the issue of government disclosure of the names of its witnesses to the defense. The Reporter provided a brief overview of a similar amendment which had been proposed by the Criminal Rules Committee, published for comment, and approved by the Standing Committee. Judge Wilson had been one of the chief supporters of that proposal. The amendment did not receive the support of the Judicial Conference and the issue had not been revisited since then. Judge Friedman noted that there was some merit to the idea and recommended that the Committee consider the issue again. That proposal failed by a vote of 3 to 8.

H. Rule 23. Proposal from Mr. Jeremy Bell re Issue of Whether Jury Trial is Authorized

The Reporter explained that in 2000, during the comment period of the restyling project, one of Judge Miller's students at William and Mary School of Law had proposed an amendment to Rule 23 that would specifically indicate when a defendant was entitled to a jury trial. He added that the item was being carried on the docket as pending further action. Following a brief discussion, Judge Friedman moved that the proposal be rejected. The motion was seconded by Mr. Goldberg and carried by a unanimous vote.

I. Rule 32(c)(5). Proposal from Mr. Gino Agnello, Clerk of 7th Circuit re Whether Clerk is Required to File Notice of Appeal

The Reporter stated that in 2000, Judge Davis (former Chair of the Committee) received a letter from the Clerk of the Seventh Circuit Court of Appeals requesting that the Committee consider a possible amendment to Rule 32 should address the possibility that the clerk of the court would fail to file a notice of appeal, when requested to do so by the defendant. The court, in *United States v. Hirsch*, had addressed the problem in a case where the defense counsel and defendant were under the mistaken impression that the clerk had complied with the defendant's request that a notice of appeal be filed. By the time the error was discovered, all of the permissible time limits for perfecting an appeal had expired; the only real remedy at that point, according to the court, was for the defendant to file a § 2255 motion. Mr. Wroblewski said that he had contacted various United States Attorneys and had concluded that this issue was not a problem requiring an amendment to the rules. Other members noted that the same issue could arise in any rule provision that required a party or court to take a particular action, and no action is taken. Judge Carnes noted that a clear consensus had formed to not address the issue in an amendment and asked that the Administrative Office relay that information to the Appellate Rules Committee.

J. Rule 32.1. Decision in October 1997 to Monitor Legislation re Victims' Rights.

The Reporter explained that in 1997, Congress had considered legislation concerning victim allocution and that in response to that development, Judge Davis had appointed a subcommittee to consider whether Rules 11, 32, and 32.1 should be amended to provide for victim allocution and to monitor pending legislation. At some point, not reflected in the Committee's records, the subcommittee was discontinued. Although the Committee has subsequently considered amendments to Rule 32 concerning victim allocution (including a pending amendment) no additional action had been taken with regard to Rules 11 and 32.1. The Criminal Rules docket indicates that the matter is still pending and the Reporter recommended that the issue be treated as "completed." Mr. Wroblewski stated that the Department was not opposed to that action but that there are other pending victim allocution issues that may require the Committee's attention in the future. Judge Trager moved that the item be listed as completed. Mr. Goldberg seconded the motion, which carried by a unanimous vote.

K. Rule 35. Proposal from ABA to Permit Defendant to Move for Reduction of Sentence

In 2001, as part of the public comment period on the restyled Rules of Criminal Procedure, the American Bar Association had recommended that Rule 35 be amended to permit the defendant to move for sentence reduction. The matter had not been specifically addressed since that time, although the proposal appears on the docket as pending. The Reporter indicated that the issue has been raised from time to time, without any formal vote. Following additional discussion, Judge Carnes provided the Committee with an opportunity to move to propose the amendment. When no motion was forthcoming, he stated that the proposal had been considered rejected, for lack of a motion and that the docket should be amended to reflect that the proposal had been "completed."

L. Rule 40. Proposal from Magistrate Judge Collings to Authorize Magistrate Judge to Set New Conditions on Release

The Reporter stated that in January 2003 Magistrate Judge Collings had written to the Committee recommending that Rule 40 be amended to address the authority of a magistrate judge to issue conditions of release if a defendant is arrested for some offense other than failing to appear. In his view, the proposed change would grant magistrate judges the same powers they now have in cases involving arrests for failure to comply with other conditions of release set in another district. Several members expressed the view that the proposal had merit. Judge Carnes asked the subcommittee, consisting of Judge Battaglia, Mr. Campbell, and Mr. Wroblewski, to study the problem and report to the Committee at its April 2004 meeting.

M. Rule 41. Proposal from Judge David Dowd re Recording of Oral Search Warrant

The Reporter stated that in 1998 Judge Dowd, a former member of the Committee, had recommended an amendment to Rule 41 that would require the court to prepare a written transcript of sworn testimony presented to the magistrate judge in requesting a search warrant. The matter had been discussed at the April 1998 meeting during which the Committee decided "not to take any action to amend Rule 41 at this time." Consequently, the proposal continued to be carried as "deferred indefinitely." He recommended that the Committee direct that the proposal be shown as being "completed" on the docket with no expectation that the Committee will need to address it any further. Following brief discussion, the Committee concurred in that proposal.

N. Rule 57. Proposal from Standing Committee (12/97) re Uniform Effective Date for Local Rules.

Finally, the Reporter stated that in June 1997, members of the Standing Committee had recommended that the Advisory Committees consider adoption of a uniform effective date for any amendments to local rules. He added, however, that the docket continued to carry the item as "pending" although he could not recall that the Committee had ever fully discussed the matter or voted on it. Mr. Rabiej stated that the matter was in effect "completed" because other developments in the area of local rules had disposed of the matter. Thus, the docket will be changed to reflect that fact.

VII. REPORT OF THE ADMINISTRATIVE OFFICE ON MATTERS PENDING BEFORE CONGRESS

Mr. Rabiej reported briefly on several matters pending before Congress, including a status report on the continuing attempts to amend Rule 46. He also noted that Congress was considering an amendment to Rule 32.2 to correct a problem in those cases where the forfeiture order is not included in the judgment.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting in April or May 2004. Judge Carnes asked Mr. Rabiej to circulate a list of possible dates to the Committee and asked members to indicate if they could not attending any of those dates.

The meeting adjourned at 11:45 a.m. on Thursday, October 16, 2003

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee

Preliminary Draft of

Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure

Request For Comment

ALL WRITTEN COMMENTS DUE BY

February 16, 2004

COMMENTS ARE SOUGHT ON AMENDMENTS TO:

Appellate Rules	4, 26, 27, 28, 32, 34, 35, 45, and new Rules 28.1 and 32.1
Bankruptcy Rules	1007, 3004, 3005, 4008, 7004, and 9006
Civil Rules	6, 24, 27, 45, and new Rule 5.1
Admiralty Rules	B and C
Criminal Rules	12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59

PUBLIC HEARINGS WILL BE HELD ON THE AMENDMENTS TO:

Appellate Rules in Los Angeles, California, on January 20, 2004, and in Washington, D.C., on January 26, 2004; Bankruptcy Rules in Washington, D.C., on January 30, 2004; Civil Rules in Houston, Texas, on January 9, 2004; and Criminal Rules in Atlanta, Georgia, on January 23, 2004.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

August 2003

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

August 15, 2003

TO THE BENCH, BAR, AND PUBLIC:

Proposed Rules and Official Forms Amendments

The Judicial Conference Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal Rules have proposed amendments to federal rules and forms and requested that the proposals be circulated to the bench, bar, and public for comment. The proposed amendments are posted on the Internet at <http://www.uscourts.gov/rules>.

Opportunity for Public Comment

Please provide any comments and suggestions on the proposed amendments whether favorable, adverse, or otherwise as soon as possible. **The comment deadline is February 16, 2004**. Please send all correspondence to: Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. Comments may also be sent electronically via the Internet to http://www.uscourts.gov/rules.

The Advisory Committees will hold public hearings on the proposed amendments to the rules and forms on the following dates:

January 9, 2004	Houston, Texas	Civil Rules
January 20, 2004	Los Angeles, California	Appellate Rules
January 23, 2004	Atlanta, Georgia	Criminal Rules
January 26, 2004	Washington, D.C.	Appellate Rules
January 30, 2004	Washington, D.C.	Bankruptcy Rules

If you wish to testify you must contact the Committee Secretary at the above address **at least 30 days before the hearing**. The Advisory Committees will review all timely comments. All comments are made part of the official record and are available to the public.

After the public comment period, the Advisory Committees will decide whether to submit the proposed amendments to the Standing Committee on Rules of Practice and Procedure. At present, the Standing Committee has not approved these proposed amendments, except to authorize their publication for comment. The proposed amendments have not been submitted to nor considered by the Judicial Conference or the Supreme Court.

Anthony J. Scirica
Chair

Peter G. McCabe
Secretary

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: **Hon. Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Ed Carnes, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 15, 2003**

I. Introduction.

The Advisory Committee on the Rules of Criminal Procedure met on April 28-29, 2003, in Santa Barbara, California and took action on proposed amendments to the Rules of Criminal Procedure.

* * * * *

II. Action Items—Summary and Recommendations.

* * * * *

Second, the Committee has considered and recommended amendments to the following Rules:

- Rule 12.2. Notice of Insanity Defense; Mental Examination; Sanction for Failing to Disclose.
- Rules 29, 33, 34 & 45. Regarding Ruling by Judge on Motions to Extend Time for Filing Motions Under Those Rules.
- Rule 32. Sentencing; Regarding Victim Allocution.
- Rule 32.1. Revoking or Modifying Probation or Supervised Release; Regarding Allocution by Defendant.
- New Rule 59. Review of Rulings by Magistrate Judges.

The Committee recommends that those rules be published for public comment.

* * * * *

IV. Action Items—Recommendation to Publish Amendments to Rules.

A. ACTION ITEM—Rule 12.2. Notice of Insanity Defense; Mental Examination and Sanctions for Failure to Disclose.

For the last year the Committee has considered a proposal to amend Rule 12.2 to fill a perceived gap. Although the rule

contains a sanctions provision for failing to comply with the requirements of the rule, there is no provision stating possible sanctions if the defendant does not comply with Rule 12.2(c)(3), which requires the defendant to disclose to the government the results and reports of the defendant's expert examination.

The Committee has unanimously proposed an amendment to Rule 12.2(d) to address that issue and requests that the rule be published for public comment.

* * * * *

B. ACTION ITEM—Rules 29, 33, 34, and 45; Proposed Amendments re Rulings by Court and Setting Times for Filing Motions.

In Rules 29, 33, and 34 the court is required to rule on any motion for an extension of time, within the seven-day period specified for filing the underlying motion. Failure to do so deprives the court of the jurisdiction to consider an underlying motion, filed after the seven-day period. *See United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict"). Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not act on the request within the seven days, the court lacks jurisdiction to act on the underlying substantive motion.

Parallel amendments have been proposed for Rules 29, 33, and 34 and a conforming change has been proposed for Rule 45. The defendant would still be required to file motions under those rules within the specified seven-day period unless the time is extended. And the defendant would still be required to file within that seven-day period any request for extension. The change is that the court would not be required to act on that motion within the same seven-day period on the request for the extension.

The Rule and Committee Note . . . was approved by an 8 to 2 vote of the Committee . . ..

C. ACTION ITEM—Rule 32, Sentencing; Proposed Amendment re Allocution Rights of Victims of Non-violent and Non-sexual Abuse Felonies.

Currently, Rule 32(i)(4) provides for allocution at sentencing by victims of violent crimes and sexual abuse. Although there is no provision in the current rule for victim allocution for other felonies, the Committee understands that many courts nonetheless consider statements from victims of felonies that do not involve violence or sexual abuse.

At its September 2002 meeting, the Committee decided to amend Rule 32 to provide for allocution for victims of non-violent and non-sexual abuse felonies. At its April 2003 meeting, the Committee continued its discussion of the proposed amendment and voted by a margin of 7 to 2, with one abstention, to recommend that the proposed amendment be published for comment.

The Committee considered but rejected a provision that would provide that a court's decision regarding allocution in this type of case would not be reviewable. In rejecting that provision, the Committee considered the fact that there is already some authority for the view that victims do not have standing to appeal a court's decision denying them the ability to address the court.

The proposed amendment does not make any specific provision for hearing from representatives of victims of non-violent or non-sexual abuse felonies, because the Committee believes that the policy reasons for permitting statements by third persons are not as compelling in cases involving "economic" crimes. In any event, the rule does not prohibit the court from considering statements from third persons, speaking on behalf of victims.

* * * * *

D. ACTION ITEM—Rule 32.1. Revoking Or Modifying Probation Or Supervised Release. Proposed Amendments To Rule Concerning Defendant's Right Of Allocution.

In *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), the court observed that there is no explicit provision in Rule 32.1 giving the defendant a right to allocution; it suggested that the Advisory Committee might wish to address that matter. At the Committee's April 2002 meeting, it voted to amend Rule 32.1 to address allocution rights at revocation hearings; at its September 2002 meeting, the Committee decided to consider a further amendment to the rule that would include a similar allocution provision in proceedings to modify a sentence.

The Committee unanimously approved the proposed amendment to Rule 32.1 and recommends that the Standing Committee approve the amendments for publication.

* * * * *

E. ACTION ITEM—Rule 59; Proposed New Rule Concerning Rulings by a Magistrate Judge

In response to a decision by the Ninth Circuit in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001), the Committee has considered an amendment to the Rules of Criminal Procedure that would parallel Federal Rule of Civil Procedure 72, which addresses procedures for appealing decisions by magistrate judges.

At its April 2002 meeting, the Committee voted to consider the issue further and at its September 2002 meeting the Committee adopted a draft rule that would have included not only procedures for appealing a magistrate judge's decision but would also have addressed the ability of a magistrate judge to take a guilty plea. That provision was dropped, however, due to two developments. First, the Magistrate Judges' Committee was opposed to any reference in the rule to taking guilty pleas. And second, the Ninth Circuit had granted *en banc* review in *United States v. Reyna-Tapia*, 294 F.3d 1192 (9th Cir.), *vacated by* 315 F.3d 1107 (9th Cir. 2002), the case that had provided the impetus for including reference to guilty pleas in the proposed rule. [Following the meeting, the Committee learned the court had decided that a magistrate judge could hear Rule 11 plea colloquies, for findings and recommendations and that the district court was not required to conduct a de novo review unless one of the parties objected.]

The current draft, approved by a vote of 8 to 1 would be new Rule 59 and it would address only the issue of appealing a magistrate judge's orders, both for dispositive and nondispositive matters.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12.2. Notice of an Insanity Defense; Mental Examination

* * * * *

(d) Failure to Comply.

(1) ***Failure to Give Notice or to Submit to Examination.*** ~~If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the~~ The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case~~.~~ if the defendant fails to:

(A) give notice under Rule 12.2(b); or

*New material is underlined; matter to be omitted is lined through.

(B) submit to an examination when ordered under Rule 12.2(c).

(2) ***Failure to Disclose.*** The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

* * * * *

COMMITTEE NOTE

The amendment to Rule 12.2(d) fills a gap created in the 2002 amendments to the rule. The substantively amended rule that took effect December 1, 2002, permits a sanction of exclusion of "any expert evidence" for failure to give notice or failure to submit to an examination, but provides no sanction for failure to disclose reports. The proposed amendment is designed to address that specific issue.

Rule 12.2(d)(1) is a slightly restructured version of current Rule 12.2(d). Rule 12.2(d)(2) is new and permits the court to exclude any expert evidence for failure to comply with the disclosure requirement in Rule 12.2(c)(3). The sanction is intended to apply only to the evidence related to the matters addressed in the report that the defense failed to disclose. Unlike the broader sanction for the two violations listed in Rule 12.2(d)(1)—which can substantially affect the entire hearing—the Committee believed that it would be overbroad to expressly authorize exclusion of "any" expert evidence, even evidence unrelated to the

results and reports that were not disclosed as required in Rule 12.2(c)(3).

As with sanctions for violating other parts of the rule, the amendment entrusts to the court the discretion to fashion an appropriate sanction proportional to the failure to disclose the results and reports of the defendant's expert examination. *See Taylor v. Illinois*, 484 U.S. 400, 414 n. 19 (1988) (court should consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful"), citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983).

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later~~, or within any other time the court sets during the 7-day period.~~

* * * * *

COMMITTEE NOTE

Rule 29(c) has been amended to remove the requirement that the court must act within seven days after a guilty verdict or after the court discharges the jury, if it sets another time for filing a motion for a judgment of acquittal. This amendment parallels similar changes to Rules 33 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 29(c) requires the defendant to move for a judgment of acquittal within seven days of the guilty verdict, or after the court discharges the jury, whichever occurs later, or some other time set by the court in an order issued within that same seven-day period. Similar provisions exist in Rules 33 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to

act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a judgment of acquittal under Rule 29 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 32. Sentencing and Judgment

* * * * *

(i) Sentencing.

* * * * *

(4) Opportunity to Speak.

* * * * *

(B) *By a Victim <u>of a Crime of Violence or Sexual Abuse</u>*. Before imposing sentence, the court must address any victim of a

crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) *By a Victim of a Felony Offense.* Before imposing sentence, the court must address any victim of a felony offense, not involving violence or sexual abuse, who is

present at sentencing and must permit the victim to speak or submit any information about the sentence. If the felony offense involved multiple victims, the court may limit the number of victims who will address the court.

~~(C)~~(D) *In Camera Proceedings.* Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

* * * * *

COMMITTEE NOTE

In a series of amendments, Rule 32 has been modified to provide allocution for victims of violent crimes, and more recently for victims of sexual offenses. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222, 108 Stat. 1796 (amending Rule 32 to provide for victim allocution in crimes of violence). In 2002, Rule 32 was amended to extend the right of victim allocution to victims of sexual abuse. *See* Rule 32(a)(1)(B). The amendment to Rule 32(i)(4) expands the right of victim-allocution to all felony cases.

The role of victim allocution has become part of the accepted landscape in federal sentencing. *See generally* J. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001). And although the actual practice varies, some courts currently permit statements from victims of crimes that do not involve violence or sexual abuse. Typical examples include statements from victims of fraud and other economic crimes. Victims of non-violent felonies may have pertinent information that could affect application of a particular sentencing guideline. At the same time, however, there are potential problems with victim allocution, particularly in cases involving a large number of victims. *See* Barnard, *supra*, at 65-78 (noting arguments against victim allocution).

Rule 32(i)(4)(C) is a new provision that extends the right of allocution to victims of felonies that do not involve either sexual abuse or violence. The amendment attempts to strike a reasonable balance between the interest of victims in being heard and the ability of the court to efficiently move its sentencing docket. Although the rule requires the court to hear from victims if any are present and wish to speak, it gives the court some discretion about the manner in which victims are to be heard. In a particular case, the court may permit, or require some or all of the victims to present their information in the form of written statements. The rule explicitly states that if there are multiple victims, the court may properly limit the number of persons who will be permitted to address the court during sentencing.

The amendment does not include any provision requiring a court to permit a representative to speak on behalf of a victim, as the court must do for victims of sexual abuse or violence. The Committee believed that the policy reasons for permitting a victim to speak through a representative in a case involving sexual abuse or violence do not exist in most other types of cases. Nonetheless,

there is nothing in the rule that would prohibit the court from permitting a third person to represent the views of one or more victims of a felony not involving violence or sexual assault.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

* * * * *

(b) Revocation.

* * * * *

(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; ~~and~~

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel~~.~~ ; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) Modification.

(1) In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel~~.~~ and an opportunity to make a statement and present any information in mitigation.

* * * * *

COMMITTEE NOTE

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a person upon resentencing. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in Rule 32 was not incorporated into Rule 32.1. *See United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be "better practice" for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." *Id.*

The amended rule recognizes the importance of allocution and now explicitly recognizes that right at revocation hearings, Rule 32.1(b)(2), and extends it as well to modification hearings where the court may decide to modify the terms or conditions of the defendant's probation, Rule 32.1(c)(1). In each instance the court is required to give the defendant the opportunity to make a statement and present any mitigating information.

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty. ~~, or within such further time as the court sets during the 7-day period.~~

COMMITTEE NOTE

Rule 33(b)(2) has been amended to remove the requirement that the court must act within seven days after a verdict or finding of guilty if it sets another time for filing a motion for a new trial. This amendment parallels similar changes to Rules 29 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 33(b)(2) requires the defendant to move for a new trial within seven days after the verdict or the finding of guilty verdict, or within some other time set by the court in an order issued during that same seven-day period. Similar provisions exist in Rules 29 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an

extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a new trial under Rule 33(b)(2) within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the

court determines that the failure to file it on time was the result of excusable neglect.

Rule 34. Arresting Judgment

* * * * *

(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere. ~~, or within such further time as the court sets during the 7 day period.~~

COMMITTEE NOTE

Rule 34(b) has been amended to remove the requirement that the court must act within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere if it sets another time for filing a motion to arrest a judgment. The amendment parallels similar amendments to Rules 29 and 33. Further, a conforming amendment has been made to Rule 45(b).

Currently, Rule 34(b) requires the defendant to move to arrest judgment acquittal within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within some other time set by the court in an order issued by the court within that same seven-day period. Similar provisions exist in Rules 29 and 33. Courts have held that the

seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, the court loses jurisdiction to act on the underlying substantive motion, if it is not filed within the seven days. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion to arrest judgment under Rule 34 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(b), if for some reason the defendant fails to file the underlying motion within the specified time, the court may

nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 45. Computing and Extending Time

* * * * *

(b) Extending Time.

(1) In General. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) Exception. The court may not extend the time to take any action under Rule ~~Rules 29, 33, 34, and~~ 35, except as stated in ~~those rules~~ that rule.

* * * * *

COMMITTEE NOTE

Rule 45(b) has been amended to conform to amendments to Rules 29, 33, and 34, which have been amended to remove the requirement that the court must act within the seven-day period specified in each of those rules if it sets another time for filing a motion under those rules.

Currently, Rules 29(c)(1), 33(b)(1), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Rule 45(b)(2) currently specifies that a court may not extend the time for taking action under Rules 29, 33, or 34, except as provided in those rules.

Assuming that the current provisions in Rules 29, 33, and 34 were intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of

time, under those rules, as long as it does so within the seven-day period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

The defendant is still required to file motions under Rules 29, 33, and 34 within the seven-day period specified in those rules. The defendant, however, may consistently with Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 59. Matters Before a Magistrate Judge

(a) *Nondispositive Matters*. A district judge may refer to a magistrate judge for determination any matter that does not dispose of the case. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may

serve and file any objections to the order within 10 days after being served with a copy of a written order or after the oral order is made on the record, or at some other time the court sets. The district judge must consider any timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law. Failure to object in accordance with this rule waives a party's right to review.

(b) ***Dispositive Matters.***

(1) Referral to magistrate judge. A district judge may refer to a magistrate judge for recommendation any matter that may dispose of the case including a defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence. The magistrate judge must promptly conduct the required proceedings. A record must be made of any

evidentiary proceeding before the magistrate judge and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately serve copies on all parties.

(2) Objections to findings and recommendations. Within 10 days after being served with a copy of the recommended disposition, or such other period as fixed by the court, a party may serve and file any specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the party objecting to the recommendation must promptly arrange for transcribing the record, or whatever

portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

(3) De novo review of recommendations. The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or may resubmit the matter to the magistrate judge with instructions.

COMMITTEE NOTE

Rule 59 is a new rule that creates a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges. The rule is derived in part from Federal Rule of Civil Procedure 72.

The Committee's consideration of a new rule on the subject of review of magistrate judges' decisions resulted from *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). In that case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to

district judges as a requirement for review by a court of appeals. The court suggested that Federal Rule of Civil Procedure 72 could serve as a suitable model for a criminal rule.

New Rule 59(a) sets out procedures to be used in reviewing nondispositive matters, that is, those matters that do not dispose of the case. The rule requires that if the district judge has referred a matter to a magistrate judge, that the magistrate judge must issue an oral or written order on the record. To preserve the issue for further review, a party must object to that order within 10 days after being served with a copy of the order or after the oral order is made on the record or at some other time set by the court. If an objection is made, the district court is required to consider the objection. If the court determines that the magistrate judge's order, or a portion of the order, is clearly erroneous or contrary to law, the court must set aside the order, or the affected part of the order. *See also* 28 U.S.C. § 636(b)(1)(A).

Rule 59(b) provides for assignment and review of recommendations made by magistrate judges on dispositive matters, including motions to suppress or quash an indictment or information. The rule directs the magistrate judge to consider the matter promptly, hold any necessary evidentiary hearings, and enter his or her recommendation on the record. After being served with a copy of the magistrate judge's recommendation, under Rule 59(b)(2), the parties have a period of 10 days to file any objections. If any objections are filed, the district court must consider the matter de novo and accept, reject, or modify the recommendation, or return the matter to the magistrate judge for further consideration.

Both Rule 59(a) and (b) contain a provision that explicitly states that failure to file an objection in accordance with the rule amounts to a waiver of the issue. This waiver provision is

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Public Comments on Proposed Amendment to Rule 12.2(d)

DATE: April 6, 2004

The proposed amendment to Rule 12.2(d) is intended to fill a gap created in the 2002 amendments to the rule; the current rule contains no sanction provisions if the defendant fails to disclose any expert reports, as required under Rule 12.2(c)(3). A copy of the published rule is attached.

The amendment was approved for publication by the Standing Committee in June 2003 and the comment period ended on February 15, 2004.

The Committee has received four comments on the proposed amendment.

First, Mr. Jack Horsley generally supports the proposed amendments to all of the rules, without any specific reference to Rule 12.2.

Second, the Magistrate Judges Association supports the amendment and notes that the change "appropriately entrusts to the court to fashion an appropriate sanction."

Third, the Federal Bar Association believes that the proposed amendment goes to far, from a practical perspective. The Association notes that if defense counsel does not provide notice and the evidence is excluded, an appeal will follow on grounds of ineffective assistance of counsel. Instead of this amendment, the Association suggests that the government be given "ample opportunity" to test the defendant and prepare a rebuttal.

Finally, the Style Subcommittee has offered comments on rule.

This rule is on the agenda for the May 2004 meeting.

Kimble's + Style Sdc. Comments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12.2. Notice of Insanity Defense; Mental Examination

* * * * *

(d) Failure to Comply.

(1) ***Failure to Give Notice or to Submit to Examination.*** ~~If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the~~ The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case if the defendant fails to:

(A) give notice under Rule 12.2(b); or

*New material is underlined; matter to be omitted is lined through.

I think the two items worked better at the beginning. But now it has been published,

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12.2. Notice of an Insanity Defense; Mental Examination

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(A) give notice under Rule 12.2(b); or

*New material is underlined; matter to be omitted is lined through.

(B) submit to an examination when ordered under Rule 12.2(c).

(2) ***Failure to Disclose.*** The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

* * * * *

COMMITTEE NOTE

The amendment to Rule 12.2(d) fills a gap created in the 2002 amendments to the rule. The substantively amended rule that took effect December 1, 2002, permits a sanction of exclusion of "any expert evidence" for failure to give notice or failure to submit to an examination, but provides no sanction for failure to disclose reports. The proposed amendment is designed to address that specific issue.

Rule 12.2(d)(1) is a slightly restructured version of current Rule 12.2(d). Rule 12.2(d)(2) is new and permits the court to exclude any expert evidence for failure to comply with the disclosure requirement in Rule 12.2(c)(3). The sanction is intended to apply only to the evidence related to the matters addressed in the report that the defense failed to disclose. Unlike the broader sanction for the two violations listed in Rule 12.2(d)(1)—which can substantially affect the entire hearing—the Committee believed that it would be overbroad to expressly authorize exclusion of "any" expert evidence, even evidence unrelated to the

results and reports that were not disclosed as required in Rule 12.2(c)(3).

As with sanctions for violating other parts of the rule, the amendment entrusts to the court the discretion to fashion an appropriate sanction proportional to the failure to disclose the results and reports of the defendant's expert examination. *See Taylor v. Illinois*, 484 U.S. 400, 414 n. 19 (1988) (court should consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful"), citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983).

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Public Comments on Proposed Amendments to Rules 29, 33, 34, and 45 re Time for Ruling on Motions Under Those Rules**

DATE: **April 7, 2004**

The amendments to Rules 29, 33, and 34 are intended to remove the language from the current rule that imposes a 7-day requirement on the court for setting a time for filing motions under those rules. A conforming change has been proposed for Rule 45.

In June 2003, the Standing Committee approved the publication of the rules for public comment; that comment period expired on February 15, 2004.

The Committee received four comments on the proposed amendments.

First, Professor Lushing noted that in the Committee Note for Rule 34 the word "acquittal" seems to be misplaced.

Second, Mr. Horsley generally approved of the proposed rules package, but did not offer any specific comments on these particular rules.

Third, the United States Courts Committee of the State Bar of Michigan suggests that any changes to Civil Rule 6 concerning time requirements for filings should also be reflected in Criminal Rule 45. The Committee apparently offers no specific comments on the current proposed change to Rule 45.

Finally, the Magistrate Judges Association supports the proposed amendments to Rules 29, 33, 34, and 45.

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) **After Jury Verdict or Discharge.**

(1) **Time for a Motion.** A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later. ~~, or within any other time the court sets during the 7-day period.~~

* * * * *

COMMITTEE NOTE

Rule 29(c) has been amended to remove the requirement that the court must act within seven days after a guilty verdict or after the court discharges the jury, if it sets another time for filing a motion for a judgment of acquittal. This amendment parallels similar changes to Rules 33 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 29(c) requires the defendant to move for a judgment of acquittal within seven days of the guilty verdict, or after the court discharges the jury, whichever occurs later, or some other time set by the court in an order issued within that same seven-day period. Similar provisions exist in Rules 33 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to

act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a judgment of acquittal under Rule 29 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 33. New Trial

* * * * *

(b) Time to File.

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(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty. ~~, or within such further time as the court sets during the 7-day period.~~

COMMITTEE NOTE

Rule 33(b)(2) has been amended to remove the requirement that the court must act within seven days after a verdict or finding of guilty if it sets another time for filing a motion for a new trial. This amendment parallels similar changes to Rules 29 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 33(b)(2) requires the defendant to move for a new trial within seven days after the verdict or the finding of guilty verdict, or within some other time set by the court in an order issued during that same seven-day period. Similar provisions exist in Rules 29 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an

extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

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Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a new trial under Rule 33(b)(2) within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 34. Arresting Judgment

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(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere. ~~, or within such further time as the court sets during the 7 day period.~~

COMMITTEE NOTE

Rule 34(b) has been amended to remove the requirement that the court must act within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere if it sets another time for filing a motion to arrest a judgment. The amendment parallels similar amendments to Rules 29 and 33. Further, a conforming amendment has been made to Rule 45(b).

Currently, Rule 34(b) requires the defendant to move to arrest judgment acquittal within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within some other time set by the court in an order issued by the court within that same seven-day period. Similar provisions exist in Rules 29 and 33. Courts have held that the

seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, the court loses jurisdiction to act on the underlying substantive motion, if it is not filed within the seven days. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

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Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion to arrest judgment under Rule 34 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(b), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 45. Computing and Extending Time

* * * * *

(b) Extending Time.

(1) In General. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) Exception. The court may not extend the time to take any action under Rule ~~Rules 29, 33, 34, and~~ 35, except as stated in ~~those rules~~ that rule.

* * * * *

COMMITTEE NOTE

Rule 45(b) has been amended to conform to amendments to Rules 29, 33, and 34, which have been amended to remove the requirement that the court must act within the seven-day period specified in each of those rules if it sets another time for filing a motion under those rules.

Currently, Rules 29(c)(1), 33(b)(1), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Rule 45(b)(2) currently specifies that a court may not extend the time for taking action under Rules 29, 33, or 34, except as provided in those rules.

Assuming that the current provisions in Rules 29, 33, and 34 were intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, under those rules, as long as it does so within the seven-day period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

The defendant is still required to file motions under Rules 29, 33, and 34 within the seven-day period specified in those rules. The defendant, however, may consistently with Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Public Comments on Proposed Amendment to Rule 32 Regarding Testimony of Victims

DATE: April 8, 2003

At its June 2003 meeting, the Standing Committee approved for publication, a proposed amendment to Rule 32 that would extend the right of allocution to all victims in non-violent, non-sexual abuse felony cases. The comment period ended in February 2004.

The Committee received four comments from members of the public and also some suggested changes from the Style Subcommittee of the Standing Committee.

First, Mr. Jack Horsley supports the package of amendments published in 2003, but offers no specific comments about the proposed change to Rule 32.

Second, Judge Robert Holmes Bell, Chief District Judge of the Western District of Michigan, opposes the amendment to the extent it requires the court to hear victim testimony. He notes that victims do not provide anything new because the Presentence Report is supposed to present the victim's perspective about the crime. He adds that the definition of victim is so vague that many people demand to be heard. He concludes by suggesting that the entire section (B) should be rewritten to give the court the discretion to hear from the victims.

Third, the State Bar of California, Committee on Federal Courts, supports the amendment to Rule 32.

Fourth, the Magistrate Judges Association supports the proposed change but identifies two concerns. First, the amendment does not explicitly state who is a "victim." For example, the Association questions who the victims would be in a conspiracy to distribute drugs. Second, the amendment may unduly restrict the discretion of the court. Although the rule uses the term "must," the Committee Note seems to signal some discretion to the court. The Association offers the following as additional language:

> "In particular cases, the court, may, in its discretion, determine who are the victims of an offense, impose reasonable limits on the number of victims or classes of victims who may present information, and determine whether the information presented should be presented orally, in writing, or by some other means."

Finally, the Style Subcommittee questions why the term "Felony Offense" is used in the title of Section (C), rather than just the word "Felony." Their comment is attached to this memo.

This item is on the agenda for discussion at the May 2004 meeting.

Rule 32. Sentencing and Judgment

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(i) Sentencing.

* * * * *

(4) Opportunity to Speak.

* * * * *

(B) *By a Victim of a Crime of Violence or Sexual Abuse*. Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) *By a Victim of a Felony Offense*. Before imposing sentence, the court must address any victim of a felony offense, not involving violence or sexual abuse, who is

present at sentencing and must permit the victim to speak or submit any information about the sentence. If the felony offense involved multiple victims, the court may limit the number of victims who will address the court.

~~(C)~~(D) *In Camera Proceedings.* Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

* * * * *

COMMITTEE NOTE

In a series of amendments, Rule 32 has been modified to provide allocution for victims of violent crimes, and more recently for victims of sexual offenses. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222, 108 Stat. 1796 (amending Rule 32 to provide for victim allocution in crimes of violence). In 2002, Rule 32 was amended to extend the right of victim allocution to victims of sexual abuse. *See* Rule 32(a)(1)(B). The amendment to Rule 32(i)(4) expands the right of victim-allocution to all felony cases.

The role of victim allocution has become part of the accepted landscape in federal sentencing. *See generally* J. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001). And although the actual practice varies, some courts currently permit statements from victims of crimes that do not involve violence or sexual abuse. Typical examples include statements from victims of fraud and other economic crimes. Victims of non-violent felonies may have pertinent information that could affect application of a particular sentencing guideline. At the same time, however, there are potential problems with victim allocution, particularly in cases involving a large number of victims. *See* Barnard, *supra*, at 65-78 (noting arguments against victim allocution).

Rule 32(i)(4)(C) is a new provision that extends the right of allocution to victims of felonies that do not involve either sexual abuse or violence. The amendment attempts to strike a reasonable balance between the interest of victims in being heard and the ability of the court to efficiently move its sentencing docket. Although the rule requires the court to hear from victims if any are present and wish to speak, it gives the court some discretion about the manner in which victims are to be heard. In a particular case, the court may permit, or require some or all of the victims to present their information in the form of written statements. The rule explicitly states that if there are multiple victims, the court may properly limit the number of persons who will be permitted to address the court during sentencing.

The amendment does not include any provision requiring a court to permit a representative to speak on behalf of a victim, as the court must do for victims of sexual abuse or violence. The Committee believed that the policy reasons for permitting a victim to speak through a representative in a case involving sexual abuse or violence do not exist in most other types of cases. Nonetheless, there is nothing in the rule that would prohibit the court from permitting a third person to represent the views of one or more victims of a felony not involving violence or sexual assault.

crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) *By a Victim of a Felony Offense.* Before imposing sentence, the court must address any victim of a felony offense, not involving violence or sexual abuse, who is

Why not just "felony"?

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Public Comments on Proposed Amendment to Rule 32.1 Regarding Allocution Rights**

DATE: **April 8, 2003**

At its April 2003 meeting, the Committee approved an amendment to Rule 32.1 that would provide allocution rights for a person who faces revocation or modification of probation or supervised release. The Standing Committee, at its June 2003 meeting, approved the rule for publication and public comment. That comment period ended in February 2004.

The Committee received only two written comments on the proposed amendment.

First, Mr. Jack Horsley commented favorably on the package of published amendments. He did not, however, comment on the specific amendment to Rule 32.1

Second, the Federal Magistrate Judges Association supports the amendment, noting that it "wisely fills a gap in the rule noted in case law."

This item is on the agenda for the May 2004 meeting.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

* * * * *

(b) Revocation.

* * * * *

(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; ~~and~~

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel~~.~~ ; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) Modification.

(1) In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel~~.~~ and an opportunity to make a statement and present any information in mitigation.

* * * * *

COMMITTEE NOTE

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a person upon resentencing. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in Rule 32 was not incorporated into Rule 32.1. *See United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be "better practice" for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." *Id.*

The amended rule recognizes the importance of allocution and now explicitly recognizes that right at revocation hearings, Rule 32.1(b)(2), and extends it as well to modification hearings where the court may decide to modify the terms or conditions of the defendant's probation, Rule 32.1(c)(1). In each instance the court is required to give the defendant the opportunity to make a statement and present any mitigating information.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Public Comments on Proposed New Rule 59

DATE: April 8, 2003

The proposed new Rule 59, which is intended to parallel Civil Rule 72, sets out procedures for dealing with matters referred to a magistrate judge. The rule was approved by this Committee at its Spring 2003 meeting and forwarded it to the Standing Committee. That Committee approved the publication of the proposed new rule; the comment period ended in February 2004.

The Committee received three comments on the proposed rule.

First, Mr. Jack Horsley commented favorably on the package or rule amendments but offered no specific comments on Rule 59.

Second, the Magistrate Judges Association offered a number of suggested changes to the rule:

- The Association believes that in order to avoid confusion, the Committee should consider addressing the question of whether the terms "dispositive" and "nondispositive" should be given the same meaning in both Rule 59 and Civil Rule 72. It suggests that the words, "matter not dispositive of a charge or defense of a party," is preferable and would be similar to the language in Rule 72.

- It notes some ambiguity in the rule regarding the time for filing objections. It suggests that the language be changed to reflect the differences in those instances where the ruling is made orally on the record and where the ruling is written.

- The Association suggests that Rule 72 be changed to include the language in Rule 59, concerning the failure to object.

- It states that the provision in the rule that would permit the judge to alter the time for filing objections is problematic and recommends that the 10-day time limit in Rule 72 be added to Rule 59 or that if an extension is requested, that it must be made within the 10-day period.

- The Association suggests that it would be helpful to expand the Committee Note to address the differences in the scope of Rules 59 and 72, regarding

referral of matters to magistrate judges. It notes that the "broad scope for Rule 59(a)" may lead to further amendments to Rule 72.

- Finally, the Association states that the rule does not address the effect of a report and recommendation in the absence of an objection. It suggests addition of a new Rule 54(b)(4) that would state that where no objection is filed that the report and recommendation is not self-executing and has no effect until the district court enters an order or judgment.

The Style Subcommittee has also offered some suggested style changes to the Rule. Those comments are attached to this memo.

Although you should have received copies of all of the written comments, I am taking the liberty of attaching that portion of the Association's comments relating to Rule 59.

This item is on the agenda for the meeting in Monterey.

Rule 59. Matters Before a Magistrate Judge

(a) *Nondispositive Matters*. A district judge may refer to a magistrate judge for determination any matter that does not dispose of the case. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file any objections to the order within 10 days after being served with a copy of a written order or after the oral order is made on the record, or at some other time the court sets. The district judge must consider any timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law. Failure to object in accordance with this rule waives a party's right to review.

(b) *Dispositive Matters.*

(1) Referral to magistrate judge. A district judge may refer to a magistrate judge for recommendation any matter that may dispose of the case including a defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence. The magistrate judge must promptly conduct the required proceedings. A record must be made of any

evidentiary proceeding before the magistrate judge and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately serve copies on all parties.

(2) ***Objections to findings and recommendations.*** Within 10 days after being served with a copy of the recommended disposition, or such other period as fixed by the court, a party may serve and file any specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the party objecting to the recommendation must promptly arrange for transcribing the record, or whatever

portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

(3) ***De novo review of recommendations.*** The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or may resubmit the matter to the magistrate judge with instructions.

COMMITTEE NOTE

Rule 59 is a new rule that creates a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges. The rule is derived in part from Federal Rule of Civil Procedure 72.

The Committee's consideration of a new rule on the subject of review of magistrate judges' decisions resulted from *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). In that case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to

district judges as a requirement for review by a court of appeals. The court suggested that Federal Rule of Civil Procedure 72 could serve as a suitable model for a criminal rule.

New Rule 59(a) sets out procedures to be used in reviewing nondispositive matters, that is, those matters that do not dispose of the case. The rule requires that if the district judge has referred a matter to a magistrate judge, that the magistrate judge must issue an oral or written order on the record. To preserve the issue for further review, a party must object to that order within 10 days after being served with a copy of the order or after the oral order is made on the record or at some other time set by the court. If an objection is made, the district court is required to consider the objection. If the court determines that the magistrate judge's order, or a portion of the order, is clearly erroneous or contrary to law, the court must set aside the order, or the affected part of the order. *See also* 28 U.S.C. § 636(b)(1)(A).

Rule 59(b) provides for assignment and review of recommendations made by magistrate judges on dispositive matters, including motions to suppress or quash an indictment or information. The rule directs the magistrate judge to consider the matter promptly, hold any necessary evidentiary hearings, and enter his or her recommendation on the record. After being served with a copy of the magistrate judge's recommendation, under Rule 59(b)(2), the parties have a period of 10 days to file any objections. If any objections are filed, the district court must consider the matter de novo and accept, reject, or modify the recommendation, or return the matter to the magistrate judge for further consideration.

Both Rule 59(a) and (b) contain a provision that explicitly states that failure to file an objection in accordance with the rule amounts to a waiver of the issue. This waiver provision is

intended to establish the requirements for objecting in a district court in order to preserve appellate review of magistrate judges' decisions. In *Thomas v. Arn*, 474 U.S. 140, 155 (1985), the Supreme Court approved the adoption of waiver rules on matters for which a magistrate judge had made a decision or recommendation. The Committee believes that the waiver provisions will enhance the ability of a district court to review a magistrate judge's decision or recommendation by requiring a party to promptly file an objection to that part of the decision or recommendation at issue. Further, the Supreme Court has held that a de novo review of a magistrate judge's decision or recommendation is required to satisfy Article III concerns only where there is an objection. *Peretz v. United States*, 501 U.S. 923 (1991).

Despite the waiver provisions, the district judge retains the authority to review any magistrate judge's decision or recommendation whether or not objections are timely filed. This discretionary review is in accord with the Supreme Court's decision in *Thomas v. Arn, supra,* at 154. *See also Mathews v. Weber*, 423 U.S. 261, 270-271 (1976).

time, under those rules, as long as it does so within the seven-day period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

The defendant is still required to file motions under Rules 29, 33, and 34 within the seven-day period specified in those rules. The defendant, however, may consistently with Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 59. Matters Before a Magistrate Judge.

(a) ***Nondispositive Matters.*** A district judge may refer to a magistrate judge for determination any matter that does not dispose of the case. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may

serve and file any objections to the order within 10 days after being served with a copy of a written order or after the oral order is made on the record, or at some other time the court sets. The district judge must consider any timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law. Failure to object ~~in accordance with this rule~~ waives a party's right to review.

(b) ***Dispositive Matters.***

(1) Referral to magistrate judge. A district judge may refer to a magistrate judge for recommendation any matter that may dispose of the case, including a defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence. The magistrate judge must promptly conduct the required proceedings. A record must be made of any

entered ?

properly

Do you want "clearly" to modify "contrary to law."? If not, switch the two items. If so, repeat "clearly."

evidentiary proceeding before the magistrate judge and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately serve copies on all parties.

(2) Objections to findings and recommendations. Within 10 days after being served with a copy of the recommended disposition, or ~~such~~ other period ~~as~~ fixed by the court, a party may serve and file ~~any~~ specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the party ~~objecting to the recommendation~~ must promptly arrange for transcribing the record, or whatever

portions of it the parties agree to or the magistrate judge considers sufficient. Failure to properly object ~~in accordance with this rule~~ waives a party's right to review.

(3) De novo review of recommendations. The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or ~~may~~ resubmit the matter to the magistrate judge with instructions.

(not in parallel)

COMMITTEE NOTE

Rule 59 is a new rule that creates a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges. The rule is derived in part from Federal Rule of Civil Procedure 72.

The Committee's consideration of a new rule on the subject of review of magistrate judges' decisions resulted from *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). In that case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to

(Computing and Extending Time) to conform this rule to the proposed amendments to Rules 29, 33 and 34.

DISCUSSION: Presently, Rules 29, 33 and 34 each have a 7-day period for a defendant to bring a motion for the relief indicated. Courts have held the 7-day rule is jurisdictional. Thus, if a defendant moves for an extension of time to file a motion for relief under one of these rules, the court must rule on the motion within the same seven day period or lose jurisdiction to act. The proposed amendments to these rules simply provide that the court is not forced to rule on a motion to extend time within a particular time period or face the loss of jurisdiction to do so.

Rule 45(b)(2) similarly limits a court's ability to extend the time for taking action under Rules 29, 33 or 34. The proposed amendment to Rule 45 simply conforms it to the other three amended rules.

In summary, the defendant is still required to file motions under Rules 29, 33 and 34 within the respective 7-day periods set forth in those rules. However, under the proposed amendments, if within that 7-day period the defendant files a motion to extend time to file one of these motions, the court is not required to act on the motion for an extension of time within a particular time period. And if the defendant fails to file one of the underlying motions within the specified time provided by the particular rule, the court may under the amended Rule 45 consider the untimely motion if it determines the failure to file the untimely motion was the result of excusable neglect. Rule 45(b)(1).

E. PROPOSED RULE 59 (MATTERS BEFORE A MAGISTRATE JUDGE)

COMMENT: The Committee supports the adoption of a new rule that is analogous to Rule 72 of the Federal Rules of Civil Procedure and creates a procedure for district judges to review nondispositive and dispositive decisions by magistrate judges in criminal cases. The Committee recommends that the language of the proposed rule be modified to prevent confusion, to promote finality of decisions, to maintain consistency with Rule 72, and to

clarify the legal effect of a report and recommendation on a dispositive matter.

DISCUSSION: The proposed rule is derived in part from Federal Rule of Civil Procedure 72, but contains important differences that may create confusion. Because both Rules 59(a) and 72(a) apply to "nondispositive matters," the meaning of the term "nondispositive matter" should be the same in both rules. It is not. Rule 59(a) applies to referrals from a district judge of "any matter that does not dispose of the case," whereas Rule 72(a) applies to referrals of "a pretrial matter not dispositive of a claim or defense of a party." For example, the dismissal of one count of a multi-count civil complaint would be treated as a dispositive ruling under Rule 72(a) because it disposes of a claim, but the dismissal of one count of a multi-count criminal indictment would not be treated as a dispositive ruling under proposed Rule 59(a) because it does not dispose of the case. There is no explanation in the Advisory Committee Notes for this difference between Rule 59(a) and Rule 72(a). The issue of whether a matter is dispositive or nondispositive has important consequences for how courts and parties must address the matter. Therefore, in order to avoid confusion, the definitions should be equivalent for both civil and criminal cases. In the Federal Rules of Criminal Procedure the term "charge" is equivalent to the term "claim" in the civil rules. See e.g., Fed. R. Civ. P. 10(a)(2) (". . . stating to the defendant the substance of the charge"); Fed. R. Cr. P. 11(b)(1)(6) ("the nature of each charge to which the defendant is pleading"). For these reasons, the use of the phrase "matter not dispositive of a charge or defense of a party" similar to Rule 72(a) is preferable.

Rule 59(b)(1) addresses dispositive matters. Rule 59(b)(1) includes a "defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence" as examples of dispositive matters. Once again, the definition of a dispositive matter as "any matter that may dispose of the case" creates an ambiguity for those situations where a motion to dismiss or a motion to suppress evidence is directed to only a portion of the case. Are these motions to be considered dispositive under Rule 59(b) or non-dispositive under Rule 59(a)? For this reason, the use of the phrase "matter dispositive of a charge or

defense of a party" that parallels Rule 72(b) is preferable, because it recognizes that dismissal of a portion of an indictment is dispositive of a charge although it may not dispose of the case. Therefore, to identify issues as dispositive when they may not dispose of the case creates confusion under Rule 59(b) that does not arise under Rule 72(b). Because orders entered under Rule 59(a) are self-executing if not objected to, whereas reports and recommendations under Rule 59(b) are not self-executing, the Rule should be clarified to differentiate between dispositive and non-dispositive criminal matters consistent with the treatment of dispositive and non-dispositive civil matters under Rule 72. Furthermore, the Committee supports the specific identification of a motion to suppress evidence as a dispositive matter based on existing practice.

A second issue raised by Rule 59(a) is the issue of the timing of filing objections. Rule 59(a) provides that a party may file objections "within 10 days after being served with a copy of a written order or after the oral order is made on the record, or at some other time the court sets." Rule 72(a) provides that objections may be filed "[w]ithin 10 days after being served with a copy of the magistrate judge's order." As proposed, Rule 59(a) creates the following ambiguity: If a court announces its ruling from the bench and later enters a written order on the docket, when does the 10 day objection period begin to run? It is not unusual for a judge to announce a ruling in court and later enter a written order on the same motion. The Rule or Advisory Committee Notes should be clarified to provide that the 10 days begin to run from the date the oral order is made on the record, but only when no written order is entered. In the event a written order is entered, the 10 days should begin to run after the party is served with a copy of the written order.

Third, Rules 59(a) and 59(b)(2) both state: "Failure to object in accordance with this rule waives a party's right to review." Rule 72 does not contain a comparable provision. The Committee recommends that similar provisions be added to Rule 72 in order to avoid the inference that a failure to object under Rule 72 does not waive a party's right to review.

A fourth issue raised by Rules 59(a) and 59(b) is that they permit the court to alter the time for filing objections. Rule 59(a) allows the time for objections to be altered to "such other time the court sets." Similar language is found in Rule 59(b)(2) ("or such other period as fixed by the court"). No similar provision exists in Rule 72(a). This provision in Rule 59 is problematic because it appears to defeat the purpose of the final sentences of Rule 59(a) and 59(b)(2) which both state: "Failure to object in accordance with this rule waives a party's right to review." Can a party ask the magistrate judge or district judge to extend the time for filing objections one month after the ruling is made? How about one year? The Rule appears to permit it. If so, there would appear to be no finality. The Committee recommends that the 10 day time period of Rule 72(a) be included in Rule 59 or, if an extension is requested, that the request for an extension be made to the court within the initial 10 day period. Allowing the time for objections to be extended to "such other time the court sets" is an invitation for delay and a lack of finality that should either be deleted or be strictly limited.

Fifth, Rule 59(a) permits a district judge to refer "any matter that does not dispose of the case," whereas Rule 72(a) governs referrals of "a pretrial matter not dispositive of a claim or defense of a party." The authority of magistrate judges to handle pretrial and post-trial referrals derives from 28 U.S.C. § 636(b)(1)(a) and 28 U.S.C. § 636(b)(3). It would be useful if the Advisory Committee Notes specifically discuss the reason for the difference in scope of the referrals and the reliance upon 28 U.S.C. § 636(b)(3) for this expanded scope. *Peretz v. United States*, 501 U.S. 923, 932 (1991) ("The generality of the category of 'additional duties' indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen"). The broad scope of Rule 59(a) may lead to a later modification of Rule 72(a) to specifically include the work performed by magistrate judges on post-trial matters.

Finally, Rule 59(b)(3) describes the procedure for *de novo* review by the district judge of any objections. However, there is no discussion of the effect of a report and

recommendation in the absence of an objection. See *Thomas v. Arn*, 474 U.S. 140, 154 (1985) ("Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard"). It would be helpful to add a new Rule 59(b)(4) that would make it clear that, even where no objection is filed, a report and recommendation is not self-executing and has no force or effect until the district judge enters an order or judgment with respect to the report and recommendation. *Matthews v. Weber*, 423 U.S. 261, 271 (1976)("The authority and the responsibility to make an informed, final determination, we emphasize, remains with the [district] judge").

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Report of Subcommittee on Rules 3, 4, 5, 5.1, 32.1, 40, 41 and 58**

DATE: **April 8, 2004**

At its Fall 2003 meeting, the Committee considered a number of issues, including transmission of documents by facsimile or other electronic media, differences in Rules 32.1 and 40(a), and entitlement to a preliminary hearing. Judge Carnes appointed a subcommittee to review these, and any related, matters.

The Subcommittee consists of Judge Battaglia (Chair), Mr. Campbell, and Ms. Rhodes.

The Subcommittee's written report and recommendations are attached. These rules will be on the agenda for the May 2004 meeting in Monterey.

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U.S. Courts Building
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Anthony J. Battaglia
United States Magistrate Judge

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MEMORANDUM

TO: Hon. Edward E. Carnes, Chair
Advisory Committee on Criminal Rules

FROM: Judge Battaglia, Chair
Criminal Rules Subcommittee

RE: Subcommittee Report

DATE: March 5, 2004

At the Advisory Committee meeting in October 2003, a subcommittee was created to study and comment on a variety of issues. The subcommittee consists of the following persons: Judge Anthony J. Battaglia as chair; Lucien B. Campbell, Esq. ; Deborah Rhodes, Esq. Peter G. McCabe, Esq.; John K. Rabiej, Esq.; Professor David A. Schlueter; and, Jonathan J. Wroblewski, Esq. also participated.

The subcommittee had two telephonic conferences, conducted a survey of magistrate judges with regard to the probable cause determination, and conferred electronically by facsimile and e: mail in coming to recommendations on these issues. The issues considered and the subcommittee's recommendations follow.

I. IS A RULE OF PROCEDURE NECESSARY TO ADDRESS THE PROBABLE CAUSE DETERMINATION REQUIRED FOLLOWING A WARRANTLESS ARREST UNDER *GERSTEIN v. PUGH*, 420 U.S. 103 (1975)?

There is no current procedural rule in place to deal with the probable cause determination required by the U.S. Constitution following a warrantless arrest. See, *Gerstein v. Pugh,* 420 U.S. 103 (1975). This determination should typically occur within 48 hours of the arrest. *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991). Particularly on weekends, magistrate judges use a variety of informal and non-adversarial procedures to ensure that the protections of *Gerstein* and *Riverside* are provided. The question of the need for a rule to address the procedure in general or the use of reliable electronic means, including facsimiles specifically was examined.

A survey of magistrate judges in the United States revealed that the procedure is handled through a variety of informal procedures. These vary district by district based upon a variety of factors, including case volume, distance, weather, and availability of the judge. These procedures include presentation of information face to face, telephonically and/or by facsimile. This is consistent with case law, see, *United States v. Van Poyck*, 77 F.3d 285, 289-90 (9th Cir), *cert. denied*, 519 U.S. 912 (1996). Magistrate judges are supportive of having a rule on this issue, but urged that flexibility be allowed, so they may continue to use the procedures they find most effective in their locales.

After study, deliberation and discussion, the subcommittee concluded that no separate rule is required with regard to the procedure or the mode and means of presentation of the issue to a magistrate judge. Since the case law regarding the informality of the proceedings is clear, creating a rule specifically to deal with this situation may create issues that do not currently exist. Rather than ensuring flexibility, a rule might limit options and the judges' discretion. Based thereon, the subcommittee recommends that no action be taken in this regard.

II. AMENDMENT OF RULES 3 AND 4, RESPECTIVELY, TO ALLOW FOR THE ISSUANCE OF ARREST WARRANTS BY FACSIMILE.

This issue was raised by an e:mail by Judge Zimmerman (See Exhibit 1). Judge Zimmerman posed the question of amending the rules to allow the issuance of an arrest warrant by facsimile. Under Rule 4, an arrest warrant can be issued upon a showing of probable cause in a complaint or in one or more affidavits filed with the complaint. Rule 4 is otherwise silent on the means of issuance.

Under Rule 3, a complaint is a written statement of essential facts constituting the offense charged. It must be made under oath before a magistrate judge. The wording "before a magistrate judge" connotes a presentation in the physical presence of a judicial officer. "Before" means "in a physical presence of" or "in sight of" or "face to face with" a judicial officer. *Purba v. Immigration and Naturalization Service*, 884 F.2d 516, 517 (9th Cir.1989). Because warrants are typically presented to the magistrate judge in concert with the warrant, in order to generally allow issuance of a warrant by facsimile, Rule 3 would require a change. The requirement that the Complaint be presented under an oath "before" a magistrate judge would need to be changed so that it could be presented either in person, by facsimile or by other reliable electronic means.

The subcommittee does not believe that there is a problem with the current rule or the traditional means for issuing warrants for arrest. While an amendment in this regard could be easily drafted, absent some real need, the subcommittee respectfully recommends that no further action be taken on this issue.

III. THE ANOMALY CREATED BETWEEN RULES 32.1(a)(6) AND RULE 40(a) WITH REGARD TO RELEASE ON BOND.

This issue was raised in a letter from Judge Collings. (See Exhibit 2). Judge Collings points out a restrictive reading of Rule 40 regarding the lack of jurisdiction to consider bail in out of district cases, except where a failure to appear is alleged. This conflicts with the language of Rule 32.1(a)(6) allowing consideration of bail in out of district proceedings regarding revocation of release for violation of conditions of supervision, in general. The subcommittee recommends that Rule 40(a) be amended as set forth in Exhibit 3.

IV. AMENDMENT OF RULE 32.1(a)(5)(B) TO ALLOW THE USE OF FACSIMILE OR OTHER RELIABLE ELECTRONIC MEANS

Judge Sanderson raised this issue by his letter of February 24, 2003. (See Exhibit 4). The judge urges the amendment of Rule 32.1(a)(5)(B) to allow the use of facsimile and other reliable electronic means of transmission of documents to court for removal proceedings under this section. The suggested amendment is consistent with the current provision in Rule 5(c)(3)(D)(i) regarding use of facsimiles in similar proceedings. The subcommittee recommends the amendment of this Rule as suggested and including more expansive language regarding other reliable electronic means. The proposed amendment is attached as Exhibit 5. It is also recommended that Rule 5(c)(3)(D)(i) and Rule 41(d)(3)(A) be similarly amended. A proposed amendment for Rule 5(c)(3)(D)(i) is attached as Exhibit 6. Rule 41(d)(3)(A) is discussed under item VI, below.

V. CONFLICT WITH REGARD TO RULES 5.1(a)(4), 5.1(a)(5) and 58(b)(2)(G).

This was raised by an e:mail sent by Judge Nowak. (See Exhibit 7). Judge Nowak has raised a conflict with regard to the above referenced rules. These Rules create confusion with regard to the entitlement to a preliminary hearing. In order to cure this confusion, the subcommittee recommends amendments to Rule 58(b)(2)(G) and Rule 5(c)(3)(C) respectively. The recommended amendment to Rule 58(b)(2)(G) is attached as Exhibit 8. The recommended amendment to Rule 5(c)(3)(C) is contained in Exhibit 6

VI. EXPANDING THE USE OF FACSIMILE OR OTHER RELIABLE ELECTRONIC MEANS TO TRANSMIT THE TELEPHONIC WARRANT UNDER RULE 41

This issue was raised by the subcommittee survey of magistrate judges on the *Gerstein v. Pugh* determination. Magistrate judges revealed an interest in expanding the use of facsimile or other electronic means in the area of telephonic search warrants. The committee has considered the issue and proposes an amendment to allow the facsimile or electronic transmission of the warrant itself. This would be in addition to the current Rule provision providing for oral dictation of the warrant by the agent to the judge who, in turn, would have to dictate the warrant to the agent for transcription and then service in the field. Where reliable technology can be used, it would save a great deal of time in the warrant process. Warrant description of premises and the subjects of the search can be lengthy and highly detailed. The proposed amendment is attached as Exhibit 9.

Respectfully submitted,

Anthony J. Battaglia,
United States Magistrate Judge

cc: Subcommittee Members and Participants

battaglia/advisory committee/subcommittee report 203

EXHIBIT 1

Author: "Netscape SuiteSpot" <nsuser@host3.uscourts.gov> at ~Internet
Date: 1/26/01 7:13 PM
Normal
TO: Rules Comments at AO-OJPPO
Subject: Submission from http://www.uscourts.gov/rules/comment2001/we
---------- Message Contents

RECEIVED 1/29/01
Via InTernet

00-CR-015
Substantive

01-CR-A

Salutation:
First: Bernard
MI:
Last: Zimmerman
Org: US District Court
MailingAddress1:
MailingAddress2:
City:
State: default
ZIP:
EmailAddress: bernie@youbetvin.com
Phone: 415-522-4093
Fax:
CriminalRules: Yes
Comments:

I am a magistrate judge in the Northern District of California. I support the amendments to allow videoconferencing and think they are long overdue. I urge the Committee to consider amending Rule 4 to clarify the ability of judges to issue warrants via facsimile transmission.

submit: Submit Comment

HTTP Referer: http://www.uscourts.gov/rules/comment2001/webform.htm
HTTP User Agent: Mozilla/4.08 [en] (Win95; U ;Nav)
Remote Host: 207.41.18.130
Remote Address: 207.41.18.130

EXHIBIT 2

03-CR-A

United States District Court
District of Massachusetts
United States Courthouse
1 Courthouse Way, Suite 6420
Boston, Massachusetts 02210

RECEIVED 1/24/03

Chambers of
Robert B. Collings
United States Magistrate Judge

Telephone No.
(617) 748-9229

January 23, 2003

Peter G. McCabe, Esquire
Secretary to the Rules Committee
Administrative Office of United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Mr. McCabe:

I recently encountered the following situation:

(a) A defendant who had been released on conditions of release in Pittsburgh was allowed to reside in Massachusetts while on release.

(b) While on release in Massachusetts, he allegedly violated those conditions of release.

(c) The magistrate judge in Pittsburgh issued a warrant for the defendant's arrest pursuant to 18 U.S.C. § 3148(b).

(d) The defendant was arrested on the Pittsburgh warrant in Massachusetts and brought before me.

(e) At the hearing, the Government took the position that I had no power, were I so inclined, to set conditions of release which would govern the defendant's return to Pittsburgh and that I had to detain the defendant and issue an Order of Removal if identity was found.

The reason this factual situation created a problem was that Rule 40, as it now reads after the December 1, 2002 amendments, deals only with arrest in another district for **failing to appear** and not with arrest in another district for violation of a condition of release other than for failing to appear.

After hearing from counsel and researching the issue, I concluded that the Government was correct. I issued an opinion in the case, *United States v. Zhu,* explaining the problem and the reasons for my conclusion, and I enclose a copy.

As I state in the opinion, it seems to me anomalous that if someone is arrested for failing to appear - perhaps the most serious violation of release conditions - the magistrate judge has authority to set new conditions of release pursuant to Rule 40(c). But if a defendant is arrested for a less serious violation - such as a minor violation of a curfew - the magistrate judge has no power to set new conditions of release.

Accordingly, I propose that Rule 40 be amended as follows; the suggested additions are in italics:

Rule 40. Arrest for Failing to Appear in Another District *or for Violation of Conditions of Release Set in Another District*

(a) **In General.** If a person is arrested under a warrant issued in another district for failing to appear - as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by subpoena - *or for otherwise failing to comply with the terms of the release set in the other district,* the person must be taken without unnecessary delay before a magistrate judge in the district of arrest.

The proposed amendment would have the effect of granting magistrate judges the same powers they now have in cases of arrest for failure to appear in another district to cases of arrest for failure to comply with other conditions of release set in another district.

Please advise if you are in need of any further information. As always, I'm looking forward to seeing you in March.

Very truly yours,

ROBERT B. COLLINGS
United States Magistrate Judge

Enclosure.

EXHIBIT 3

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

~~**(a) In General.** If a person is arrested under a warrant issued in another district for failing to appear—as required by the terms of that person's release under 18 U.S.C. §§ 3141–3156 or by a subpoena—the person must be taken without unnecessary delay before a magistrate judge in the district of arrest.~~

(a) In General. A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear, as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by subpoena; or

(ii) violating conditions of release set in another district.

* * * * *

COMMITTEE NOTE

Rule 40 currently refers only to a person arrested for failing to appear in another district. The amendment is intended to fill a perceived gap in the rule that a magistrate judge in the district of arrest lacks authority to set release conditions for a person arrested only for violation of conditions of release. *See, e.g.*, *United States v. Zhu*, 215 F.R.D. 21, 26 (D. Mass. 2003). The Committee believed that it would be inconsistent for the magistrate judge to be empowered to release an arrestee who had failed to appear altogether, but not to release one who only violated conditions of release in a minor way. Rule 40(a) is amended to expressly cover not only failure to appear, but also violation of any other condition of release.

EXHIBIT 4

RECEIVED 3/4/03

03-CR-B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
UNITED STATES COURTHOUSE
1100 COMMERCE STREET ROOM 1376
DALLAS, TEXAS 75242

WM. F. SANDERSON JR
U S MAGISTRATE JUDGE

PHONE: (214) 753-2385
FAX: (214) 753-2390

February 24, 2003

Peter G. McCabe
Committee on Rules of Practice and Procedure
Administrative Office of the U S. Courts
OJP AD/4-180
One Columbus Circle, NE
Washington, D.C. 20544

Dear Mr McCabe:

I am writing to request that the Advisory Committee on Criminal Rules consider amending Federal Rule of Criminal Procedure 32 1(a)(5)(B)(i) which requires that the government produce certified copies of the judgment, warrant and warrant application relating to a probation or supervised release arrestee charged in another district.

The provisions of Rule 32.1 apply to such an individual by virtue of the provisions of amended Rule 5(a)(2)(B).

In the case of a person arrested on an out-of-district criminal complaint, facsimiles of the underlying charging documents are permitted. See Rule 5(c)(3)(D)(i). It is indeed anomalous that the authentication of documents with reference to a person who has already been convicted of a federal crime must satisfy a higher standard than those supporting a pending charge against an arrestee.

I can perceive of no rational reason for such a higher standard and apprehend that it is based on a mere oversight based upon the vast amount of material the Committee had to review in drafting the amendments which became effective December 1, 2002.

On a purely pragmatic level I would make the following observations:

1. More often than not an out-of-district probation (supervised release) violator is an absconder from jurisdiction of the distant district and is apprehended as a result of an NCIC "hit" following a local arrest. Therefore it is unlikely in the extreme that the clerk or the United States Marshal in the district of arrest has certified copies at the time of arrest

2 Since the arresting district court has no jurisdiction over such an offender the delay in obtaining certified copies simply impedes the ultimate return of the offender to the issuing court, which benefits no one including the arrestee. Although Rule 32.1(a)(6) permits release on bond, it is highly unlikely that an absconder can discharge the burden imposed.

3. The standard in Rule 5(c)(3)(D)(i) is sufficient to protect the interests of an out-of-district probation (supervised release) violator - assuming no issue regarding identity In nearly 24 years I have never confronted a situation in which facsimile copies of documents differed one iota from the original or certified copies.

Thank you for your consideration and that of the Advisory Committee

Very truly yours,

Wm. F. Sanderson, Jr.

EXHIBIT 5

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(5) ***Appearance in a District Lacking Jurisdiction.*** If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

* * * * *

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces [certified] copies of the judgment, warrant, and warrant application, or copies of those documents by other reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

* * * * *

COMMITTEE NOTE

Rule 32.1(a)(5)(B)(i) has been amended to permit the magistrate judge to accept a judgment, warrant, and warrant application by facsimile or by reliable electronic means. Currently, the rule requires the government to produce certified copies of those documents. This amendment parallels similar changes to Rules 5 and 41.

The amendment reflects a number of significant improvements in technology. First, receiving documents by facsimile has become very commonplace and many courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received

at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission, security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. The Committee envisions that the term "electronic" would include use of facsimile transmissions.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as local matter, perhaps in a local rule. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may wish to consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

EXHIBIT 6

Rule 5. Initial Appearance

* * * * *

(c) Place of Initial Appearance; Transfer to Another District.

* * * * *

(3) ***Procedures in a District Other Than Where the Offense Was Allegedly Committed.*** If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

* * * * *

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 ~~or Rule 58(b)(2)(G)~~;

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a [certified] copy of the warrant ~~, a facsimile of either,~~ or ~~other appropriate~~ a reliable electronic form of either; and

* * * * *

COMMITTEE NOTE

The amendment to Rule 5(c)(3)(C) parallels an amendment to Rule 58(b)(2)(G), which in turn has been amended to remove a conflict between that rule and Rule 5.1(a), concerning the right to a preliminary hearing.

Rule 5(c)(3)(D) has been amended to permit the magistrate judge to accept a warrant by reliable electronic means. Currently, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either

of those documents. This amendment parallels similar changes to Rules 32.1(a)(5)(B)(i) and 41. The reference to a facsimile version of the warrant was removed because the Committee believed that the broader term "electronic form" includes facsimiles.

The amendment reflects a number of significant improvements in technology. First, more courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission, security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as local matter, perhaps in a local rule. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

EXHIBIT 7

Nancy S Nowak
09/25/2003 03:33 PM

To: Tommy Miller/VAED/04/USCOURTS@USCOURTS
cc:
Subject: Preliminary hearings

Tommy: another detail question:

FRCrP 5.1(a)(5) says that the MJ must conduct a preliminary hearing unless the def is charged with msdm and consents. Rule 5.1(a)(4) says that no preliminary hearing is necessary if def. is charged by information with a msdm. Query: what if def is charged with msdm by complaint and doesnt' consent? Does he/she get a preliminary?

Rule 58(b)(2)(G) which discusses IAs and the necessary advisements at the IA says that the def must be advised that if he/she is charged with a msdm and in custody they get a preliminary hearing. But 5.1 doesn't say anything about the custody prerequisite to entitlement to preliminary hearing.

Am I missing something?

I'm inclined to follow 5.1 which is entitled "preliminary hearing" and give all non-consenting msdm def's charged by complaint a preliminary (if they want it) -- vs Rule 58 which apparently merely addresses what the def. should be informed of at the IA.

I confess we don't have many of these, but it has come up.

Am I reading the rule correctly?

Thank you, oh wise one.

--Nancy

EXHIBIT 8

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure

* * * * *

(2) Initial Appearance

* * * * *

(G) ~~if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the~~ any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

* * * * *

COMMITTEE NOTE

Rule 58(b)(2)(G) sets out the advice to be given to defendants at an initial appearance on a petty offense other than a misdemeanor charge. As currently written, the rule creates a conflict and some confusion when compared to Rule 5.1(a) concerning the right to a preliminary hearing. Paragraph (G) is incomplete in its description of the circumstances requiring a preliminary hearing. In contrast, Rule 5.1(a) is a correct statement of the law concerning the defendant's entitlement to a preliminary hearing and is consistent with 18 U.S.C. § 3060 in this regard. Rather than attempting to define, or restate, in Rule 58 when a defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1.

EXHIBIT 9

Rule 41. Search and Seizure

* * * * *

(d) Obtaining a Warrant.

* * * * *

(3) ***Requesting a Warrant by Telephonic or Other Means.***

(A) *In General.* [If the court determines it is reasonable under the circumstances] A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means, including facsimile transmission.

(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

* * * * *

(e) Issuing the Warrant.

(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original

warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) *Preparing an Original Warrant* If the applicant reads the contents of the proposed duplicate original warrant, the ~~The~~ magistrate judge must enter ~~the~~ those contents ~~of the proposed duplicate original warrant~~ into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) *Modifications.* The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly. ~~In that case, the judge must also modify the original warrant.~~

D. Signing the ~~Original Warrant and the Duplicate Original~~ Warrant Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

* * * * *

COMMITTEE NOTE

[Rule 41(d)(3)(A) has been amended to require that the magistrate judge conclude that it is reasonable to use telephonic or other means to issue a warrant. The reasonableness requirement was in the rule before the 2002 amendments. Although the Committee Note does not identify that change as being substantive in nature, at least one treatise so interprets it as being substantive. See CHARLES A. WRIGHT, NANCY J. KING & SUSAN R. KLEIN, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 3D § 670.1, at 303–04 (2004) ("Under the 1977 amendment, the telephonic search warrant procedure could only be used if the applicant for the warrant persuaded the federal magistrate that 'the circumstances make it reasonable to dispense with a written affidavit.' However, the 2002 Amendments to the Rule dispense with this requirement.") (footnotes omitted). The Committee recognizes that it is anomalous for the rule to require reasonableness to dispense with the requirement of a written affidavit in the presence of a judge while not requiring reasonableness to dispense with the presence altogether. Thus, the express condition or reasonableness is restored to the rule.]

Rule 41(e) has been amended to permit the magistrate judges to use facsimile copies and other reliable electronic means to issue warrants. Currently, the rule makes no provision for using such media. The amendment parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i).

The amendment recognizes the significant improvements in technology. First, more counsel, courts, and magistrate judges now routinely use facsimile transmissions of documents. And many courts and magistrate judges are now equipped to receive filings by electronic means. Indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings may be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using facsimiles and electronic media to transmit a warrant can be both reliable and efficient use of judicial resources.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. Although facsimile transmissions are not specifically identified, the Committee envisions that facsimile transmissions would fall within the meaning of "electronic means."

While the rule does not impose any special requirements on use of facsimile transmissions, neither does it presume that those transmissions are reliable. The rule treats all electronic transmissions in a similar fashion; whatever the mode, the means used must be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as local matter, perhaps in a local rule. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain

documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 29, Regarding Delayed Ruling on Motion for Judgment of Acquittal

DATE: April 12, 2004

For the last several meetings, the Committee has discussed a proposed amendment from the Department of Justice concerning an amendment to Rule 29. The amendment would require that in all cases in which a defendant moves for a judgment of acquittal, the court must delay making any decision on the motion until after the jury has returned a verdict. The purpose of the amendment would be to preserve the government's right to appeal an adverse ruling on the motion.

Following an extensive discussion on the proposal at the Fall 2003 meeting, the Committee approved in concept (by a vote of 7 to 4) the proposed amendment. Judge Carnes asked the Department to continue working on the amendment and attempt to address issues that had been identified in the discussion, i.e., the problem of multi-count cases and cases where the jury is unable to reach a verdict.

Attached is the Department's recent memo proposing language to adopt its position (the "Proposed Rule"). As noted in the memo, the Department also considered the issues of multi-count cases and hung jury cases and proposes language to address only the "deadlocked jury" problem (Exhibit C to its memo). It believes that there are other non-Rule alternatives for dealing with multi-count cases. It urges the Committee to adopt the 'Proposed Rule," which would not address either the hung jury or multi-count cases.

I am also attaching a memo from Mr. Rabiej, dated April 6, 2004, which summarizes the results of research conducted by the Administrative Office on the subject.

This item will be on the agenda for the May 2004, meeting.

U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, D C 20530*

April 9, 2004

MEMORANDUM

TO: Hon. Edward E. Carnes
Chairman, Advisory Committee on Criminal Rules

FROM: Deborah Rhodes
Counselor to the Assistant Attorney General & Ex Officio

SUBJECT: Proposed Amendment to Criminal Rule 29

1. At the Criminal Rules Advisory Committee meeting in Oregon, the Committee approved in principle the Department of Justice's proposal that Rule 29 of the Federal Rules of Criminal Procedure be amended to ensure the Government's right to appeal district court decisions granting a motion for judgment of acquittal. As described in our September 15, 2003 memorandum, the amendment achieves that goal by providing that such a motion could not be granted until after a verdict of guilty.

The Committee instructed the Department to draft the proposed Rule and Advisory Committee Notes reflecting the Department's proposed amendment (the "Proposed Rule"). The Proposed Rule and Advisory Committee Notes are attached (Exhibit A). As indicated on the attached comparison (Exhibit B), the Proposed Rule has been refined slightly in its wording from the Department's proposed amendment discussed at the Oregon meeting. The Proposed Rule clarifies that if the decision on the motion is reserved, the court must set aside the verdict and enter an acquittal if the evidence is insufficient to sustain the guilty verdict; it also allows the district court the same time to consider whether to grant a post-verdict judgment of acquittal on

its own motion as it has on a defendant's motion. The proposed Notes clarify that the Proposed Rule does not affect the ability of a judge in a bench trial to enter a "not guilty" verdict.

2. The Committee also instructed the Department to draft an alternative proposed Rule and Advisory Committee Notes, allowing unappealable judgments of acquittal to be entered after a jury has hung (the "Deadlocked Jury Proposal"). The alternative Rule and Notes showing the changes necessary to give district courts that option are attached as well (Exhibit C). Nonetheless, the United States believes that the Committee should adopt the Proposed Rule, rather than this alternative Deadlocked Jury Proposal. There are a variety of the reasons why a jury can deadlock, many of which (*e.g.*, a difficult juror, juror nullification, differing views of credibility) are no indication of legal insufficiency of the evidence. There is thus no assurance that a judgment of acquittal entered in that situation is less likely to be erroneous; it therefore should be subject to the same appellate review as any other judgment of acquittal. Allowing a judgment of acquittal to be entered after a jury has hung makes such erroneous decisions unreviewable, deprives the Government of its appellate rights, negates all the effort put into the case thus far, and can improperly loose dangerous defendants on the public.

These harms outweigh any gain from terminating the case prior to the retrial, particularly as retrial is the expected result of a deadlocked jury, retrial often occurs promptly, and the parties are already prepared for a retrial. Moreover, the Proposed Rule would not mean that a charge which in the judge's view lacks sufficient evidence and results in a hung jury will necessarily be retried; judicial suasion and voluntary dismissal should be adequate measures to prevent an unwarranted retrial, as the court can suggest and the prosecution can agree that the Government should dismiss the charge. Finally, the Department believes that there are very few instances

where retrial results in another hung jury and then another retrial (especially if the judge is suggesting dismissal), so that unlikely scenario should not distort the general rule.

3. The Committee also instructed the Department to consider whether it was practicable to draft a proposed Rule providing that in multi-defendant and/or multi-count cases, judgments of acquittal could be granted prior to the guilty verdict on some but not all defendants or counts, respectively, so as to streamline the case in a way favorable to the jury and the parties. As predicted by a member of the Committee, it is not possible to draft a workable rule. A rule which permitted some but not all of the counts or defendants to be dismissed would be arbitrary and promote arbitrariness. (Indeed, the Department has had cases where the trial prosecutors believed the pre-verdict judgment of acquittal was entered on the count where they had the strongest evidence, leaving them to go to the jury on their weaker counts.) Such a rule would allow the uncorrectable erroneous decisions and the loss of the Government's appellate rights that the Rule 29 is being amended to avoid.

Rather, the Government believes this concern is best addressed by judicial suasion and voluntary dismissal. The premise for this proposal, as raised at the Oregon meeting, was that dismissing some but not all of the defendants or counts is favorable to all parties including the Government, because it streamlines the case for the jury while terminating only portions of the case that are unimportant to or unnecessary for the Government. In those situations, the District Judge is free to suggest exactly that to the Government, which if it agrees can easily achieve the desired streamlining by voluntarily dismissing those defendant(s) or count(s). The Proposed Rule's Advisory Committee Notes have been written to suggest such a resolution where all agree such streamlining is desirable.

4. The Department therefore submits the Proposal Rule and the Deadlocked Jury Proposal for the Committee to consider in making its selection of which proposal to submit to public comment. The Department would welcome the opportunity to appear before the Committee to answer any questions and present its recommendation before the Committee makes its choice.

EXHIBIT A

PROPOSED RULE AND ADVISORY COMMITTEE NOTES

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the defendant may move for a judgment of acquittal of any offense. The court may deny the motion or reserve decision on the motion, but the court may not grant the motion prior to the jury's return of a verdict of guilty. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. If the court reserves decision on the motion, the court must proceed with the trial, submit the case to the jury, and decide the motion after the jury returns a verdict of guilty. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved. The court must set aside the verdict and enter an acquittal if the evidence is insufficient to sustain the guilty verdict.

(c) After Jury Verdict.

(1) Time for a Motion. Within 7 days after a guilty verdict, or within any other time the court sets during the 7-day period, a defendant may move for a judgment of acquittal, or renew such a motion, or the court may make its own motion for a judgment of acquittal.

(2) Ruling on the Motion. After the jury has returned a guilty verdict, the court must set aside the verdict and enter an acquittal if the evidence is insufficient to sustain the guilty verdict.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury verdict.

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

ADVISORY COMMITTEE NOTES

Rule 29 previously permitted an anomaly: it permitted orders disposing of entire prosecutions or counts without any possibility of appellate review. *See* Richard Sauber & Michael Waldman, Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433 (1994). This anomaly arose because Rule 29 was originally drafted in 1944, when the Government under the 1907 Criminal Appeals Act could not appeal a judgment of acquittal whether rendered before or after a guilty verdict. *See* United States v. Sisson, 399 U.S. 267 (1970). In 1971, however, Congress enacted a new Criminal Appeals Act permitting the Government to appeal from any judgment dismissing an indictment or any count thereof, including a judgment of acquittal under Rule 29, unless "the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731; *see* United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977). In enacting § 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." United States v. Wilson, 420 U.S. 332, 337-38 (1978). Although "Congress was determined to avoid creating non-constitutional bars to the Government's right to appeal," id., Rule 29 acted as a non-constitutional bar to the Government's right to appeal, by permitting district courts to enter judgments of acquittal at times (at the close of the Government's case, at the close of all the evidence, after the jury is discharged without returning a verdict) when the Double Jeopardy Clause prohibited appeal.

This anomaly was partially remedied by the1994 amendment, which permitted and encouraged district judges to reserve until after the guilty verdict its decision on a motion for judgment of acquittal, thus rendering its decision appealable. Unfortunately, some district courts did not always follow that best practice, but instead issued pre-verdict judgments of acquittal which were unappealable no matter how erroneous. The current amendment completes the process begun by the 1994 amendment and makes the best practice the required practice.

The amendment requires that, if a motion for judgment of acquittal on any count(s) is made before the jury returns a verdict, the decision must be reserved (unless the district court simply denies the motion) until after the jury returns a verdict of guilty on the count(s), at which time the court must grant a judgment of acquittal on the count(s) if the evidence is insufficient. *See* Jackson v. Virginia, 443 U.S. 307 (1979). Thus, the amendment precludes the granting of a judgment of acquittal before the jury returns a verdict, or if the jury is discharged without having returned a verdict. *See* Carlisle v. United States, 517 U.S. 416 (1996). As a result, all judgments of acquittal will be subject to appellate review. *See* United States v. Scott, 437 U.S. 82 (1978); United States v. Genova, 333 F.3d 750 (7th Cir. 2003). The amendment thus conforms Rule 29 to § 3731, secures the Government the full scope of its right to appeal, advances the public's interests in correcting erroneous judgments of acquittal, protects the public from defendants who would otherwise be mistakenly released, and prevents such erroneous rulings from irretrievably losing all of the time and effort invested in the case by the prosecution, judge, and jury.

The amendment preserves the defendant's opportunity to make a motion for judgment of acquittal at three times: at the close of the Government's case-in-chief; at the close of all the evidence; and within the specified period after the verdict. In addition, the amendment protects the defendant's interests by providing that if a defendant moves for judgment of acquittal at the close of the Government's case, and the district court reserves its decision until after the verdict, its decision must be made solely on the basis of the evidence presented in the Government's case. Finally, the amendment safeguards defendant's constitutionally-protected interests in avoiding a second trial; if the district court grants a judgment of acquittal after a guilty verdict and the appellate court reverses, the guilty verdict is reinstated without putting defendant through a second trial.

The amendment removes any pressure on the district court to make an immediate unreviewable decision. Reservation also removes the need for the court to rule on the motion if the jury verdict on the challenged count(s) is not guilty. Further, the amendment preserves the power of the court to enter a judgment of acquittal on its own motion, but simply requires that any such *sua sponte* motion and ruling be made within the specified period after the guilty verdict, making such rulings subject to appellate review.

The Committee considered but declined to create an exception permitting a judgment of acquittal to be granted after a jury has deadlocked. The Supreme Court has held that "[r]egardless of the sufficiency of the evidence at [a defendant's] first trial, he has no valid double jeopardy claim to prevent his retrial" after a jury has hung. Richardson v. United States, 468 U.S. 317, 326 (1984). Further, the Court has emphasized that retrials should be permitted after juries hang because of "'society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.'" Id. at 324. Moreover, juries deadlock, or are discharged without reaching a verdict, for a wide variety of reasons which may not indicate that the evidence is legally insufficient. Whatever the reason, a deadlocked jury is an insufficient

justification for precluding appellate review by allowing a judgment of acquittal to be entered prior to the verdict in the retrial. After a jury has hung, the prosecution can dismiss a charge if it believes that its evidence is insufficient for retrial, with leave of court, *see* Fed. R. Crim. P. 48(a), and the district court can indicate that such leave would be granted if requested.

The Committee also considered whether to create an exception allowing pre-verdict judgments of acquittal on some, but not all, of the counts or defendants in multi-count or multi-defendant cases, to streamline the case for the jury in a way favorable to all parties. The Committee concluded that such an exception would be unworkable and arbitrary, would offer insufficient benefits to justify foreclosing appellate review of erroneous judgments of acquittal, and is unnecessary. Instead, the district court is free to suggest such streamlining to the parties. If all parties agree that some count(s) or defendant(s) should be removed to streamline the case, the prosecution can achieve that goal by dismissing the count(s) or defendant(s) with the consent of the defendant and leave of the court. *See* id.

The amendment does not prevent the giving of an instruction seeking a verdict on a lesser included offense. Such an instruction may be given at the request of the defense or the prosecution. *See* Schmuck v. United States, 489 U.S. 705 (1989); Fed. R. Crim. P. 31(c). Whether or not such an instruction is given, a court which is considering a reserved motion for judgment of acquittal, which finds the evidence insufficient to sustain a conviction on the greater offense, must consider whether the evidence would be sufficient to sustain a conviction on a lesser included offense. 2A Charles Alan Wright, Federal Practice and Procedure: Criminal 3d § 467 (3d ed. 2000).

The amended Rule applies equally to motions for judgments of acquittal made in bench trials. A defendant may make such a motion after the government closes its evidence, after the close of all the evidence, or within the specified period after the judge's finding of guilt, but only after the judge's finding of guilt may the judge grant any motion for judgment of acquittal, which could then be appealed. *See* United States v. Morrison, 429 U.S. 1 (1976). Of course, even though decision is reserved on the motion for judgment of acquittal, the judge at the end of the trial may enter an unappealable "not guilty" finding as the finder of fact (which, unlike a judge considering a judgment of acquittal, is allowed to discredit evidence of guilt and draw inferences unfavorable to a guilty verdict).

EXHIBIT B

Comparison of the Proposed Rule to the Department's Proposal at the Oregon Meeting

(The differences between the Proposed Rule and that discussed in Oregon are in **blue and bold**; the deletions are in brackets).

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the defendant may move for a judgment of acquittal of any offense [for which the evidence is insufficient to sustain a conviction]. The court may deny the motion or reserve decision on the motion, but the court may not grant the motion prior to the jury's return of a verdict of guilty. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. If the court reserves decision on the motion, the court must proceed with the trial, submit the case to the jury, and decide the motion after the jury returns a verdict of guilty. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved. **The court must set aside the verdict and enter an acquittal if the evidence is insufficient to sustain the guilty verdict.**

(c) After Jury Verdict.

(1) Time for a Motion. Within 7 days after a guilty verdict, or within any other time the court sets during the 7-day period, a defendant may move for a judgment of acquittal, or renew such a motion, or the court **may make** [on] its own motion **for** [may grant] a judgment of acquittal.

(2) Ruling on the Motion. After the jury has returned a guilty verdict, the court **must** [may] set aside the verdict and enter an acquittal **if the evidence is insufficient to sustain the guilty verdict.**

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the

case to the jury as a prerequisite for making such a motion after jury verdict.

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

EXHIBIT C

DEADLOCKED JURY PROPOSAL

(Differences from the Proposed Rule are in **bold and red**.)

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the defendant may move for a judgment of acquittal of any offense. The court may deny the motion or reserve decision on the motion, but the court may not grant the motion before the jury returns a verdict of guilty. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. If the court reserves decision on the motion, the court must proceed with the trial, submit the case to the jury, and decide the motion after the jury returns a verdict of guilty. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved. The court must set aside the verdict and enter an acquittal if the evidence is insufficient to sustain the guilty verdict.

(c) After Jury Verdict.

(1) Time for a Motion. Within 7 days after a guilty verdict **or after the court discharges a jury because it cannot agree on a verdict**, or within any other time the court sets during the 7-day period, a defendant may move for a judgment of acquittal, or renew such a motion, or the court may make its own motion for a judgment of acquittal.

(2) Ruling on the Motion. After the jury has returned a guilty verdict, the court must set aside the verdict and enter an acquittal if the evidence is insufficient to sustain the guilty verdict. **If the jury has been discharged because it cannot agree on a verdict, the court may enter an acquittal if the evidence is insufficient to sustain a conviction.**

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury verdict.

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court 's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

ADVISORY COMMITTEE NOTES

Rule 29 currently permits an anomaly: it permits orders disposing of entire prosecutions or counts without any possibility of appellate review. *See* Richard Sauber & Michael Waldman, Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433 (1994). This anomaly arose because Rule 29 was originally drafted in 1944, when the Government under the 1907 Criminal Appeals Act could not appeal a judgment of acquittal whether rendered before or after a guilty verdict. *See* United States v. Sisson, 399 U.S. 267 (1970). In 1971, however, Congress enacted a new Criminal Appeals Act permitting the Government to appeal from any judgment dismissing an indictment or any count thereof, including a judgment of acquittal under Rule 29, unless "the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731; *see* United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977). In enacting § 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." United States v. Wilson, 420 U.S. 332, 337-38 (1978). Although "Congress was determined to avoid creating non-constitutional bars to the Government's right to appeal," id., Rule 29 acted as a non-constitutional bar to the Government's right to appeal, by permitting district courts to enter judgments of acquittal at times (at the close of the Government's case, at the close of all the evidence, after the jury is discharged without returning a verdict) when the Double Jeopardy Clause prohibited appeal.

This anomaly was partially remedied by the1994 amendment, which permitted and encouraged district judges to reserve until after the guilty verdict its decision on a motion for judgment of acquittal, thus rendering its decision appealable. Unfortunately, some district courts have not always followed that best practice, but instead have issued pre-verdict judgments of acquittal which are unappealable no matter how erroneous. The current amendment completes the process begun by the 1994 amendment and makes the best practice the required practice.

The amendment requires that, if a motion for judgment of acquittal on any count(s) is made before the jury returns a verdict, the decision must be reserved (unless the district court simply denies the motion) until after the jury returns a verdict of guilty on the count(s), at which time the court must grant a judgment of acquittal on the count(s) if the evidence is insufficient. *See* Jackson v. Virginia, 443 U.S. 307 (1979). Thus, the amendment precludes the granting of a judgment of acquittal before the jury returns a verdict**, or if the jury is discharged without having returned a verdict (unless the jury is deadlocked)**. *See* Carlisle v. United States, 517 U.S. 416 (1996). As a result, **in almost** all **situations,** judgments of acquittal will be subject to appellate review. *See* United States v. Scott, 437 U.S. 82 (1978); United States v. Genova, 333 F.3d 750 (7th Cir. 2003). The amendment thus conforms Rule 29 to § 3731, secures the Government almost the full scope of its right to appeal, advances the public's interests in correcting erroneous judgments of acquittal, protects the public from defendants who would otherwise be mistakenly released, and prevents such erroneous rulings from irretrievably wasting all of the time and effort invested in the case by the prosecution, judge, and jury.

The amendment preserves the defendant's opportunity to make a motion for judgment of acquittal at three times: at the close of the Government's case-in-chief; at the close of all the evidence; and within the specified period after the verdict **or the discharge of a deadlocked jury**. In addition, the amendment protects the defendant's interests by providing that if a defendant moves for judgment of acquittal at the close of the Government's case, and the district court reserves its decision until after the guilty verdict, its decision must be made solely on the basis of the evidence presented in the Government's case. Finally, the amendment safeguards defendant's constitutionally-protected interests in avoiding a second trial; if the district court grants a judgment of acquittal after a guilty verdict and the appellate court reverses, the guilty verdict is reinstated without putting defendant through a second trial.

The amendment removes any pressure on the district court to make an immediate unreviewable decision. Reservation also removes the need for the court to rule on the motion if the jury verdict on the challenged count(s) is not guilty. Further, the amendment preserves the power of the court to enter a judgment of acquittal on its own motion, but simply requires that any such *sua sponte* motion and ruling be made within the specified period after the guilty verdict**, or after a deadlocked jury has been discharged.**

There is only one exception to the rule that judgments of acquittal can be entered only after a jury verdict of guilty: when a trial court declares a mistrial after deliberations have deadlocked because of a jury's inability to agree on a verdict. *See* Fed. R. Crim. P. 31(b)(3). In that sole instance, if the defendant or the district court files a motion within the specified time period after the deadlocked jury is discharged, the court may (but is not required to) grant a judgment of acquittal if the court finds that all the evidence submitted at trial is legally insufficient. The amendment thus permits such a ruling to prevent retrial after retrial on insufficient evidence, although courts should exercise great caution before

entering such a judgment of acquittal because it is unreviewable. *See* Martin Linen, 430 U.S. at 575. At the same time, to allow courts to preserve the Government's appeal rights, the amendment gives the district court the right to decline to rule on the motion and allow retrial to proceed. The Supreme Court has held that "[r]egardless of the sufficiency of the evidence at [a defendant's] first trial, he has no valid double jeopardy claim to prevent his retrial" after a jury has hung. Richardson v. United States, 468 U.S. 317, 326 (1984). Moreover, the Court has emphasized that retrials should be permitted after juries deadlock because of "'society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.'" Id. at 324.

The Committee also considered whether to create an exception allowing judgments of acquittal on some, but not all, of the counts or defendants in multi-count or multi-defendant cases, to streamline the case for the jury in a way favorable to all parties. The Committee concluded that such an exception would be unworkable and/or arbitrary, would offer insufficient benefits to justify foreclosing appellate review of erroneous judgments of acquittal, and is unnecessary. Instead, the district court is free to suggest such streamlining to the parties. If all parties agree that some count(s) or defendant(s) should be removed to streamline the case, the prosecution can achieve that goal by dismissing the count(s) or defendant(s) with the consent of the defendant and leave of the court. *See* id.

The amendment does not prevent the giving of an instruction seeking a verdict on a lesser included offense. Such an instruction may be given at the request of the defense or the prosecution. *See* Schmuck v. United States, 489 U.S. 705 (1989); Fed. R. Crim. P. 31(c). Whether or not such an instruction is given, a court which is considering a reserved motion for judgment of acquittal, which finds the evidence insufficient to sustain a conviction on the greater offense, must consider whether the evidence would be sufficient to sustain a conviction on a lesser included offense. 2A Charles Alan Wright, Federal Practice and Procedure: Criminal 3d § 467 (3d ed. 2000).

The amended Rule applies equally to motions for judgments of acquittal made in bench trials. A defendant may make such a motion at the specified times before submission of the case to the judge, but only within the specified period after the judge's finding of guilt may the judge grant any motion for judgment of acquittal, which could then be appealed. *See* United States v. Morrison, 429 U.S. 1 (1976). Of course, even though decision is reserved on the judgment of acquittal, at the end of the trial the judge may enter an unappealable "not guilty" finding as the finder of fact (which, unlike a judge considering a judgment of acquittal, is allowed to discredit evidence of guilt and draw inferences unfavorable to a guilty verdict).

April 6, 2004

MEMORANDUM TO ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: *Rule 29 Statistical Study*

Background

A court may enter a judgment of acquittal under Federal Rule of Criminal Procedure 29 on the defendant's motion or its own initiative at any time before a criminal case is submitted to the jury or after the jury's verdict. But if the judgment of acquittal is entered before the jury's verdict, the government may not appeal the judgment because the Constitution's Double Jeopardy Clause prohibits it. The judgment of acquittal is final and cannot be appealed. The Rule was amended in 1994 to permit a judge to reserve decision on a motion for judgment of acquittal until after the jury returns a guilty verdict.

In September 2003, the Department of Justice recommended that Rule 29 be amended to require judges to do what the 1994 amendment merely permitted, *i.e.* – reserve decision until after a guilty verdict. The Department cited examples where an otherwise meritorious appeal was denied because the court had entered a Rule 29 judgment of acquittal before the jury's verdict.

The docket sheets of 78,835 defendants whose cases were disposed of in federal court during FY 2002 (October 1, 2001 – September 30, 2002) were electronically searched. Although the docket sheets have a high degree of accuracy, the statistical information on them is posted by docket clerks in each of the district courts and is subject to human error. In several instances, the entries are obviously inaccurate and in other instances the entries are ambiguous. Although these entries required further research and some interpretation, the overall number of instances were not substantial and are described below.

Highlights of Study

We found that felony charges against 2,985 of the 78,835 defendants were disposed of by trial. We also found that the court entered a Rule 29 judgment of acquittal before the jury's verdict for 37 felony defendants in the 2,985 trials (1.24% of the defendants tried and less than 0.05% of the total number of defendants).

Approximately half of the 37 pre-verdict Rule 29 defendants were charged with drug-

related offenses, the other half were charged primarily with fraud offenses and a few miscellaneous offenses. Also, approximately half of the 37 defendants were tried with other defendants. About 75% of the 37 defendants were fully exonerated by the pre-verdict Rule 29 judgment of acquittal (28 defendants). Another 14% were fully exonerated after the jury acquitted them on the remaining charges (5 defendants).

Breakdown of Numbers

The following discussion breaks down the numbers. Of the 78,835 defendants under review, the clerks filed statistical reports with the Administrative Office identifying a total of 391 defendants who were acquitted by the court on at least one charge either after a bench trial or a pre-verdict or post-verdict Rule 29 judgment. The 391 defendants included 219 defendants charged with a Class A misdemeanor or petty offense and 172 defendants charged with a felony.

A closer review of the actual docket sheets of the 172 felony defendants acquitted by the court showed that the statistical information in 53 cases was clearly miscoded and did not involve an acquittal by the court. The 53 miscoded cases included the following:

- In 28 cases, the defendant was acquitted by a jury verdict and fully exonerated on all charges.
- In 20 cases, the defendant agreed to a guilty plea. In each of these cases, some charges were dismissed on the government's motion, while the defendant pleaded guilty to other charges as part of a plea agreement.
- In 5 cases, the defendant was charged with between two and four counts, each of which was dismissed on the government's motion.

The remaining 119 defendants included 41 cases in which the acquittal was not based on a Rule 29 judgment. The 41 cases consisted of 16 cases in which the defendant was convicted after either a jury trial or bench trial, 12 cases in which the defendant was acquitted by the judge in a bench trial, one case resulting in a hung jury, and one case resulting in a not-guilty decision by reason of insanity. There were 11 cases in which information was unavailable from the electronic docket sheets to make any determination.

Total Number of Pre-Verdict and Post-Verdict Rule 29 Judgments

The court entered a pre-verdict or post-verdict Rule 29 judgment of acquittal for 78 defendants, including 37 defendants who were granted a pre-verdict Rule 29 judgment of acquittal and 36 defendants who were granted a post-verdict Rule 29 judgment. It was unclear from the docket sheets of the remaining five defendants whether the court had entered the Rule 29 judgment of acquittal before or after the verdict.

Types of Offenses Involved in Pre-Verdict Rule 29 Judgments

The majority of the 37 pre-verdict Rule 29 defendants were charged with either a drug charge or fraud charge, as described below:

Fifteen cases involved a defendant charged with one or more of the following drug-related counts: attempt/conspiracy to distribute narcotics; intent to manufacture/distribute of narcotics; manufacturing/distribution of narcotics or marijuana; and importation of marijuana.

Eleven defendants were charged with a total of 17 fraud counts, including: five counts of conspiracy to commit offense or to defraud United States; three counts of false statement; two counts of criminal forfeiture; two counts of frauds and swindles charges; two counts of fraud by wire/radio/television; one count of attempt to evade or defeat tax; one count of false/fraudulent claim; and one count of fraud in connection with access device.

Three cases involved a defendant who was charged with one of the following firearms-related counts: unlawful possession of firearms; sale of firearms to felons; use of firearms of in commission of violent crime; and firearms violations. The remaining four defendants were charged with attempt to evade tax; theft from Indian tribal organizations; assault; and RICO violations.

Incidence of Multi-Defendant Cases Involving Pre-Verdict Rule 29 Judgments

Thirty-three of the 37 pre-verdict Rule 29 defendants, who had been completely exonerated, were prosecuted in 28 cases. In 12 of these cases, the defendant who had been granted the Rule 29 judgment of acquittal was the sole defendant. In 16 cases, a total of 90 defendants were prosecuted, including five cases each with two defendants, two cases each with three, four, and five defendants, one case each with six and seven defendants, two cases each with eight defendants, and one case with fifteen defendants.

Effect of Pre-Verdict Rule 29 Judgments

The 37 pre-verdict Rule 29 judgments of acquittal fully exonerated 28 of the defendants of all felony counts. Nine defendants were partially exonerated by the Rule 29 pre-verdict judgment of acquittal. They included five defendants acquitted after trial on the balance of counts not dismissed under Rule 29, and four defendants convicted of counts which had not been dismissed under Rule 29. The four defendants partially exonerated included the following:

- *United States v. Chavez-Torres* (Western District of Washington) – A pre-verdict Rule 29 acquittal dismissed one count of attempt and conspiracy to distribute a controlled substance. The jury convicted the defendant on four remaining counts: manufacture, distribute or dispense a controlled substance; attempt and conspiracy to manufacture controlled substance; manufacturing a controlled substance; unlawful establishment of manufacturing operations.
- *United States v. Gamba* (District of Montana) – A pre-verdict Rule 29 acquittal dismissed

two counts of false statements and one count of witness tampering. A post-verdict acquittal dismissed one charge of accessory after the fact. The jury convicted the defendant on one remaining count of witness tampering.

- *United States v. Steiger* (Middle District of Alabama) – A pre-verdict Rule 29 acquittal dismissed two counts of transportation of minors. A post-verdict acquittal dismissed one charge of sexual exploitation of minors. The jury convicted the defendant on three remaining counts: sexual exploitation of minors and two counts for possession of sexually explicit material.

- *United States v. Shalash*, (Eastern District of Kentucky) – A pre-verdict Rule 29 acquittal dismissed one count of interstate/foreign shipments by carrier. The jury convicted the defendant on all remaining counts, including laundering of monetary instruments; racketeering conspiracy; transportation of stolen goods; prescription drug marketing; conspiracy to defraud the United States.

Effect of Post-Verdict Rule 29 Judgments

A total of 36 cases involved a post-verdict Rule 29 disposition, including 15 cases in which the judgment of acquittal only partially exonerated the defendant.

John K. Rabiej

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 49 Implementing the E-Government Act**

DATE: **April 8, 2004**

The Committee has been asked to consider amendments to the Federal Rules of Criminal Procedure to implement provisions in the E-Government Act of 2002 (Public Law 107-347). Section 205 of that Act, which is attached, requires, inter alia, every federal court to make available access to docket information, the substance of all written opinions of the court, and access to documents filed with the court in electronic form. It also authorizes the courts to convert any document into an electronic form; any document so converted, however, must be made available to the public online.

Of particular interest to the Committee is a provision in Section 205(c)(3)(A)(i), which requires that the Judicial Conference use the Rules Enabling Act procedures to

> "prescribe rules...to protect privacy and security concerns relating to electronic filing of documents and the public availability...of documents filed electronically.

The Act also specifies that these rules of privacy and security issues are to be applied in a uniform manner throughout the federal courts. Those charged with drafting the rules are to "take into consideration best practices in Federal and State courts to protect privacy information or otherwise maintain necessary information security." See Section 205(c)(3)(A)(iii). The Act contains one specific item about privacy rules. Section 205(c)(3)(A)(iv) states that:

> To the extent that such rules provide for redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which...shall be either in lieu of, or in addition to, a redacted copy in the public file.

This provision was included in the Act at the request of the Department of Justice; the Judicial Conference opposed it. Subsequently, DOJ and the Conference have developed a compromise provision which is still pending in Congress.

To respond to the mandate to draft privacy rules for all of the Federal Rules of Procedure (Appellate, Bankruptcy, Civil and Criminal), Judge Levi (Chair of the Standing Committee) appointed the E-Government Subcommittee, chaired by Judge

Sidney A. Fitzwater. The Subcommittee includes liaisons from each of the Rules Advisory Committees and several other committees of the Judicial Conference; the Reporters of the Advisory Committees serve as consultants. Professor Dan Capra, Reporter to the Evidence Advisory Committee, is serving as the Lead Reporter for the Subcommittee. Judge Struhbar represents this Committee on the Subcommittee.

The Subcommittee met in Scottsdale Arizona in January 2004, to discuss the approach and scheduling for drafting uniform privacy rules. The Subcommittee adopted the following schedule:

- First, Professor Capra drafted a sample template rule that could be used by all of the Committees and patterned after a rule developed by the Committee on Court Administration and Case Management (CACM).

- Second, each of the Rules Committee Reporters will use the template to draft privacy amendments for their respective rules and present them to their Committees for discussion and consideration during the Spring 2004 meetings.

- Third, the Reporters and liaison members will meet in June 2004 to discuss the various proposals and the reactions and comments of their respective committees. The Chairs and Reporters of each Committee will attempt to draft or modify their respective rules to be as consistent as possible with the other Committees' versions of the rules

- Fourth, at their respective Fall 2004 meetings, the Committees will review the uniform rules and prepare draft amendments for publication and public comment.

- Fifth, those amendments will be considered at the Standing Committee's January 2005 meeting. If there is a consensus the rules will be published in Spring 2005. Otherwise, the Committees will be asked to revisit the issue at their respective Spring meetings and present their proposals again at the Summer 2005 meeting of the Standing Committee. The Subcommittee's goal is to publish all of the privacy amendments in Summer 2005.

I am attaching materials which may assist you in your discussions—a copy CACM's response to the template rule and committee note developed by Professor Capra, a copy of the E-Government Act and other background materials on the practices used in some states and federal courts, and a memo from the Social Security Administration commenting on the impact of the proposed rules.

Using the template, I have drafted proposed amendments to Rule 49, Serving and Filing Papers, using Professor Capra's original template. For now, I have not drafted any specific language for a Committee Note. The Committee should probably consider the draft template committee note submitted by Professor Capra and indicate whether it

agrees or disagrees with any portions of that Note. Given the sometimes major differences in philosophy among the Committees about what should go in the Committee Notes, I expect there to be considerable discussion about the contents of the Note.

It is important that, at least at this stage, that the Criminal Rules Committee address the following issues at the May meeting:

- Should the privacy rules be included in Rule 49, or in some other rule, or in a new free-standing rule? (An argument for the latter possibility would be that the rule is important enough to stand on its own and would draw the reader's attention to the specific concerns identified in the E-Government Act.).

- The draft rule already identifies that specified information be redacted from the documents. Are there other items of information that are peculiar to criminal cases that should be listed in the rule?

- Should the rule contain a provision for "interim rules" from the Judicial Conference? As you will see from some of the background materials, this provision is probably not necessary and may actually cause greater confusion.

- Finally, what if any comments, does the Committee have about the template Committee Note? I tend to agree with CACM, that the listing in the Note of the general principles identified by the Judicial Conference are unnecessarily long, and can be summarized in the Note.

Rule 49. Serving and Filing Papers

* * * * *

(e) **Filing and Privacy**.

(1) ***Personal Data Identifiers in Court Filings***. Subject to (e)(2) of this rule, a party filing any information or material with the court—whether electronically or in paper— must comply with the following procedures:

(A) *Social Security Numbers*. If a person's social security number must be included, the first five numbers must be deleted.

(B) *Names of Minor Children*. If the name of a minor child must be included, only the child's initial's may be disclosed.

(C) *Dates of Birth*. If a person's date of birth must be included, only the year of birth may be disclosed.

(D) *Financial-Account Numbers*. If a financial-account number must be included, only the last four digits may be disclosed.

(E) *Home Address*. If a home address must be included, only the city and state may be disclosed.

(2) ***Unredacted Filing Under Seal***. A party wishing to file an otherwise proper document containing the personal identifiers listed in (e)(1) may file an unredacted document under seal. That document must be retained by the court as part of the record. The court may require the party to file a redacted copy for the public file.

(3) ***Judicial Conference Standards.*** A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.

TEMPLATE DRAFTED BY PROF. CAPRA

Rule [ ] Filing and Privacy

(a) Personal Data Identifiers In Court Filings. Subject to (b) of this rule, a party filing any information or material with the court– whether electronically or in paper – must comply with the following procedures:

> **(1) Social Security Numbers.** If a person's social security number must be included, the first five numbers must be deleted.
>
> **(2) Names of Minor Children.** If the name of a minor child must be included, only the child's initials may be disclosed.
>
> **(3) Dates of Birth.** If a person's date of birth must be included, only the year of birth may be disclosed.
>
> **(4) Financial-Account Numbers.** If a financial-account number must be included, only the last four digits may be disclosed.
>
> **(5) Home Address.** If a home address must be included, only the city and state may be disclosed.

(b) Unredacted Filing Under Seal. A party wishing to file an otherwise proper document containing the personal identifiers listed in (a) may file an unredacted document under seal. That document must be retained by the court as part of the record. The court may require the party to file a redacted copy for the public file.

(c) Judicial Conference Standards. A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.

Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in most districts

are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy sets forth seven general principles:

> 1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.
>
> 2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.
>
> 3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.
>
> 4. Except where otherwise noted, the policies apply to both paper and electronic files.
>
> 5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.
>
> 6. The availability of case files at the courthouse will not be affected or limited by these policies.
>
> 7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

The Judicial Conference policy further provides that documents in [civil] case files should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file. Because case files are available over the internet through PACERNet, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings.

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not

otherwise protected will be made available over the internet through PACERNet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule.

CACM'S COMMENTS ON CAPRA TEMPLATE

Note: Proposed deletions are stuck through, additions are in bold, and general comments and explanations are in italics.

Rule [ ] Filing and Privacy

(a) Personal Data Identifiers In Court Filings. Subject to (b) of this rule, a party filing any information or material with the court– whether electronically or in paper – must comply with the following procedures:

> **(1) Social Security Numbers.** If a person's social security number must be included, ~~the first five numbers must be deleted.~~ **only the last four digits may be disclosed.** *This change would make (1) parallel with (4).*
>
> **(2) Names of Minor Children.** If the name of a minor child must be included, only the child's initials may be disclosed.
>
> **(3) Dates of Birth.** If a person's date of birth must be included, only the year of birth may be disclosed.
>
> **(4) Financial-Account Numbers.** If a financial-account number must be included, only the last four digits may be disclosed.
>
> **(5) Home Address.** If a home address must be included, only the city and state may be disclosed.

If HR 1303 is passed by the Senate and signed by the President, we will need to consider whether to include its provisions regarding a party's ability to file a "reference list" of the complete versions of the identifiers and the corresponding shortened versions that the court shall maintain under seal and allow to be amended. This procedure would only apply to documents created by a party so as not to impact the evidentiary value of exhibits. These procedures were agreed to by the Department of Justice.

(b) Unredacted Filing Under Seal. A party wishing to file an otherwise proper document containing the personal identifiers listed in (a) may file an unredacted document under seal. That document must be retained by the court as part of the record. The court may require the party to file a redacted copy for the public file.

~~**(c) Judicial Conference Standards.** A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.~~

This is confusing given the statement in (b) above, which is contradictory to the Judicial Conference Policy, yet required by the E-Government Act. In any event, the reference to "interim rules" should be removed because pursuant to Section 205 (c)(3)(B)(i) of the E-Government act, any interim rules cease to be effective once this rule becomes effective. Further, we really do not have any "interim rules" other than the policy itself. Thus, the use of that phrase would likely be confusing to the reader.

If the current exemption for Social Security appeals is to remain part of the rule, such would need to be specifically mentioned in the civil and appellate rules.

Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in ~~most~~ **many** districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy sets forth seven general principles:

1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.

2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.

3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.

4. Except where otherwise noted, the policies apply to both paper and electronic files.

5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.

6. The availability of case files at the courthouse will not be affected or limited by these policies.

7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Including all of the 7 principles here may be too much for the Committee Note. A reference to the policy, together with the paragraph that comes after the recitation of the principles may be enough. Also, with the possible changes in access to paper files that may result in some courts due to the operational guidelines that are being developed in the criminal privacy context, principle 6 may no longer be accurate in all courts.

The Judicial Conference policy further provides that documents in [civil] case files should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file. Because case files are available over the internet through PACER~~Net~~, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings.

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not otherwise protected will be made available over the internet through PACER~~Net~~. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule. **The responsibility to redact filings rests with counsel and the parties.**

LEONIDAS RALPH MECHAM
Director

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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

March 30, 2004

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Proposed Rule Implementing E-Government Act*

Section 205(a) of the E-Government Act requires the Supreme Court to prescribe federal rules of procedure governing the privacy and security concerns arising from public access to electronic court records. The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Procedure have been asked to prepare proposed uniform amendments to their respective set of rules implementing the statutory directive for publication next year in August 2005.

Professor Cooper prepared the attached paper proposing a new rule and describing the time line and steps taken by the Standing Rules Committee to coordinate drafting of uniform rules among the advisory rules committees. It includes a "template" rule drafted by the reporter to the Advisory Committee on Evidence Rules, Professor Daniel Capra, which had been circulated earlier as a model to all the advisory committee reporters. The template rule is based on model local rules developed after several years of study by the Committee on Court Administration and Case Management (CACM). The model local rules were approved by the Judicial Conference.

Professor Patrick Schiltz, the reporter to the Advisory Committee on Appellate Rules, has drafted a new rule located on pages 8 and 9 of his memorandum for consideration of the Appellate Rules Committee. The memorandum contains background materials, including: (1) a memorandum describing CACM's study and development of privacy model local rules; (2) a Federal Judicial Center report on privacy concerns arising from public access to electronic criminal case records; (3) a staff memorandum on a "rules-based approach to privacy and public access"; (4) a pertinent excerpt from the E-Government statute; (5) minutes of the January 2004 Standing Committee's E-Government Subcommittee meeting; and (6) a staff memorandum on state court privacy court rules.

John K. Rabiej

Civil Rule Implementing the E-Government Act

The Direction to Prescribe A Civil Rule

Section 205 (a) of the E-Government Act of 2002, Pub.L. 107-347, 116 Stat. 2899, 2913, 44 U.S.C. 101 note, requires each district court to establish a website. Section 205(c)(1) provides that the court "shall make any document that is filed electronically publicly available online." The court "may convert any document that is filed in paper form to electronic form"; if converted to electronic form, the document must be made available online. Section 205(c)(2) provides an exception — a document "shall not be made available online" if it is "not otherwise available to the public, such as documents filed under seal."

Section 205(c)(3) directs adoption of implementing rules:

> (A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28 * * * to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.
>
> (ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.
>
> (iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.
>
> (iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition[,sic] to, a redacted copy in the public file.

Standing Committee E-Government Subcommittee

The Standing Committee has appointed an E-Government Subcommittee, chaired by Judge Sidney A. Fitzwater, to coordinate study of E-Government Act rules by the several advisory committees. Minutes of the Subcommittee meeting on January 14, 2004, are attached. Professor Daniel J. Capra, Reporter of the Evidence Rules Committee, has been designated Lead Reporter for the Subcommittee. Professor Capra has prepared a "template" rule and Committee Note for consideration by the advisory committees. Copies are attached. A variant form has been prepared by Professor Patrick J. Schiltz, Reporter for the Appellate Rules Committee; that proposal and a supporting memorandum also are attached.

Each advisory committee has been asked to study the template rule at its Spring 2004 meeting and to suggest any desirable changes or variations. The Subcommittee, in consultation with the advisory committee reporters, will consider the advisory committee reactions in June. The next step will be an attempt to generate a uniform rule that may be adopted in uniform — or nearly uniform — terms for each of the Appellate, Bankruptcy, Civil, and Criminal Rules. Some variations may prove suitable for the different circumstances faced by the different procedure systems.

Consideration of the E-Government Act rule may entail consideration of changes in other rules. Possible Civil Rules candidates are described below after presentation of a suggested Civil Rule "5.2" derived from the Template and the Appellate Rule variation. (Designation as Rule 5.2 is a first approximation. This rule is closely related to Rule 5, which includes filing in subdivisions (d) and (e). We have proposed a new Rule 5.1 to address notice of constitutional challenges to federal and state statutes; we might want to redesignate that as Rule 5.2 to bring this filing rule closer to Rule 5. There may be too much here to simply tack privacy onto Rule 5 as a new subdivision (f).)

Rule 5.2. Privacy in Court Filings

> **(a) Limits on Disclosing Personal Identifiers.** A party[49] that files an electronic or tangible paper that includes any of the following personal identifiers may disclose only these elements:
>
> > **(1)** the last four digits of a person's social-security number;[50]
> >
> > **(2)** the initials of a minor child's[51] name;[52]
> >
> > **(3)** the year of a person's date of birth;
> >
> > **(4)** the last four digits of a financial-account number; and
> >
> > **(5)** the city and state of a home address.

---

[49]Both Template and Appellate Rule are directed only to a party. Apparently that includes a party who files something in response to a court order to file. It is not clear whether all things filed with a court are filed by a party: what of an amicus? Who files the trial transcript? The court's opinion?

[50]"person" commonly includes artificial entities, such as corporations. Should taxpayer identification numbers be included?

[51]Style: is this redundant? Why not just "minor's name"?

[52]Will this prove awkward when suit is on behalf of a minor?

(b) Exception for a Filing Under Seal. A party may include complete personal identifiers [listed in subdivision (a)] in a filing made under seal. But the court may require the party to file a redacted copy for the public file.[53]

(c) Social Security Appeals; Access to Electronic Files.[54] In an action for benefits under the Social Security Act[55], access to an electronic file is permitted only[56] as follows, unless the court orders otherwise:

> **(1)** the parties and their attorneys may have remote electronic access to any part of the case file, including the [an?] administrative record; and
>
> **(2)** [a person who is not a party or a party's attorney]{other persons} may have remote electronic access to:
>
> > **(A)** the docket maintained under Rule 79(a); and
> >
> > **(B)** an opinion, order, judgment, or other written disposition, but not any other part of the case file or the administrative record.

---

[53]With the addition of the bracketed words, this tracks the Appellate Rule. It may leave open the question whether there is a right file under seal. The Template clearly says that a party who wishes to file complete personal identifiers may file an unredacted document under seal; it goes on to provide that the court may require a redacted copy for the public file. The result seems unintentional — it establishes a right file under seal by simply including a complete personal identifier, and then leaves it up to the court to direct filing a public copy. More thought is needed.

[54]The Template does not include this subdivision. The Appellate Rule does. Failure to include a parallel provision in the Civil Rule would essentially moot the Appellate Rule.

[55]The Appellate Rule formulation is: "In an appeal involving the right to benefits under the Social Security Act * * *." This language may fit the Civil Rules if the only actions we wish to reach are appeals from benefit denials. Actions by the government to recover overpayments may not involve the same level of private information. It would help to have advice from someone familiar with the various forms of social-security benefit actions that may come to the district courts.

[56]The Appellate Rule is "authorized as follows." That seems to mean the same as "permitted only." If so, there is no gap: the rule does not mean to distinguish between "access" in the introduction and "remote electronic access" in paragraphs (1) and (2). The distinction, however, may be important: do we mean to close off electronic access from a public terminal in the clerk's office?

~~**(d) Judicial Conference Standards.** A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.~~[57]

Committee Note

(A Committee Note can be adapted from the Template, Appellate Rules, and any other model.)

Parallel Civil Rules Changes

Each Advisory Committee is to determine whether existing rules should be changed to reflect the new circumstances created by electronic access to materials filed with the court. Several Civil Rules may be candidates for future amendment; some of the more obvious possibilities are described briefly below. It may be premature, however, to consider amendments before gaining any experience with electronic access. Anticipated problems may not arise, and unanticipated difficulties are almost inevitable.

Rule 5(d). The statute requires that any document filed electronically be made available online. Paper documents converted to electronic form also must be made available online. Rule 5(d) now requires filing of "[a]ll papers after the complaint required to be served upon a party." Rule 5(d) was recently amended to forbid filing of discovery papers until they are used in the proceeding or the court orders filing. Rule 5(d) might be amended further to except other papers from filing.

Rule 5, whether in subdivision (d) or otherwise, also might be the place to add provisions on sealing filed papers. Rule 26(c)(6) already authorizes a protective order sealing a deposition. Section 205(c)(2) of the E-Government Act provides that a filed document shall not be made available online if it is "not otherwise available to the public, such as documents filed under seal."

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[57]This provision in the Template raises a familiar concern. A recent illustration in the Civil Rules is shown by Rule 7.1. Rule 7.1 requires much less corporate disclosure than had been required by many local rules. Some drafts included a provision that would require additional disclosures as required by the Judicial Conference. Doubts were expressed about this attempt to delegate Enabling Act authority, despite the Rule 5(e) precedent that authorizes Judicial Conference standards for electronic filing. Doubts also were expressed about the practical availability of Judicial Conference standards; those doubts may dwindle as reliance on the Judiciary website becomes universal. There is a separate difficulty with requiring reliance on "interim rules"; initial interim rules will be superseded by adoption of Enabling Act rules. Section 205(c)(3)(B)(i) seems to contemplate interim rules only for the period before adoption of the first set of Enabling Act rules. Unless the Judicial Conference can adopt "interim rules" to bridge gaps between adoption and amendment of Enabling Act rules, the reference to interim rules should be dropped. The Appellate Rule draft omits this subdivision entirely.

The reference to interim rules raises a separate point. Section 205(c)(3)(A)(i) contemplates rules that protect not only privacy but also "security." Nothing in any of the drafts addresses "security" concerns.

Rule 5(d) also may be used to anticipate a pervasive problem. Filing discovery materials, when that happens, invokes all the limits of the proposed E-Government Act rule. Apparently depositions, responses to interrogatories, documents (including computer-generated information), requests for admission, and perhaps even reports of Rule 35 examinations, must be redacted. Rule 5(d) might be amended to provide a reminder of the duties imposed by Rule "5.2."

Amendments designed to limit filing requirements or to expand sealing practices must be approached with great care. It does not seem likely that these topics should be made part of the initial E-Government Act rules process, unless it seems appropriate to amend Rule 5(d) to refer to the Rule 5.2 duty to redact discovery materials when filed.

Rule 10. Rule 10(a) provides that "the title of the action shall include the names of all the parties." This provision is at odds with subdivision (a)(2) of the proposed rule, which permits only the initials of a "minor child." It might be desirable to add a cross-reference to Rule "5.2." (The E-Government Act might provide an occasion for reconsidering the question of pseudonymous pleading. There has not been any enthusiasm in recent years for considering an amendment that would attempt to guide this practice. But electronic access may suggest further consideration, particularly if it is easily possible to search court filings along with all other online materials that refer to a named person.)

Special problems arise from Rule 10(c), which indirectly reflects the practice of attaching exhibits to a complaint. The exhibit must be redacted to conform to Rule "5.2." It is difficult to guess whether this requirement will impose significant burdens in effecting the redaction, or whether there may be practical difficulties. If Rule "5.2(b)" survives, permitting filing of the complete complaint and exhibits under seal, these difficulties may be substantially reduced.

Again, it is difficult to frame amendments beyond a possible reference to Rule 5.2 in Rule 10(a).

Rule 11. The Minutes of the E-Government Subcommittee meeting reflect discussion of the question whether Rule 11 should be "amended to contemplate violations of the privacy/access rules. Judge [Jerry A. Davis] noted that CACM had reviewed this issue and determined that Rule 11 already covers any arguable violation of these policies and that it is better to leave it to the discretion of the courts as to how to deal with violations or abuse of any new rule regarding electronic filing. The Subcommittee agreed with this assessment."

Rule 11(b)(1) states that an attorney or party presenting a paper to the court certifies that it is not presented for any improper purpose. If it is desirable to use Rule 11 or any other rule of procedure to reach liability for such acts as purposefully filing a defamatory pleading, the present language seems adequate. The determination whether to bend Rule 11 to this purpose at all will be difficult — it at least approaches substantive questions of defamation liability, the right to petition courts, and privilege. It would not be wise to take on these issues by amending Rule 11, unless it be to disclaim any attempt to answer them.

Rule 12(f). The agenda includes a pending question addressed to the effect of a Rule 12(f) order to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Is the stricken material physically or electronically expunged? Or is it preserved to maintain a complete record, for purposes of appeal or otherwise, but sealed? Electronic access to court files may make this question more urgent, but there is no apparent change in the principles that will guide the answer.

Rule 12(f) could be amended to refer directly to an order to strike information that violates Rule "5.2." Authority to strike seems sufficiently supported, however, both by present Rule 12(f) and by the implications of Rule "5.2."

Rule 16. Rule 16(b) or (c) might be amended to include scheduling-order directions or pretrial-conference discussion of electronic-filing issues. The most apparent subjects would be limiting filing requirements or permitting filing under seal. Care would need to be taken to avoid interference with the purposes of the E-Government Act. But there may be an advantage, particularly in early years, from assuring that parties and court think of the privacy and security issues that may arise from electronic access.

Rule 26 or Other Discovery. Rule 5(d) limits on filing discovery materials are noted above. It is conceivable that a reminder of E-Government Act access — and the need to redact filed documents to comply with Rule "5.2" — should be added somewhere in the discovery rules as well.

The protective-order provisions of Rule 26(c) do not seem to need amendment. They provide ample authority to respond on a case-specific basis "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense * * *."

Rule 56. Summary-judgment affidavits are among the papers covered by Rule "5.2." It would be possible to add a cross-reference to Rule 56.

Rule 80(c). Rule 80(c) — inevitably part of the future project to reconcile the Civil Rules with the Evidence Rules — states that whenever stenographically reported testimony is admissible in evidence at a later trial, it may be proved by the transcript. Although the proof might include filing, and a corresponding need to redact under Rule "5.2," there is no apparent need to amend Rule 80(c) to refer back to Rule "5.2."

MEMORANDUM

DATE: February 17, 2004

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 03-10

Section 205 of the E-Government Act of 2002 (Public Law 107-347) requires every federal court to maintain a website (§ 205(a)) and to make specific information available through that website, including "[a]ccess to docket information for each case" (§ 205(a)(4)), "[a]ccess to the substance of all written opinions issued by the court" (§ 205(a)(5)), and "[a]ccess to documents filed with the courthouse in electronic form" (§ 205(a)(6)). The Act also provides that "each court shall make any document that is filed electronically publicly available online" (§ 205(c)(1)), and the Act authorizes a court to "convert any document that is filed in paper form to electronic form" (§ 205(c)(1)). Any document that is so converted must "be made available online" (§ 205(c)(1)).

The Act thus establishes broad access to documents that are filed in or converted to electronic form, but the Act recognizes that access cannot be unlimited. The Act provides that documents that "are not otherwise available to the public, such as documents filed under seal, shall not be made available online" (§ 205(c)(2)). Moreover, the Act directs that the Rules Enabling Act process be used to "prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically" (§ 205(c)(3)(A)(i)). These privacy rules are to "provide to the extent practicable

for uniform treatment of privacy and security issues throughout the Federal courts" (§ 205(c)(3)(A)(ii)), and those charged with drafting such rules — including this Committee — are instructed to "take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security" (§ 205(c)(3)(A)(iii)).

Except as I have already described, the Act contains only one specific directive about the privacy rules. The Act provides that:

> To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which . . . shall be either in lieu of, or in addition[] to, a redacted copy in the public file. (§ 205(c)(3)(A)(iv).)

This last provision was included in the Act at the insistence of the Department of Justice, and over the objection of the Judicial Conference. The Department and the Conference have subsequently negotiated a compromise agreement and have jointly proposed legislation to amend this last provision to implement that compromise agreement. That legislation is pending in Congress.

Background materials — including the full text of § 205 of the E-Government Act of 2002 and information about the "best practices" of various states — are attached to this memorandum. I will not summarize those materials further.

In response to the Act's directive that the Rules Enabling Act process be used to implement privacy rules, Judge David F. Levi, the Chair of the Standing Committee, appointed an E-Government Subcommittee chaired by Judge Sidney A. Fitzwater. The Subcommittee includes liaisons from each of the five Advisory Committees (Judge John G. Roberts, Jr.,

represents this Committee), as well as liaisons from other Judicial Conference committees. The Reporters to the Advisory Committees serve as consultants to the Subcommittee.

The Subcommittee met on January 14 in Scottsdale, Arizona. The minutes of that meeting are attached. As you will see, the Subcommittee reviewed the significant amount of work that has already been done on privacy-related issues by the Committee on Court Administration and Case Management ("CACM"). That work culminated in CACM issuing model local rules regarding access to electronic files in civil and criminal cases.

At its January meeting, the Subcommittee agreed after much discussion that work on privacy-related amendments to the rules of practice and procedure would proceed as follows:

1. Prof. Daniel J. Capra, Reporter to the Evidence Rules Committee, and Lead Reporter to the E-Government Subcommittee, will draft a "template" privacy rule patterned after the model rules drafted by CACM.

2. That template will be provided to the Reporters to the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. Each of those Reporters will then use the template to draft privacy amendments to his respective set of rules. Those amendments will follow the template as closely as possible.

3. The Advisory Committees will consider these draft amendments at their Spring 2004 meetings and provide input to the Chairs and Reporters.

4. In the summer of 2004 — most likely in connection with the June meeting of the Standing Committee — the Chairs and Reporters will confer about the draft amendments and the reactions of the Advisory Committees to those amendments. The Chairs and Reporters will

attempt to work out any problems that have been identified and to modify the draft amendments so that they are as consistent as possible.

5. At their fall 2004 meetings, the Advisory Committees will be asked to approve privacy amendments for publication. If all Advisory Committees do so, the Standing Committee will consider those amendments at its January 2005 meeting. If problems arise and one or more Advisory Committees do not approve amendments, those Advisory Committees will be asked to approve amendments at their spring 2005 meetings, and the Standing Committee will take up the matter at its June 2005 meeting. In any event, the goal is to publish all privacy amendments for comment in August 2005.

As directed by the Subcommittee and Judge Alito, I have prepared a draft privacy amendment to the Appellate Rules for your consideration. I want to draw your attention to three issues:

1. I considered two options for the placement of these privacy provisions: incorporating them as a new subsection (5) to Rule 25(a) or setting them forth in a new Rule 25.1. As you will see, I decided on the latter. I did this because I feared that, given the length of the privacy provisions, sticking them in Rule 25(a) would make Rule 25 ungainly. I also did this in order to draw attention to the provisions, which will take practitioners some getting used to. That said, I could easily redraft the provisions as a new Rule 25(a)(5).

2. At the Subcommittee meeting, we talked about the possibility that the Appellate Rules could simply incorporate by reference the privacy provisions of the Civil and Criminal Rules. The Appellate Rules could provide, for example, that "In an appeal in a civil case, the parties

must comply with Federal Rule of Civil Procedure xx," or that "In an appeal in a criminal case, the parties must comply with Federal Rule of Criminal Procedure xx."

I rejected this approach for a couple of reasons. First, I generally dislike incorporating other rules by reference; as much as possible, I think that an appellate practitioner should be able to find the rules that govern appellate proceedings in the Appellate Rules. Second, we have talked at great length about the difficulty of distinguishing "civil" appeals from "criminal" appeals; this approach would aggravate that problem. Finally, many proceedings are neither appeals in civil cases nor appeals in criminal cases; those proceedings include, for example, petitions to review agency orders under Rule 15 or petitions for extraordinary relief under Rule 21. The privacy provisions of the Appellate Rules must apply to those proceedings as well.

On balance, it seems to me preferable to adopt a straightforward rule that would apply to all appellate proceedings — whether civil, criminal, or something else — and that would simply list the information that should be redacted. That list would include everything that must be redacted in civil cases under the Civil Rules and everything that must be redacted in criminal cases under the Criminal Rules. I do not believe that there will be major differences between the Civil Rules and the Criminal Rules, but, even if there are, I don't think that combining their provisions into a single Appellate Rule will cause any harm.

3. Finally, drafting the rule was made more complicated by the fact that CACM has suggested a number of changes to the Capra template, and the Style Subcommittee has thoroughly rewritten the template. At this point, each Advisory Committee is being left to decide for itself to what extent the recommendations of CACM and the Style Subcommittee should be adopted. (Again, the Chairs and Reporters will compare notes in June.) To assist this

Committee in that endeavor, I have attached three documents: (a) "Template Drafted By Prof. Capra"; (b) "CACM's Comments on Capra Template": and (c) "Capra's Responses to CACM's Comments."

You will see that, in drafting a proposed Rule of Appellate Procedure, I have used the Style Subcommittee's version of the template and generally agreed with the substantive suggestions made by CACM. My reasoning was as follows:

a. I agree with CACM that we should strike the Judicial Conference provision. You may recall that when we were in the process of amending Rule 26.1 (regarding corporate disclosure statements), this Committee proposed a similar "Judicial Conference" provision. That provision was strongly opposed by the commentators and by members of the Standing Committee and the other Advisory Committees — even though it was arguably narrower than the one in Prof. Capra's template. I also do not think that we should enshrine "interim rules" in the rules of practice and procedure. That reference is unnecessary (in that the interim rules to which it refers already have the force of law by virtue of § 205(c)(3)(B)(i)) and confusing (in that those same interim rules will "cease to have effect" as soon as the rule referring to them becomes law).

b. As CACM notes, Judicial Conference policy is to exclude the files in Social Security appeals from being accessible online. Unless this Committee strongly disagrees with that policy, it seems to me that the policy should be reflected in the rule.

c. Like CACM, I would be inclined to remove the seven principles from the Note, both because inclusion of the principles is somewhat confusing (in that the typical practitioner may wonder what force these "general principles" have and how they relate to the rule) and because it lengthens the Committee Note for no compelling reason.

d. Finally, I think that adding at the end of the Note the sentence suggested by CACM would be helpful. It seems to me that the sentence suggested by CACM is as much implied by the text of the rule as the sentence that precedes it.

These are, of course, merely my recommendations. I can easily redraft the proposed rule to take into account whatever the Committee decides.

Rule 25.1 Privacy in Court Filings

(a) Limits on Disclosing Personal Identifiers. If a party includes any of the following personal identifiers in an electronic or paper filing, the party is limited to disclosing:

(1) only the last four digits of a person's social-security number;

(2) only the initials of a minor child's name;

(3) only the year of a person's date of birth;

(4) only the last four digits of a financial-account number; and

(5) only the city and state of a home address.

(b) Exception for a Filing Under Seal. A party may include complete personal identifiers in a filing if it is made under seal. But the court may require the party to file a redacted copy for the public file.

(c) Social-Security Appeals; Access to Electronic Files. In an appeal involving the right to benefits under the Social Security Act, access to an electronic file is authorized as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record; and

(2) a person who is not a party or a party's attorney may have remote electronic access to:

(A) the docket maintained under Rule 45(b)(1); and

(B) an opinion, order, judgment, or other written disposition, but not any other part of the case file or the administrative record.

Committee Note

This rule is adopted in compliance with § 205(c)(3) of the E-Government Act of 2002 (Public Law 107-347). Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." This rule goes further than the E-Government Act in protecting personal identifiers, as this rule applies to paper as well as electronic filings. Paper filings in many districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore they raise the same privacy and security concerns when filed with the court.

This rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy provides that — with the exception of Social Security appeals — documents in civil case files should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file. Because case files are available over the internet through PACER, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings and by altogether prohibiting electronic access to the files in Social Security cases by members of the general public. (Social Security appeals are unique in their great number, their extensive records, and their focus on medical records and other intensely private information.)

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not otherwise protected will be made available over the internet through PACER. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from § 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

TEMPLATE DRAFTED BY PROF. CAPRA

Rule [ ] Filing and Privacy

(a) Personal Data Identifiers In Court Filings. Subject to (b) of this rule, a party filing any information or material with the court– whether electronically or in paper – must comply with the following procedures:

> **(1) Social Security Numbers.** If a person's social security number must be included, the first five numbers must be deleted.
>
> **(2) Names of Minor Children.** If the name of a minor child must be included, only the child's initials may be disclosed.
>
> **(3) Dates of Birth.** If a person's date of birth must be included, only the year of birth may be disclosed.
>
> **(4) Financial-Account Numbers.** If a financial-account number must be included, only the last four digits may be disclosed.
>
> **(5) Home Address.** If a home address must be included, only the city and state may be disclosed.

(b) Unredacted Filing Under Seal. A party wishing to file an otherwise proper document containing the personal identifiers listed in (a) may file an unredacted document under seal. That document must be retained by the court as part of the record. The court may require the party to file a redacted copy for the public file.

(c) Judicial Conference Standards. A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.

Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in

most districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy sets forth seven general principles:

> 1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.
>
> 2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.
>
> 3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.
>
> 4. Except where otherwise noted, the policies apply to both paper and electronic files.
>
> 5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.
>
> 6. The availability of case files at the courthouse will not be affected or limited by these policies.
>
> 7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

The Judicial Conference policy further provides that documents in [civil] case files should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file. Because case files are available over the internet through PACERNet, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings.

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not

otherwise protected will be made available over the internet through PACERNet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule.

CACM'S COMMENTS ON CAPRA TEMPLATE

Note: Proposed deletions are stuck through, additions are in bold, and general comments and explanations are in italics.

Rule [ ] Filing and Privacy

(a) Personal Data Identifiers In Court Filings. Subject to (b) of this rule, a party filing any information or material with the court– whether electronically or in paper – must comply with the following procedures:

> **(1) Social Security Numbers.** If a person's social security number must be included, ~~the first five numbers must be deleted.~~ **only the last four digits may be disclosed.** *This change would make (1) parallel with (4).*
>
> **(2) Names of Minor Children.** If the name of a minor child must be included, only the child's initials may be disclosed.
>
> **(3) Dates of Birth.** If a person's date of birth must be included, only the year of birth may be disclosed.
>
> **(4) Financial-Account Numbers.** If a financial-account number must be included, only the last four digits may be disclosed.
>
> **(5) Home Address.** If a home address must be included, only the city and state may be disclosed.

If HR 1303 is passed by the Senate and signed by the President, we will need to consider whether to include its provisions regarding a party's ability to file a "reference list" of the complete versions of the identifiers and the corresponding shortened versions that the court shall maintain under seal and allow to be amended. This procedure would only apply to documents created by a party so as not to impact the evidentiary value of exhibits. These procedures were agreed to by the Department of Justice.

(b) Unredacted Filing Under Seal. A party wishing to file an otherwise proper document containing the personal identifiers listed in (a) may file an unredacted document under seal. That document must be retained by the court as part of the record. The court may require the party to file a redacted copy for the public file.

~~**(c) Judicial Conference Standards.** A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.~~

This is confusing given the statement in (b) above, which is contradictory to the Judicial Conference Policy, yet required by the E-Government Act. In any event, the reference to "interim rules" should be removed because pursuant to Section 205 (c)(3)(B)(i) of the E-Government act, any interim rules cease to be effective once this rule becomes effective. Further, we really do not have any "interim rules" other than the policy itself. Thus, the use of that phrase would likely be confusing to the reader.

If the current exemption for Social Security appeals is to remain part of the rule, such would need to be specifically mentioned in the civil and appellate rules.

Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in ~~most~~ **many** districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy sets forth seven general principles:

1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.

2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.

3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.

4. Except where otherwise noted, the policies apply to both paper and electronic files.

5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.

6. The availability of case files at the courthouse will not be affected or limited by these policies.

7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Including all of the 7 principles here may be too much for the Committee Note. A reference to the policy, together with the paragraph that comes after the recitation of the principles may be enough. Also, with the possible changes in access to paper files that may result in some courts due to the operational guidelines that are being developed in the criminal privacy context, principle 6 may no longer be accurate in all courts.

The Judicial Conference policy further provides that documents in [civil] case files should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file. Because case files are available over the internet through PACER~~Net~~, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings.

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not otherwise protected will be made available over the internet through PACER~~Net~~. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule. **The responsibility to redact filings rests with counsel and the parties.**

CAPRA'S RESPONSES TO CACM'S COMMENTS

Katie,

I will send the suggestions to all the reporters for their respective Committee meetings in the spring. I wanted to give my observations on the reasoning behind some of the language on which suggestions were made.

1. The reference to Judicial Conference Policy came from suggestions at the meeting that from time to time the Judicial conference may wish-- in the future--to establish certain guidelines in this area. Perhaps a compromise would be an introductory phrase saying, "Except as inconsistent with this rule . . . "

2. We agreed at the meeting to leave social security out of the template. Civil and Appellate will decide how to treat those cases.

3. We do plan to incorporate the reference list "solution" if it is enacted. I hope that you will keep me apprised of developments.

4. I thought that it would be helpful to practitioners, at least as a starting point, to include all of the general principles in the Committee Note, as they would not be expected to find it elsewhere. I am not sure what the other reporters think, but that will be a topic of discussion at their meetings.

5. I thought the language on responsibility of the parties might be outside the scope of a committee note, as the Standing Committee is currently looking at it. But again, the other reporters might have a different view.

Thanks so much for the comments.

Dan Capra

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

January 6, 2004

MEMORANDUM TO E-GOVERNMENT SUBCOMMITTEE

SUBJECT: *Materials for January 14 Subcommittee Meeting*

For your information, I have attached background materials for the E-Government Subcommittee meeting. The meeting will be held at 8:30 am on Wednesday, January 14, in the Boardroom at the Hermosa Inn in Scottsdale, Arizona.

Under section 205(c) of the E-Government Act of 2002 (Pub. Law No. 107-347), the Supreme Court must prescribe rules governing the security and privacy concerns arising from public access to electronic case records. The E-Government Subcommittee was formed by Judge David Levi to develop proposed rules for the consideration of the pertinent advisory rules committees and review by the Standing Rules Committee, in accordance with the Rules Enabling Act.

In June 1999, several years before the enactment of the E-Government Act of 2002, the Committee on Court Administration and Case Management (CACM) began a study of privacy issues regarding public access to electronic case files in appellate, civil, bankruptcy, and criminal cases. CACM published proposed privacy policies for public comment. It conducted a series of meetings and public hearings. After extensive work and debate spanning four years, the committee developed a set of recommendations that were adopted by the Judicial Conference as the judiciary's electronic-case-files privacy policy.

The attached materials include:

- Five-page staff memorandum from the Committee on Court Administration and Case Management describing the history of the committee's actions in developing the present Judicial Conference privacy policy regarding public access to electronic case files. The memorandum contains six attachments, including: (1) A chart identifying and summarizing 242 comments submitted on CACM's initial proposed privacy policy. (2) A list of speakers testifying at the public hearing on CACM's proposed privacy policy. (3) CACM's report to the Judicial Conference recommending adoption of a judiciary-wide privacy policy regarding appellate, civil, criminal, and bankruptcy case files. (4) A revised proposed model notice of

electronic availability of case file information. (5) The original proposed model notice of electronic availability of case file information. (6) Guidelines for implementing Judicial Conference policy on privacy and public access to electronic criminal case files.

- May 7, 2003, Federal Judicial Center report: *Remote Public Access to Electronic Criminal Case Records: A Report on a Pilot Project in Eleven Federal Courts.*

- June 17, 2003, notice of Judicial Conference's Executive Committee action regarding the redaction of personal identifying information, e.g., social security numbers, contained in pending legislation amending section 205(c) of the E-Government Act.

- December 15, 2003, staff memorandum on a "Rules-based approach to privacy and public access: an initial outline."

- Section 205(c) of the E-Government Act of 2002.

I look forward to seeing you at the January 14 meeting.

John K. Rabiej

Attachments

cc: Honorable David F. Levi (with attach.)
Professor Daniel R. Coquillette (with attach.)
Peter G. McCabe, Secretary (with attach.)
Abel J. Mattos (with attach.)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: December 30, 2003

FROM: Abel J. Mattos

SUBJECT: Background Materials on the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files

TO: Subcommittee on E-Government and Privacy Rules

This memorandum is intended to provide you with general background regarding the process by which the Judicial Conference, on the recommendation of its Committee on Court Administration and Case Management (CACM), developed approved, and is implementing its Policy on Privacy and Public Access to Electronic Case Files.

Historically, courts have made case file documents available at courthouses and, upon request, by mail or other similar delivery to members of the public. In recent years though, both courts and the public (lawyers and nonlawyers alike) have created a demand for the availability of court documents electronically, either on court websites or through the judiciary's Public Access to Court Electronic Records (PACER) system which issues each registered user a login and password that must be entered before case file documents can be accessed. Four years ago, the CACM Committee formed a Privacy Subcommittee to study what implications such electronic public access to case files would have on the privacy interests in the federal court process. The Privacy Subcommittee included four CACM Committee members as well as a member from the Committee on the Rules of Practice and Procedure, the Information Technology Committee, the Bankruptcy Committee, and the Committee on Criminal Law.

The Privacy Subcommittee's work was extensive. In its first year, it held numerous meetings and worked with experts and academics in the privacy arena, court users (including judges, and court clerks) and government agencies. In May 2000, the Privacy Subcommittee presented several initial policy options for the creation of a judiciary-wide electronic access privacy policy. These options were presented to the CACM Committee, and the four liaison committees at their Summer 2000 meetings.

Using the comments received from the Committees, the Privacy Subcommittee further refined the policy options and, in November 2000, produced a document entitled "Request for Comment on Privacy and Public Access to Electronic Case Files." This document was published in the Federal Register and posted on a specially-created website to solicit comments from the public. Over 242 comments were received from a wide variety of interested persons including private citizens, privacy advocacy groups, journalists, attorneys, government agencies, private investigators, data re-sellers and members of the financial services industry. Attachment 1 is a chart that summarizes the comments received. You may access the full text of any comment by visiting the Privacy Policy website at www.privacy.uscourts.gov , clicking on the "comments

received" box and selecting the comment you wish to view.

Subsequently, in March 2001, the Privacy Subcommittee held a public hearing during which individuals representing a wide spectrum of public, private and government interests made oral presentations and answered questions from Privacy Subcommittee members. It was clear from the comments submitted and presentations made, that remote electronic access to public case file information provides numerous benefits. For example, several speakers noted that such access would provide citizens with the opportunity to see and understand the workings of the court system, thereby fostering greater confidence in government. The argument that electronic access "levels the geographic playing field" by allowing individuals not located in proximity to the courthouse easy access to what is already public information was also frequently mentioned. Others noted that providing the same access to this public information through the Case Management/Electronic Case Files (CM/ECF) system by way of PACER as well as at the courthouse would discourage the creation of a "cottage industry" by individuals who could go to the courthouse, copy and scan the information, download it to a private website and charge for access, thus profiting from the sale of public information and undermining restrictions intended to protect privacy. Attachment 2 is a list of the individuals who testified at the hearing. The materials used by members of the Privacy Subcommittee to prepare for this hearing will be available to Subcommittee members upon request.

After much thought and debate, the Privacy Subcommittee recommended to the CACM Committee and the liaison committees the adoption of a uniform, nationwide policy to address issues relating to privacy and public access to electronic case file information. The involved committees endorsed the proposed policy and the CACM Committee recommended it to the Judicial Conference. The Conference adopted the policy in September 2001 (JCUS-SEP/OCT 01, pp. 48-50). Attachment 3 is a copy of the CACM Committee report adopted by the Conference.

The policy contains seven general principles and continues to establish a general privacy and access policy for civil, bankruptcy, criminal and appellate cases separately. For civil case files, the policy is that documents be made available electronically to the same extent that they are available at the courthouse with one exception (Social Security cases should be excluded from electronic access) and one change in policy (the requirement that certain "personal data identifiers" be modified or partially redacted by the litigants). These identifiers are Social Security numbers, dates of birth, financial account numbers and names of minor children.

For criminal case files, the policy was that public remote electronic access to documents not be available at this time, with the understanding that the Judicial Conference will reexamine the policy within two years.

For bankruptcy case files, the policy is that documents be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy

change for personal identifiers as in civil cases; that § 107(b)(2) of the Bankruptcy Code be amended to establish privacy and security concerns as a basis for the sealing of a document; and that the Bankruptcy Code and Rules be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits.

For appellate case files, the policy is that documents be treated the same way in which they are treated at the lower level.

Following Conference adoption of the policy, the CACM Committee formed and implementation subcommittee which was further divided into subgroups to focus on the implementation of the policy in civil, criminal and bankruptcy cases. In April 2002, the CACM Committee informed all district courts that the privacy policy for civil cases was to be in effect for all courts that make electronic version or images of documents available to the public on line. The Committee provided the courts with a model notice and guideline for a model local rule to assist in implementing this change for civil cases. These documents are included at Attachment 4.[1]

As noted in the policy, implementation for bankruptcy cases required amending the bankruptcy code and official forms and rules. The CACM subgroup on bankruptcy implementation worked with the Advisory Committee on Bankruptcy Rules to draft proposed amendments to the bankruptcy rules and forms. As part of this process, the Advisory Committee on Bankruptcy Rules held a hearing where it received testimony from interested parties, particularly those in the credit industry.

The Committee on Rules of Practice and Procedure endorsed the rules and forms changes

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[1] Specific provisions of the E-Government Act of 2002 relating to redaction of person information from court files went into effect on April 16, 2003. The Act's requirements regarding redaction differ from the Judicial Conference policy in that the Act requires that a court allow a party to file an unredacted version of a document under seal and keep that version of the document as the official record. It permits a court to require the filing of a redacted version of the document for inclusion in the public file. The Judicial Conference sought to amend these provisions, as well as the requirement that national rules be developed to address privacy and security concerns. In an effort to achieve this amendment, the Administrative Office negotiated with the Department of Justice, which was the author of the problematic provisions. These negotiations resulted in an amendment that would still require the development of national rules but would also permit the use of a sealed "reference list" for most filings that would contain the complete version of personal identifiers, thereby allowing only the redacted version to be used in public filings while still preserving the evidentiary integrity of a document. This compromise is included in HR 1303, and amendment to the E-Government Act that has passed the House. It is currently with the Senate Committee on Governmental Affairs.

suggested by the Advisory Committee on Bankruptcy Rules and recommended them for approval by the Judicial Conference. The Conference approved the amendments to the rules at its September 2002 session (JCUS-SEP 02, p. 59). The amendments to Rules 1005, 1007, 2002 and 2003 were then approved by the Supreme Court and forwarded to Congress. Congress took no action and the amendments became effective on December 1, 2003. In general, these amendments require only the last four digits of Social Security numbers of debtors to be included in the bankruptcy case file. With theses amendments, the policy should be in effect for all bankruptcy cases. In November 2003, the CACM Committee sent a memorandum to all bankruptcy courts informing them that they should be in compliance with the policy by December 1, 2003 and providing them with guidance for a model local rule and notice to assist with implementation. A copy of these documents is Attachment 5.

At the request of the CACM Committee, the Judicial Conference has included in the most recent version of the court improvements bill, the request to amend two sections of Title 11 to allow for further implementation of the privacy policy in bankruptcy cases. The first request is to amend 11 U.S.C. § 107 to explicitly add privacy and security concerns as grounds for sealing information. The second is to amend, 11 U.S.C. § 342(c) require only the last four digits of the number in order to be consistent with the policy and the rules and forms amendments.

For criminal cases, the implementation subgroup focused on the best way to fulfill the Conference's requirement that the prohibition on criminal access be reexamined within two years. As part of this process, the CACM Committee made two recommendations to the Conference regarding the criminal policy, both of which were adopted in March 2002. The first was the creation of a pilot program to allow selected courts to provide remote public access to criminal case file documents. The Federal Judicial Center was asked to study these courts and provide a report to the Committee on the impact of electronic access to criminal case files. The purpose of the study was not to weigh the benefits versus the possible drawbacks. The potential benefits were well documented in the public feedback received in 2000 and 2001. The study was aimed at ascertaining whether any evidence could be gathered that would confirm or dispel concerns about potential drawbacks, particularly with regard to threats to the personal security of co-operating individuals. The Criminal Law Committee was consulted regarding this study. The second was creation of a "high profile" exception that would permit remote public access to criminal case file information in certain cases. (JCUS-MAR 02, pp. 10-11).

The results of the FJC study were presented to the CACM Committee and the Committee on Criminal Law at their Summer 2003 meetings. It revealed no instances of harm based on the enhanced access and found that the majority of those participating in the study, including judges, court personnel and attorneys, were in favor of the increased access. Nonetheless, some members of the Committee on Criminal Law expressed serious reservations about allowing remote public access to criminal case files. After careful consideration and debate, the CACM

Committee, with the concurrence of the Committee on Criminal Law, recommended that the Conference amend the prohibition on remote public electronic access to criminal case files and permit public access to the same documents electronically as at the courthouse with the requirement that specific personal identifiers be partially redacted by the filer whether the document is filed in paper or electronically. In addition, it was recommended that this amendment not become effective until the Conference approved specific guidance – developed by this Committee, the Committee on Criminal Law, and the Defender Services Committee – for the courts to use in implementing the new policy. The Conference adopted this recommendation. (JCUS-SEP 03, p._).

To assist in developing this guidance, the Committee established its Criminal Privacy Files Implementation Subcommittee, with members from each of the three participating committees. The subcommittee has conducted several meetings via conference call and has agreed upon a draft of the guidance that would go to the courts regarding implementation of the new criminal case files access policy. The draft guidance was reviewed by the three committees at their Winter 2003 meetings and a copy of the most recent draft is included at Attachment 6. The Subcommittee is now working on drafting a model local rule for public access to electronic criminal case files.

Attachments

REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS: A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS

Prepared for the Court Administration and Case Management Committee of the Judicial Conference

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Federal Judicial Center

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REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS
A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS

THE QUESTION AND A SUMMARY OF FINDINGS

The Question Before the Committee and the Purpose of the Report

The Court Administration and Case Management Committee (Committee) recommended to the Judicial Conference of the United States in 2001 that the Conference prohibit remote public access to electronic criminal case files. The Judicial Conference agreed, and agreed that it would reconsider the policy in two years, during which time the Committee would study the implications of allowing remote public access. The Committee asked the Federal Judicial Center (Center) to conduct an evaluation of a pilot project authorizing ten district courts and one circuit court to make available remote public access to electronic criminal case documents. This report summarizes the results of that evaluation, with the purpose of providing information to the Committee as it re-examines the policy prohibiting remote public access to electronic criminal case files.

Summary of Major Findings

Study Design. The pilot project began in the spring of 2002. Ten district courts and one court of appeals were granted exemptions to the Judicial Conference policy that "public remote electronic access to documents in criminal cases should not be available at this time [September 1, 2001]."[1] The Committee selected four additional districts to serve as comparison courts for purposes of this evaluation. These comparison courts had made electronic images available prior to 2001 but were not granted exemptions by the Judicial Conference to continue allowing remote public access during the pilot. The Administrative Office (AO) issued a set of operational guidelines for the pilot courts that specified which documents could not be displayed under any circumstances and what information was to be redacted from all criminal filings (see the Appendix for the exact text of the operational guidelines).

The goal of the pilot project evaluation was to generate answers to a set of questions, agreed to by the Committee, the AO, and Center. The evaluation questions address these areas of concern: (1) what rules and procedures did the courts promulgate for remote public access; (2) what advantages and/or disadvantages are there to parties, judges, and court staff of such access;

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[1] JCUS-SEP 01, p. 49

and (3) what harm and potential harm of remote public access to criminal case documents did the Center's evaluation of the pilot program identify? This report is organized around these questions.

In addition to harm or potential harm from remote public access, the Committee asked the Center to study the potential harm posed by online criminal dockets, which contain entries such as hearings, filings of motions, and issuance of orders for a given criminal case. These entries are accompanied by descriptions of the entries, regardless of whether electronic images of documents are available. The question is whether these descriptions can contain harmful information. The Committee selected six additional districts to serve as comparison courts for the supplemental study of docketing information.

The sources of information for this report are: 1) telephone interviews with chief judges, clerks of court, federal defenders, CJA panel attorneys and U.S. Attorneys in the eleven pilot courts and four comparison courts; 2) a survey of district and magistrate judges in the ten pilot district courts; 3) a study of defense attorney location relative to the federal courthouses in the ten pilot district courts; and 4) a study of docket sheets in the six additional comparison courts. Results from U.S. Attorney interviews are reported separately and any information obtained from U.S. Attorneys is identified as coming from that source.

Modes of Access. The pilot courts' most common means of accessing online case information is PACER (Public Access to Court Electronic Records). Less common is the use of RACER (Remote Access to Court Electronic Records).

Court Practices. The actual practices of the pilot courts cannot be easily summarized and compared, as these practices vary considerably. Most of the pilot courts had allowed remote public access before the formal pilot program began, and each court had a different set of criminal case documents that it made available in electronic form online. The pilot courts that had offered remote access to criminal case documents before the pilot project sought to conform their practices to the AO's operational guidelines on document availability and redaction, but with varying results. The variation in the adoption of the operational guidelines is most apparent when these practices are considered in terms of the number and types of documents the courts make available via remote public access.

The operational guidelines prohibit remote public access to certain documents such as pretrial and presentence investigations, Statements of Reasons, and sealed documents. As respondents in the district courts often noted, the prohibited documents were not made available

online before the pilot project and, therefore, posed no implementation issues for the pilot district courts.

The pilot district courts that make a limited subset of other criminal case documents available online adopted the operational guidelines with few or no reported problems. Respondents in the district courts with greater numbers of documents available online often reported concerns about the operational guidelines and the need to balance competing demands of document availability (to meet the needs of users), document redaction, and monitoring of guideline compliance by filing parties. Several of the courts with more extensive online offerings found that they had to make changes in their practices to comply with the operational guidelines. These changes included one or more of the following: changes to document formats, special document scanning procedures, exemptions to the redaction rules, and removal of certain documents from remote public access. Virtually every pilot court respondent, however, whether they were judges, clerks, or defense attorneys, agreed that redaction had to be the responsibility of the filing parties. And they were in agreement as to why: clerks' offices have neither the personnel nor the training and experience to redact each filed document.

The Eighth Circuit reported no problems in implementing the operational guidelines.

Local Rules. None of the pilot courts had instituted new local rules for the pilot project at the time this report was prepared. Some courts had working or advisory groups address the issue of redaction, with input from the U.S. Attorney's office and the defense bar. One court, which makes virtually all unsealed documents available online, turned the task over to its local rules committee. However, that committee did not reach an agreement on a new rule for document availability and redaction, and that court has not implemented the operational guidelines. While this report was being prepared, another of the pilot courts had proposed an amendment to its local rules that specified how identifying information in pleadings and other filed documents would be made available to the court but not to the public.

Advantages/Disadvantages to Parties. Interview respondents in the pilot courts reported four categories of advantages of remote access to parties (and attorneys): access to information; case tracking; organizational/operational benefits; and general public benefits.

Most interview respondents extolled the advantages of access for attorneys and, to a lesser extent, for defendants and the general public. When asked about possible advantages to the public of remote access, the most common response was that it created or reinforced the concept of the courts as an open, public institution. This response came from chief judges, clerks, and defense attorneys. Respondents reported few disadvantages of remote public access. The only

disadvantage reported by more than one respondent was the potential misuse of criminal case documents, in the form of identity theft or the identification of cooperating defendants.

Advantages/Disadvantages to Judges and Staff. Respondents reported four categories of advantages to judges and court staff:

- savings of time and money;
- remote access by judges;
- organizational benefits (separate from time and money savings); and
- highlighting of the open and public nature of the court.

Respondents described few disadvantages to the court. Those mentioned fall into three categories:

- the court must take on a gate-keeping function, deciding which documents are available via remote public access;
- the organizational burden of scanning documents and ensuring that only selected documents are available to the public; and
- loss of control over publicly available documents and the information therein.

Sealed Documents. When asked if requests by government or defense attorneys in the pilot courts to seal documents might increase, to prevent document availability via remote access, most respondents were not concerned that it would become a widespread practice. Several defense attorneys said that they rely on judges to make reasonable decisions about requests to seal any portion of a case or the entire case.

Harm. For the period of the pilot project, interview respondents reported no instances of harm resulting from remote public access in any of the pilot courts.[2]

The majority of the pilot courts and all of the comparison courts made criminal case documents available through remote public access prior to September 2001. For the period before the pilot project, interview respondents reported no verifiable instances of harm resulting from remote public access in any of the pilot court or comparison courts. A CJA Panel attorney in a comparison court reported a threat to a client who was cooperating with the government.

[2] During the pilot project there was a case of alleged identity theft filed in federal court in the Middle District of Florida, a non-pilot court. The defendants targeted prominent and wealthy individuals who had been charged with crimes in federal court, used the Internet and publicly available federal court records to gather identifying information about these individuals, and with that information, established credit cards and lines of credit. According to investigators, the case does not involve the misuse of documents available via remote public access. The defendants allegedly used PACER to track the progress of their victims' criminal cases, but obtained by mail copies of documents filed in federal courts around the country.

However, the source of the information behind the threat could not be traced directly to remote public access to online documents. The information could have been obtained from other sources that include co-defendants, the online docket (without accessing criminal case documents) and the paper file kept in the clerk's office. This was the only reported incident in any of the comparison courts.

U.S. Attorney Interviews. The views of the U.S. Department of Justice (DOJ) on remote public access are contained in the Department's formal comment to the AO on privacy and public access to electronic case files as to public access to electronic criminal case files[3] DOJ urges the Judicial Conference to consider during its policy deliberations the potential for harm to individuals or to criminal investigations and prosecutions of widespread public dissemination of criminal case information. Our interviews of U.S. Attorneys or their designees revealed no specific instances of harm to individuals, such as cooperating defendants, from remote public access nor did they report problems with investigations or prosecutions, but the pilot district courts are a small sample of all 94 districts, whose experiences may not be representative of what would happen across all federal districts.

Survey Results. The survey results confirmed many of the findings of the interviews. The district and magistrate judges we surveyed saw more advantages than disadvantages to allowing remote public access to criminal case files. This was especially the case with judges who used remote access to electronic criminal case files. When judges were asked about restrictions on access to criminal case documents, 57 percent of the district judges and 56 percent of the magistrate judges responded that there should be unlimited remote public access to criminal case documents (excluding sealed documents). Only 4 percent of the district judges and 6 percent of the magistrate judges responded that there should be no public access. The judges were asked whether, to their knowledge, any harm had resulted from remote public access in their district. The response was 100 percent no.

THE REPORT: STUDY CONTEXT AND DESIGN

Context

At its September 2001 meeting, the Judicial Conference adopted recommendations by the Committee concerning remote public access to electronic civil, criminal, bankruptcy and

[3] U.S. Department of Justice, Comments Regarding the Privacy and Security Implications of Public Access to Electronic Case Files, February 2001.

appellate case files. With regard to criminal case files, the Judicial Conference adopted this recommendation:[4]

> Public remote electronic access to documents in criminal cases should not be available at this time, with the understanding that the policy will be reexamined within two years of adoption by the Judicial Conference.

At its March 2002 meeting, the Judicial Conference endorsed a recommendation by the Committee to create a pilot project to study the impact of remote public access to electronic criminal case files. The Center conducted the evaluation of the first year of the pilot project, May 2002 to March 2003), under the guidance of the Committee's Subcommittee on Privacy Policy Implementation.

The evaluation was designed to answer five general questions.

1. **Description of Court Practices.** What kinds of documents and information are the courts making available electronically?
2. **Rules.** What rules and procedures have the courts promulgated?
3. **Party Advantages/Disadvantages.** What is the utility of remote public access and electronic filing to parties in criminal cases?
4. **Judge and Staff Advantages/Disadvantages.** What effect does a policy that limits public access have on judges and court staff?
5. **Harm.** Has anyone been harmed or threatened with harm because of information contained in case documents that were obtained through remote public access?

The pilot courts were asked by the AO to implement operational guidelines, which specified that certain documents and certain information could not be made available via remote public access. Consequently, the rules and procedures implemented by the courts largely concern which documents and information are made available and how these restrictions are effected. Therefore, the first two questions will be answered together.

Study Design

The study has four parts that will help answer the evaluation questions: interviews with chief judges, clerks of court, federal defenders, CJA panel attorneys, and U.S. Attorneys in the pilot courts and a set of comparison courts; a survey of district and magistrate judges in the pilot

[4] JCUS, *supra* note 1.

district courts; a study of defense attorney location relative to the federal courthouse in the pilot district courts; and a study of docket information in a second set of comparison courts. This section describes the pilot and comparison courts and the purposes and data sources for these parts of the study.

Selection of Courts. To answer the study questions, the Committee selected three categories of courts. These categories of courts represent a range of experiences with public access and include courts that are currently making case documents available electronically to the public as well as courts that did so before September 2001. The courts in each category are listed in Table 1. The first category, the Pilot Courts, consists of ten district courts and one court of appeals, to all of which the Judicial Conference granted an exemption to the policy prohibiting remote public access to electronic images of criminal case documents. Nine of the district courts offered remote public access to criminal case documents before September 2001, and as a result have considerable experience with such access. Therefore, these courts can speak to many of the study questions and speak more authoritatively than other courts about the impact of permitting remote public access. Two other courts were added to the list: the District of the District of Columbia and the Eighth Circuit. At the time of the Committee's recommendation, the District of the District of Columbia planned to begin making documents available online and the court of appeals made briefs available online in electronic form before September 2001.

The second category of courts in Table 1 displayed electronic images of criminal case documents prior to September 2001, but were not granted an exemption to the Judicial Conference policy (Comparison Courts, Group I). These courts have prior experience with electronic public access and therefore can speak to many of the study questions. These courts can also speak about the impact of not permitting remote public access to criminal case documents. The third category in Table 1 consists of courts that have never made criminal case documents available online to the public (Comparison Courts, Group II). We used this third set of courts for a study of online criminal dockets (see below).

Table 1

Pilot Courts	Comparison Courts Group I	Comparison Courts Group II
S.D. Cal.	S.D. Iowa	D. Colo.
D. D.C	W.D. N.C.	M.D. Fla.
S.D. Fla.	W.D. Okla.	S.D. N.Y.
S.D. Ga.	D. Vt.	M.D. Tenn.
D. Idaho		W.D. Va.
N.D. Ill.		W.D. Wisc.
D. Mass.		
N.D. Okla.		
D. Utah		
S.D. W.Va.		
Eighth Circuit		

Interviews. Between September 2002 and April 2003, Center staff conducted interviews in the pilot courts and Group I of the comparison courts. In the pilot courts, the chief judges and clerks of court were interviewed at the beginning of the study and at the end of the study to inquire about changes in court policies or procedures since the first interview. In the pilot district courts, federal defenders[5] or assistant federal defenders, CJA panel attorneys, and U.S. Attorneys or their designees were interviewed once. In the Group I comparison courts, chief judges, clerks of court, and federal defenders were interviewed once.

For various reasons, not all of these individuals were interviewed in every pilot court. For example, in six of the ten pilot courts and the court of appeals, the chief judge chose not to be interviewed, deferring to the clerk instead. One of the pilot courts does not have a federal defender; the CJA panel attorney representative was interviewed instead. The District of the District of Columbia has not yet implemented the pilot project because of the time and resources required to do so. This court did not have remote public access before September 2001 and, after the pilot project began, devoted its resources to the implementation of the Case Management and Electronic Case Filing System (CM/ECF). As a result, only the chief judge of the District of the District of Columbia was interviewed; no other interviews were conducted in that district.

[5] Several of the pilot district courts have Community Defenders. For purposes of this report, the terms "federal defender" and "defender" will refer to Community Defenders as well as Federal Defenders.

Finally, interviews could not be scheduled with two of the remaining nine U.S. Attorneys by the time this report was prepared.

The interviews dealt with the questions listed earlier: harm, advantages and/or disadvantages to parties, judges, court staff, and the public, court practices, and rules. Respondents were also asked about document availability and redaction and the operational guidelines. A basic set of questions was asked of all respondents, with more in-depth questions tailored to the respondent. For example, chief judges and clerks were asked about court practices and rules; attorneys were asked about their everyday use of remote access. In addition, the interviews in the Group I comparison courts included questions about the impact of ending remote public access to electronic criminal case documents at the conclusion of the pilot study.

Pilot Court Survey. The Center sent a questionnaire to 62 magistrate judges and 133 district judges in the ten pilot district courts. The questions dealt with a subset of the issues covered in the interviews, with a focus on advantages and disadvantages of remote public access, document availability, and redaction. Questionnaires were returned by 32 of the 62 magistrate judges (52 percent) and 64 of the 133 district judges (48 percent). The range of responses from both groups was substantial and we are confident that they are representative of the views of magistrate and district court judges in the pilot courts.

Distance of Attorney Offices from the Federal Courthouse. To better gauge the advantages of remote access to parties, a study was conducted of defense attorneys in a sample of criminal cases filed in the ten pilot district courts during fiscal year 2001. The purpose was to obtain information about: 1) the proportion of cases in which the defense attorney is a private attorney (as opposed to a federal defender), and 2) the location of defense attorneys' offices relative to the federal courthouse. Federal defenders are typically located in or near the federal courthouse, whereas private attorneys may or may not be located in the same city as the courthouse. Remote access to electronic criminal case files is likely to be of greater value to attorneys who do not have easy access to the federal courthouse.

Criminal Docket Sheets. The electronic docket, which is publicly available regardless of whether electronic criminal case documents are available, contains a significant amount of information and entries about a criminal case: initial charges, pretrial release status, final charges, trial information, plea, sentence disposition, and other information. We were especially interested in determining whether there is information in the docket that is potentially harmful, whether to defendants, victims, witnesses, or 3rd parties. The interviews addressed this question, but to supplement the interview data, we undertook a modest analysis of docketing information in the Group II Comparison Courts (see Table 1). Docket sheets were downloaded for a random sample

of 100 cases filed in fiscal year 2001 from each of these six comparison courts. Our examination of the docketed information was guided by information we obtained during the interviews about potentially harmful docket entries.

FINDINGS FROM THE PILOT COURTS

The majority of findings reported in this section come from the interviews with chief judges, clerks, federal defenders and assistant federal defenders, and CJA panel attorneys. As a reporting convention, the term federal defender will refer to both federal defenders and assistant federal defenders,[6] and defense attorney will refer to both federal defenders and CJA panel attorneys. In general, interview results will not be reported in terms of the numbers or proportions of respondents expressing a view or reporting a piece of information. The number of interviews is too small to give meaning to frequencies, proportions, or percentages. Results from U.S. Attorney interviews are reported separately and any information obtained from U.S. Attorneys is identified as coming from that source.

The Pilot Courts

As context for the discussion of findings, Table 2 gives some information about the pilot district courts. This information is taken from tables published in Judicial Business of the United States Courts.[7] Note that the range of criminal filings is quite large, from less than 200 to almost 4,000 criminal filings per year.

[6] See Footnote 5.
[7] Judicial Business of the United States Courts, 2001 Annual Report of the Director.

TABLE 2

2001 FILINGS IN THE PILOT DISTRICTS

District	Authorized Judgeships[a]	Criminal Filings[b]	Civil Filings[c]
S.D. Cal.	8	3,853	2,618
D. D.C	15	464	2,958
S.D. Fla.	17	1,841	8,961
S.D. Ga.	3	418	1,128
D. Idaho	2	161	697
N.D. Ill.	22	647	10,340
D. Mass.	13	403	2,884
N.D. Okla.	3.5	121	1,001
D. Utah	5	745	1,158
S.D. W.Va.	5	235	1,253

[a] Table X-1A
[b] Table D-1
[c] Table C-3

Court Practices and Rules

The pilot project began in May 2002 when the pilot courts were sent the AO's operational guidelines on document availability and redaction (see Appendix). Upon receipt of the guidelines, the courts were authorized to allow remote public access to criminal case documents. Six of the eleven pilot courts had never stopped remote public access to criminal case documents. Four of the remaining five courts re-established remote public access (one of these courts had implemented remote access for the U.S. attorney's and federal defender's offices after September 2001). The remaining court, the District of the District of Columbia, has not yet implemented the pilot project because of the time and resources required to do so. This court did not have remote public access before September 2001 and, after the pilot project began, devoted its resources to the implementation of the Case Management and Electronic Case Filing System (CM/ECF). Therefore, this court is not included in the interview results reported here. The court is included in the results of the survey and the attorney distance study.

Mode of Access. The most common means of accessing online case information is PACER. PACER is an electronic public access service available in most federal courts. It allows a user to request information about a particular individual or case in the participating districts. It is supported through the PACER Service Center, the judiciary's centralized registration, billing,

and technical support center. Members of the public can register online for PACER accounts by providing their name, address, phone number, and e-mail address. Users are billed for their usage. The individual courts maintain their own PACER databases.

Nine of the ten pilot courts with access to criminal case documents use PACER, although in three of these courts criminal case documents are accessible only through RACER, an alternative system for requesting case information. RACER does not have a centralized system and can be set up so that it either does or does not require an ID and password. The tenth court uses RACER exclusively.

Court Practices. The guidelines prohibit remote public access to certain documents such as pretrial and presentence investigations, Statements of Reasons, and sealed documents (see the Appendix for a complete list of documents). The guidelines also require the redaction of certain information from all criminal filings: Social Security Numbers, financial account numbers, dates of birth, names of minor children, and home addresses. Redaction is the responsibility of the filing parties, with the possibility of sanctions by the court for failure to comply.

The Eighth Circuit reported no problems implementing the operational guidelines. Attorneys are sent a notice with the guideline information on redaction when a case is docketed. That notice also instructs attorneys not to include Presentence Reports and Statements of Reasons in their briefs.

The pilot district courts described varied experiences implementing the operational guidelines. As respondents often noted, the prohibited documents were not made available online before the pilot project and, therefore, posed no implementation issues for the pilot courts. However, the redaction requirements produced a variety of experiences among the pilot district courts. Several courts reported no problems implementing the redaction requirements. Several other courts described significant problems that had to be resolved before and after the guidelines were put into effect. A chief judge in one pilot district described the redaction requirements as a "disaster" when applied to certain types of pretrial documents (*e.g.*, bail surety documentation) that, of necessity, contain identifying information on the list of information to be redacted. A clerk in another pilot district said that he would have opposed participation in the pilot project had he known about the redaction requirements beforehand. Another pilot district could not reach an agreement about a local rule for redaction and, consequently, never implemented that portion of the operational guidelines. From the beginning of the pilot project to the time this report was prepared, there has been no redaction of documents filed in and available via remote public access from this court.

Based on the interviews and examination of the courts' online dockets, much of the variation in implementation experiences seems to be associated with the number and variety of criminal case documents the district courts make available online. The courts that offer more criminal case documents online tended to report more issues with implementation than did the courts with fewer types of documents available. If there was an effect of the number or variety of documents on the implementation, it may have been enhanced by the fact that document availability was also associated with the number of criminal filings. Courts with larger numbers of filings also tended to offer more documents online. However, any associations should be viewed cautiously in a sample of nine district courts.

There is no typical list of criminal case documents available online among the pilot district courts. At a minimum, a pilot district court might have indictments, informations, motions, orders, and the Judgment and Commitment Order (less the Statement of Reasons). The districts that offer more documents online have, in addition to those cited above, one or more of the following: warrants, supporting documents for bond applications, magistrate information sheets, financial affidavits, petitions in supervised release violation cases, sentencing memoranda, plea agreements, and transcripts. Many of these documents contain information that the operational guidelines require be redacted.

One of the pilot district courts makes every unsealed document publicly available online (except transcripts and documents on the prohibited list). The clerk of this court stated that attorneys rely heavily on the availability of these documents in the course of their work. This court proposed a local rule for redaction, but the local rules committee could not come to an agreement on the rule. A member of the local rules committee was specific in stating that the U.S. attorney's office did not want to redact any of its filings and sought exemptions to any redaction requirements. The committee could not reach agreement and the redaction portion of the operational guidelines had not been implemented at the time this report was prepared.

Another court established a working group to implement the operational guidelines; the group included representatives from the U.S. attorney's office, the federal defender's office, and the local defense bar. This court also has an extensive list of documents available to the public online. The clerk of this court described PACER as a "workhorse" and an important factor in keeping their high volume of criminal cases moving. The court had issued a general order at the beginning of the pilot project that was modeled on the operational guidelines. Based on the working group's efforts, a revised general order was issued, adding a number of documents to the prohibited list that it decided could not be redacted easily.

Somewhere in the middle of these varied experiences is the pilot district that has taken a measured approach to making documents available online. Although it does extensive scanning of documents for internal use, only indictments, informations, and orders are publicly available on the court's web site. A working group, with representatives from the U.S. Attorney's office and the local bar, has met to make decisions about which documents to make available. But, according to the clerk, they have moved slowly, and intentionally so.

Several districts had a more specific implementation matter: 18 USC § 3612(b)(1)(A) requires that a "judgment or order imposing, modifying, or remitting a fine or restitution order of more than $100 shall include the name, social security account number, and residence address of the defendant." Several courts interpreted this statute as a prohibition on redacting Judgment and Commitment Orders. This interpretation led to various solutions. One district simply blocked the social security number and date of birth with opaque tape before scanning the documents. Another district moved these identifiers to the Statement of Reasons. This same district was also concerned about the identifiers in the petition filed in supervised release violation cases. The clerk did not want to produce two versions of the petition (or of the Judgment and Commitment Order)—redacted and unredacted—and these petitions are now filed under seal. A third district decided to not make Judgment and Commitment Orders available online.

Compliance and Monitoring. The operational guidelines put the responsibility for redaction of criminal filings on the filing parties. Based on the guideline's recommended language for notice to the bar of the pilot project and its redaction requirements (see Appendix), the courts were not obligated to check each document for compliance. In fact, one clerk read the guidelines to mean that the court was not obligated to do anything different than what it had been doing. Apart from the district courts' redaction of internally-generated criminal case documents, the courts did not seem to monitor compliance, or monitor it closely. Several clerks expressed the concern that the volume of documents processed by their courts made monitoring difficult, particularly monitoring of private defense attorneys unfamiliar with the redaction requirements. At the same time, defense attorneys in several districts reported receiving assurances from their respective courts that they would not be sanctioned for inadvertent failures to redact.

Advantages and Disadvantages to Parties

In the interviews, most respondents extolled the advantages of access for attorneys and, to a lesser extent, for defendants and the general public. Defense attorneys were generally very positive about the benefits to them and their staffs of remote access. The advantages cited in the interviews can be grouped generally into four categories: access to information; case tracking; organizational/operational benefits; and general public benefits.

Access to information. Remote access provides immediate, remote, and simultaneous access to case information and documents, 24 hours a day. In other words, attorneys can access case documents from their offices, any time of the day, regardless of who else might be accessing the documents. Everything—the docket and filed documents—is in one place (depending on the documents a court makes available online). And access to all of the filed cases creates a research tool for attorneys (as well as for law students and academics). These were the most common responses, and they came from judges, clerks, and attorneys. Several respondents noted that this is a form of equal access that helps "level the playing field" for defense attorneys who might be located some distance from the court and for whom trips to the clerk's office could be burdensome.

Case tracking. With remote access, attorneys, defendants, defendants' families, and other members of the public can track cases. U.S. attorneys and defense attorneys can check for new filings in their cases, without waiting for documents to be sent to them by the court or by opposing counsel.

Organizational/Operational Benefits. Attorneys can print documents as they are needed or, if documents are not available online, they can determine which documents to request from the clerk's office. Federal defenders can use online charging documents to assign cases in their offices. In response to questions, the clerk's office can direct the media to cases online for more information.

General Public. When asked about possible advantages to the public of remote access, the most common response was that it created or reinforced the concept of the courts as an open, public institution. This response came from every type of respondent: chief judges, clerks, and defense attorneys. In fact, this served as the basis for many respondents to state that there should be remote public access to all or most unsealed documents and that as little redaction as possible should take place.

The chief judges, clerks, and defense attorneys cited few disadvantages of remote public access to attorneys, defendants, or to the general public. The only disadvantage cited more than once was harm caused by misuse of documents or the information therein (*e.g.*, identity theft). The most commonly cited concern was identity theft, followed by the identification of and possible harm to cooperating defendants, informants, witnesses, or victims. In a typical criminal case, identifying information about a defendant might be scattered throughout the range of filed documents—indictments and informations, documents in support of bond applications, financial affidavits, and Judgment and Commitment Orders contain or may contain identifying, information such as social security numbers, financial account numbers, dates of birth, and home

addresses. As a counterpoint, several respondents stated that criminal defendants do not represent good targets for identity thieves (but see footnote 2). As for cooperating defendants, some respondents were skeptical that documents posed much of a threat. Several respondents said that they assume a defendant is cooperating if a case does not go to trial. One defense attorney said that information about cooperation "gets around the street" and that the last place anyone would look for it is online.

Other disadvantages, each reported by no more than one respondent, are:

- easy access by jurors or witnesses to criminal case documents;
- remote access requires a certain level of technology—a computer, Internet service, and a PACER account—that may be beyond the reach of some individuals; and
- inconsistency within and between districts as to the number and types of documents available—remote public access is no guarantee that certain documents and information are available in this format.

Advantages and Disadvantages to Judges and Court Staff

Only chief judges and clerks of court in the eleven pilot courts were asked about advantages and disadvantages to judges and court staff. They reported advantages that can be grouped into four categories: savings of time and money; remote access by judges; organizational benefits (separate from time and money savings); and enhancements to the public nature of the court.

Savings. Most of the chief judges and clerks discussed the time and money savings to the court of remote public access. These savings stem from the fact that staff spend less time pulling files, making copies of documents, and answering questions. One clerk did point out that these savings are assumed to occur; no empirical assessment of the savings in time and money has been made.

Remote Access by Judges. With remote public access, judges have access to information and documents from their cases regardless of location. If a judge travels to another place of holding court, docket and case file information are still readily available. Remote access is particularly valuable for court of appeals judges, who are located throughout their respective circuits.

Organizational Benefits. Respondents cited several organizational benefits apart from savings of time and money: less traffic in the clerk's office; errors are more likely to be detected, and detected earlier because attorneys and others have fast and ready access to documents; the media and the general public can be referred to the online docket for answers to questions; scanning of documents facilitates fax notification of attorneys of newly filed documents; and the use of a new technology positions the court to take advantage of future technological changes.

Public Nature of the Court. Many of the chief judges and clerks cited this as an advantage of remote public access. The courts are a public institution, and ready access to information highlights and reinforces that quality.

The chief judges and clerks of court identified few disadvantages to the court of remote public access. Those reported were of three types generally: gate keeping function; organizational; and loss of control over information. Several respondents reported that there were no disadvantages to judges nor to the court of remote public access.

Gate keeping. Remote public access forces the court to make decisions about which documents and what information in those documents the public can and cannot view online.

Organizational. Remote public access requires extra work by the clerk's office, scanning documents and ensuring that the correct documents are made available (*i.e.*, ensuring that sealed documents are not inadvertently made available).

Loss of Control. Once documents are available online, the court no longer has any control over who views them, nor the uses to which they are put.

Harm Resulting From Remote Public Access

The majority of the pilot courts had made documents available online prior to September 2001. These documents were also made available as part of the pilot project, however, the pilot courts were not required to redact the pre-September 2001 documents for the pilot project. These unredacted documents were accessible alongside the redacted documents filed under the operational guidelines of the pilot project. There were exceptions as several courts prohibited access to documents filed during the pilot project that could not be easily redacted (*e.g.*, bond documents, Judgment and Commitment Orders) and, in one district, extended that prohibition to these documents filed before the pilot project. In the majority of pilot districts the documents filed prior to the pilot courts' implementation of the operational guidelines constitute a higher level of risk than do those filed afterwards. Consequently, the availability of both redacted and unredacted documents tests the efficacy of the redaction requirements in the operational guidelines.

For the period of the pilot project, there were no reports of misuse of criminal case documents, nor were there any reports of harm stemming from the availability of these documents via remote public access.

A CJA panel attorney in a Group I comparison court reported threats to a client who had cooperated with the government. However, the source of the information behind the threats

could not be traced directly to online documents (which would have been available in that district before September 2001). The information about this defendant's cooperation could have been obtained from a number of sources that include co-defendants, the online criminal docket (without accessing criminal case documents) and the paper file kept in the clerk's office. Otherwise, for the period prior to the beginning of the pilot projects, there were no documented instances of misuse of online documents nor of harm stemming from their availability online in any of the pilot or comparison courts.

U.S. Attorney Interviews

The views of the U.S. Department of Justice (DOJ) on remote public access are contained in the Department's formal comment to the AO on privacy and public access to electronic case files as to public access to electronic criminal case files[8] DOJ urges the Judicial Conference to consider during its policy deliberations the potential for harm to individuals or to criminal investigations and prosecutions of widespread public dissemination of criminal case information. Our interviews of U.S. Attorneys or their designees revealed no specific instances of harm to individuals, such as cooperating defendants, from remote public access nor did they report problems with investigations or prosecutions, but the pilot district courts are a small sample of all 94 districts, whose experiences may not be representative of what would happen across all federal districts.

Document Availability and Redaction

The Operational Guidelines. All respondents were asked about the document availability and redaction portions of the operational guidelines. With a few exceptions, respondents agreed with the list of prohibited documents. This result should not surprise, since the documents prohibited by the operational guidelines are treated by the courts as if they were sealed documents. In other words, these documents are not available to the public, even in the clerk's office. The lone exception is the pilot district court that makes Statements of Reasons available to the public. Respondents in that district thought that the Statement of Reasons should not be on the prohibited list. Otherwise, if respondents in the pilot courts proposed changes to the prohibited list, it was to add documents. Proposed additions to the list include: sentencing memoranda by defense attorneys, documents with mental or physical health information, financial statements, CJA vouchers, pretrial diversion information, any document involving departures, grand jury target letters, witness lists, and trial memoranda.

[8] U.S. Department of Justice, Comments Regarding the Privacy and Security Implications of Public Access to Electronic Case Files, February 2001.

Similarly, most respondents agreed with the list of information to be redacted. Only one respondent, a defense attorney, suggested an addition to that list. This respondent would like to see the entire social security number redacted rather than just the first seven digits. Finally, virtually every respondent, whether they were judges, clerks, or attorneys, agreed that redaction had to be the responsibility of the filing parties. And they were in agreement as to why: the clerk's office does not have the personnel nor the training and experience to redact each filed document. Only the parties will be able to redact reliably the documents they file with the court.

Sealed Documents. Many respondent, especially the attorneys, brought up the issue of sealed documents. Most of the defense attorneys said that, if they were concerned about a document or the information therein, they would request that the document be sealed. When asked if requests by government and/or defense attorneys in the pilot courts to seal documents might increase, to counter document availability via remote access, most respondents were not concerned that it would become a widespread practice. Several defense attorneys said that they rely on judges to make reasonable decisions about the need to seal any portion of a case or the entire case.

FINDINGS FROM THE GROUP I COMPARISON COURTS

The four districts in comparison Group I (see Table 1 above) were selected because they had had remote public access before September 2001, for varying lengths of time, but these courts did not receive exemptions to continue that access as part of the pilot project. The chief judges, clerks, and federal defenders in these districts were interviewed after the pilot project had been in operation for approximately eight months. Since these courts were not participating in the pilot project, there was no need for multiple interviews nor for interviews at the beginning of the pilot project.

Access

These courts ended remote public access to criminal case documents when the Judicial Conference approved the policy prohibiting such access. However, three of the four courts developed alternative systems, through PACER or RACER, to allow the U.S. attorneys, federal defenders, and private defense attorneys to access online the documents for their cases. In these districts, the chief judges and clerks reported no complaints or issues resulting from the end of public access. The fourth district did not develop such a system. The clerk of court in that district reported that the U.S. Attorney's office complained about the lack of access and the federal defender reported that the lack of remote access to documents was an inconvenience.

Findings

The interviews with respondents in the comparison courts echoed those reported in the pilot courts. Respondents reported the same types of advantages and disadvantages of remote public access and the same range of views on document availability and redaction. This is not a surprising result since these courts have some history of remote access. If there was one difference that stood out, it was more ambivalence toward unrestricted remote public access, defined as no restriction on who can have remote public access. Almost half of the respondents were either undecided about unrestricted access or favored access limited to parties. The remainder were in favor of unrestricted remote public access.

SURVEY RESULTS IN THE PILOT COURTS

Advantages and Disadvantages

The mail survey of judges included questions about the advantages and disadvantages of remote public access. Judges were presented with separate lists of advantages and disadvantages and asked, for each item in each list, whether they agreed that it was an advantage or disadvantage, respectively. The lists were drawn from the interviews with chief judges, clerks, federal defenders, and CJA panel attorneys. Figure 1 contains a chart of the percentages of magistrate and district judges, separately, who agreed that each item was an advantage. There is one item missing from the chart. Since no judge agreed that there were no advantages, it is omitted from the chart.

The chart in Figure 1 (see below) shows high rates of agreement with the potential of remote public access. The percentages for district judges range from 82 percent for "attorneys can track cases" to 48 percent for "saves case preparation time." The percentages for magistrate judges tend to be lower, ranging from 88 percent for "attorneys can track cases" to 38 percent for "creates a spirit of public openness." When asked whether they access documents online, 73 percent of the judges reported doing it occasionally or regularly. Figure 2 lists the same advantages, but excludes district and magistrate judges who never use remote access. The percentages increase in virtually every category: judges who use remote access are more likely to see advantages to parties, the clerk's office, the court, and to themselves than judges who never use remote access to criminal case documents.

Figure 1
Advantages of Online Public Access

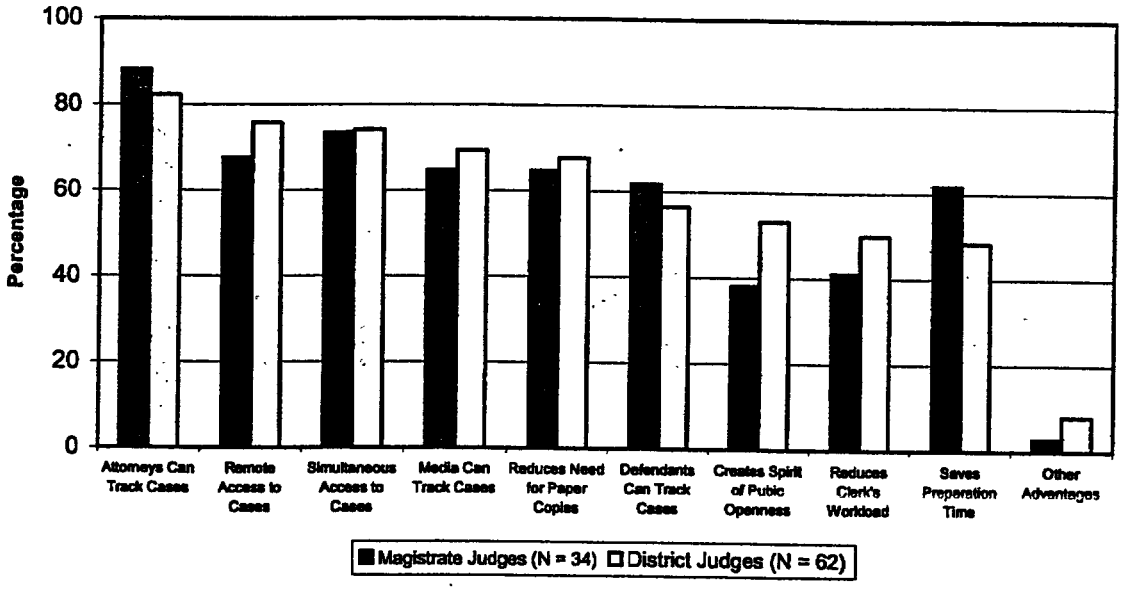
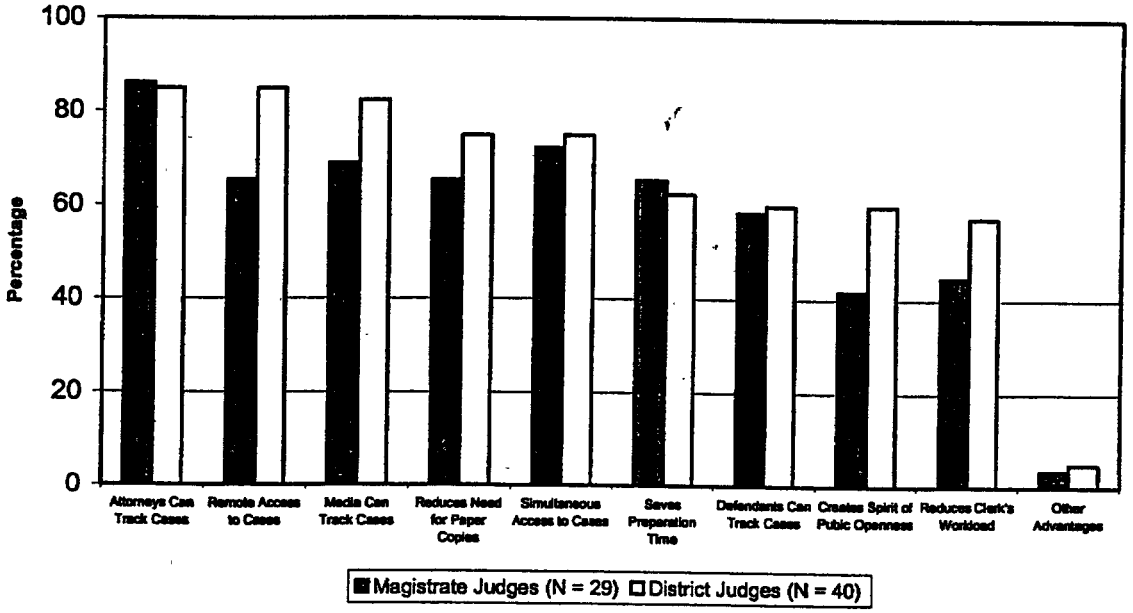


Figure 2
Advantages of Online Public Access
Judges Who Use Online Access



Although high proportions of judges see advantages in remote public access, the chart in Figure 3 shows fewer judges think there are potential disadvantages of remote public access. In Figure 3, the high and low categories are the same for magistrate and district judges: 56 percent and 55 percent for "jurors can access cases," respectively, and 41 percent and 29 percent for "potential of identity theft," respectively. Whereas no judges said there were no advantages of remote access, 21 percent of the magistrate judges and 15 percent of the district judges said there were no disadvantages to remote access. Figure 4 lists the same disadvantages, but for judges who use remote access. The results are more mixed than for advantages, but internally consistent. Judges with remote access are as or slightly more likely to see its risks, and therefore more likely to view danger to cooperating defendants and 3rd parties and identity theft as disadvantages. In the other categories of potential disadvantages, judges with remote access are as or less likely to see these as disadvantages.

Figure 3
Disadvantages of Online Public Access

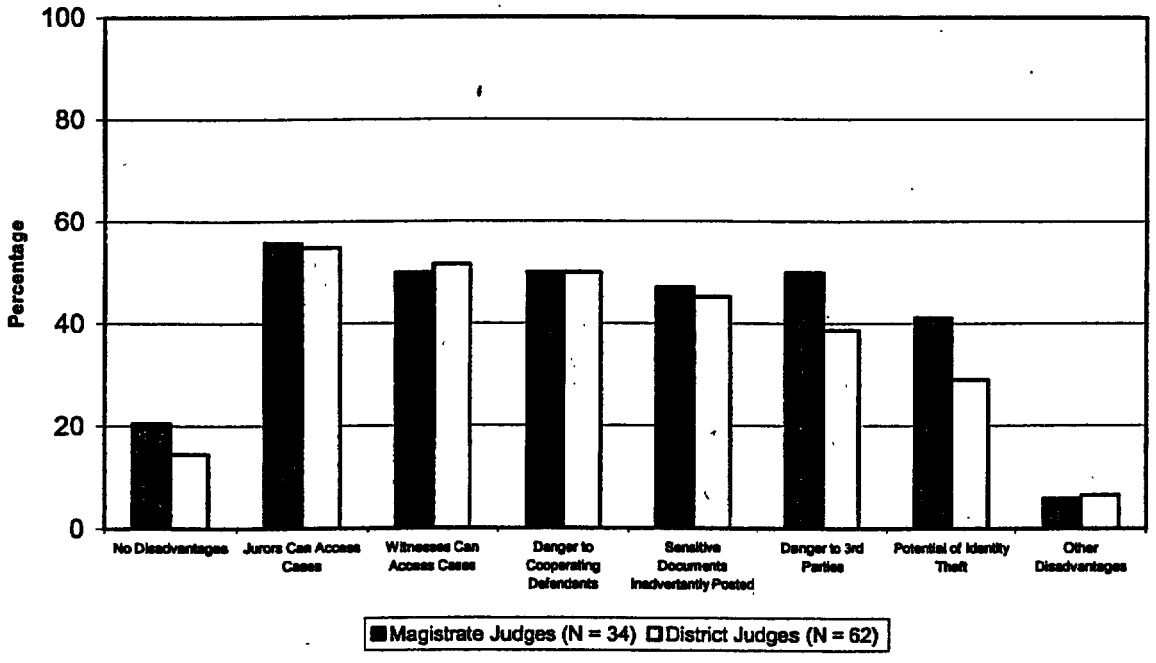
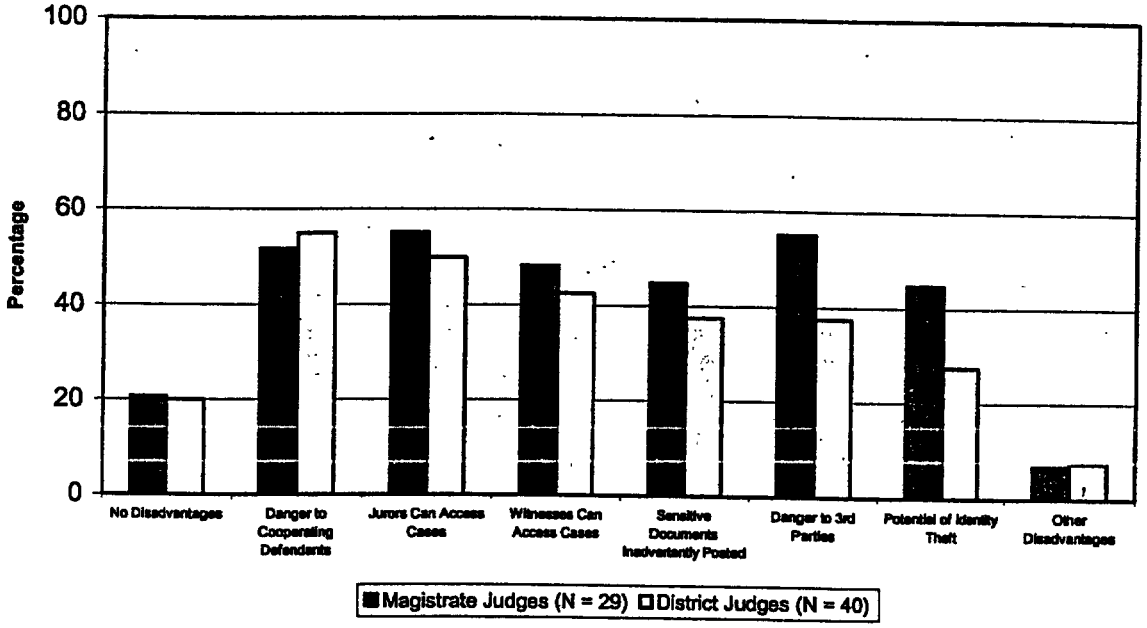


Figure 4
Disadvantages of Online Public Access
Judges Who Use Online Access



Document Availability and Redaction

Judges were asked about the operational guidelines for the pilot project, specifically whether they agreed with list of criminal documents prohibited from remote access and the list of information to be redacted from criminal documents filed with the court. With respect to the documents, 83 percent of the district judges and 88 percent of the magistrate judges agreed with the list. Judges were given an opportunity to name the documents that they would remove from that list; thirteen judges responded and each named the Statement of Reasons in the Judgment and Commitment Order. Seven of these responses were from judges in the pilot district that makes Statements of Reasons available online.

With respect to redacted information, 97 percent of the district judges and 100 percent of the magistrate judges agreed with the list. One judge suggested that "information ... material to a judicial decision" should be exempted from redaction.

When district judges were asked if there were other documents that should be prohibited or information redacted, 27 percent said additional documents should be prohibited and 9 percent said additional information should be redacted. The figures for magistrate judges are 30 percent

and 21 percent, respectively. When asked which documents they would add to the prohibited list, judges gave a variety of responses that ranged from the very general ("any doc[ument] that would endanger the safety or health of others") to the very specific ("motions to seal"), but with no pattern. There was a similar variety of unpatterned responses as to what additional information should be redacted.

Restrictions on Remote Access

When judges were asked about restrictions on access to criminal case documents, 57 percent of the district judges and 56 percent of the magistrate judges responded that there should be unrestricted remote public access to criminal case documents (excluding sealed documents). Only 4 percent of the district judges and 6 percent of the magistrate judges responded that there should be no public access. Of the remaining judges, 19 percent of the district judges and 24 percent of the magistrate judges indicated that access should be restricted to parties and their attorneys.

Harm

The judges were asked whether, to their knowledge, any harm had resulted from remote public access in their districts. The response was 100 percent no.

ATTORNEY LOCATION IN RELATION TO THE FEDERAL COURTHOUSE

To supplement the interview and survey data, a study was conducted of the location of defense attorneys, both federal defenders and private attorneys, relative to the courthouses in their respective districts. The purpose was to determine whether, based on their distance from the court and the clerk's office, remote access to criminal case documents presented a real advantage. Distance to the courthouse was measured by the attorneys' postal Zip Codes, which provides a proximate distance.

Samples of 110 cases were drawn from each of the ten pilot districts. Cases for which addresses were not available were eliminated from the sample, as were a small numbers of cases represented by both federal defenders and private attorneys. If more than one private attorney was listed on the docket, only the first attorney was used. Table 3 contains information about the distribution of the sampled cases for federal defenders and private attorneys.[9]

[9] The data in Table 3 were weighted to adjust for the fact that a fixed size rather than proportionate size sample was drawn from each district.

Table 3
Attorney Distance to the Courthouse

Attorney	N	Distance to the Courthouse (in Miles) Median	75th Percentile	90th Percentile
Federal Defender	382	0.5	0.7	59.3
Private Attorney	649	1.1	16.0	52.2

The median value reported in Table 3 is the mid-point of the distribution of distances to the courthouse—half of the distances are below that value. The 75th and 90th percentiles are similar measures of the distribution of distances—75 percent and 90 percent of the distances are below their respective percentile values. The results show, first, that private attorneys represent more cases than federal defenders. One of the pilot districts—the Southern District of Georgia—has no federal defender; private attorneys represent all cases in this district. If this district is removed from that total, private attorneys still outnumber federal defenders. Second, in the majority of cases, the attorneys are within about one mile of the courthouse. In 75 percent of the cases with a federal defender, that attorney is still located within one mile. But in 75 percent of the cases with a private attorney, the attorney is located within 16 miles of the courthouse. Alternatively, in 25 percent of the cases in their respective categories, federal defenders are located .7 miles or more from the courthouse and private attorneys are located 16 miles or more from the courthouse.

One conclusion to be drawn from this analysis is that the vast majority of defense attorneys are local. Another conclusion is that, given the distances involved, private attorneys can benefit more from remote public access than federal defenders. They are located farther from the courthouse and therefore do not necessarily have ready access to the clerk's office. In the interviews, one federal defender stated that private attorneys gain the most from remote access, for this reason. Two other federal defenders reported that their offices were not in the courthouse, albeit nearby, and that remote access compensated for their more remote location.

FINDINGS FROM THE STUDY OF DOCKET INFORMATION

The final question on which we focused was whether information on the docket sheets could pose a risk to defendants, witnesses, victims, or others, regardless of which criminal case documents are available via remote access. All respondents were asked during the interview about this possibility. The interview information was used to guide a study of this potential risk.

The data source for this study was a sample of docket sheets from the Group II comparison courts.

When asked about the possibility that docket information posed any sort of risk, no interview respondent could name any possibilities except the identification of cooperating defendants. When asked about this possibility, some respondents felt that it was a real risk, but most respondents did not think that the risk would arise solely from docketing information.

How would a cooperating defendant be identified through docketing information? The pilot district courts as well as the Group II comparison courts differ somewhat in how they record information about docket entries. Here are some of the ways in which information about cooperating defendants can be recorded. If the government files a motion for a downward departure based on substantial assistance to the government,[10] for example, there will be entry in the docket describing a government motion, and that motion may be described as a motion by the government for downward departure. If that motion is filed under seal, it may be accompanied by a docket entry that describes a sealed motion. Alternatively, that sealed motion may not be recorded in the online docket. The result is a skip in the numbering of docket entries, which can be taken as evidence that a sealed document was filed with the court. If there is a hearing on that motion, it may be sealed and recorded in the docket in a manner similar to that for the motion. Either way, a sealed document or a sealed hearing prior to sentencing may be evidence of cooperation by the defendant. Regardless of what is or is not sealed, the docket contains information about the original charges and the sentence. These two pieces of information, when compared, may indicate that the defendant received a reduced sentence in exchange for assistance to the government. For example, one defense attorney asserted that he could identify substantial assistance with almost 100 percent accuracy by examining the initial charges, the charges of conviction, the sentencing guideline range for the charges of conviction, and the actual sentence. A defendant rewarded for cooperation will receive a sentence below the guideline range for the charges of conviction, even when that guideline range is proscribed by a mandatory minimum sentence.

Why did interview respondents discount the risk posed by online docketing information? Respondents gave a number of reasons. First, except for sealed documents, any documents filed with the court are available in the clerk's office. Many clerks' offices now have public terminals that access the court's internal system and display not only the docket but also unsealed documents that are not available remotely. No identification is needed to access documents in the clerk's office, and copies may be requested for a fee. Second, remote access requires a computer,

[10] USSG §5K1.2

Internet access, and, in most districts, a PACER account. One defense attorney said that online is the last place he would expect someone interested in detecting cooperation to look. There are alternative sources for this information, including the clerk's office, co-defendants, attorneys, and "word on the street." Third, several respondents made the point that, in multi-defendant cases, cooperation at some level may be the norm. One of these respondents, a defense attorney, said that he assumes cooperation occurred if a defendant in a multi-defendant case did not go to trial. Finally, several respondents argued that a certain level of knowledge and sophistication is required to read and interpret docketing information that does not clearly report that the government moved for a downward departure based on substantial assistance.

A random sample of 100 criminal cases filed in Fiscal Year 2001 was selected from each of the six Group II comparison courts (see Table 1 above) for the docketing information study. The docket sheets for these cases were downloaded and examined. We do not report exact numbers because they would give a false sense of precision. We found sufficient variance in how docket entries are written within and between districts to conclude that the results of the docket study should be viewed cautiously. This result is not limited to these six courts. A clerk in one of the pilot courts felt that periodic reminders to the docketing clerks of the court's guidelines for composing docket entries was a good practice.

The results of docket sheet study from the Group II comparison courts are consistent with the information obtained from interviews. In three of the six districts, we found a few docket entries describing government motions for downward departures, sometimes with a notation that the motion was sealed. But not all of the motions were sealed. In the other districts, we found docket entries that described sealed documents, and sealed hearings on these documents, following a guilty plea and preceding sentencing. In these instances, it would take a sophisticated observer to guess that the defendants were cooperating with the government.

APPENDIX

Operational Guidelines for Courts Participating in the Study of Public Remote Electronic Access to Criminal Case Files

Your court has agreed to participate in a study of remote public electronic access to criminal case file documents. As part of this study, your court will be granted an exemption to the Judicial Conference policy prohibiting remote public access to electronic criminal case files and will be allowed to provide such access, within certain parameters. This document is intended to establish those parameters.

Each court will be allowed to return to the level of remote public access to criminal case files that it was providing before September 19, 2001, the date on which the Judicial Conference adopted the policy prohibiting such access. If your court was not providing remote public access to electronic criminal case file documents at that time, as part of the study, you may provide remote public access to all criminal case file documents, except those documents described below. It is important to note that the Judicial Conference policy on privacy and public access to criminal case files does not prohibit public remote electronic access to orders or opinions.

No court should provide remote public access to the following documents under any circumstances:

- unexecuted warrants of any kind (*e.g.*, search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;
- statements of reasons in the judgment of conviction;
- juvenile records; and
- sealed documents

The following personally identifying information should also be redacted by the filing party from all criminal filings as follows:

- Social Security numbers to the last four digits (*e.g.*, redact the Social Security number on a Judgment and Commitment form);
- financial account numbers to the last four digits;
- dates of birth to the year only;
- names of any minor children to initials; and

- the home address of any individual (*e.g.*, victims).

You should make every effort to inform all filers and other court users that documents filed in criminal cases will be available to the general public on the Internet and that the filer has the obligation to redact the specified identifying information from the document prior to filing. It is recommended that you include a notice of electronic availability of criminal case file documents on your court's website, in the clerk's office and through the normal means used by your court to disseminate critical information to the bar and the public. Such notice might state:

> Please be informed that this court is participating in a pilot program pursuant to which, for a limited period of time, certain documents filed in criminal cases will be electronically available to the general public via the Internet.
>
> You should not include certain types of sensitive information in any document filed with the court unless such inclusion is necessary and relevant to the case in which it is filed. If sensitive information must be included, certain personal and identifying information, *e.g.*, Social Security numbers, financial account numbers, dates of birth and the names of minor children, must be redacted in the document.
>
> Counsel is strongly urged to share this information with all clients so that an informed decision about the inclusion, redaction and/or exclusion of certain information may be made. It is the sole responsibility of counsel, the parties, and any other person preparing or filing a document to be sure that the document complies with this redaction requirement. The clerk will not review each document for redaction. Counsel, the parties and any other person preparing or filing a document are cautioned that failure to redact personal identifiers and/or the inclusion of irrelevant personal information in a document or exhibit filed with the court may subject them to the full disciplinary and remedial power of the court.

Thank you for agreeing to participate in this study regarding public remote electronic access to criminal case files. Your assistance and experiences will provide valuable information that will make it possible to assess the current state of electronic access to criminal case file information and to develop appropriate levels of access to this information in the future. If you have any questions regarding this document or your participation in the study, please contact Katie Simon, Attorney-Advisor, Court Administration Policy Staff via e-mail at Katie_Simon@ao.uscourt.gov , phone at 202-502-1560, or fax at 202-502-1022.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

Memorandum of Action

CAROLYN DINEEN KING
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Executive Committee
United States Judicial Conference

June 17, 2003

The Executive Committee took action by mail ballot concluded June 17, 2003, on the following matters:

(1) E-Government Act of 2002

Subsection 205 of the E-Government Act of 2002 (Public Law No. 107-347) mandates the development of national rules addressing the protection of personal identifying information and states that the Judicial Conference may issue interim guidance pending the development of formal rules. An earlier version of the legislation did not require the development of formal rules and allowed the Judicial Conference to establish its own rules to protect privacy and security concerns relating to court records. With Conference endorsement, a bill has been introduced in the House of Representatives, H.R. 1303, 108th Congress, that is consistent with the earlier version of the legislation. At the request of the Department of Justice, which apparently favored the use of formal rules, markup of H.R. 1303 was delayed, and staff of the House Judiciary Committee requested that the judiciary and the Department of Justice work together to find a solution agreeable to both. To that end, Administrative Office staff and DOJ staff developed a compromise proposal to which both sides agreed.

The Committee on Court Administration and Case Management endorsed the joint proposal and, because markup of the bill was imminent, sought its approval by the Executive Committee on behalf of the Judicial Conference. By mail ballot concluded on June 17, 2003, the Executive Committee approved the joint proposal, a copy of which is attached.

(2) The Proposed Involuntary Bankruptcy Improvement Act of 2003

On June 10, 2003, the House passed H.R. 1529 (108th Congress), the Involuntary Bankruptcy Improvement Act of 2003, which was introduced by Representative F. James Sensenbrenner, Jr. (R-WI). The legislation would amend section 303 of the Bankruptcy Code to require a bankruptcy court, on motion of an individual involuntary debtor (1) to expunge from court records the petition and all records and references relating to the petition, if the petition initiating the case is false or contains any materially false, fictitious, or fraudulent statement; and (2) to permit a bankruptcy court to enter an order prohibiting all credit reporting agencies from issuing a consumer report containing information relating to the individual debtor's dismissed involuntary bankruptcy case.

While recognizing the laudable intent of the legislation (*i.e.*, to prevent the victim's credit rating and reputation from being harmed), the Bankruptcy Committee believed that this goal would best be achieved if the court were to retain tangible proof of the bad faith filing and subsequent dismissal, to assist with any subsequent prosecution and help reinstate the victim's pre-petition credit rating. Because Senate consideration of the legislation could occur at any time, the Bankruptcy Committee asked the Executive Committee to consider the matter on an expedited basis on behalf of the Conference.

The Executive Committee, by mail ballot concluded on June 17, 2003, approved the recommendation of the Bankruptcy Committee that the Judicial Conference express concern regarding legislation that would expunge case records in an involuntary bankruptcy case filed in bad faith against an individual and instead support a policy and procedure to retain case records upon dismissal of such cases with a notation, flag, or other means to signal to the public the nature of the dismissal.

Carolyn Dineen King

Committee: Gregory W. Carman
Joel M. Flaum
Thomas F. Hogan
D. Brock Hornby
Boyce F. Martin, Jr.
Leonidas Ralph Mecham
John M. Walker, Jr.

Attachment

June 20, 2003

Joint Proposal of Judicial Conference and Department of Justice
for Amendment of Section 205 of the E-Government Act

Change subsection (c)(3) of the E-Government Act of 2002 to read as follows:

(3) **Privacy and security concerns.–**

(A) (i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically or converted to electronic form.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) (I) Except as provided in subclause (II), to the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such protected information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition to, a redacted copy in the public file.

(II) Such rules may require the use of appropriate redacted identifiers in lieu of such protected information in any pleading, motion, or other paper filed with the court (except with respect to a paper that is an exhibit or other evidentiary matter, or with respect to a reference list described in this subclause), or in any written discovery response--

(aa) by authorizing the filing under seal, and permitting the amendment as of right under seal, of a reference list that (i) identifies each item of unredacted protected information that the attorney or, if there is no attorney, the party, certifies is relevant to the case and (ii) specifies an appropriate redacted identifier that uniquely corresponds to each item of unredacted protected information listed; and

(bb) by providing that all references in the case to the redacted identifiers in such reference list shall be construed, without more, to refer to the corresponding unredacted item of protected information.

(B) (i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns arising from electronic filing or electronic conversion shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: December 15, 2003

FROM: Bob Deyling, Office of Judges Programs

SUBJECT: Rules-based approach to privacy and public access: an initial outline

TO: Judge Fitzwater
Professor Capra

This outline presents potential overall rule topics first, and then reviews some issues regarding specific types of cases. It is not intended to be a rule proposal, but rather, as Prof. Capra suggested, my "insights on what a set of privacy rules might look like."

I. Potential "General" Rule Topics.

A. Scope (and/or Purpose) of Rule(s).

There are several threshold questions to be addressed. Does the rule govern public access to case files? In electronic and/or paper form? Is the rule only about protecting privacy or security interests? Does the rule specify the contents of the public file? Is it directed to the public, the bar, the courts, or all three? Is there a need for separate civil, criminal, bankruptcy, and appellate rules – with parallel general provisions?

The Judicial Conference privacy policy states several "general principles." Some of these may assist the E-Government Subcommittee in determining the appropriate scope of federal rules. These principles, taken directly from the privacy policy, are addressed in greater detail later in this memo:

- There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.
- Notice of these policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.

- Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.

- Except where otherwise noted, the policies apply to both paper and electronic files.

- Electronic access to docket sheets and court opinions will not be affected by these policies.

- The availability of case files at the courthouse will not be affected or limited by these policies.

- Nothing in the policy is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Several state court systems have recently developed public access rules that may be helpful to answer some of the questions posed above. Most state court rules or policies begin with an affirmation or statement of the presumption of public access to court records, and an explanation of the records to which the rules will apply. Some state court rules also list "purposes" of the rule.

B. Definition(s).

Assuming that a federal rule would only address "the case file" – and not judicial branch administrative records as some state rules address – it may be important to define at least the term "case file." One proposal may be: "The case file (whether electronic or paper) consists of the collection of documents officially filed by the litigants or the court in the context of litigation, the docket entries that catalog such filings, and transcripts of judicial proceedings. The case file generally does not include other case-related information, including: non-filed discovery material, trial exhibits that have not been admitted into evidence, and drafts or notes by judges or court staff. Sealed material, although part of the case file, is accessible only by court order."

Terms defined in state court public access rules include, for example: court record, electronic record, electronic access, case record, administrative record, bulk distribution, compiled information, public, record custodian, and judicial branch record.

C. Information that is not subject to public access because it is not (must not be?) part of the public case file.

In addition to confirming the general presumption of public access to filed material, a federal rule might include a comprehensive list of public access restrictions. One approach would be to list items that are not [or, should not be] part of the public case file. Another approach would be a simple statement that only documents in the public case file are subject to public access (unless sealed, see section D below). The Vermont state court rules and the proposed Indiana state court rules provide particularly comprehensive models.

To develop this section of a rule, it would be helpful to:

1) Review and catalog existing statutes, rules, policies and procedures that require, prohibit, or restrict public access to information that is part of the case file or docket.

2) Identify and discuss sensitive information that is normally permitted to be placed on the public record, and consider whether there are alternatives that would allow for the protection of privacy interests without adversely affecting the adjudication process. (Alternatives might include presumptive sealing, use limitations, or segregation for use only by litigants or the court);

3) Identify gaps in existing statutes, rules, policies and procedures; and

4) Identify issues that do not require (or are not appropriate for) a rules-based approach and recommend pursuing solutions to those issues as a complement to the rulemaking process.

D. Information that is filed, but is not available for public access because it must be filed under seal.

This section would confirm that sealed information is not subject to public access. It might also list any items that must be presumptively sealed. In contrast to state courts, which may be required to seal certain categories of cases or sensitive information (for example, family law, mental health, or probate), very few items are presumptively sealed in federal courts. (Note, however, that the CACM subcommittee on implementation of the criminal case file privacy policy may make recommendations concerning the routine need to seal certain criminal case file documents).

Section 205 of the E-Government Act provides for presumptive filing under seal of information that would otherwise be redacted or truncated under the Judicial Conference privacy policy. Thus, the E-Government Act, in effect, amends the Judicial Conference privacy policy to allow a litigant to file unredacted documents under seal. The court may still require the filing of

a redacted document for public access purposes. Section 205 requires that this procedure must be made a part of any national rule. The judiciary has sponsored a bill that would partially amend Section 205 by allowing litigants to file a sealed "reference list" (see section E below) of information that would be protected under the privacy policy. Thus, both sealing requirements and the "reference list" concept would be appropriate topics for federal rules.

E. [H.R. 1303 – a procedure for filing sensitive private information on a sealed "reference list" and/or the use of "sensitive information forms"].

The Judicial Conference supports legislation (H.R. 1303) that would allow litigants to file a sealed "reference list" containing information that otherwise would be subject to the Judicial Conference privacy policy. (Note: The Senate Judiciary Committee Report on H.R. 1303 explains this in greater detail).

Several state courts now require – or new rules will require – the filing of certain sensitive information on special forms that are not subject to routine public access. The Washington state courts, for example, require parties in family law cases to use a "Confidential Information Form" to provide the court with financial account numbers, Social Security numbers, income tax information, telephone numbers and birth dates of children. These forms will be sealed in both the paper and electronic file system. With respect to the federal courts, the "Study of Financial Privacy in Bankruptcy" suggested a similar approach to make selected financial information available only to creditors and other "parties in interest."

There are other potential benefits of the use of reference lists or sensitive information forms. Courts may need to collect information for case management purposes that is not (or should not be) made part of the public record. Rules might provide that information collected on such forms could be used for court purposes only, and/or be made available to the litigants as appropriate.

Related to the rules issue is a technology issue: Certain privacy protections would be easier to implement if court filings were to be created on established electronic forms. For example, private information on bankruptcy schedules might be easier to segregate electronically if the schedules could be filed as database-type forms, allowing some information to become part of the public file while other information to be made available only to parties in interest. This "database" model may have promise with respect to other sensitive information or types of cases.

F. Judges' case-by-case discretionary authority.

Should there be an explicit rule section concerning the discretionary authority of judges to allow or deny public access notwithstanding any new rules? The protection of privacy interests relating to federal court case files, in the absence of specific statutory protections, historically has

been addressed by judges on a case-by-case basis. Except for a few case types, the Judicial Conference privacy policy retains the tradition of case-by-case analysis of privacy issues. That approach may, of course, complement a rule that defines categories of information to be presumptively sealed or maintained separately from the public file.

G. Remote electronic access / courthouse-only access.

The Judicial Conference privacy policy adopts the default presumption that remote electronic public access, if available, will mirror access at the courthouse. But the policy also prohibits electronic public access to Social Security case files and criminal case files (until implementation of the September 2003 Judicial Conference decision permitting access to criminal case files). Moreover, certain personal identifiers either should not be filed, or should be filed only in truncated form.

Most state court rules limit remote electronic access to certain case types or information. The California rules, for example, bar *remote* electronic access to family, criminal, mental health, juvenile, guardianship/conservatorship, and civil harassment proceedings, "because of the personal and sensitive nature of the information parties are required to provide to the court in these proceedings." However, the rules permit electronic access to these records *at the courthouse*. The "Guidelines for Public Access to Court Records," developed by the National Center for State Courts in conjunction with the Conference of Chief Justices and the Conference of State Court Administrators, states: "The nature of certain information in some court records, however, is such that remote public access to the information in electronic form may be inappropriate, even though public access at the courthouse is maintained."

H. Notice of electronic public access.

It may be appropriate for a national rule to address the question of notice to litigants, including the development of a consistent method to provide such notice. The Judicial Conference policy suggests that litigants should be given "notice" of the presumption of public access to documents filed in litigation, and, if appropriate, should be informed that case file documents will be made available on the Internet. CACM has developed a model notice that many courts have adopted. A similar notice has been incorporated into several local rules.

I. Requirements relating to attorneys.

Certain issues relating to the bar may be appropriate for federal rules, while other issues may be implementation issues relating to electronic filing, or matters more appropriate for individual courts to address.

The Judicial Conference privacy policy states that the bar should be educated about access and privacy issues. If rules on access and privacy are developed, the rules should assist attorneys to understand what information is to be filed under presumptive seal or other access restrictions. It may also be appropriate to specify by rule a standard process to remind attorneys how to treat private or sensitive information in the context of electronic filing. One possibility would be to make the access/privacy issue a topic at the first meeting before the judge.

J. Docket sheet and case management information.

Although the Judicial Conference privacy policy states that "electronic access to docket sheets will not be affected by these policies," docketing practices may affect the development and implementation of federal rules on public access. Some personal identifiers may, for example, appear on the docket itself, either in the caption, docket entries, or other required elements of the docket. Court practices also vary with respect to filing requirements for certain documents, or the timing of filing. This consideration may be especially relevant in criminal cases, where it is the detailed nature of some docket entries – or even the existence of certain entries – that has raised some of the "security" concerns that motivated the (initially) restrictive public access policy for criminal files.

K. Treatment of "bulk" information.

Most state court policies and rules address the topic of access to "bulk" or "compiled" case file data. Such policies usually distinguish between bulk access to public information, which is generally permitted if it does not burden the court, and access to confidential or non-public case file information, which is allowed only subject to significant restrictions.

The E-government Subcommittee may wish to consider whether there is a need to address this issue in federal rules.

II. Potential Case-or-Court-Specific Rule Topics

<u>Civil case files</u>

The Judicial Conference policy provides: "that documents in civil case files should be made available electronically to the same extent that they are available at the courthouse with one exception (Social Security cases should be excluded from electronic access) and one change in policy (the requirement that certain "personal data identifiers" be modified or partially redacted by the litigants). These identifiers are Social Security numbers, dates of birth, financial account numbers and names of minor children."

A federal rule might specify additional documents and/or case types that should be sealed, or should be presumed to be protected from unlimited public access (*see* discussion sections C and D above).

Criminal case files

The Criminal Law, Defender Services, and Court Administration and Case Management Committees have formed a subcommittee to determine how to implement the recent Judicial Conference decision to allow remote electronic access to criminal case files. That subcommittee expects to make a recommendation to the Judicial Conference for action at its March 2004 meeting.

Bankruptcy case files

The Judicial Conference privacy policy recommends: "that documents in bankruptcy case files should be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers as in civil cases; that § 107(b)(2) of the Bankruptcy Code should be amended to establish privacy and security concerns as a basis for the sealing of a document; and that the Bankruptcy Code and Rules should be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits."

Amendments to the Bankruptcy Rules to implement the Judicial Conference policy became effective December 1, 2003. The suggested amendment to § 107(b)(2) of the Bankruptcy Code has not yet been accomplished.

Other options for rules relating to bankruptcy cases might include segregating certain sensitive information for filing on separate forms (like the "reference lists" contemplated in H.R. 1303) that would be protected from unlimited public access. Information to be filed in this manner might include items that are used only for administration of the estate by the case trustee and/or United States Trustee. The executive branch "Study of Financial Privacy and Bankruptcy" recommended limiting public access to schedules and statements in consumer bankruptcy cases to parties in interest. In developing the privacy policy, however, CACM recommended against limiting public access to such information.

Appellate cases

The privacy policy requires "that appellate case files be treated at the appellate level the same way in which they are treated at the lower level." Privacy issues at the appellate level have been reviewed by a CACM subcommittee chaired by Judge Sandra Lynch. I assisted with that analysis, which identified several issues for further review or monitoring. Those issues include:

1. Considering whether to treat administrative agency case records "in the same manner they were treated by the agency." Doing so would represent, in some situations, a change in current policy or practice because a document may be protected in agency litigation, but would be publicly accessible in federal court litigation. The need to protect private information may be especially relevant with respect to individual benefits cases. The legal principles of the Privacy Act and the Freedom of Information Act, although not directly applicable to the judicial branch, also may support protecting privacy interests in agency records that are filed in federal courts.

2. Continuity of sealing. The Judicial Conference policy includes the implicit assumption that courts of appeals will maintain the sealed status of material sealed at the district court level. That assumption may not apply to certain courts of appeals that have local rules about the need to justify continuation of sealing orders at the appellate level.

3. Treatment of specialized courts. Certain appeals from decisions of the Court of Federal Claims and/or the Court of International Trade may present special access or privacy issues that would affect the Court of Appeals for the Federal Circuit.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: February 25, 2004

FROM: Robert Deyling, Office of Judge Programs

SUBJECT: State Court Privacy Rules and Policies (excerpts)

TO: Judge Fitzwater
Professor Capra
Professor Coquillette
Professor Cooper
Professor Morris
Professor Schiltz
Professor Schlueter

As you requested at the first meeting of the Subcommittee on E-Government, I have compiled the attached excerpts from state court rules on privacy and public access to court records. I have organized this material by topic, as follows:

(1) Scope (and/or Purpose) of Rule;
(2) Definitions
(3) Information (or documents) not available for public access
(4) Segregation of information on "sensitive information forms"
(5) Judicial discretion (and procedures for requesting or denying access)
(6) Notice (to persons accessing records)
(7) Remote access / courthouse-only access
(8) Access to information maintained by the court (including dockets)
(9) Access to "bulk" information

These excerpts are drawn from the approved state court rules of California, Indiana, Maryland and Vermont, and the proposed rules for the Arizona and Minnesota courts.

	1) Scope (and/or Purpose) of Rule
California Rule 2070; 2071	Rule 2070. Statement of purpose. (a) [Intent]: The rules in this chapter are intended to provide the public with reasonable access to trial court records that are maintained in electronic form, while protecting privacy interests. ... Rule 2071. Authority and applicability. ...(c) [Access by parties and attorneys] The rules in this chapter apply only to access to court records by the public. They do not limit access to court records by a party to an action or proceeding, by the attorney of a party, or by other persons or entities that are entitled to access by statute or California Rules of Court.
Indiana Rule 9(A)	(A) Scope and Purposes. (1) Pursuant to the inherent authority of the Indiana Supreme Court and pursuant to Indiana Code §5-14-3-4(a)(8), this rule governs public access to, and confidentiality of, court records. Except as otherwise provided by this rule, access to court records is governed by the Indiana Access to Public Records Act (Indiana Code §5-14-3-1, et. seq.). (2) The purposes of this rule are to: (a) Promote accessibility to court records; (b) Support the role of the judiciary; (c) Promote governmental accountability; (d) Contribute to public safety; (e) Minimize the risk of injury to individuals; (f) Protect individual privacy rights and interests; (g) Protect proprietary business information; (h) Minimize reluctance to use the court system; (i) Make the most effective use of court and clerk of court staff; (j) Provide excellent customer service; and (k) Avoid unduly burdening the ongoing business of the judiciary....

	1) Scope (and/or Purpose) of Rule
Vermont Rule 1, 2	§ 1. Purpose; Construction. These rules govern access by the public to the records of all courts and administrative offices of the Judicial Branch of the State of Vermont, whether the records are kept in paper or electronic form. They provide a comprehensive policy on public access to Judicial Branch records. They shall be liberally construed in order to implement the policies therein. § 2. Scope. (a) *In General.* These rules govern access to judicial branch records where the right of access is solely that of a member of the public. (b) *Specific Right of Access.* If, based on a statute, judicial rule or other source of law, a person, or an authorized officer or member of the Executive or Legislative Branch, claims a right of access greater than that available to a member of the public, the record custodian shall act in conformity with the applicable statute, rule or other source of law....
Maryland R 16-1002	Rule 16-1002. General Policy (a) Presumption of Openness Court records maintained by a court or by another judicial agency are presumed to be open to the public for inspection. Except as otherwise provided by or pursuant to these Rules, the custodian of a court record shall permit a person, upon personal appearance in the office of the custodian during normal business hours, to inspect such a record....

	2) Definitions
California Rule 2072	Definitions. (a) [Court record] As used in this chapter, "court record" is any document, paper, or exhibit filed by the parties to an action or proceeding; any order or judgment of the court; and any item listed in subdivision (a) of Government Code section 68151, excluding any reporter's transcript for which the reporter is entitled to receive a fee for any copy. The term does not include the personal notes or preliminary memoranda of judges or other judicial branch personnel. (b) [Electronic record] As used in this chapter, "electronic record" is a computerized court record, regardless of the manner in which it has been computerized. The term includes both a document that has been filed electronically and an electronic copy or version of a record that was filed in paper form. The term does not include a court record that is maintained only on microfiche, paper, or any other medium that can be read without the use of an electronic device. (c) [The public] As used in this chapter, "the public" is an individual, a group, or an entity, including print or electronic media, or the representative of an individual, a group, or an entity. (d) [Electronic access] "Electronic access" means computer access to court records available to the public through both public terminals at the courthouse and remotely, unless otherwise specified in these rules.
Indiana Rule 9(C)	(C) Definitions. For purpose of this rule: (1) "Court Record" means both case records and administrative records. (2) "Case Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a particular case. (3) "Administrative Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency, or clerk of court pertaining to the administration of the judicial branch of government and not associated with any particular case.... (6) "Public access" means the process whereby a person may inspect and copy the information in a court record. (7) "Remote access" means the ability of a person to inspect and copy information in a court record in electronic form through an electronic means. (8) "In electronic form" means any information in a court record in a form that is readable through the use of an electronic device, regardless of the manner in which it was created. (9) "Bulk Distribution" means the distribution of all, or a significant subset of the information in court records in electronic form, as is, and without modification or compilation. (10) "Compiled Information" means information that is derived from the selection, aggregation or reformulation of some of all or a subset of all the information from more than one individual court record in electronic form.

	3) Information (or documents) not available for public access
Maryland R 16-1006, R 16-1007	Rule 16-1006. Required Denial of Inspection – Certain Categories of Case Records Except as otherwise provided by law, these Rules, or court order, the custodian shall deny inspection of: ... (3) In any action or proceeding, a case record concerning child abuse or neglect.... (5) The following case records in criminal actions or proceedings: (a) A case record that has been ordered expunged pursuant to Md. Rule 4-508. (b) The following court records pertaining to search warrants: (i) The warrant, application, and supporting affidavit, prior to execution of the warrant and the filing of the records with the clerk. (ii) Executed search warrants and all papers attached thereto filed pursuant to Md. Rule 4-601. (c) The following court records pertaining to an arrest warrant: (i) A court record pertaining to an arrest warrant issued under Md. Rule 4-212(d) and the charging document upon which the warrant was issued until the conditions set forth in Md. Rule 4-212(d)(3) are satisfied. .... (e) A pre-sentence investigation report prepared pursuant to Md. Code, Correctional Services Article, § 6-112..... (8) The following case records containing medical information: (a) A case record, other than an autopsy report of a medical examiner, that (i) consists of a medical or psychological report or record from a hospital, physician, psychologist, or other professional health care provider, and (ii) contains medical or psychological information about an individual.... (9) A case record that consists of the Federal or Maryland income tax return of an individual.... Rule 16-1007. Required Denial of Inspection --Specific Information in Case Records. Except as otherwise provided by law, these Rules, or court order, a custodian shall deny inspection of a case record or a part of a case record that would reveal: ... (3) Any part of the social security or Federal Identification Number of an individual, other than the last four digits....

	3) Information (or documents) not available for public access
Vermont Rule 6	§ 6. Case Records. (a) *Policy.* The public shall have access to all case records, in accordance with the provisions of this rule, except as provided in subsection (b) of this section. (b) *Exceptions.* The public shall not have access to the following judicial branch records:... (4) Records of the family court in juvenile proceedings governed by Chapter 55 of Title 33, except as provided in 33 V.S.A. § 5536; (5) Records of the court in mental health and mental retardation proceedings under Part 8 of Title 18, not including an order of the court, except where the court determines that disclosure is necessary for the conduct of proceedings before it or that failure to make disclosure would be contrary to the public interest; (6) A presentence investigation report as provided in Chapter 5 of Title 28 and Rule 32(c) of the Vermont Rules of Criminal Procedure;... (8) Records containing a description or analysis of the DNA of a person if filed in connection with a family court proceeding; (9) Records produced or created in connection with discovery in a case in court, including a deposition, unless used by a party (i) at trial or (ii) in connection with a request for action by the court; (10) Records containing financial information furnished to the court in connection with an application for an attorney at public expense pursuant to 13 V.S.A. § 5236(d) and (e), not including the affidavit submitted in support of the application; (11) Records containing financial information furnished to the court in connection with an application to proceed in forma pauperis, not including the affidavit submitted in support of the application;... (13) Any federal, state or local income tax return, unless admitted into evidence;... (15) Records of the issuance of a search warrant, until the warrant is executed and (i) property seized pursuant to the warrant is offered in a proceeding, or is subject to a motion to suppress; or (ii) a person, fetus or corpse searched for pursuant to the warrant has been located; (16) Records of the denial of a search warrant; (17) Records created as a result of treatment, diagnosis, or examination of a patient by a physician, dentist, nurse or mental health professional;... (24) Records filed in court in connection with the initiation of a criminal proceeding, if the judicial officer does not find probable cause to believe that an offense has been committed and that defendant has committed it, pursuant to Rule 4(b) or 5(c) of the Vermont Rules of Criminal Procedure;... (29) Records containing a social security number of any person, but only until the social security number has been redacted from the copy of the record provided to the public; (30) Records with respect to jurors or prospective jurors as provided in the Rules Governing Qualification, List, Selection and Summoning of All Jurors;... (32) Any evidence introduced in a proceeding to which the public does not have access; and (33) Any other record to which public access is prohibited by statute.

	4) Segregation of information on "sensitive information forms"
Minnesota [proposed]	**Rule 313.01. Definitions.** For purposes of this rule, the following definitions shall apply: (10) "Restricted identifiers" shall mean the social security number [and/or employer identification number] and financial account numbers of a party or party's child. (11) "Financial source documents" means income tax returns, W-2s and schedules, wage stubs, credit card statements, financial institution statements, check registers, as well as other financial information deemed financial source documents by court order. **Rule 313.02. Restricted Identifiers.** (a) Pleadings and Other Papers Submitted by a Party. No party shall submit restricted identifiers on any pleading or other paper that is to be filed with the court except: 1) on a separate form entitled Confidential Information Form (see Form 11 appended to these rules) filed with the pleading or other paper; or 2) on Sealed Financial Source Documents under Rule 313.03. The parties are solely responsible for ensuring that restricted identifiers do not otherwise appear on the pleading or other paper filed with the court. The court administrator will not review each pleading or document filed by a party for compliance with this rule. The Confidential Information Form shall not be accessible to the public. (b) Records Generated by the Court. Restricted identifiers maintained by the court in its register of actions (i.e., activity summary or similar information that lists the title, origination, activities, proceedings and filings in each case), calendars, indexes, and judgment docket shall not be accessible to the public. Courts shall not include restricted identifiers on their judgments, orders, decisions, and notices except on the Confidential Information Form (Form 11), which form shall not be accessible to the public. **Rule 313.03. Sealing Financial Source Documents.** Financial source documents shall be submitted to the court for filing under a cover sheet designated "Sealed Financial Source Documents" and substantially in the form set forth as Form 12 appended to these rules. Financial source documents submitted with the required cover sheet are not accessible to the public except to the extent that they are formally admitted into evidence in a hearing or trial. The cover sheet or copy of it shall be accessible to the public. Financial source documents that are not submitted with the required cover sheet and that contain restricted identifiers are accessible to the public, but the court may, upon motion or on its own initiative, order that any such financial source documents be sealed.

	4) Segregation of information on "sensitive information forms"
Arizona [proposed policy]	**Sensitive Data** 1. The courts should protect from remote electronic public disclosure the following sensitive data from case files: Social Security Numbers Credit Card Numbers Debit Card Numbers Other Financial Account Numbers Victim contact information (address and phone number) Names of juvenile victims Rule 123(c)(3) already prohibits public access to financial account and social security numbers appearing in administrative files. Every court should review its forms and processes to ensure that this information is not being gathered unnecessarily. 2. To protect the data listed in Recommendation Number 1 above, the Supreme Court should develop a sensitive data form and require its use where applicable. The sensitive data form shall be maintained by the clerk as a confidential record accessible by the general public only on a showing of good cause pursuant to the process set forth in Rule 123. Good cause may include access by a media representative for purposes of researching a news story. 3. The Supreme Court should educate judges, attorneys and the public that case records are publicly accessible and may be available via the Internet.

	5) Judicial discretion (and procedures for requesting or denying access)
Vermont Rule 2(b) Rule 7	**§ 2. Scope.** .... (b) *Specific Right of Access*. If, based on a statute, judicial rule or other source of law, a person, or an authorized officer or member of the Executive or Legislative Branch, claims a right of access greater than that available to a member of the public, the record custodian shall act in conformity with the applicable statute, rule or other source of law. If a person, or an authorized officer or member of the Executive or Legislative Branch, claims a right of access greater than that available to the public as a whole, but not based on a specific statute or rule, that claim shall be determined by the court administrator for administrative records or the presiding judge of the court involved for case records. In making that determination, the court administrator or judge shall be guided by these rules and any other relevant rules or statutes and shall weigh the special interest of the person or officer or member seeking the record against the interests protected by the restriction on public access. An appeal from such a determination may be made to the Supreme Court. **§ 7.** Exceptions. (a) *Case Records*. Except as provided in this section, the presiding judge by order may grant public access to a case record to which access is otherwise closed, may seal from public access a record to which the public otherwise has access or may redact information from a record to which the public has access. All parties to the case to which the record relates, and such other interested persons as the court directs, have a right to notice and hearing before such order is issued, except that the court may issue a temporary order to seal or redact information from a record without notice and hearing until a hearing can be held. An order may be issued under this section only upon a finding of good cause specific to the case before the judge and exceptional circumstances. In considering such an order, the judge shall consider the policies behind this rule. If a statute governs the right of public access and does not authorize judicial discretion in determining to open or seal a record, this section shall not apply to access to that record. ... ©) *Appeals*. Appeals from determinations under this section shall be made to the Supreme Court.

	5) Judicial discretion (and procedures for requesting or denying access)
Indiana Rule 9(H)	(H) Prohibiting Public Access to Information In Court Records. (1) A verified written request to prohibit public access to information in a court record, may be made by any person affected by the release of the information. The request shall demonstrate that:(a) The public interest will be substantially served by prohibiting access; (b) Access or dissemination of the information will create a significant risk of substantial harm to the requestor, other persons or the general public; (c) A substantial prejudicial effect to on-going proceedings cannot be avoided without prohibiting public access, or; (d) The information should have been excluded from public access under section (G) of this rule. The person seeking to prohibit access has the burden of providing notice to the parties and such other persons as the court may direct, providing proof of notice to the court or the reason why notice could not or should not be given, demonstrating to the court the requestor's reasons for prohibiting access to the information. A party or person to whom notice is given shall have twenty (20) days from receiving notice to respond to the request. (2) A court may deny a request to prohibit public access without a hearing. If the court does not initially deny the request, it shall post advance public notice of the hearing. A court may grant a request to prohibit public access following a hearing if the requestor demonstrates by clear and convincing evidence that any one or more of the requirements of (H)(1)(a) through (H)(1)(d) have been satisfied. An order prohibiting public access to information in a court record may be issued by the court having jurisdiction over the record. An order prohibiting public access to information in bulk or compiled records, or in records under the jurisdiction of multiple courts may be issued only by the Supreme Court. (3) The court shall balance the public access interests served by this rule and the grounds demonstrated by the requestor. In its order, the court shall state its reasons for granting or denying the request. If the court prohibits access, it will use the least restrictive means and duration. When a request is made to prohibit public access to information in a court record at the time of case initiation, the request and the case information will remain confidential for a reasonable period of time until the court rules on the request. When a request is made to prohibit public access to information in court records that are already publicly accessible, the information may be rendered confidential for a reasonable period of time until the court rules on the request. (4) This section does not limit the authority of a court to seal court records pursuant to Ind. Code § 5-14-3-5.5. *[Indiana Rule 9(I) is entitled "Obtaining Access to Information Excluded from Public Access." Its provisions are similar to Rule 9(H) above.]*

	5) Judicial discretion (and procedures for requesting or denying access)
Maryland R 16-1009	RULE 16-1009. Court Order Denying or Permitting Inspection of Case Record (a) Motion (1) Any party to an action in which a case record is filed, including any person who has been permitted to intervene as a party, and any person who is the subject of or is specifically identified in a case record may file a motion: (A) to seal or otherwise limit inspection of a case record filed in that action that is not otherwise shielded from inspection under these Rules; or (B) to permit inspection of a case record filed in that action that is not otherwise subject to inspection under these Rules. (2) The motion shall be filed with the court in which the case record is filed and shall be served on: (A) all parties to the action in which the case record is filed; and (B) each identifiable person who is the subject of the case record. ... (d) Final Order (1) After an opportunity for a full adversary hearing, the court shall enter a final order: (A) precluding or limiting inspection of a case record that is not otherwise shielded from inspection under these Rules; (B) permitting inspection, under such conditions and limitations as the court finds necessary, of a case record that is not otherwise subject to inspection under these Rules; or (C) denying the motion. (2) In determining whether to permit or deny inspection, the court shall consider: (A) if the motion seeks to preclude or limit inspection of a case record that is otherwise subject to inspection under these Rules, whether a special and compelling reason exists to preclude or limit inspection of the particular case record; and (B) if the petition or motion seeks to permit inspection of a case record that is otherwise not subject to inspection under these Rules, whether a special and compelling reason exists to permit inspection. (3) Unless the time is extended by the court on motion of a party and for good cause, the court shall enter a final order within 30 days after a hearing was held or waived. ... (f) Non-Exclusive Remedy This Rule does not preclude a court from exercising its authority at any time to enter an order that seals or limits inspection of a case record or that makes a case record subject to inspection.

	6) Notice (to persons accessing records)
California Rule 2074	Rule 2074. Limitations and conditions ... (c) [Conditions of use by persons accessing records] A court may condition electronic access to its records on (1) the user's consent to access the records only as instructed by the court and (2) the user's consent to the court's monitoring of access to its records. A court must give notice of these conditions, in any manner it deems appropriate. The court may deny access to a member of the public for failure to comply with any of these conditions of use. (d) [Notices to persons accessing records] A court must give notice of the following information to members of the public accessing its electronic records, in any manner it deems appropriate: (1) The court staff member to contact about the requirements for accessing the court's records electronically. (2) That copyright and other proprietary rights may apply to information in a case file absent an express grant of additional rights by the holder of the copyright or other proprietary right. The notice should indicate that (A) use of such information is permissible only to the extent permitted by law or court order and (B) any use inconsistent with proprietary rights is prohibited. (3) Whether electronic records constitute the official records of the court. The notice should indicate the procedure and any fee required for obtaining a certified copy of an official record of the court. (4) Any person who willfully destroys or alters any court record maintained in electronic form is subject to the penalties imposed by Government Code section 6201. (e) [Access policy] A court must post a privacy policy on its public-access Web site to inform members of the public accessing its electronic records of the information it collects regarding access transactions and the uses that the court may make of the collected information.

	7) Remote access / courthouse-only access
California Rule 2073	Rule 2073. Public access (a) [General right of access] All electronic records must be made reasonably available to the public in some form, whether in electronic or in paper form, except those that are sealed by court order or are made confidential by law. (b) [Electronic access required to extent feasible] A court that maintains the following records in electronic form must provide electronic access to them, both remotely and at the courthouse, to the extent it is feasible to do so. (1) Register of actions (as defined in Gov. Code, § 69845), calendars, and indexes; and (2) All records in civil cases, except those listed in (c). (c) [Courthouse electronic access only] A court that maintains the following records in electronic form must provide electronic access to them at the courthouse, to the extent it is feasible to do so, but may provide remote electronic access only to the records governed by (b)(1): (1) Any record in a proceeding under the Family Code, including, but not limited to, proceedings for dissolution, legal separation, and nullity of marriage; child and spousal support proceedings; and child custody proceedings; (2) Any record in a juvenile court proceeding; (3) Any record in a guardianship or conservatorship proceeding; (4) Any record in a mental health proceeding; (5) Any record in a criminal proceeding; and (6) Any record in a civil harassment proceeding under Code of Civil Procedure section 527.6....

	8) Access to information maintained by the court (including dockets)
Minnesota [proposed] R 313.02	**Rule 313.02. Restricted Identifiers.** .... (b) Records Generated by the Court. Restricted identifiers maintained by the court in its register of actions (i.e., activity summary or similar information that lists the title, origination, activities, proceedings and filings in each case), calendars, indexes, and judgment docket shall not be accessible to the public. Courts shall not include restricted identifiers on their judgments, orders, decisions, and notices except on the Confidential Information Form (Form 11), which form shall not be accessible to the public....
California Rule 2077	Rule 2077. Electronic access to court calendars, indexes, and registers of actions **(a) [Intent]** The intent of this rule is to specify information to be included in and excluded from the court calendars, indexes, and registers of actions to which public access is available by electronic means under rule 2073 (b). To the extent it is feasible to do so, the court must maintain court calendars, indexes, and registers of actions available to the public by electronic means in accordance with this rule..... **(c) [Information that must be excluded from court calendars, indexes, and registers of action]** The following information must be excluded from a court's electronic calendar, index, and register of actions: (1) Social security number; (2) Any financial information; (3) Arrest warrant information; (4) Search warrant information; (5) Victim information; (6) Witness information; (7) Ethnicity; (8) Age; (9) Gender; (10) Government-issued identification card numbers (i.e., military); (11) Driver's license number; and (12) Date of birth.

	9) Access to "bulk"information
California Rule 2073	Rule 2073. Public access ...(e) [Access only on case-by-case basis] A court may only grant electronic access to an electronic record when the record is identified by the number of the case, the caption of the case, or the name of a party, and only on a case-by-case basis. This case-by-case limitation does not apply to a calendar, register of actions, or index. (f) [Bulk distribution] A court may provide bulk distribution of only its electronic calendar, register of actions, and index. "Bulk distribution" means distribution of all, or a significant subset, of the court's electronic records....
Arizona [policy proposal]	7. Remote electronic access to case information should be afforded on a case-by-case basis only; bulk data should not be electronically accessible via the Internet. Electronic access should be limited to prevent the wholesale downloading of case files or case management databases via the Internet.
Indiana Rule 9(f)	(F) Bulk Distribution and Compiled Information. (1) Upon written request as provided in this section (F), bulk distribution or compiled information that is not excluded by Section (G) or (H) of this rule may be provided. (2) Requests for bulk distribution or compiled information shall be made to the Executive Director of the Division of State Court Administration or other designee of the Indiana Supreme Court. The Executive Director or other designee may forward such request to a court exercising jurisdiction over the records, and in the instance of records from multiple courts, to the Indiana Supreme Court, for further action. Requests will be acted upon or responded to within a reasonable period of time. (3) With respect to requests for case record information not excluded from public access by Sections (G) or (H) of this rule, the request for bulk distribution or compiled information may be granted upon determination that the information sought is consistent with the purposes of this rule, that resources are available to prepare the information, and that fulfilling the request is an appropriate use of public resources. The grant of said request may be made contingent upon the requestor paying reasonable costs of responding to the request.... *[this rule continues with process for obtaining bulk access to information that is excluded from general public access]*

E-GOVERNMENT ACT OF 2002

PUBLIC LAW 107-347

SECTION 205

Public Law 107–347
107th Congress

An Act

To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes.

Dec. 17, 2002
[H.R. 2458]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

E-Government Act of 2002.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

44 USC 101 note.

(a) SHORT TITLE.—This Act may be cited as the "E-Government Act of 2002".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 205. FEDERAL COURTS.

44 USC 3501 note.

(a) INDIVIDUAL COURT WEBSITES.—The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:

(1) Location and contact information for the courthouse, including the telephone numbers and contact names for the clerk's office and justices' or judges' chambers.

(2) Local rules and standing or general orders of the court.

(3) Individual rules, if in existence, of each justice or judge in that court.

(4) Access to docket information for each case.

(5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

(6) Access to documents filed with the courthouse in electronic form, to the extent provided under subsection (c).

(7) Any other information (including forms in a format that can be downloaded) that the court determines useful to the public.

(b) MAINTENANCE OF DATA ONLINE.—

(1) UPDATE OF INFORMATION.—The information and rules on each website shall be updated regularly and kept reasonably current.

(2) CLOSED CASES.—Electronic files and docket information for cases closed for more than 1 year are not required to be made available online, except all written opinions with a date of issuance after the effective date of this section shall remain available online.

(c) ELECTRONIC FILINGS.—

Public information.

(1) IN GENERAL.—Except as provided under paragraph (2) or in the rules prescribed under paragraph (3), each court shall make any document that is filed electronically publicly available online. A court may convert any document that is filed in paper form to electronic form. To the extent such conversions are made, all such electronic versions of the document shall be made available online.

(2) EXCEPTIONS.—Documents that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online.

Regulations.

(3) PRIVACY AND SECURITY CONCERNS.—(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition, to, a redacted copy in the public file.

(B)(i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns

arising from electronic filing shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security. Deadlines. Reports.

(d) DOCKETS WITH LINKS TO DOCUMENTS.—The Judicial Conference of the United States shall explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in each case to be obtained from the docket sheet of that case.

(e) COST OF PROVIDING ELECTRONIC DOCKETING INFORMATION.—Section 303(a) of the Judiciary Appropriations Act, 1992 (28 U.S.C. 1913 note) is amended in the first sentence by striking "shall hereafter" and inserting "may, only to the extent necessary,".

(f) TIME REQUIREMENTS.—Not later than 2 years after the effective date of this title, the websites under subsection (a) shall be established, except that access to documents filed in electronic form shall be established not later than 4 years after that effective date. Deadlines.

(g) DEFERRAL.—

(1) IN GENERAL.—

(A) ELECTION.—

(i) NOTIFICATION.—The Chief Justice of the United States, a chief judge, or chief bankruptcy judge may submit a notification to the Administrative Office of the United States Courts to defer compliance with any requirement of this section with respect to the Supreme Court, a court of appeals, district, or the bankruptcy court of a district.

(ii) CONTENTS.—A notification submitted under this subparagraph shall state—

(I) the reasons for the deferral; and

(II) the online methods, if any, or any alternative methods, such court or district is using to provide greater public access to information.

(B) EXCEPTION.—To the extent that the Supreme Court, a court of appeals, district, or bankruptcy court of a district maintains a website under subsection (a), the Supreme Court or that court of appeals or district shall comply with subsection (b)(1).

(2) REPORT.—Not later than 1 year after the effective date of this title, and every year thereafter, the Judicial Conference of the United States shall submit a report to the Committees on Governmental Affairs and the Judiciary of the Senate and the Committees on Government Reform and the Judiciary of the House of Representatives that— Deadline.

(A) contains all notifications submitted to the Administrative Office of the United States Courts under this subsection; and

(B) summarizes and evaluates all notifications.

E-Government Subcommittee

Minutes of the meeting of January 14, 2004
Scottsdale, AZ

The E-Government Subcommittee (the "Subcommittee") met on January 14, 2004, at the Hermosa Inn in Scottsdale, Arizona.

The following members of the Subcommittee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Robert L. Hinkle, Liaison from the Evidence Rules Committee
Hon. John G. Roberts, Jr., Liaison from the Appellate Rules Committee
Hon. Shira A. Scheindlin, Liaison from the Civil Rules Committee
Hon. A. Thomas Small, Liaison from the Bankruptcy Rules Committee
Hon. Reta M. Strubhar, Liaison from the Criminal Rules Committee
Hon. David F. Levi, Chair, Standing Committee *(ex officio)*
Hon. Jerry A. Davis, Liaison from the Committee on Court Administration and Case Management
Hon. James B. Haines, Jr., Liaison from the Committee on Court Administration and Case Management
Professor Daniel R. Coquillette, Reporter to the Standing Committee *(ex officio)*
Professor Daniel J. Capra, Lead Reporter and Reporter to the Evidence Rules Committee *(consultant)*
Professor Edward H. Cooper, Reporter to the Civil Rules Committee *(consultant)*
Professor Jeffrey W. Morris, Reporter to Bankruptcy Rules Committee *(consultant)*
Professor Patrick J. Schiltz, Reporter to the Appellate Rules Committee *(consultant)*
Professor David H. Schlueter, Reporter to the Criminal Rules Committee *(consultant)*

The following individuals participated via teleconference:

Hon. Donetta W. Ambrose, Liaison from the Criminal Law Committee
Hon. James S. Gwin, Liaison from the Information Technology Committee
Abel J. Mattos, Administrative Office of the Federal Courts/Committee on Court Administration and Case Management
Katie Simon, Administrative Office of the Federal Courts/Committee on Court Administration and Case Management

Also present were:

Robert Deyling, Esq., Attorney Advisor, Administrative Office of the Courts
Professor Steven Gensler, Supreme Court Judicial Fellow
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Al Cortese, Esq.
Brook D. Coleman, Esq.

Welcome and Introduction:

Judge Levi extended a welcome to the Subcommittee and thanked all in attendance for coming. Those attending the meeting introduced themselves.

Business of the Subcommittee Meeting:

Judge Fitzwater welcomed the Subcommittee members and other individuals in attendance. He briefly outlined the charge of the Subcommittee and began by focusing the discussion on where e-government issues have been, where those issues currently stand, and where the Subcommittee should focus going forward. Beginning with where e-government issues have been, Judge Fitzwater explained that an incredible amount of work had already been done by the Committee on Court Administration and Case Management ("CACM"). Judge Fitzwater asked Judge Davis to explain CACM's role and progress on this issue to the Subcommittee.

CACM Report:

Judge Davis reported to the Subcommittee that CACM began its involvement in e-government with a study regarding the effect electronic court filings would have on the privacy of litigants and what, if any, policies should be adopted to deal with any privacy issues. During CACM's study, a number of government agencies became involved and provided input to CACM. In the summer of 2000, CACM presented a number of policy options and solicited feedback from court file users. CACM received over 150 comments from a wide spectrum of users (e.g., media, data resellers, financial services). Judge Davis referred the Subcommittee to attachment 1 of the meeting materials, which contained a summary of these comments.

Judge Davis further explained that in March 2001, CACM conducted a public hearing regarding the various policy options. The prior research and this hearing further clarified the fact that there were huge benefits to electronic access to court files. However, it was also clear that there were looming concerns about privacy and how to balance the two.

CACM decided that its recommendations to the Judicial Conference regarding electronic filings would be based on the premise that there should be a consistent and uniform nationwide policy. With that in mind, CACM recommended the following:

- Civil Cases. CACM recommended that civil case files be available electronically to the same extent that they are available as paper files. However, CACM made one exception to this recommendation for social security cases. It reasoned that those cases should not be available electronically since there are a high number of such cases, and the cases contain a large amount of private information. Finally, CACM recommended that certain personal identifiers such as social security numbers and names of minor children should not be included in the electronically available civil files.

- Criminal Cases. CACM decided that criminal cases presented more daunting issues since safety concerns regarding informants and other parties may require certain precautions. In order to examine this issue, CACM delayed a position on criminal cases for two years in order to allow for a FJC study to be completed.

- Bankruptcy Cases. CACM determined that it was appropriate to treat bankruptcy cases like civil cases.

- Appellate Cases. Similarly, CACM determined that cases on appeal should be treated as they were at the lower court level.

Judge Davis went on to explain that in the spring of 2002, certain district courts informed CACM that their filings were online. CACM distributed model notice provisions and local rules accordingly. Later that year, the President signed the E-Government Act of 2002, which as the Subcommittee knows, requires the federal courts to put their court files online. Some of the E-Government Act provisions were inconsistent with the model rules that CACM had formulated so CACM modified those provisions to comply.

With respect to the position of CACM on criminal cases, its concerns basically turned on protecting certain vulnerable parties involved in criminal cases. When the FJC completed its study, these concerns did not appear to bear out. The study convinced CACM and others that the benefits of public access outweighed the seemingly low amount of risk to these parties. This position was further reinforced by the commitment of any criminal file access policy to the value of sealing certain sensitive documents from public access.

In fall 2002, CACM recommended to the Judicial Conference that, like civil cases, criminal cases should be available electronically to the same extent that they are publicly available at the courthouse. However, CACM further recommended that this change not go into effect until all aspects of implementation were settled. The model rule was drafted and sent to the Department of Homeland Security and other agencies for their feedback.

Judge Haines added that the bankruptcy courts had been slightly ahead in the process, as they had a rule regarding truncated social security numbers that went into effect this past December. He added that the bankruptcy courts are canaries in the mine on this issue because bankruptcy involves a lot of personal information. This forced the bankruptcy courts to be innovative in how they should balance the concerns of privacy and access. Finally, the bankruptcy courts experienced the implementation issues connected to the recently enacted rule on truncating social security numbers. He advised that, in his opinion, allowing for ample notice and planning had been invaluable to the success of that implementation.

Judge Davis concluded by noting that he had provided only a rough overview of what CACM has done and asked if the Subcommittee members had any questions for him. Finally, he noted that

the key to successful adoption and implementation is to educate the bar regarding these rules and about their role in implementation. Judge Ambrose echoed this assertion and added that another key was to avoid the problem of inconsistency (i.e. what is contained in a criminal case file should be the same from district to district).

The members of the Subcommittee then discussed the CACM recommendations with the members of CACM who were present. Professor Capra asked if consideration had been given to adding to the list of privacy items in a criminal case. Judge Davis responded that CACM had considered adding plea agreements and other similar documents. However, Judge Davis stated that CACM concluded that it should leave those determinations to each of the courts by giving the courts and the attorneys involved the discretion regarding what to seal from the public, if anything. Judge Ambrose pointed out that the initial draft policy did have a list of documents for which public access would not be allowed. But, at the end of the day, CACM determined that a better policy was to keep the list simple and allow the courts to make their own determinations regarding what to seal on a case by case basis.

Section 205(c) of the E-Government Act of 2002 – Potential Amendments:

Professor Capra requested that John Rabiej update the subcommittee regarding the proposed amendments to § 205(c) of the E-Government Act. Mr. Rabiej explained that currently, § 205(c)(iv) states that a party can submit an unredacted version of a filed document if it wishes. The provision mandates that a party would have to submit two copies of a document, one with the private provisions redacted, and one with the full text of the document unredacted. He explained that this provision was made at the behest of the Department of Justice, as the Department felt it was a necessary provision to preserve the integrity of original evidence. The Judicial Conference has opposed this provision and has been working with the DOJ on compromise legislation. The compromise reached would allow parties to file a separately sealed document that contains a complete list of the data that has been redacted in the publicly filed document(s). This "reference list" would not be publicly available, but would be available to the court so that it can take notice of the redacted information. This compromise amendment has passed the House of Representatives and is currently in the Senate Government Reform Committee. The Subcommittee discussed this proposed legislation and how it would affect the rulemaking process.

Court Transcripts:

Professor Capra asked if there had been any developments regarding the treatment of court transcripts within the scope of the E-Government Act. Professor Davis responded that it was the position of CACM that when a transcript is filed with the court, it becomes a part of the case file and should, therefore, be electronically available. CACM's general policy is to require that the lawyers take on the responsibility for redacting any private information before any document is filed. Ms. Simon added that the Judicial Conference adopted a policy that states that if a transcript is going to be filed electronically, the court reporter must initially provide the transcript to the parties in hard copy. The parties then have to notify the court reporter that they intend to submit redactions within

five days of that hard fling. The parties then have an additional 21 days to submit any such redactions. The transcript is filed electronically once those redactions are made.

Ms. Simon further explained that the Judicial Conference adopted this policy in principle, but has delayed implementation in order to determine the impact, if any, on court reporter income. A pilot program is being conducted to study this impact, but Ms. Simon noted that most of the districts being studied in the pilot program are already complying with the Judicial Conference policy of making transcripts publicly available. Judge Davis pointed out that there will be issues for court reporters in districts where there has not been compliance with the Judicial Conference policy. The Subcommittee agreed that court reporter compensation could be an explosive issue once the transcripts are all electronically available as mandated by the Conference and now the E-Government Act.

General Discussion:

The Subcommittee discussed the general importance of educating the bar with respect to all of these changes. For example, Judge Haines noted that, with respect to transcripts, attorneys need to start thinking about why they are asking personal questions of witnesses during trial (such as home address information). Given the potential availability of this information over the internet once made part of the transcript, lawyers may need to change their standard procedures. In addition, attorneys will need to be educated regarding their responsibility for their client's personal information. Judge Fitzwater asked Judge Small how the bankruptcy courts were handling the recent changes. Judge Small noted that it was early, but that he believed that the changes had been well-received. Judge Small added that he thought the process was going well due in most part to the well-communicated notice of the changes to the bench and bar. The Subcommittee again discussed how to best notify members of the bar regarding these impending changes and policies.

On another note, the representatives from CACM were asked why special provision had been made for Social Security cases, but not for other cases where privacy issues were arguably just as important. Judge Davis responded that the issue had been fiercely debated within CACM and that a compromise had been made primarily because social security cases are solely individual matters involving a government agency. Therefore, the cases require a meaningful amount of personal information to be included in court filings. Judge Davis acknowledged that, as Judge Levi stated, ERISA cases and other similar cases have a high frequency of personal information, but Judge Davis pointed out that the option to seal documents still exists in those cases. Ms. Simon also explained that there are a high number of social security appeals filed, and that requesting the sealing of documents in each case would be burdensome -- while ERISA cases, for example, are not appealed with the same frequency. In addition, Ms. Simon noted that the administrative record involved in social security cases would be too burdensome to scan in electronically for every case since those records are not currently available electronically.

State Law Best Practices Survey:

Judge Fitzwater informed the Subcommittee that Mr. Deyling had conducted an overview of best practices in state courts with respect to privacy and access issues. He asked Mr. Deyling to discuss his findings.

Mr. Deyling stated that following his review of state court practices, he determined that the Subcommittee may want to consider the following issues when drafting rules implementing § 205(c):

- Scope or Purpose Provision. Mr. Delying noted that several states have a statement regarding the purpose of their privacy provisions -- ranging from succinct statements of purpose to more detailed statements of the public policy governing the rule. Mr. Deyling noted that some state provisions also set out whether the rule should be about privacy, access, or both. Finally, he noted that some states have determined whether the rules are about paper, electronic availability, or both.

- Uniformity. Mr. Deyling observed that notice to the litigants and their attorneys was important and that location neutrality -- whether that be desk vs. courthouse or one district vs. another district -- was pivotal for the success of any privacy and access provision.

- Definitions. Mr. Deyling noted that many states had attempted to define everything in a case file, while other states had defined what was not considered part of the file or had left it ambiguously defined. In addition, some states had provisions that stated that certain categories of documents were presumptively sealed.

- Reference List. Mr. Deyling explained that many states, like the currently proposed national amendment, had a system where the private information at issue could be put in a separate document where it was not accessible to the public.

- Education. Mr. Deyling observed that some states provided attorneys with a list of documents that they should consider attempting to seal.

- Directions to Clerk of Court. Many state court rules provided instructions to the clerk of the court regarding, for example, what goes on the electronically available docket sheet.

- Bulk Information. Mr. Deyling explained that some states had provisions governing the practice of downloading and manipulating bulk information from the court websites.

The Subcommittee discussed Mr. Deyling's presentation regarding best practices in the state courts.

The members of the Subcommittee observed that a fundamental question exists as to whether the rules to be implemented are simply for court records, or whether the scope is expanded to things not filed such as exhibits, judges' notes, etc. However, it was noted that if the Subcommittee starts venturing into this realm as opposed to just determining that what is currently available at the court house to the public should also be available electronically, the Subcommittee is taking on a lot more than what it is charged with doing by virtue of § 205(c). Judge Fitzwater agreed, and noted that § 205(c) speaks to making what is "filed" electronically available; therefore, limiting the spectrum of what any rule should cover. Committee members were in general agreement that any national rule should remain simple and should apply only to court filings that are electronically available over the internet.

The Subcommittee also discussed whether the rules should list documents that the Subcommittee believes should be sealed. Professor Schlueter noted that the Subcommittee needed to determine for whom these rules were being drafted. He further suggested that perhaps the rules should refer practitioners to the Judicial Conference policy guidelines -- that way, the Subcommittee would not be prescribing attorney conduct, but would be aiding their conversion to this new system. The Subcommittee discussed the advantages of this approach and likened it to current Fed.R.Civ.P. 5. Professor Capra also suggested that the rule could read like the Eleventh Circuit's model rule, which provides some mandatory information that should be redacted, along with suggestions for other information in a note to the rule.

Judge Levi noted that the respective Advisory Committees may have different issues to address, and the focus of the Subcommittee should be to determine how each of the Advisory Committees can efficiently address each of their specific issues and concerns. The Subcommittee members agreed that the Advisory Committees should take a common approach to the extent possible, with variations as necessary to accommodate particular issues that will arise in civil, criminal, bankruptcy, and appellate proceedings.

Finally, the Subcommittee discussed the general commercial interest in court information. Members noted that a number of databases were being created and sold online. Mr. [Gwynn] also noted that the fees obtained from PACER, which included fees paid by these commercial companies, were important to the various courts' information technology budgets.

Access Issues:

The Subcommittee discussed the practical effects of electronic filing on access. Judge Sheindlin asked whether complete versions of redacted documents were available to the judges electronically if they needed to see them. Judge Hinkle stated that on CM/ECF in his district, he has access to the unredacted document, while the public and lawyers do not. Ms. Simon noted that the most recent version of CM/ECF does allow for judges to view redacted and sealed documents in camera via electronic means.

Judge Levi inquired as to whether CACM had reviewed the official forms used, for example,

in judgments. He noted that a practitioner in his district had informed him that the criminal judgment form provided the individual's entire social security number. Judge Davis noted that the forms were generally reviewed. Ms. Simon added that the criminal judgment form had been reviewed in September 2003, and the social security information had been moved to the statement of reason, which is not publicly filed.

The Subcommittee generally discussed the fact that PACER currently provides a gateway to access to these documents via the requirement to pay to use the service. This gateway allows public access to be monitored if necessary to protect privacy interests. The members questioned, however, whether this would always be the case or whether there would be a movement to provide cost-free access.

Template Rule Regarding § 205(c):

The Subcommittee then discussed what the template rule that the advisory committees would modify should look like. Professor Capra noted that CACM had done a lot of really important work and perhaps the rule should build on that foundation. The Subcommittee discussed whether the rule should provide an exhaustive list of categories for redaction, whether the rule should provide a brief list of main categories, and if so, whether reference should be made to further categories via the Judicial Conference policies. A discussion ensued regarding the pros and cons of referencing the Judicial Conference policies, including, but not limited to, a discussion of whether such policies were accessible enough to practitioners.

Members of the Subcommittee further discussed how to approach drafting the rules. Some members suggested that each of the advisory committees should consider what issues are specifically important to them, and draft a rule accordingly. Other members were concerned that this would create four inconsistent rules. Professor Capra suggested that he could draft a template rule that all of the advisory committees could then take and modify as they saw fit. The advisory committees could then compare their versions to be sure that there was not too much variation as between all of the rules. The Subcommittee members agreed with that approach.

The question then turned to timing on the implementation of these rules. The members of the Subcommittee agreed that the advisory committees should review the template rule to be prepared by Professor Capra at their respective spring meetings. They should have their rules finalized for presentation to their advisory committees by their fall 2004 meetings. The Standing Committee can then review the various rules at its January 2005 meeting, or at its June 2005 meeting at the latest. The Subcommittee agreed on this schedule and noted that, barring any problems, the rules would then become effective on December 1, 2007.

The Subcommittee also discussed the possibility that § 205(c) would implicate other rules. For example, in Fed.R.Civ.P. 16, the Advisory Committee on Civil Rules may want to consider adding a discussion of § 205(c) to the pre-trial conference phase.

In addition, the Subcommittee discussed whether Fed.R.Civ.P. 11 should be amended to contemplate violations of the privacy/access rules. Judge Davis noted that CACM had reviewed this issue and determined that Rule 11 already covers any arguable violation of these policies and that it was better to leave it to the discretion of the courts as to how to deal with violations or abuse of any new rule regarding electronic filing. The Subcommittee agreed with this assessment.

Finally, Judge Fitzwater reminded each advisory committee of its obligation to continue to consider best practices of the state courts. He encouraged the advisory committees to call on Mr. Deyling and the work he has already done in this area.

Conclusion of Meeting:

Judge Fitzwater thanked the members of the Subcommittee for their input and thought on these matters. He gave special thanks to the members of CACM, who had worked so hard and provided so much guidance to the Subcommittee on this issue. He reviewed the plan of action for the Subcommittee and adjourned the meeting at 11:30 a.m.

Respectfully submitted,

Brook D. Coleman, Esq.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

February 18, 2004

MEMORANDUM TO JUDGE SIDNEY A. FITZWATER

SUBJECT: *Social Security Administrations's Comments*

For your information, I am attaching a copy of the January 2000 comments submitted by the Social Security Administration in response to the Committee on Court Administration and Case Management's request for comment on the proposed judiciary's privacy policy. The privacy policy eventually adopted by the Judicial Conference does not permit the public remote electronic access to social security appeals court records. The advisory committee's reporters are working on drafting an appropriate provision to accommodate the Social Security Administration's concerns. The Administration's attached comments explain their position in detail.

John K. Rabiej

Attachment

cc: E-Government Subcommittee (with attach.)
Peter G. McCabe, Secretary (with attach.)

No 165
1/19/00
Charlotte Hardnett, Acting General Counsel
Social Security Administration
Arthur Freid, Former General Counsel
Social Security Administration
In response to the public notice at 65 Fed. Reg. 67,016 (2000), the Social Security Administration
believes that Federal court records in Social Security cases should not be made available to the public at large through the use of the Internet. In addition, we offer the following general and specific comments on the privacy and security implications of Judicial Conference proposals for providing electronic public access to Federal court case files.

The notice observes that electronic court files may be "viewed, printed, or downloaded by anyone, at any time" and such universal, instantaneous access to court files may be substantively different from accessing such paper records at the courthouse. Id. at 67,017. Because Internet access by the general public to the complete court records of Social Security claimants would substantively different and entail potential harms for these claimants, the Social Security Administration recommends that electronic case files be available only to judicial personnel and parties to the particular court proceeding. In so recommending, the Social Security Administration does not seek to change the traditional access of the general public to paper records at the courthouse. Social Security records that must be filed in court cases pursuant to 42 U.S.C. 405(g) contain the claimant's application for benefits, disability and vocational reports, administrative determinations and decisions, and medical and vocational evidence submitted in support of the application. These materials include the individual's Social Security number, date of birth, address, telephone number, other names, including maiden name, and in the case of disability insurance benefits, earnings records. In Supplemental Security Income cases, the application also includes other personal financial information. The parties' briefs also contain detailed medical and other personal information. In most instances, this information is not releasable by the Social Security Administration, absent the consent of the claimant. Internet disclosure of Social Security case files
would increase the incidents of identity fraud. The information in these files is personal and could be extremely embarrassing, especially with respect to medical treatment reports, including mental health examinations. The potential for fraud and invasion of privacy based on Internet disclosure of personally identifiable information in these records may chill the right of claimants to obtain judicial review of administrative decisions on their claims. On balance, such disclosures are simply
too high a price to pay to justify the benefits of general public access to this court information. As the Courts embark on the implementation of new data systems that will support their operations and facilitate electronic access to the files they maintain, this is an opportune time to establish policies properly limiting access to this personal and sensitive information.

It should not be overlooked that typically, Social Security claimant litigants have simply chosen to pursue their right to judicial review of Agency claims decisions. 42 U.S.C. 405(g). They would likely be among those most significantly affected by global electronic access to Federal court case files due to the large quantity of detailed personal, medical, and financial information contained

in
their court case files. These litigants may be aged or disabled and, therefore, could suffer greater distress or harm than other litigants due to invasions of personal privacy or criminal activities stemming from the posting of personally identifiable information in their Federal court records on the Internet. Social Security claimants' records inevitably contain sensitive information for which they have some privacy expectations even though they are pursuing their claims in court. Court filings in these cases should be protected from unfettered disclosure on the Internet.

Our comments must be placed in the context of the Social Security Administration's longstanding attentiveness to the privacy of Social Security records. Even in the electronic age, the Agency's Internet site, www.ssa.gov, assures the public of such confidentiality, stating: " . . . the privacy of our customers has always been of utmost importance to the Social Security Administration." In fact our first regulation, published in 1937, was written and published to ensure your privacy. Our concern for your privacy is no different in the electronic age. Analogously, Kenneth S. Apfel, Commissioner for Social Security, testified before the House Ways and Means Committee, Subcommittee on Social Security, last March: "As electronic services expand, we are fully committed to prudent authentication and security technologies to protect the privacy of the information with which we are entrusted." Given the realities of moving to the electronic environment and longstanding policy to protect the privacy of Social Security claimants' records, the Social Security Administration advocates strongly for protecting personally identifiable information of claimants from Internet disclosure, even when the information is in Federal court case files at the courthouse. Comments are organized according to the proposed Judicial Conference policy options printed in boldface below. 65 Fed. Reg. 67,016-19.

Policy Alternatives on Electronic Public Access to Federal Court Case Files

Regardless of what entity addresses the issues of privacy and electronic access to case files, the effort must be made to balance access and privacy interests in making decisions about the public disclosure and dissemination of case files. The policy options outlined below are intended to promote consistent policies and practices in the federal courts and to ensure that similar protections and electronic access presumptions apply, regardless of which federal court is the custodian of a particular case file. One or more of the policy options for each type of case file may be recommended to the Judicial Conference for its consideration. Some, but not all of the options are mutually exclusive.

We highly commend the efforts of the Judicial Conference to develop a nationwide Federal court electronic filing procedure that addresses privacy and security concerns. This is a difficult objective.
Congress has attempted to address closely related issues through legislation, but with limited results to date that provide no comprehensive legislative solution. The Executive Branch has only limited powers concerning the treatment of Social Security claimants' records in the courts. We are pleased that through Judicial Branch efforts the Federal Government can serve as a role model regarding Internet disclosures of personally identifiable information. Accordingly, this effort to implement a uniform and sound policy is laudable.

Given the efforts that have already been undertaken by all three branches of the Federal Government to establish privacy and security safeguards for personally identifiable information, it would be

anomalous to take an inconsistent path by establishing any procedures that would make Social Security numbers and other identifying information available through the Internet. Although the United States courts have a long tradition of maintaining open access to their records, they recognize the access rights are not absolute and technology may affect the balance between access rights and privacy and security interests. 65 Fed. Reg. 67,107, citing United States Department of Justice v. Reporters Committee For Freedom of the Press, 489 U.S. 749 (1989) and Nixon v. Warner Communications Inc., 435 U.S. 589 (1978). Further, through their supervisory powers, courts deny access to court files that might become a vehicle for improper purposes. Id. at 598. Congress has long regulated disclosures of certain personally identifiable information. E.g., 42 U.S.C. 1306 (felony for disclosure of Social Security Administration information), 1320b-11 (felony for disclosure of confidential blood donor information), and 290 dd-2 (fines for violating confidentiality of alcohol and drug abuse treatment records); 5 U.S.C. 552a(i) (misdemeanors for Privacy Act disclosures); 26 U.S.C. 6103 and 7213(a) (felony for disclosure of tax returns and tax return information). Recently, Congress established civil and criminal penalties for improper disclosures of identifiable health information in the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, 1177.

Under HIPAA, the Department of Health and Human Services issued comprehensive regulations to protect the privacy of individual medical records. 45 CFR Parts 160 and 164, Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462-01 (2000). See also Johnson v. Sawyer, 120 F.3d 1307 (5th Cir. 1997) (including taxpayer's middle initial, age, home address, and occupation in IRS press release about taxpayer's criminal conviction was wrongful disclosure of return information, even if such information was included in court record, where immediate source of such information was taxpayer's return).

Internet disclosure of personally identifiable information is particularly inappropriate in context of Social Security litigation. It is wholly contrary to the overall privacy and security protection framework within which the Social Security Administration operates. Social Security Administration policy is not to disclose personal information pursuant to a Federal or State court order or other legal process unless the disclosure is permitted by the Social Security Act. 42 U.S.C. 1306(a). If pursuant to law the Social Security Administration must disclose personally identifiable information in court filings, once the information is disclosed, its confidentiality cannot be protected. 20 C.F.R. 401.190. Yet much of this information remains "especially sensitive." Participation in Social Security programs is mandatory, and people cannot limit what information is given to the Social Security Administration. Id. Further, it is likely that most Social Security disability claimants do not fully appreciate the public nature of their court case files when they seek judicial review of administrative denial of their claims. As claimants become aware of global electronic access to Social Security disability court case files, some may decide not to request judicial review of an administrative denial to avoid making public their private information. Thus, completely open access to Social Security litigation case files would likely have a chilling effect on seeking judicial review of administrative decisions on Social Security claims. Such a policy alternative is not warranted as the cost of exercising a Social Security claimant's legal right to seek judicial review of an administrative decision under 42 U.S.C. 405(g). Any such chilling effect would be in tension with the congressional intent to furnish Social Security claimants the right to judicial review. 42 U.S.C.
405(g)-(h). A claimant's right to such review necessarily outweighs any general public interest in

universal, instantaneous electronic access to a claimant's personally identifiable information.

Civil Case Files

Since the Social Security Administration is a party in a large volume of civil litigation, the proposed policies in this area are of greatest concern to the Agency. The civil case record in Social Security cases generally includes the pleadings, the parties' briefs on the merits of the Social Security claim, the administrative record, and the court's decision. The administrative record contains large amounts of personally identifiable information, described below; in addition, it contains the application for Social Security benefits, claimant statements and reports to the Agency, Agency determinations, and Administrative Law Judge hearing testimony. Merits briefs must refer frequently and in detail to the administrative record and, therefore, contain personally identifiable information as well. Any docketed court filing in a Social Security case may contain the claimant's Social Security number.

1. Maintain the presumption that all filed documents that are not sealed are available both at the courthouse and electronically. This approach would rely upon counsel and pro se litigants to protect their interests on a case-by-case basis through motions to seal specific documents or motions to exclude specific documents from electronic availability. It would also rely on judges' discretion to protect privacy and security interests on a case-by-case basis through orders to seal or to exclude certain information from remote electronic public access.

The Social Security Administration does not consider sealing records on a case by case basis as a viable method for addressing privacy and security of Social Security claimants involved in civil litigation with the Agency. The potential harms outweigh the benefits of general public in Internet access. First, virtually every Social Security case file contains sensitive information. Presumably, Social Security claimants would not want such personal information to be made available to the general public through the Internet. Such disclosure would expose Social Security claimants to invasions of privacy and criminal activities, such as identity theft, because merely publishing Social Security numbers affords criminals the information they need to perpetrate identity theft. There can be no public interest in facilitating such activity, and certainly none that outweighs the claimant's interest in some measure of security while pursuing a claim for Government benefits.

Second, due the pervasiveness of personally identifiable information in Social Security court case files and the large volume of Social Security civil litigation, this policy alternative would be extremely burdensome for the courts and the parties. In each Social Security case, one or more courts could be called upon to determine whether to seal one or more of the documents containing personally identifiable information.

Third, we know of no legal authority for sealing Social Security court records at the courthouse. Moreover, moving to the electronic filing environment should not alter the traditional availability of these records at the courthouse. Accordingly, courts may tend not to seal court Social Security case filings under this alternative, making them available to the general public on the Internet. As indicated herein, the Social Security Administration opposes this result. Moving to the electronic filing environment should not entail untoward invasions of personal privacy and the potential victimization of Social Security claimants. They are just pursuing a right to judicial review under the Social Security Act. 42 U.S.C. 405(g).

Fourth, a single, nationwide approach is necessary to help ensure uniform treatment of Social

Security claimants and consistent handling of their records in Federal court litigation. Clearly, this is not an appropriate area for the percolation of ideas through litigation in the various district and appellate courts. It is inappropriate for Social Security claimants litigating in one court to be subject to greater risks due to less protective decisions about sealing records in that court, while those litigating in another court enjoy greater protections. Indeed, district and appellate courts would be in an awkward position if asked to create their own rules concerning Internet disclosures of Social Security records. In fact, it could lead Congress to amend the Social Security Act with respect to protecting claimants' privacy and security interests uniformly.

2. Define what documents should be included in the "public file" and, thereby, available to the public either at the courthouse or electronically. This option would treat paper and electronic access equally and assumes that specific sensitive information would be excluded from public review or presumptively sealed. It assumes that the entire public file would be available electronically without restriction and would promote uniformity among district courts as to case file content. The challenge of this alternative is to define what information
should be included in the public file and what information does not need to be in the file because it is not necessary to an understanding of the determination of the case or because it implicates privacy and security interests. Since this policy alternative links the public file in the courthouse and on the Internet, the Social Security Administration does not view this as a workable alternative for the same reasons. Although this alternative may handle Internet disclosures more uniformly than in the previous alternative, the unacceptable result of inappropriate Internet disclosures of Social Security claimants' personally identifiable information would occur under this approach.

3. Establish "levels of access" to certain electronic case file information. This contemplates use of
software with features to restrict electronic access to certain documents either by the identity of the individual seeking access or the nature of the document to which access is sought, or both. Judges, court staff, parties and counsel would have unlimited remote access to all electronic case files. This approach assumes that the complete electronic case file would be available for public
review at the courthouse, just as the entire paper file is available for inspection in person. It is important to recognize that this approach would not limit how case files may be copied or disseminated once obtained at the courthouse.

If Internet access to Social Security court case files were restricted to judicial personnel and parties to the litigation, the Social Security Administration would favor this alternative. As the Judicial Conference has observed, access and privacy interests must be balanced in deciding about public electronic disclosure and dissemination of court case files. In balancing these interests, we endorse the use of technology to shield personally identifiable information in courthouse records of Social Security claimants from Internet disclosure to the general public.

It is noted, however, that filing paper copies of the administrative record portion of the Social Security court case record is the best currently available alternative. Currently, scanning is the only way to electronically file these records and it is of limited value for several reasons. Scanning the many, lengthy records would require the considerable additional funding. Further, scanning does not produce word-searchable texts that are reliable. At present, optical character recognition conversion of scanned records generates inaccuracies not found in paper copies due to the prevalence

of forms and non-text materials, e.g., medical graphs. Review and correction of the numerous, inevitable inaccuracies would require additional funding and, through human error, the electronic product would still contain more errors than a paper copy. Current technology for scanning and viewing voluminous, non-word searchable texts does not permit quick and reliable comparisons of various parts of the administrative record as manual working with paper copies does. Finally, failure to rely on accurate records would lead to erroneous court decisions.

4. Seek an amendment to one or more of the Federal Rules of Civil Procedure to account for privacy and security interests.

The Social Security Administration would be amenable to employing this approach to accomplish the objectives described above. For this alternative, we would want to participate in the development of any such amendments sufficiently to help ensure the privacy and security of personally identifiable information in Social Security case records.

Criminal Case Files

The Social Security Administration prosecutes a limited volume of criminal litigation through United States Attorneys.

1. Do not provide electronic public access to criminal case files. This approach advocates the position that the ECF component of the new CM/ECF system should not be expanded to include criminal case files. Due to the very different nature of criminal case files, there may be much less of a legitimate need to provide electronic access to these files. The files are usually not that extensive and do not present the type of storage problems presented by civil files. Prosecution and defense attorneys are usually located near the courthouse. Those with a true need for the information can still access it at the courthouse. Further, any legitimate need for electronic access to criminal case information is outweighed by safety and security concerns. The electronic availability of criminal information would allow co-defendants to have easy access to information regarding cooperation and other activities of defendants. This information could then be used to intimidate and harass the defendant and the defendant's family. Additionally, the availability of certain preliminary criminal information, such as warrants and indictments, could severely hamper law enforcement and prosecution efforts.

No comment.

2. Provide limited electronic public access to criminal case files. This alternative would allow the general public access to some, but not all, documents routinely contained in criminal files. Access to documents such as plea agreements, unexecuted warrants, certain pre- indictment information and presentence reports would be restricted to parties, counsel, essential court employees, and the judge.

If this policy alternative is chosen, the Social Security Administration is concerned about any personally identifiable information, especially Social Security numbers, that would be made available to the public on the Internet. Indictments of Social Security number fraud cases always include the victim's Social Security number. Further, indictments of representative payees usually include personally identifiable information about the Social Security beneficiary. Court records may contain other personally identifiable information about victims and witnesses. In the case of

fraudulent use of Social Security numbers it would be an intolerable irony if the victim's Social Security number were made available to the public on the Internet.

Bankruptcy Case Files

Generally, the Social Security Administration is concerned about making Social Security numbers and other personally identifiable information in bankruptcy case files available through the Internet.
We would support efforts to restrict Internet access to such information.

1. Seek an amendment to section 107 of the Bankruptcy Code. Section 107 currently requires public access to all material filed with bankruptcy courts and gives judges limited sealing authority. Recognized issues in this area would be addressed by amending this provision as follows: (1) Specifying that only "parties in interest" may obtain access to certain types of information; and (2) enhancing the 107(b) sealing provisions to clarify that judges may provide protection from disclosures based upon privacy and security concerns.

For the reasons previously stated, we believe that personally identifiable information, and Social Security numbers in particular, should not be included on Internet postings of bankruptcy case filings.

2. Require less information on petitions or schedules and statements filed in bankruptcy cases.

For the reasons previously stated, we believe that personally identifiable information, and Social Security numbers in particular, should not be included on Internet postings of bankruptcy case filings.

3. Restrict use of Social Security, credit card, and other account numbers to only the last four digits to protect privacy and security interests.

The Social Security Administration concurs.

4. Segregate certain sensitive information from the public file by collecting it on separate forms that will be protected from unlimited public access and made available only to the courts, the U.S. Trustee, and to parties in interest.

The Social Security Administration has no objection.

Appellate Cases

1. Apply the same access rules to appellate courts that apply at the trial court level.

The Social Security Administration concurs.

2. Treat any document that is sealed or subject to public access restrictions at the trial court level with the same protections at the appellate level unless and until a party challenges the restriction in the appellate court.

Any document that is sealed or subject to public access restrictions at the trial court level should enjoy the same protections at the appellate level, until a court of competent jurisdiction unseals the

documents or revises the access restrictions.

In conclusion, we appreciate the opportunity to comment in this matter. Pursuant to the request in the Federal Register notice, we are interested in participating in a public hearing, if one is held.

For additional assistance in this matter, you may contact us by e-mail reply. Additionally, you may directly contact the undersigned at 410-965-0600, or Donna J. Fuchsluger at 410-965-3209.

Very truly yours,

(signed by Charlotte J. Hardnett)

Charlotte J. Hardnett
Acting General Counsel

Enclosure

cc:
Mr. Deyling

August 2, 1999

Mr. Leonidas Ralph Mecham
Secretary
Judicial Conference of the United States
1 Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. Mecham:

I am writing to request the support of the Judicial Conference of the United States in ensuring that the confidentiality of information regarding Social Security and Supplemental Security Income (SSI) claimants under the control of the courts, is maintained. While we strongly support electronic filing of court documents, we believe that general publication of administrative transcripts and parties briefs on the Internet raises significant concerns.

The administrative transcripts contain the individuals application for benefits, disability and vocational reports, administrative determinations and decisions, and medical and vocational evidence submitted in support of the application. These materials include the individuals Social Security number, date of birth, address, telephone number, other names including maiden name, and in the case of disability insurance benefits, earnings records. In Supplemental Security Income cases, the application will also include other financial information. The parties briefs contain detailed medical and other private information.

The posting of administrative records and briefs on the Internet substantially increases the risk of identity theft, an issue of great concern to the President, the Congress, and the Social Security Administration. In addition, it makes readily available personal information that would not be

releasable in most instances by the Social Security Administration, absent the consent of the claimant. Finally, because of the potential for fraud and the invasion of privacy, the availability of this information on the Internet may chill the right of claimants to appeal benefit denials to district court. As the Courts embark on the implementation of new data systems that will support their operations and facilitate electronic access to the files they maintain, this is an opportune time to establish policies properly limiting access to this personal and sensitive information.

Identity Theft

Armed with only a persons Social Security number, an unscrupulous individual could obtain a persons welfare benefits or Social Security benefits, order new checks at a new address on that persons checking account, obtain credit cards, or even obtain the persons pay check. Greidinger v. Davis, 988 F.2d 1344, 1353 (4th Cir. 1993) (citations omitted). Clearly, the availability and accessibility of the Social Security number as well as various additional forms of personal identifying information on the Internet would significantly enhance the risk of identity theft, the prevalence and cost of which are growing. For example, the General Accounting Office (GAO) reported that the actual losses to individuals and financial institutions that the U.S. Secret Service had tracked involving identity fraud totaled $450 million in 1996, and $745 million in 1997.
Identity Fraud: Information on Prevalence, Cost, and Internet Impact is Limited, May 1, 1998, GGD-98-100BR, at 29. Further, GAO reported that the Social Security Administrations investigations of Social Security number misuse increased nearly fourfold from 1996 to 1997. Id. at 31.

Concerned by the dramatic increase in identity theft, Congress enacted the Identity Theft and Assumption Deterrence Act of 1998, P. L. No. 105-318, 112 Stat. 3007 (1998). The Act expanded 18 U.S.C 1028 to criminalize the theft of identity information, and established restitution provisions for individual victims of identify theft. In expanding the current law, the Senate Judiciary Committee noted that [t]oday criminals do not necessarily need a document to assume an identity; often they just need the information itself to facilitate these types of crimes. S.Rep. No. 105-274, at 5 (1998). The Senate Judiciary Committee also noted the statistics contained in the GAO report discussed above, and concluded that identify theft was a proliferating problem which crossed State lines and required Federal action. Id. at 6. It also found that increasingly criminals involved with identify theft are part of international syndicates committing financial, drug-related, immigration and violent crimes. Id. at 7. More recently, the
White House announced its strategy to implement this legislation by launching a vigorous identity theft enforcement and prevention strategy. White House Press Release, The Clinton-Gore Plan for Financial Privacy and Consumer Protection in the 21st Century (May 4,
1999).

Claimants Privacy Interest in Preventing Wide Dissemination of Medical Records I am also concerned about the availability on the Internet of plaintiffs medical records that are contained in their entirety in the administrative transcript and summarized in the briefs. Medical records typically contain information about a plaintiffs health that he or she had not previously held out for wide public scrutiny, and may contain information about matters of an especially sensitive nature, e.g., HIV status, mental illness, substance abuse, etc. The sensitivity of such information is evident in the procedures and safeguards mandated by Congress. See, e.g., 42 U.S.C. 1320b-11(d) (protecting

the confidentiality of blood donor records and directing that address information and related blood donor records must be destroyed upon completion of their use in providing the notification for which the information was obtained, so as to make such information and records undisclosable.); 42 C.F.R. Part 2 (imposing restrictions, pursuant to Congressional statutory provisions to prohibit the disclosure and use of alcohol and drug abuse patient records which are maintained in connection with the performance of any federally assisted alcohol and drug abuse program). Pending legislation in the Congress demonstrates the public concern about the confidentiality of medical records. See, e.g., The Patients Bill of Rights, S.240, 106th Cong. (1999); Medical Information Privacy and Security Act, S.573, 106th Cong. (1999); and The Health Care Personal Information Nondisclosure Act of 1999, S.578, 106th Cong. (1999).

Further, the aforementioned categories of personal information and medical records are protected by the Privacy Act, 5 U.S.C. 552a. While the Privacy Act is not binding on the courts, it would generally preclude an individual from obtaining the same information directly from the Agency. The Privacy Act provides that [n]o agency shall disclose any record which is contained in system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains [subject to 12 exceptions]. 5 U.S.C. 552a(b). One of those exceptions is that information must be disclosed if required by the Freedom of Information Act (FOIA), 5 U.S.C. 552.

However, the FOIA identifies nine categories of records that are exempt from mandatory disclosure. Exemption (b)(6) specifically exempts from disclosure, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C . 552(b)(6).

Additionally, Social Security numbers enjoy special protection under the Privacy Act. Pub.L. 93-579
7; reprinted in, 5 U.S.C. 552a note. In its report supporting the adoption of this provision, the Senate Committee stated that the extensive use of Social Security numbers as universal identifiers in both the public and private sectors is one of the most serious manifestations of privacy concerns in the nation. S.Rep. No. 93-1183 (1994), reprinted in, 1974 U.S.C.C.A.N. 6916, 6943.

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), requires the Commissioner to file administrative transcripts in court when a claimant seeks judicial review of a final administrative decision. Consequently, these transcripts then become a judicial record. However, Congress never contemplated that such records should be published for unrestricted, public viewing on the Internet. While the public has a general right to inspect and copy judicial records and documents, this right is not absolute. Nixon v. Warner Communications Inc., 435 U.S. 589, 597-98 (1978). Every court has supervisory power over its own records and files, and access has been denied where court files might become a vehicle for improper purposes. Id. at 598.

Currently, transcripts are only available to a member of the public if that individual requests the case file, in person at the courthouse. This process at the courthouse typically involves filling out a request form, which, at a minimum, requires the identity of the requestor. Thus, from a practical standpoint, availability of court documents in the courthouse does not significantly prejudice plaintiffs privacy expectations. Conversely, publishing the transcripts on the Internet greatly infringes upon plaintiffs privacy concerns. Any individual has ready access to the electronic

database of all cases filed electronically and can easily identify the subset of Social Security cases.
Then, in only a matter of minutes, that individual, located virtually anywhere in the world, can view and download personal and confidential information, which pursuant to the Privacy Act and the FOIA, would not be available from Federal agencies and would be available in a limited manner at the courthouse. Thus, unlimited accessibility on the Internet to such records causes an untoward intrusion into plaintiffs privacy.

In Whalen v. Roe, 429 U.S. 589 (1977), the Supreme Court upheld a States right to record, in a centralized computer file, the names and addresses of all persons who obtain prescribed drugs for which there is both a lawful and unlawful market. But in his concurring opinion, Justice Brennan noted that [b]road dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights. Id. at 606 (Brennan,J., concurring). He further indicated that [t]he central storage and easy accessibility of computerized data vastly increase the potential for abuse of the information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on the technology. Id. at 607.

The difference in plaintiffs privacy interest in information which must be manually collected versus that of information which is readily accessible on an electronic database was recognized by the Supreme Court in United States Department of Justice v. Reporters Committee For Freedom of the Press, 489 U.S. 749 (1989). In Reporters Committee, the issue was whether the disclosure of the Federal Bureau of Investigation criminal identification records, sometimes referred to as rap sheets, could reasonably be expected to constitute an unwarranted invasion of personal privacy within the meaning of the FOIA. 489 U.S. at 751. The Court, although recognizing that much of the rap sheet information was a matter of public record, observed that its availability and dissemination was limited. Id. at 753. In holding that the information was exempted under the FOIA, the Court wrote that there is a vast difference between public records that might be found after a diligent search of courthouse files. .. and a computerized summary located in a single clearinghouse of information. Id. at 764.

If administrative transcripts and briefs in Social Security cases are made available on the Internet, it will substantially increase the possibility of identity theft and substantially prejudice plaintiffs privacy concerns. Ultimately, it also may have a chilling effect on a claimants willingness to bring a civil court action pursuant to 42 U.S.C. 405(g). As noted by President Clinton upon signing the Identity Theft and Assumption Deterrence Act of 1998 into law, [a]s we enter the Information Age, it is critical that our newest technologies support our oldest values. Statement by President William J. Clinton Upon Signing H.R. 4151, 34 Weekly Comp. Pres. Doc. 2203 (Nov. 9, 1998). Further, Chief Judge Sifton of the Eastern District of New York and Chief Judge Matia of the Northern District of Ohio have acted vigorously in response to these concerns. Chief Judge Sifton issued a standing order prohibiting electronic filing of transcripts and litigants briefs in Social Security cases to protect plaintiffs in Social Security benefits cases from the dangers and invasions of privacy that could readily result from having such private and personal information easily attainable on the Internet. Chief Judge Matia also confirmed to us that such materials maintained by his court, will not be made accessible on the Internet to the general public.

In conclusion, I strongly oppose the ready availability of Social Security transcripts and briefs on the

Internet. I am confident that technological solutions exist which would allow electronic filing of the transcripts and litigants briefs but still safeguard the plaintiffs privacy interests. If it would help to assist your efforts, we would welcome an opportunity to discuss alternative measures with Judicial Conference representatives. I request your strong support in encouraging courts not to make this information available online in the various electronic filing efforts either currently underway or that may be undertaken by the courts in the future.

Very truly yours,

Arthur J. Fried
General Counsel

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 11(c)(1), Regarding Questioning Defendant Regarding Plea Agreement Offers**

DATE: **April 12, 2004**

Attached is a letter from Judge David Dowd, a former member of the Committee, proposing an amendment to Rule 11 that would require the court to question the defendant regarding the issue of whether the defendant had been fully apprised of any offered plea agreements.

His proposal, which is self-explanatory, is on the agenda for the May meeting.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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JERRY E. SMITH
EVIDENCE RULES

December 3, 2003

Professor David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Dear Dave:

Enclosed is a copy of a letter with enclosures from Judge Dowd, dated November 20, 2003, proposing an amendment to Rule 11(c)(1).

Please see that this matter is included in the agenda for our next committee meeting.

Sincerely,

ED CARNES
United States Circuit Judge

Enclosures

c: (without enclosures)
Judge Dowd
John Rabiej

United States District Court
Northern District of Ohio
United States Courthouse
2 South Main Street
Akron, Ohio 44308

David D. Dowd, Jr.
Judge

(330) 375-5834
Fax: (330) 375-5628

November 20, 2003

Honorable Edward E. Carnes
United States Court of Appeals
500-D Frank M. Johnson, Jr. Federal
Courthouse Annex
One Church Street
Montgomery, AL 36104

In Re: Criminal Rule 11 (c)(1) and the provision that "The court must not participate in these discussions" as referring to Guilty Plea Agreements.

Dear Judge Carnes,

I am sending this letter to you in your capacity as the Chairperson of the Criminal Rules Advisory Committee. I am also sending a copy to John Rabiej who is assigned by the Administrative Office of the Courts to assist the various advisory committees on rules.

There has been a growing trend in the Sixth Circuit to require evidentiary hearings in cases arising under 28 U.S.C. § 2255 when the defendant contends that he was denied the effective assistance of counsel on the basis that the offer of the government to engage in a negotiated guilty plea discussions was rebuffed or not communicated to the defendant by his counsel.

The purpose of my letter is to suggest that the Committee should consider a proposed amendment to Criminal Rule 11 (c)(1) by adding after the sentence declaring that "the court must not participate in these discussions," the following language by eliminating the period after the word discussions and replacing the period with a comma and then adding the following language: "but may question whether the defendant has been fully advised as to any government proposed guilty plea agreement."

Now permit to discuss the Sixth Circuit jurisprudence that has developed over the past several years.

1. The unpublished opinion in the case of *Dabelko v. United States*, No. 98-3247, 2000 WL 571957 (6th Cir. May 3, 2000). A copy of the opinion is attached. In Dabelko, the Sixth Circuit reversed our district court in a Section 2255 case because the district court did not hold an evidentiary hearing after the petitioner alleged that he had been denied the effective assistance of counsel when his counsel allegedly failed to communicate a proposal of the government for a

guilty plea. On remand, the case was assigned to me, and I conducted a lengthy evidentiary hearing and then wrote a decision which is published. *See United States v. Dabelko*, 154 F.Supp.2d 1156 (N.D. Ohio 2000).

2. The next case of importance is *Griffin v. United States,* 330 F.3d 733 (6th Cir. 2003). In *Griffin* I was the trial judge and I denied the request for an evidentiary hearing in the subsequently filed *pro se* Section 2255 action because of the defendant's repeated protestations of innocence, first to the Probation Department at the time the Presentence Report was prepared and again at sentencing. The Sixth Circuit reversed and remanded for an evidentiary hearing. At that point, I recused because of my prior fact determinations that I had spread on the record. The judge to whom the case was then transferred appointed counsel for the petitioner, and the petitioner was returned to the district for the required evidentiary hearing. At the hearing, the petitioner invoked the Fifth Amendment. He was then denied relief again. A copy of the *Griffin* opinion is also attached.

As a consequence of the Sixth Circuit rulings in *Dabelko* and *Griffin,* many judges of this district are now inquiring on the record as to whether guilty plea negotiations have been conducted or whether the government has tendered a written guilty plea agreement to the defendant when it becomes apparent that the defendant has elected to go to trial. In my court, I require the proposed guilty plea agreement to be placed under seal after it has been initialed by counsel for both parties, and I inquire of the defendant if he or she has been provided a copy or had the opportunity to discuss the proposed plea agreement with his or her counsel, does he or she understand the agreement, and has he or she made the decision to go to trial.

Against that background of caution in light of *Dabelko* and *Griffin*, a third decision of the Sixth Circuit was published on November 3, 2003 in *Smith v. United States*, __F.3d __, No. 01-5215, 2003 WL 22469973 (6th Cir. Nov. 3, 2003) and a copy is enclosed. On November 17, 2003, I circulated a memorandum to my fellow judges, a copy of which is enclosed.

As a consequence of the decision in *Smith,* it now seems clear to me, to avoid the prospect of evidentiary hearings in Section 2255 cases where the subsequent claim is that the petitioner's trial counsel failed to properly explain the potential sentencing consequence, is to inquire further about the government's view as to what the worst case sentencing scenario for the defendant will be if he or she is convicted as charged. This must be done in the presence of the defendant to be effective. Then, if the defendant does enter a plea of guilty after such a discussion, then the argument on direct appeal or in a subsequent 2255 action will be that the district court violated Criminal Rule 11 (c)(1) in its present form.

Against that belief, I now respectfully suggest that the proposed amendment would give the district court judge some cover if the proposed questioning takes place and against the background that the district court is not to participate in guilty plea discussions.

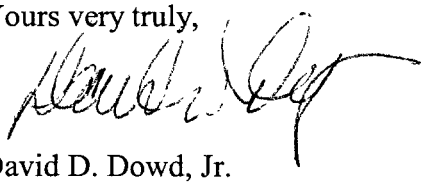
I suggest that the problems created by the Sixth Circuit jurisprudence will become well known in the prison libraries and will cause a substantial increase in Section 2255 cases suggesting a denial of the effective assistance of counsel in those cases where the defendant-petitioner stands trial and is convicted with a subsequent sentence that exceeds the sentence that would have resulted had the government's rejected plea agreement been accepted.

The cost in resources when an evidentiary hearing is mandated is considerable. The petitioner-defendant must be transported back to the district by the U.S. Marshal and then additional marshal time is required to jail the petitioner and transport the petitioner back and forth to court. Counsel must be appointed and time must be devoted by the district court to the evidentiary hearing.

It may take a number of years before the predicted avalanche develops, but a stitch in time seems justified. I suggest that my proposed amendment or some variation of the proposal would be an improvement. I recognize that the committee may disagree, but I appreciate any consideration that the committee extends to my proposal.

Thank you.

Yours very truly,



David D. Dowd, Jr.
U.S. District Judge

DDD:flm
Enclosures

cc: Mr. John K. Rabiej w/enclosures
All Judges and Magistrate Judges of the Northern District of Ohio w/o enclosures

211 F.3d 1268 (Table)
Unpublished Disposition

(Cite as: 211 F.3d 1268, 2000 WL 571957 (6th Cir.(Ohio)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Richard DABELKO, Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 98-3247.

May 3, 2000.

On Appeal from the United States District Court for the Northern District of Ohio.

Before WELLFORD, SILER, and GILMAN, Circuit Judges.

WELLFORD, Circuit Judge.

**1 Petitioner, Richard DaBelko, moved, under 28 U.S.C. § 2255, to vacate or to correct a 1990 sentence of 292 months for violations of 21 U.S.C. §§ 846, 841, and 843(b), affirmed by a panel of this court on January 9, 1992, in Nos. 90-3926/3969/4126. DaBelko received a much more severe sentence than did his co-defendants, including his brother, in a substantial cocaine conspiracy and distribution scheme. DaBelko claims in the action in district court ineffective assistance of counsel in that he alleged his attorney did not tell him about the consequences of his past felony record and other sentencing factors when he decided to go to trial rather than to plead guilty. The indictment charged DaBelko (and his brother) with possession with intent to distribute cocaine--1959 grams.

In the prior opinion on appeal, this court had this to say about the sentencing disparity between the co-defendants:

> The difference in the sentencing between Blum and the co-defendant's results from the following dissimilarity of criminal records and conduct: 1) Blum's cooperation with the government; 2) the trial court's awareness of additional quantities of cocaine that could not be used against Blum under U.S.S.G. § 1B1.8, but could be considered by the court as relevant conduct under § 1B1.3 as it relates to these appellants; 3) Blum was credited for accepting responsibility while the appellants were not; 4) Richard DaBelko had a prior drug trafficking conviction, which pursuant to 21 U.S.C. § 851 enhances the penalty; and 5) Richard DaBelko's sentence was increased because a firearm was found with his scales and money as part of his drug trafficking activity. Given these factors, the district court did not err in refusing to depart downward for the sole purpose of harmonizing sentences where the defendants had dissimilar criminal records and conduct.

We added, with respect to the quantity of cocaine attributed to DaBelko:

> The indictment charges defendants with a conspiracy beginning as early as March 1989 through May of 1989. The defendants argue that the amount of cocaine involved from March to May 1989 was 6.5 kilograms, which would make their base offense level 32. At trial, however, the conspiracy was recognized as extending back at least as far as early 1987, which expanded the amount of cocaine to 40 kilograms and raised the base offense level to 34.
> ....
> However, here the trial court was not clearly erroneous in finding by the preponderance of the evidence that the conspiracy involved the distribution of 40 kilograms of cocaine. Blum testified about the date of the beginning the conspiracy, who the supplier was (Carol Eckman), how frequently trips were made (every 6 to 8 weeks), the amount of cocaine received per trip (3 to 5 kilograms) and the length of the relationship (lasted until August 1988). Blum also testified about the defendants' use of a new supplier (Philip Christopher) starting in September 1988, how often transactions occurred with him (again every 6 to 8 weeks) and the amount of cocaine (3 kilograms). Making conservative

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estimates from this information (3 kilograms every 8 weeks) a total of 27 kilograms (nine trips at 3 kilograms) and 15 kilograms (5 trips at 3 kilograms) creates a conspiracy involving at a minimum of 42 kilograms. Given these figures, the trial court was not clearly erroneous in basing its sentencing calculations on 40 kilograms of cocaine.

**2 DaBelko also argued unsuccessfully on appeal other elements of his guidelines levels--the finding that he was a supervisor of his brother in the conspiracy and the enhancement for his possession of a firearm during his drug trafficking, *see United States v. Moreno,* 899 F.2d 465, 430 (6th Cir.1990), as well as the filing shortly before trial of a special information, under 21 U.S.C. § 851(a), relating to his prior convictions.

In this proceeding, DaBelko claims that his nearly twenty-five year sentence was imposed, rather than a much lesser plea bargain which may have been effectuated, by reason of ineffective assistance of counsel. DaBelko was represented at trial by one counsel, Milano, and by two others at sentencing. A fourth has represented him in this proceeding. In essence, this proceeding involves the following contention set out in DaBelko's brief:

> Prior to trial, Mr. Milano failed to provide Mr. DaBelko with sufficient, accurate, reliable information with which to make an informed choice whether to plead guilty or stand trial. Moreover, Mr. Milano did not fulfill his obligations, leaving Mr. DaBelko to make decisions on his own without accurate information and advice of counsel.

DaBelko also asserts that it was error for the district court not to have held a hearing on his contentions. *See* 28 U.S.C. § 2255 (requiring, among other things, that the district court "grant a prompt hearing [to] determine the issues and make findings of fact" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"); *Amiel v. United States,* 209 F.3d 195, 2000 WL 378880 (2d Cir. Apr.13, 2000).

To establish his ineffective assistance of counsel claim, petitioner must first "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Next he must "establish that there is a reasonable probability that, but for the incompetence of counsel, he would have accepted the ... offer and pled guilty." *Turner v. State,* 858 F.2d 1201, 1206 (6th Cir.1988), *vacated on other grounds,* 492 U.S. 901 (1989); *see Hill v. Lockhart,* 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Plaintiff must show this by objective evidence. *See Turner,* 858 F.2d at 1206; *Hill,* 474 U.S. at 59-60. Then, the government may show by "clear and convincing evidence that the trial court would not have approved the plea arrangement." *Turner,* 858 F.2d at 1209. If petitioner were to establish the bases for showing ineffective assistance of counsel, the remedy for such violation would then have to be considered, including whether a new trial should be ordered. *See id.* at 1207-09. Under the unique facts of that case if relief were to be ordered, a hearing might be required "at which the [government] is required to show cause why its former offer ... should not be reinstated." *Id.* at 1209 (Ryan, J., concurring).

**3 In light of the government's argument in the instant appeal, contrary to the facts in *Turner,* it is not a given that the United States may actually have made a specific offer which DaBelko was prepared to accept regardless of his counsel's advice, or lack thereof. The burden is upon DaBelko to show that the prosecution made him a specific plea bargain that he was ready to accept had he received effective assistance of counsel.

We recognize that in this type of controversy a decision favorable to the defense may encourage defendants to reject plea offers, and then in the event of an unfavorable sentencing outcome with a greater penalty than offered by the prosecution, seek to overturn the sentence based upon alleged ineffective assistance of counsel. We must be cautious and careful in such cases in imposing appropriate burdens not to give defendants easy avenues to obtain a second bite at the apple at the penalty stage once they have acknowledged guilt or it has been determined by the factfinders. Petitioner argues that he was constitutionally entitled to reasonable and competent advice of counsel (or advice from the prosecutor or the court) about minimum or maximum sentence exposure in the event of a guilty plea and that his chosen counsel failed to fulfill this obligation. *See United States v. Gordon,* 156 F.3d 376 (2d Cir.1998); *United States v. Day,* 969 F.2d 39 (3d Cir.1972); *see also Paters v. United States,* 159 F.3d 1043 (7th Cir.1998). The district court concluded, we believe properly, that

> [p]rior to trial a defendant is entitled to rely on his counsel to make an independent examination of the facts, circumstances, pleadings and law involved and then offer his informed opinion as to what plea should be entered. [*Boria v. Keane,* 99 F.3d 492, 497 (2d Cir.1996), *cert. denied,* 521 U.S. 1118, 117 S.Ct. 2508, 138 L.Ed.2d 1012 (1997)].

A complicating factor in this case was a dispute concerning the quantity of cocaine for which petitioner would be held responsible under the indictment. The

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amount determined by the sentencing judge would have a great bearing on the ultimate sentence imposed. The question is whether DaBelko or his lawyer knew about the drug quantity guidelines potential, or should have known, at the critical time. The quantity determined by the district court was affirmed, in any event, in our previous opinion on the merits.

The district court found that "[t]here is nothing in the record showing that the government *would have been interested in plea bargaining* with him." (emphasis added.) Further, the district court found no plea bargain was, in fact, offered to defendant. What does the government say to this? Counsel for the government "stated at sentencing that 'there were very intense plea negotiations.' " Moreover, the government's brief adds:

> These negotiations focused on guideline ranges and the many factors which might have had an impact on those ranges, including: (1) amounts of cocaine attributable to the defendant, (2) his role in the offense, and (3) possession of weapons. The parties, however, were never able to agree on these factors.

**4 More than this, the government goes on to argue that DaBelko "was aware that guideline range negotiations included at least 20 years." [FN1]

> FN1. DaBelko admits, at least by inference, that his counsel mentioned another person's receiving a twenty-year sentence, but DaBelko said he "couldn't believe ... that I was facing this kind of time."

The government's argument is that to the extent it offered DaBelko any plea bargain, it offered not to file the § 851(a) special information in exchange for DaBelko's guilty plea and to le DaBelko plead guilty and face a sentencing range under the guidelines for which the minimum was almost twenty years. DaBelko on the other hand, argues that his attorney never told him that once the government filed the special information, no sentence under twenty years would be possible if DaBelko was convicted. (Indeed, DaBelko insists that even after he was convicted, his attorney professed not to understand why DaBelko was subject to a minimum sentence of twenty, rather than ten, years.) We believe the district court, in light of this, was incorrect in stating that the government was not interested in a plea bargain, and that *no* plea bargain was even offered to DaBelko. The petitioner conceded at sentencing that had he known the government was proposing a twenty-year minimum, he was unsure what his response would have been--"maybe" he would have made a different decision. His sentencing counsel responded that "we didn't anticipate that the Court would use as a base level the 40 kilograms of cocaine."

Did the district court err in not holding a hearing in light of these circumstances? It certainly would have been preferable to have afforded petitioner a hearing. But, even if we were to hold that it was error not to have held a hearing, was such a failure a reversible error? DaBelko maintains that he was never served with (and personally did not know about) the special information seeking enhanced penalties as a repeat offender. Presumably his counsel did have such knowledge. The record does not reflect that the government filed a response in district court to petitioner's motion to vacate, set aside, or correct sentence, and the district court made no reference to any response in its memorandum and order denying the motion.

The issue is a close one, but we have found error in the district court's important findings that the government was not interested in a plea bargain, and that none was made or offered. Petitioner has indicated enough in his motion that his counsel may not have made an adequate examination of the facts and circumstances about guilt and sentence enhancement. His counsel may not have made an adequate, minimal examination of the applicable guidelines law so as to advise DaBelko about his serious exposure in light of circumstances involving a prior drug conviction, extent of the conspiracy and quantity of drugs, and possession of a firearm in connection with drug activities.

DaBelko received a draconian sentence in this case, approved by this court in the direct appeal. Without deciding at this juncture the *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), issues, we believe in our oversight capacity it is appropriate to order a hearing in the district court to reconsider the issues raised and to determine whether DaBelko has carried his burden to demonstrate ineffective assistance of counsel, as claimed.

**5 We therefore VACATE the decision of the district court and REMAND for a hearing consistent with this opinion.

211 F.3d 1268 (Table), 2000 WL 571957 (6th Cir.(Ohio)), Unpublished Disposition

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154 F.Supp.2d 1156
(Cite as: 154 F.Supp.2d 1156)

United States District Court,
N.D. Ohio,
Eastern Division.

UNITED STATES of America,
Plaintiff-Respondent,
v.
Richard DABELKO, Defendant-Petitioner.

No. 4:97CV1076.
No. 4:89CR171.

Dec. 18, 2000.

Defendant convicted of conspiracy to distribute and possess with intent to distribute cocaine, possession of cocaine with intent to distribute, and use of communication facility to facilitate felony filed motion to vacate. The United States District Court for the Northern District of Ohio, White, J., denied motion. Defendant appealed. The Court of Appeals vacated and remanded. The District Court, Dowd, J., held that: (1) counsel's representation with respect to communicating accurately the text of guilty plea discussions with government fell below objective standard of reasonableness, but (2) defendant failed to establish that, had he been properly advised by trial counsel, he would have accepted plea agreement.

Motion denied.

West Headnotes

[1] Criminal Law ⚿641.13(5)
110k641.13(5) Most Cited Cases

Counsel's representation of defendant with respect to communicating accurately the text of guilty plea discussions with government fell below an objective standard of reasonableness, as required to support ineffective assistance of counsel claim, when counsel informed defendant of possibility that prosecution would enter into plea agreement, but misrepresented discussions by substantially minimizing the substance of the plea discussions and failed to advise defendant accurately as to consequences of conviction in terms of years of incarceration faced by defendant under impact of Sentencing Guidelines. U.S.C.A. Const.Amend. 6; U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[2] Criminal Law ⚿641.13(5)
110k641.13(5) Most Cited Cases

Defendant failed to establish that he would have accepted plea agreement had he been properly advised by trial counsel of impact of Sentencing Guidelines on his potential sentence if he proceeded to trial, and thus failed to establish that counsel's ineffectiveness with respect to advising defendant about plea discussions warranted relief, when government had never offered to permit defendant to plead guilty under agreement providing for sentence of less than approximately 20 years of confinement and defendant had rejected what he believed was offer providing for 10 years' imprisonment. U.S.C.A. Const.Amend. 6; U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[3] Criminal Law ⚿641.13(5)
110k641.13(5) Most Cited Cases

Trial counsel's advice that government's case was weak and defendant would be "crazy" to accept plea bargain offer of 10 years' incarceration did not constitute ineffective assistance of counsel, even though, in hindsight, advice appeared to be misguided. U.S.C.A. Const.Amend. 6.

***1157** Ronald B. Bakeman, Office Of The U.S. Attorney, Cleveland, OH, for Respondent.

Cheryl J. Sturm, Chadds Ford, PA, Petitioner.

MEMORANDUM OPINION

DOWD, District Judge.

I. Introduction.

Presently before the Court is the petition of Richard Dabelko ("petitioner") for relief under the provisions of 28 U.S.C. § 2255. Petitioner's basic claim is that he was denied the effective assistance of his lawyer, Jerry Milano, who represented him at trial in 1990 and failed to communicate accurately the status of guilty plea negotiations that preceded the trial, presided over by Judge George White, as a result of which he was convicted and sentenced to 292 months. The petitioner's conviction and sentence were affirmed by the Sixth Circuit on January 9, 1992 in its Case Nos. 90-3926, 3969 and 4126.

The petitioner's action pursuant to 28 U.S.C. § 2255

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was filed in 1997 and dismissed by Judge George White without requesting a response from the government. The petitioner filed an appeal to the denial, and the Sixth Circuit remanded the case to the district court for an evidentiary hearing. As Judge White had retired, the case was reassigned to this branch of the Court. The Court conducted an evidentiary hearing on August 22, 2000 in which the petitioner, Ron Bakeman, the assigned AUSA for the 1990 trial, Attorney Phillip Korey and petitioner's former secretary, Susan Jeffers, testified. Dabelko's trial attorney did not testify as it was stipulated that he has no memory of the proceedings, and the Court understands that Mr. Jerry Milano suffers from Alzheimers Disease. The Court ordered a transcript of the evidentiary hearing and directed post hearing briefs and reply briefs which have been filed. The case is now at issue.

The Court conducted the evidentiary hearing mindful of the Sixth Circuit's opinion in the § 2255 case in which it stated in part as follows:

> To establish his ineffective assistance of counsel claim, petitioner must first "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington,* ***1158** 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Next he must "establish that there is a reasonable probability that, but for the incompetence of counsel, he would have accepted the ... offer and pled guilty." *Turner v. State,* 858 F.2d 1201, 1206 (6th Cir.1988), *vacated on other grounds,* 492 U.S. 902, 109 S.Ct. 3208, 106 L.Ed.2d 559 (1989); *see Hill v. Lockhart,* 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Plaintiff must show this by objective evidence. *See Turner,* 858 F.2d at 1206; *Hill,* 474 U.S. at 59-60, 106 S.Ct. 366. Then, the government may show by "clear and convincing evidence that the trial court would not have approved the plea arrangement." *Turner,* 858 F.2d at 1209. If petitioner were to establish the bases for showing ineffective assistance of counsel, the remedy for such violation would then have to be considered, including whether a new trial should be ordered. *See id.* at 1207-09. Under the unique facts of that case if relief were to be ordered, a hearing might be required "at which the [government] is required to show why its former offer ... should not be reinstated." *Id.* at 1209 (Ryan J., concurring).
>
> In light of the government's argument in the instant appeal, contrary to the facts in *Turner,* it is not a given that the United States may actually have made a specific offer which DaBelko was prepared to accept regardless of his counsel's advice, or lack thereof. The burden is upon DaBelko to show that the prosecution made him a specific plea bargain that he was ready to accept had he received effective assistance of counsel.
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> * * * * * *
>
> The issue is a close one, but we have found error in the district court's important findings that the government was not interested in a plea bargain, and that none was made or offered. Petitioner has indicated enough in his motion that his counsel may not have made an adequate examination of the facts and circumstances about guilt and sentence enhancement. His counsel may not have made an adequate, minimal examination of the applicable guidelines law so as to advise DaBelko about his serious exposure in light of circumstances involving a prior drug conviction, extent of the conspiracy and quantity of drugs, and possession of a firearm in connection with drug activities.
>
> DaBelko received a draconian sentence in this case, approved by this court in the direct appeal. Without deciding at this juncture the *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), issues, we believe in our oversight capacity it is appropriate to order a hearing in the district court to reconsider the issues raised and to determine whether DaBelko has carried his burden to demonstrate ineffective assistance of counsel, as claimed.

Richard Dabelko v. United States, 211 F.3d 1268, slip op. at 3-4, 7 (6th Cir. May 3, 2000).

II. Fact Findings.

The Court makes the following fact findings to aid in its analysis and for possible appellate review.

1. The indictment was filed on June 13, 1989 and named nine defendants including the petitioner. A superseding indictment was filed on November 29, 1989. The superseding indictment charged the petitioner with conspiracy to distribute and possessing with intent to distribute cocaine in Count One, the substantive offense of possessing with intent to distribute 1,959 grams of cocaine on May 17, 1989 in Count Seven, and two Counts (19 and 20) for using a communication facility to facilitate acts constituting a felony. The conspiracy ***1159** count did not allege an amount of cocaine that would be attributable to any one conspirator. [FN1] However, it was the position of the government that the amount of cocaine chargeable to the petitioner, for guilty plea discussion purposes, was between 15 and 50 kilograms of cocaine. Pursuant to the provisions of 21 U.S.C. § 841(b)(1)(A)(ii), five or more kilograms of cocaine called for a sentence of not

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less than 10 years in prison.

FN1. Count One in the superseding indictment alleged a series of overt acts describing in paragraphs 3, 12, 43, 45, 46, and 47 varying amounts of cocaine which collectively exceeded nine kilograms.

2. Eight other defendants, Howard Blum, Francis Dabelko, Alfred Conti, John Burcsak, Phillip Christopher, Stanley Miller, Dominic Palone, Jr., and Charlie Treharn, were named in the indictment and superseding indictment. Blum, Burcsak, Christopher, Miller, Palone and Treharn entered pleas of guilty.

3. On May 24, 1990, six days before the jury trial began on May 30, 1990 for the petitioner, his brother Francis Dabelko and Alfred Conti, the prosecution filed notice of an enhancement under the provisions of 21 U.S.C. § 851 which charged that, if the petitioner was convicted of Count One of the indictment, the United States would rely upon a previous conviction of the petitioner for the purpose of involving the increased sentencing provisions of Title 21, Section 841(b)(1)(A) of the United States Code. The previous conviction for trafficking in drugs was obtained in the Court of Common Pleas, Trumbull County, Ohio on November 2, 1984.

4. The petitioner was convicted of Counts 1, 7, 19 and 20 following the jury trial and sentenced to a term of imprisonment of 292 months based on an offense level of 38 and a Criminal History of III, setting up a range of 292 months to 365 months. The district court determined the base offense level to be 34 based on a finding that the petitioner was chargeable with 40 kilograms of cocaine, an additional two levels for role in the offense and two additional levels for the weapon. A paragraph in the petitioner's presentence report added two levels for the weapons and stated:

> Richard DaBelko possessed drug paraphernalia at 1916 Sheridan Ave., Warren, Ohio. *Note:* On 11/20/90, the government advised this probation officer that two loaded weapons were found with the drug paraphrenalia [sic] in the defendant's bedroom: a .380 semi-automatic Colt pistol and a .22 Sterling Arms.

5. The other two defendants who stood trial with the petitioner, Francis Dabelko and Alfred Conti, were also charged with a quantity of cocaine of 40 kilograms.

(a) The co-defendant, Francis Dabelko, was charged with a base offense level of 34 based on 40 kilograms of cocaine and given a two-level reduction for a minor role in the offense; with a Criminal History of I, he was at a range of 121 to 151 months and he received a sentence of 121 months.

(b) The co-defendant, Alfred Conti, was charged with 40 kilograms of cocaine, with an offense level of 34, and granted a two-level reduction for a minor role; his Criminal History of II produced a range of 135 to 168 months, and he received a sentence of 135 months.

6. Howard Blum, the cooperating and testifying defendant, was held responsible for 3.5 to 5 kilograms of cocaine for an offense level of 30; four additional levels were added for role in the offense, less two levels for acceptance of responsibility, to an adjusted level of 32 less six levels that the sentencing entry says were based on ***1160** the plea agreement but which appear to be for substantial assistance. Blum was then at offense level 26 with a Criminal History of III, which resulted in a range of 78 to 97 months. He received a sentence of 96 months.

7. Phillip Christopher, who pled guilty within a few days of the start of the jury trial for the petitioner, was charged with 5 to 15 kilograms of cocaine for an offense level of 32; with a Criminal History of V, a reduction of four levels for acceptance of responsibility and another two levels for substantial cooperation produced a range of 130 to 162 months. He received a sentence of 144 months to be served concurrently with a sentence in another case.

8. The remaining defendants, Treharn, Palone, Burcsak and Miller, received much smaller sentences ranging from 36 months to a split sentence for Miller.

9. The petitioner, Francis DaBelko and Alfred Conti all appealed their convictions and sentences to the Sixth Circuit which affirmed the convictions and sentences in an unpublished opinion filed on January 9, 1992 in its Case Nos. 90-3926, 3969 and 4126. The per curiam opinion summarized the evidence in the following paragraphs:

> Evidence of defendants' guilt of possession of and conspiracy to distribute cocaine came from searches of their residences as well as court-authorized monitoring of their conversations, extensive law enforcement surveillances, and the testimony of co-conspirator Howard Blum. Executing a search warrant on Richard Dabelko's residence, the police found two scales, both covered with a white powdery substance that later tested positive for cocaine, three weapons, and over $35,000 in cash. The search

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warrant on Francis Dabelko's home produced 1,900 grams of cocaine and seven brown paper bags with his finger prints, as well as a personal telephone directory containing the telephone number of an identified supplier of cocaine. At Conti's home, the police found 19 grams of cocaine, drug paraphernalia and a scale covered with white powder. The police also confiscated a suitcase containing approximately 810 grams of cocaine from the house of Conti's sister.

The district court had authorized the interception of phone conversations over the telephones located at Richard Dabelko's residence, Conti's residence, and Howard Blum's jewelry business. It also authorized the installation of a listening device at Blum's business. Twenty conspiratorial conversations involving some or all of the three appellants were played to the jury. Topics of conversation included meetings to pick up money to pay their cocaine supplier, meetings to pick up the cocaine, delivering the cocaine to the "stash" house, discussing debts from the sale of cocaine, and other topics related to conspiracy to distribute cocaine.

Finally, co-conspirator Howard Blum testified regarding the workings of the conspiracy. Based on Blum's cooperation with federal law enforcement officials, a superseding indictment was filed against Richard DaBelko. The government informed Richard that they intended to request the court to enhance his penalties based upon his prior conviction for drug trafficking, if he was convicted for either conspiracy or possession of cocaine with intent to distribute.

United States v. Francis Dabelko, et al., 952 F.2d 404, slip op. at 2-3 (6th Cir. January 9, 1992).

10. Ron Bakeman was the assigned AUSA for Case No. 4:89CR171. Jerry Milano represented the petitioner in pre-trial matters and at the trial which led to the petitioner's conviction. Following his conviction but prior to sentencing, the petitioner changed lawyers and was represented ***1161** at the sentencing by Elmer Guiliana and Phillip Korey. Prior to the trial, Bakeman and Milano engaged in guilty plea discussions on several occasions. [FN2] In the U.S. Attorney's Office to which Bakeman was assigned, the practice as to guilty plea agreements was for the assigned AUSA to present the proposed guilty plea agreement to a supervisor for approval. [FN3] The guilty plea discussions between Bakeman and Milano did not reach the stage where Bakeman would have presented a proposed guilty plea agreement to his supervisors for the necessary approval. [FN4]

FN2. *See* Evidentiary Hearing Transcript (hereafter "TR") at 6-10.

FN3. *See* TR at 48.

FN4. *See* TR at 38-39.

11. Bakeman considered defendant Howard Blum and the petitioner to be the persons at the top of the pyramid in connection with the nine-defendant conspiracy. [FN5]

FN5. *See* TR at 12, 29-30, and 41.

12. Bakeman was unwilling to enter into a final plea agreement with the petitioner's brother and co-defendant, Francis Dabelko, unless the petitioner also agreed to plead guilty because the government's case demonstrated that Francis possessed quantities of cocaine but, in Bakeman's view, was acting for the petitioner in the possession. [FN6]

FN6. *See* TR at 20-21.

13. Bakeman initially offered testimony that the proposed guilty plea discussions with Milano were anchored in an application of the Sentencing Guidelines. They were based on a quantity of cocaine to be charged to the petitioner (50 to 150 kilograms), the petitioner's role in the offense (an increase of two levels), an increase of two levels for a gun, and a two-level reduction for acceptance of responsibility, and did not include the Section 851 enhancement based on the prior record of the petitioner. [FN7] Subsequently, Bakeman corrected his initial testimony and indicated that the plea discussions were based on 15 to 50 kilograms of cocaine (*See* TR at 37).

FN7. *See* TR at 28, 37.

14. The drug quantity table in the Sentencing Guidelines Manual effective November 1, 1989 provided for a level 34 for "at least 15 KG but not less than 50 KG of cocaine." The drug quantity for the cocaine being discussed by Bakeman during the plea discussions with Milano was 15 to 50 kilograms of

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cocaine, with a resulting base offense level of 34. An adjusted offense level of 36 would have resulted from adding two levels for petitioner's role in the offense and two levels for possession of the weapons, less two levels for acceptance of responsibility. Since the petitioner had a Criminal History of III, the sentencing range would have been 235 to 293 months.

15. Milano constantly attempted to bargain for a guilty plea agreement with Bakeman that would result in a specific number of years, but never responded to an analysis of the guideline applications being discussed by Bakeman. [FN8] The Bakeman-Milano discussions, to the extent the discussions can be described as plea negotiations, never focused on the quantity of the cocaine to be charged to the petitioner or the petitioner's role in the offense or the relevancy of the weapon.

FN8. *See* the testimony of AUSA Bakeman beginning at TR page 37, line 22 to page 41, line 25.

16. There was never a meeting of the minds between Bakeman and Milano as to any guilty plea agreement.

17. The petitioner, free on bond, met with Milano approximately six times before the trial. Milano did not discuss the applicability of the Sentencing Guidelines ***1162** with the petitioner in any of the meetings. [FN9] Milano did not tell the petitioner that he was facing a mandatory minimum of 20 years if convicted. [FN10] Milano did not inform the petitioner as to the consequences of the Section 851 enhancement. [FN11]

FN9. *See* TR at 67-68.

FN10. *See* TR at 68.

FN11. *See* TR at 69.

18. At the evidentiary hearing, the petitioner testified that Milano told him, apparently prior to trial, that Bakeman had made an offer of 121 to 154 months and the petitioner then told Milano to see if the government would go for eight years. [FN12]

FN12. *See* TR at 70.

19. At the evidentiary hearing, the petitioner testified that he asked Milano if he should accept or reject the offer Milano described as offered by Bakeman; he related that Milano told him that "I would be crazy to accept the offer." [FN13] The petitioner also testified that Milano told him that the government "had a weak case against him."

FN13. *See* TR at 71.

20. The first time the petitioner grasped the fact that he was facing a sentence of 20 years or more was after the jury found him guilty and his bond was revoked. [FN14]

FN14. *See* TR at 72.

21. Petitioner's trial counsel, Jerry Milano, did not understand the operation of the Sentencing Guidelines in a complex cocaine conspiracy case involving multiple defendants and the ensuing issues dealing with quantity of the cocaine attributable to a particular participant convicted of the conspiracy, or the impact of a role in the offense determination, or the impact of a finding that weapons were associated with the petitioner's participation in the conspiracy. [FN15]

FN15. *See* TR at 43.

22. When Bakeman was engaged in guilty plea discussions with Milano, he was of the opinion that he had a very strong case against the petitioner. [FN16]

FN16. *See* TR at 42.

23. If the plea discussions between Milano and Bakeman had developed to the stage where the proposal of Bakeman, anchored in the Sentencing Guidelines, had been reduced to writing and approved by Bakeman's supervisors and then presented to the petitioner, the petitioner, encouraged by Milano's opinion about the weakness of the government's case, would have rejected such a written plea agreement.

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III. The Conclusion Based on the Findings of Fact and the Application of the Teachings of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Turner v. State*, 858 F.2d 1201 (6th Cir.1988).

[1] To establish his ineffective assistance of counsel claim, the petitioner's first burden was to establish that Milano's representation with respect to communicating accurately the text of the guilty plea discussions Milano had with Bakeman fell below an objective standard of reasonableness. Even though the Sentencing Guidelines, first effective on November 1, 1987, were in their infancy in 1990, the Supreme Court had decided that the Sentencing Guidelines passed constitutional muster. [FN17]

FN17. *See Mistretta v. United States,* 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989).

Lawyers undertaking to represent a defendant charged in criminal court had a responsibility, even as early as 1990, to become informed and knowledgeable with respect to the operation of the Sentencing ***1163** Guidelines. Milano, although an excellent courtroom trial lawyer, [FN18] failed in this responsibility. Although Milano did inform the petitioner of the possibility that the prosecution would enter into a guilty plea agreement, he misrepresented the discussions by substantially minimizing the substance of the guilty pleas discussions. *Turner v. State, supra,* teaches that a petitioner such as Dabelko, must "establish that there is a reasonable probability that, but for the incompetence of counsel, he would have accepted the ...offer and pled guilty." As stated in the Sixth Circuit's opinion remanding this case for an evidentiary hearing: "[T]he burden is upon Dabelko to show that the prosecution made him a specific plea bargain that he was ready to accept had he received effective assistance of counsel." *Richard Dabelko v. United States, supra,* slip op. at 4.

FN18. As of 1990, Jerry Milano was an experienced criminal trial lawyer. In this Court's view, Milano enjoyed a reputation as an excellent trial lawyer. One of his well-known trial victories is briefly described in *Levine v. Torvik,* 986 F.2d 1506, 1509-10 (6th Cir.1993). In the *Levine* case, as counsel for the defendant Levine in a state criminal case, Milano achieved a not guilty by reason of insanity verdict in Cuyahoga County Common Pleas Court in a highly publicized case in which Levine kidnapped, shot and killed Julius Kravitz, a prominent Cleveland citizen, and seriously injured Kravitz's wife.

In the petitioner's brief, filed after the evidentiary hearing and in support of relief, alternative arguments are advanced. First, the petitioner appears to argue that, had Milano accurately advised the petitioner about the strength of the government's case, the petitioner would not have rejected the ten-year offer. That argument is predicated on a fact proposition that this Court has rejected. The Court has found no credible evidence that AUSA Bakeman proposed a guilty plea agreement that would have called for a ten-year sentence.

[2] Alternatively, the petitioner argues that Milano was ineffective in failing to perceive the strength of the government's case and in failing to negotiate with AUSA Bakeman on the quantity of drugs to be assigned to the petitioner, as well as other issues, in the calculation of the adjusted base offense level. The petitioner argues that, had such a process been employed by Milano and competent advice provided, he would have entered into a guilty plea agreement that would have resulted in a sentence significantly below 20 years, rather than the 292 months he received as a consequence of Milano's ineffective assistance in failing to assess properly the government's case and in failing to negotiate for a guilty plea agreement that would have reduced the adjusted base offense level.

That alternative proposition has not been recognized as a basis for relief. Translated: the petitioner, who puts the government to the test of proving its case based on the defendant's not guilty plea, contends that he is entitled to a reduced sentence by establishing that his retained counsel mistakenly analyzed the strength of the government's case and then refused to negotiate with the government on a guilty plea agreement that the petitioner now claims he would have accepted even though in excess of the allegedly rejected offer he was mistakenly advised the government had suggested.

The record before the Court strongly suggests that the petitioner would not have accepted a guilty plea agreement if the alternative scenario he now suggests had taken place. The testimony of AUSA Bakeman indicates that Francis Dabelko, the petitioner's brother, would have successfully negotiated through his counsel a guilty plea agreement that would have resulted in a

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much lower sentence than the 121 months he received after standing trial, ***1164** except for the fact that Bakeman was unwilling to agree to such a sentence absent Francis Dabelko's cooperation or the willingness of the petitioner to plead guilty. The fact that the petitioner was unwilling to plead guilty to what he believed was a ten-year offer supports the conclusion that the petitioner would not have pled guilty under a scenario where his sentence would have been substantially in excess of 10 years, assuming a successful negotiation effort by Milano to reduce the sentence to a figure approaching 15 years. [FN19]

> FN19. Had Milano entered into guilty plea negotiations with Bakeman anchored in the application of the Sentencing Guidelines, it is quite within the realm of probability that the government would have, in consideration of a guilty plea, agreed to eliminate the weapons as an additional two level addition, stayed with the quantity of cocaine at 15 to 50 kilograms and with the two level reduction for acceptance of responsibility. The adjusted offense level would then have been 34 and with a Criminal History of III, the sentencing range would have been 188 to 235 months. Since Judge George White sentenced the petitioner at the low end of the range after he stood trial, it seems likely that he would also have chosen the low end of the range under the scenario outlined.

At the very core of criminal proceedings in federal court are guilty plea discussions. The Sentencing Guidelines have served to increase meaningful plea discussions and, in the vast majority of the cases, those plea discussions result in a guilty plea agreement. The Criminal Rules of Procedure require careful monitoring of the process by the district court in the taking of the guilty plea. [FN20] However, the Criminal Rules provide in no uncertain terms that the district court is not to participate in guilty plea negotiations. [FN21] There is no procedure in place to monitor guilty plea discussions (that may or may not result in the preparation of a written plea agreement) which do not result in a guilty plea, but rather a trial. There are no procedures in place to insure that a defendant is given accurate information about the impact of the Guidelines in the event of a conviction, except during the process of taking a guilty plea. Even if there were such a procedure, it would be indeed a hazardous undertaking because some of the sentencing factors, such as quantity of drugs attributable to the defendant, his role in the offense, his acceptance of responsibility, and a possible enhancement for a weapon, would be speculative.

> FN20. *See* Fed.R.Crim.P. 11(c) and (d).

> FN21. *See* Fed.R.Crim.P. 11(e)(1).

The case at hand highlights the vacuum a defendant such as Dabelko falls into when his counsel, for whatever reason (be it ignorance, reluctance to master the Sentencing Guidelines, or the defendant's protestations of innocence), fails to guide the defendant with accurate information about the perils of trial versus a guilty plea agreement. In this vacuum, the Court has made three critical findings of fact.

First, Bakeman, on behalf of the government, never offered to permit the petitioner to plead guilty under any agreement that would have resulted in a sentence less than approximately 20 years of confinement.

Second, Milano, the petitioner's trial counsel, failed to advise the petitioner accurately as to the consequences of a conviction in terms of the years the petitioner was facing under the impact of the Sentencing Guidelines. That fact finding, as previously indicated, leads to the conclusion that the petitioner was denied the effective assistance of counsel by such a failure.

[3] Third, the petitioner was advised by his counsel that the government's case was "weak" and he would be "crazy" to ***1165** accept the offer of ten years. That advice, which on hindsight appears to have been misguided, does not constitute the ineffective assistance of counsel.

Those three fact findings lead to the dispositive conclusion that, had the petitioner been advised accurately as to the guilty plea representations as advanced by Bakeman, i.e., an application of the Sentencing Guidelines calling for a sentence of approximately 20 years, he would have rejected the Bakeman guilty plea agreement proposal and proceeded to trial. [FN22]

> FN22. The Court is of the view that counsel have since become far more sophisticated in dealing with the representation of defendants in a drug conspiracy case involving multiple defendants, cooperating defendants and

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> evidence developed from court-monitored wiretaps under Title III. In 1989, this branch of the Court presided over such a case in which over 30 defendants were joined in a single indictment. Eleven of the defendants went to trial in a single trial and all were convicted or pled guilty during the trial. The Sixth Circuit, in an unpublished opinion in Case No. 89-4098, affirmed the convictions on October 31, 1991. The sentences of the defendants who went to trial ranged from 300 months to 84 months. This year the Court was assigned a cocaine conspiracy involving approximately 30 defendants and six court-authorized Title III wiretaps and, eventually, cooperating defendants. The Court, mindful of the vacuum described in this opinion and the decision of the Sixth Circuit remanding this case for an evidentiary hearing, conducted the arraignment of all defendants at one sitting and gave a short discussion on the sentencing issues that arise in a cocaine conspiracy case including quantity of the drugs chargeable to a defendant, the role of a convicted defendant in the conspiracy, the credit for acceptance of responsibility. That case, No. 1:00CR257, has been completed by guilty pleas of all defendants except for two who were dismissed by the government. The Court is of the view that, had the petitioner here had the benefit of those years of experience that defense lawyers have developed since the late 80's, the outcome in the petitioner's case would probably have been less "draconian."

Consequently, the Court finds that the petitioner has failed to meet the burden imposed by the Sixth Circuit to establish that he would have accepted the proposed plea agreement suggested by Bakeman and rejected by Milano. Therefore, the ineffective assistance of Milano does not justify the remedy of a reduced sentence.

If, in fact, the vacuum that the Court has described requires some remedial action, such remedial action requires appellate direction in the use of its supervisory powers or an appropriate modification of the Criminal Rules of Procedure.

The petitioner's application for a writ is DENIED.

IT IS SO ORDERED.

154 F.Supp.2d 1156

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330 F.3d 733
2003 Fed.App. 0177P
(Cite as: 330 F.3d 733)

United States Court of Appeals,
Sixth Circuit.

Phillip GRIFFIN, Petitioner-Appellant,
v.
UNITED STATES of America,
Respondent-Appellee.

No. 01-3818.

Submitted: March 14, 2003.
Decided and Filed: June 4, 2003.

After defendant's drug trafficking convictions were affirmed on direct appeal, 210 F.3d 373, 2000 WL 377346, defendant moved to vacate. The United States District Court for the Northern District of Ohio, David D. Dowd, Jr., J., denied motion. Defendant appealed pro se. The Court of Appeals, Cohn, District Judge, held that evidentiary hearing was required to determine whether there was a reasonable probability that defendant would have accepted government's plea offer if defense counsel had communicated the offer to him.

Reversed and remanded.

West Headnotes

[1] Criminal Law ⚿1451
110k1451 Most Cited Cases

To warrant relief in a motion to vacate, defendant must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. 28 U.S.C.A. § 2255.

[2] Criminal Law ⚿1451
110k1451 Most Cited Cases

Relief on a motion to vacate is warranted only where a defendant shows a fundamental defect which inherently results in a complete miscarriage of justice. 28 U.S.C.A. § 2255.

[3] Criminal Law ⚿1139
110k1139 Most Cited Cases

The Court of Appeals reviews the denial of a motion to vacate de novo. 28 U.S.C.A. § 2255.

[4] Criminal Law ⚿641.13(5)
110k641.13(5) Most Cited Cases

In a claim for ineffective assistance of counsel when defendant pleaded guilty, in order to satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. U.S.C.A. Const.Amend. 6.

[5] Criminal Law ⚿641.13(5)
110k641.13(5) Most Cited Cases

A defense attorney's failure to notify his client of a prosecutor's plea offer constitutes defective performance, for purpose of claim for ineffective assistance of counsel under the Sixth Amendment. U.S.C.A. Const.Amend. 6.

[6] Criminal Law ⚿641.13(5)
110k641.13(5) Most Cited Cases

Defendant's repeated declarations of innocence did not prove that he would not have accepted a guilty plea, in prosecution for drug trafficking offenses, for purpose of determining if defense counsel's failure to advise defendant of plea offer prejudiced defendant, as required to prove ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

[7] Criminal Law ⚿393(1)
110k393(1) Most Cited Cases

A defendant must be entitled to maintain his innocence throughout trial under the Fifth Amendment. U.S.C.A. Const.Amend. 5.

[8] Criminal Law ⚿1655(6)
110k1655(6) Most Cited Cases

Evidentiary hearing was required to determine whether there was a reasonable probability that defendant convicted of drug trafficking offenses would have accepted government's plea offer if defense counsel had communicated the offer to him, in proceeding on motion to vacate, based upon ineffective assistance of counsel; gap between five-year sentenced offered and 156-month sentence imposed was significant, and

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defendant was unaware that codefendants were going to testify against him in exchange for lesser sentences, suggesting that he would have accepted plea offer had he been fully informed. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2255.

[9] Criminal Law ⚿1189
110k1189 Most Cited Cases

The Court of Appeals must exercise caution in ordering an evidentiary hearing on remand of appeal of denial of motion to vacate, since it may encourage defendants to try to manipulate the criminal justice system. 28 U.S.C.A. § 2255.

***734** Joseph M. Pinjuh, United States Attorney (briefed), Cleveland, OH, for Petitioner-Appellee.

Phillip Griffin (brief), Bradford, PA, pro se.

Before MOORE and GIBBONS, Circuit Judges; COHN, District Judge. [FN*]

FN* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

COHN, District Judge.

This is a habeas case under 28 U.S.C. § 2255. Phillip Griffin (Griffin), proceeding *pro se,* appeals from the district court's denial of his motion under section 2255. Griffin was convicted of distribution of cocaine base; his conviction was affirmed on appeal. He says that his trial counsel failed to tell him of a plea offer and argues that this constituted ineffective assistance of counsel. The government argues that the record shows that Griffin would not have accepted a plea offer even if he had been told about it.

For the reasons that follow, we reverse the decision of the district court and remand the case for an evidentiary hearing.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Griffin was indicted on four counts of distribution of cocaine base under 21 U.S.C. § 841 and for a criminal forfeiture action under 21 U.S.C. § 853. At his arraignment he pleaded not guilty. The district court held a hearing on Griffin's motion to suppress evidence seized during a search of his mother's home and on his motion to dismiss the distribution counts. The district court denied both motions.

Approximately two weeks prior to the trial date, the Assistant United States Attorney (AUSA) telephoned Griffin's trial counsel to discuss a plea agreement. The AUSA indicated that he thought a five ***735** year sentence would be possible. The government says that the plea agreement was contingent on Griffin cooperating with the authorities. Griffin's attorney responded--in that telephone conversation--that Griffin maintained his innocence and would not plead guilty. Griffin says that his attorney never mentioned the plea offer to him. Griffin's attorney does not recall any plea offer being made. Griffin says his attorney also never discussed his potential sentence exposure with him.

Griffin went to trial before a jury. His codefendants, Brooke Thompson (Thompson) and Keith Walker (Walker), entered cooperative agreements with the government. Both pleaded guilty; Thompson received a three year sentence and Walker received a six and a half year sentence. Both testified at Griffin's trial, and Griffin says their testimony destroyed his defense. Griffin's attorney never informed him that they were going to testify.

The district court granted Griffin's motion for a directed verdict as to counts three and four. The jury found Griffin guilty of counts one and two and entered a special verdict on the forfeiture action.

After he was convicted, Griffin obtained new counsel. His new attorney approached the government regarding Griffin's possible cooperation. Griffin executed a a proffer letter and agreed to make a statement. During the proffer, Griffin admitted selling drugs in the past but stated that he stopped some time in 1994 or 1995. He continued to deny his involvement in the offense for which he was convicted. The AUSA and a special agent advised Griffin that they doubted his veracity and terminated the proffer.

Griffin maintained his innocence in the preparation of the Presentence Investigation Report, which did not suggest any reductions for acceptance of responsibility. At the sentencing hearing he said:

> I think--I know I'm innocent of this action. And I didn't get those two guys any drugs. I was getting blamed for something I didn't do. And I'm going to prove that I did it. And I ain't never been in trouble with no law or anything like that. And they trying to get me ten years to life for something I didn't even

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do. I shouldn't get no more than about two or three years for something like this.... If I knew I could have got on that stand to--told a lie to get three years, I would have did the same thing too. But I knew I was innocent, and I didn't have to get up on the stand and tell any lie.

J.A. 169-70.

The district court sentenced Griffin to 156 months custody, five years supervised release, and a $200.00 special assessment. The district court also entered a final order of forfeiture. Griffin appealed his sentence; this Court affirmed the judgment of conviction in an unpublished opinion. *United States v. Griffin,* No. 98-4364, 2000 WL 377346 (6th Cir. Apr.6, 2000) (unpublished).

The AUSA mentioned the plea offer to Griffin's appellate attorney prior to oral argument before this Court on direct appeal, saying that he was surprised Griffin did not accept the offer in light of the large amount of prison time he faced. Griffin's appellate attorney did not discuss the issue with Griffin until after the appeal. Griffin now says that given the potential sentence he faced, he would have accepted the plea offer had he known about it.

After learning about the plea offer, Griffin asked his trial attorney about it. The attorney wrote in reply:

... I have no recollection of any deal being offered for you to me. I do recall telling you that if a deal were sought from the government it would have to include your willingness to be a witness ***736** for the government. As to this, while I do not have any recollection of having told you, as I have others, the fact is that I prefer not to represent informers. Indeed, more than once I have backed away from clients who wanted me to engineer a deal that would entail me being privy to efforts made by the client to inveigle someone into committing a crime so that the client could benefit from their arrest.

This is not to say I have never represented an informer. I have never done so under the circumstances that were present when I represented you. I simply refuse to be conscripted into the war on drugs as a federal agent. I personally do not approve of many of their methods. And I believe the guidelines are not only unfair, but slanted against black people.

J.A. 54-54. Griffin's trial attorney also signed an affidavit in connection with this habeas motion stating,

I have no recollection of having been told by anyone that the government was offering the defendant, Phillip Griffin, a five (5) year sentence or, for that matter, a sentence of any set number of years. On the other hand, I do recall being told by Phillip Griffin that he wanted to go to trial. Obviously he was convinced, as I was, that his arrest and the searches centralized in [sic] his case were illegal. Also, Phillip Griffin advised me that those who would be testifying against him would have to lie. Unfortunately for him the jury convicted him.

Also, I recall indicating to him that to make a deal with the government in this case he would have to implicate other people. This he said he could not do because he would have to lie.

J.A. 37.

Griffin filed a habeas petition. The district court denied the petition, finding that "Griffin's statements at sentencing clearly demonstrate that he was not prepared to accept a specific plea bargain at the time of the trial."

II. DISCUSSION

[1][2][3] To warrant relief under section 2255, a petitioner must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Relief is warranted only where a petitioner has shown "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis v. United States,* 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). Claims of ineffective assistance of counsel are appropriately brought by filing a motion under section 2255. *United States v. Galloway,* 316 F.3d 624, 634 (6th Cir.2003). We review the denial of a section 2255 motion *de novo. Lucas v. O'Dea,* 179 F.3d 412, 416 (6th Cir.1999).

[4] To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must establish two elements: (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for the deficiency, the outcome of the proceedings would have been different. *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The *Strickland* standard applies to guilty pleas as well. *Hill v. Lockhart,* 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence ***737** ... The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's

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> constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Id. at 58-59, 106 S.Ct. 366. It is therefore easier to show prejudice in the guilty plea context because the claimant need only show a reasonable probability that he would have pleaded differently. *See Ostrander v. Green,* 46 F.3d 347, 352 (4th Cir.1995) *overruled on other grounds by O'Dell v. Netherland,* 95 F.3d 1214, 1222 (4th Cir.1996). [FN1]

> FN1. As the court in *Ostrander* explained,
> [T]he district court applied the wrong legal standard to Ostrander's ineffective assistance claim. It used the *Strickland v. Washington* test instead of the more specific *Hill v. Lockhart* standard for guilty pleas induced by ineffective assistance. There is a significant difference between the tests. Under *Strickland,* the defendant shows prejudice if, but for counsel's poor performance, there is a reasonable probability that the outcome of the entire proceeding would have been different. Under *Hill,* the defendant must show merely that there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. *Id.*

[5] A defense attorney's failure to notify his client of a prosecutor's plea offer constitutes ineffective assistance of counsel under the Sixth Amendment and satisfies the first element of the *Strickland* test. *See Turner v. State,* 858 F.2d 1201, 1205 (6th Cir.1988) (agreeing with the district court that "an incompetently counseled decision to go to trial appears to fall within the range of protection appropriately provided by the Sixth Amendment"), *vacated on other grounds,* 492 U.S. 902, 109 S.Ct. 3208, 106 L.Ed.2d 559 (1989), *reinstated,* 726 F.Supp. 1113 (M.D.Tenn.1989), *aff'd,* 940 F.2d 1000 (6th Cir.1991). [FN2]

> FN2. *See also United States v. Blaylock,* 20 F.3d 1458, 1465-66 (9th Cir.1994) ("If an attorney's incompetent advice regarding a plea bargain falls below reasonable standards of professional conduct, *a fortiori,* failure even to inform defendant of the plea offer does so as well"); *United States v. Rodriguez,* 929 F.2d 747, 753 (1st Cir.1991) ("there is authority which suggests that a failure of defense counsel to inform defendant of a plea offer can constitute ineffective assistance of counsel on grounds of incompetence alone, even absent any allegations of conflict of interest"); *Johnson v. Duckworth,* 793 F.2d 898, 902 (7th Cir.1986) ("in the ordinary case criminal defense attorneys have a duty to inform their clients of plea bargains proferred by the prosecution, and that failure to do so constitutes ineffective assistance of counsel under the Sixth and Fourteenth Amendments"); *United States ex rel Caruso v. Zelinsky,* 689 F.2d 435, 438 (3d Cir.1982) ("a failure of counsel to advise his client of a plea bargain ... constitutes a gross deviation from accepted professional standards").

The second element of the *Strickland* test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice. *See id.* at 1206.

> Although some circuits have held that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence, we in this circuit have declined to adopt such a requirement. Nevertheless, it has been held, as the district court recognized, that a substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a properly informed and advised defendant would have accepted the prosecution's offer. It follows that the district court did not err in relying on such a disparity, along ***738** with the unrefuted testimony of the petitioner, to support its conclusion that habeas relief was required in this case.

Dedvukovic v. Martin, 36 Fed.Appx. 795, 798 (6th Cir.2002) (unpublished). In *Dedvukovic,* we found that where the defendant swore that his attorney never explained the significance of the government's plea offer to him, his attorney had no indication in her file that she had properly advised him of the offer and could not recall having done so (though it was her customary practice to do so), and there was a substantial disparity between the penalty offered by the government and the penalty called for by the indictment, the defendant showed a reasonable probability that he would have pleaded guilty had he received proper advice. *Id.* at 797-98.

The government concedes that it made at least a tentative plea offer and does not dispute on appeal that Griffin's counsel did not inform him of it. It argues

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only that the record does not support Griffin's claim that he would have pleaded guilty if he had known of the plea offer. The government notes that "the record is replete with Griffin's protestations of his own innocence," including his testimony at the suppression hearing and at sentencing, his statements to the probation officer responsible for writing the presentence report, and his failure to cooperate with the government post-conviction. Griffin says he would have accepted the plea if he had known about it and his potential sentencing exposure. Griffin argues that the district court should at least have held an evidentiary hearing to determine the factual issues and circumstances surrounding the plea offer.

[6][7] Griffin's repeated declarations of innocence do not prove, as the government claims, that he would not have accepted a guilty plea. *See North Carolina v. Alford,* 400 U.S. 25, 33, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) ("reasons other than the fact that he is guilty may induce a defendant to so plead, ... and he must be permitted to judge for himself in this respect" quoting *State v. Kaufman,* 51 Iowa 578, 2 N.W. 275, 276 (Iowa 1879)). Defendants must claim innocence right up to the point of accepting a guilty plea, or they would lose their ability to make any deal with the government. It does not make sense to say that a defendant must admit guilt prior to accepting a deal on a guilty plea. It therefore does not make sense to say that a defendant's protestations of innocence belie his later claim that he would have accepted a guilty plea. Furthermore, a defendant must be entitled to maintain his innocence throughout trial under the Fifth Amendment. Finally, Griffin could have possibly entered an *Alford* plea even while protesting his innocence. *See id.* These declarations of innocence are therefore not dispositive on the question of whether Griffin would have accepted the government's plea offer.

The government further argues that even if Griffin had accepted the tentative plea offer, it would have been withdrawn by the government based on his failure to provide substantial assistance. The government says the offer would have been contingent on Griffin's successful cooperation with law enforcement and argues his failure to reach a post-conviction deal means he could not have reached a plea agreement before trial. [FN3] The government's claim that it would have rescinded its plea offer cannot be substantiated on the current record. If Griffin's attorney told him of the plea offer and explained the plea process to him, we cannot say, given ***739** the disparity in sentences and the evidence arrayed against him, that he would not have changed his mind and accepted the plea. Griffin says his protestations of innocence were the result of his inexperience with the criminal justice system and not a reflection of his unwillingness to plead and we cannot find otherwise based on the evidence before us. On the current record, it is impossible to tell whether Griffin would have been sufficiently cooperative to obtain the government's assent to the possible plea agreement.

> FN3. The government says that inherent in its offer is the notion that his cooperation with the authorities would have constituted substantial assistance under section 5K1.1 of the Sentencing Guidelines.

[8] There is sufficient objective evidence in the record to warrant an evidentiary hearing to determine whether there is a "reasonable probability" that Griffin would have accepted the plea offer if he knew about it. The gap between his potential sentence if convicted and the plea offer is sufficient to merit an evidentiary hearing. *See Dedvukovic, supra* at 798; *see also United States v. Gordon,* 156 F.3d 376, 380-81 (2d Cir.1998); *United States v. Blaylock,* 20 F.3d 1458, 1466-67 (9th Cir.1994). The fact that he was unaware that his codefendants were going to testify against him in exchange for substantially lesser sentences is further evidence suggesting he might have accepted the plea offer had he been fully informed. *See Boria v. Keane,* 99 F.3d 492, 497 (2d Cir.1996) (finding there was a reasonable probability that a defendant would have accepted a plea offer if his attorney had provided his professional opinion that it was "almost impossible" for a defendant in his position to obtain an acquittal). We have granted an evidentiary hearing where an offender did not know the government was proposing sentence enhancements despite the offender's concession "at sentencing that had he known the government was proposing a twenty-year minimum, he was unsure what his response would have been-'maybe' he would have made a different decision." *Dabelko v. United States,* No. 98-3247, 2000 WL 571957, at *4 (6th Cir. May 3, 2000) (unpublished).

[9] We recognize that we must exercise caution in ordering an evidentiary hearing, since it might encourage defendants to try to manipulate the criminal justice system to obtain the advantage of a trial with its chance of acquittal as well as the advantage of a plea with its lesser sentence. *See id.* at *3. This concern, however, is mitigated by the fact that

> [m]ost defense lawyers, like most lawyers in other branches of the profession, serve their clients and the judicial system with integrity. Deliberate ineffective assistance of counsel is not only unethical, but

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> usually bad strategy as well. For these reasons and because incompetent lawyers risk disciplinary action, malpractice suits, and consequent loss of business, we refuse to presume that ineffective assistance of counsel is deliberate. Moreover, to the extent that petitioners and their trial counsel may jointly fabricate these claims later on, the district courts will have ample opportunity to judge credibility at evidentiary hearings.
>
> *United States v. Day,* 969 F.2d 39, 46 n. 9 (3rd Cir.1992).

We are convinced that an evidentiary hearing is warranted under the circumstances here. Griffin has presented a potentially meritorious claim for ineffective assistance of counsel, and he deserves the right to develop a record to show there is a reasonable probability he would have accepted the plea.

III. CONCLUSION

For the foregoing reasons, the decision of the district court is REVERSED and the case is REMANDED for an evidentiary hearing on the question of whether there is a reasonable probability that Griffin ***740** would have accepted a plea offer if he had known about it.

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2003 WL 22469973
--- F.3d ---
(Cite as: 2003 WL 22469973 (6th Cir.(Ky.)))

United States Court of Appeals,
Sixth Circuit.

Eddie D. SMITH, Petitioner-Appellant,
v.
UNITED STATES of America,
Respondent-Appellee.

No. 01-5215.

Argued March 12, 2003.
Decided and Filed Nov. 3, 2003.

Federal prisoner whose conviction of causing another to engage in sexual intercourse by use of force, engaging in sexual intercourse with a person in detention and with intent to abuse, and making a false statement under oath to an Administrative Law Judge (ALJ) was affirmed on appeal moved to vacate his sentence. The United States District Court for the Eastern District of Kentucky, Karl S. Forester, Chief Judge, denied the motion, and movant appealed. The Court of Appeals, David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation, held that: (1) movant's protestations of innocence throughout his trial did not, by themselves, justify summary denial of his motion to vacate without an evidentiary hearing on his claim that defense counsel was ineffective for failing to advise him to accept plea bargain offer; (2) counsel's alleged failure to insist that, in light of overwhelming evidence of guilt, movant plead guilty and accept plea bargain offer, was not a proper basis upon which to find deficient performance by defense counsel; (3) factual questions as to nature and quality of the advice movant received from counsel before he made his final decision to reject the government's proposed plea bargain entitled movant to a hearing on his claim that defense counsel was ineffective for failing to advise him to accept the plea bargain offer; and (4) remand to different judge was not warranted.

Vacated and remanded.

[1] Criminal Law 1652

110k1652 Most Cited Cases

A hearing on a motion to vacate is mandatory unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. 28 U.S.C.A. § 2255.

[2] Criminal Law 1652
110k1652 Most Cited Cases

[2] Criminal Law 1656
110k1656 Most Cited Cases

The postconviction relief statute does not require a full blown evidentiary hearing in every instance; rather, the hearing conducted by the court, if any, must be tailored to the specific needs of the case, with due regard for the origin and complexity of the issues of fact and the thoroughness of the record on which the motion is made. 28 U.S.C.A. § 2255.

[3] Criminal Law 1610
110k1610 Most Cited Cases

When a trial judge also hears collateral proceedings, that judge may rely on his recollections of the trial in ruling on the collateral attack.

[4] Habeas Corpus 742
197k742 Most Cited Cases

A habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims when there is a factual dispute.

[5] Criminal Law 1655(6)
110k1655(6) Most Cited Cases

Defendant's protestations of innocence throughout his trial on several counts of sexual misconduct perpetrated against female inmates at a federal prison while he was employed at the facility as a prison guard did not, by themselves, justify summary denial of his motion to vacate without an evidentiary hearing on his claim that defense counsel was ineffective for failing to advise him to accept plea bargain offer, and for failing to interview and call as a defense witness an inmate who would have testified that the government's witnesses fabricated the stories about defendant. 28 U.S.C.A. § 2255.

[6] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases

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Defense counsel's alleged failure to insist that, in light of overwhelming evidence of guilt of defendant charged with several counts of sexual misconduct perpetrated against female inmates at a federal prison while he was employed at the facility as a prison guard, defendant plead guilty and accept plea bargain offer, was not a proper basis upon which to find deficient performance by defense counsel as required to establish an ineffective assistance of counsel claim. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases

Although defense counsel may provide defendant an opinion on the strength of the government's case, the likelihood of a successful defense, and the wisdom of a chosen course of action, the ultimate decision of whether to go to trial or plead guilty must be made by defendant.

[8] Criminal Law 641.13(2.1)
110k641.13(2.1) Most Cited Cases

An attorney representing a criminal defendant has a clear obligation to fully inform her client of available options. U.S.C.A. Const.Amend. 6.

[9] Criminal Law 641.13(2.1)
110k641.13(2.1) Most Cited Cases

A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available. U.S.C.A. Const.Amend. 6.

[10] Criminal Law 641.13(7)
110k641.13(7) Most Cited Cases

A criminal defendant has the right to be informed by counsel as to the ranges of penalties under likely guideline scoring scenarios, given the information available to the defendant and his counsel at the time. U.S.C.A. Const.Amend. 6.

[11] Criminal Law 1655(6)
110k1655(6) Most Cited Cases

Factual questions as to nature and quality of the advice defendant received from counsel before he made his final decision to reject the government's proposed plea bargain on several counts of sexual misconduct perpetrated against female inmates at a federal prison while he was employed at the facility as a prison guard entitled defendant to a hearing on his claim that defense counsel was ineffective for failing to advise him to accept the plea bargain offer. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2255.

[12] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases

The failure of defense counsel to provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance, as required to establish ineffective assistance of counsel claim. U.S.C.A. Const.Amend. 6.

[13] Criminal Law 1192
110k1192 Most Cited Cases

Appellate court's authority to remand to a different judge to preserve the appearance of fairness is an extraordinary power and should be rarely invoked. 28 U.S.C.A. § 2106.

[14] Criminal Law 1192
110k1192 Most Cited Cases

The factors that the Court of Appeals considers in deciding whether to exercise its authority to remand to a different judge to preserve the appearance of fairness are (1) whether the original judge would reasonably be expected to have substantial difficulty in putting out of his mind previously expressed views or findings; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. 28 U.S.C.A. § 2106.

[15] Criminal Law 1192
110k1192 Most Cited Cases

Remand to different judge was not warranted, on remand from postconviction relief movant's appeal of denial of relief so that district court could hold hearing on movant's ineffective assistance of counsel claim; district judge was probably in a superior position to evaluate the claims, since he presided over movant's criminal trial. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2106.

ARGUED: Cheryl J. Sturm (argued and briefed), Chadds Ford, PA, for Appellant.

Charles P. Wisdom, Jr. (briefed), Assistant United

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States Attorney, John Patrick Grant, Assistant United States Attorney, Lexington, KY, for Appellee.

Before: MOORE and CLAY, Circuit Judges; LAWSON, District Judge. [FN*]

OPINION

LAWSON, District Judge.

*1 The petitioner appeals the denial of his motion to vacate sentence filed under 28 U.S.C. § 2255. He was convicted by a jury of several counts of sexual misconduct perpetrated against female inmates at a federal prison while he was employed at the facility as a prison guard. He also was found guilty of lying during a hearing into his misconduct before the Merit Systems Protection Board. The principal ground for Smith's motion is that his attorney was constitutionally ineffective because he failed to properly advise and counsel Smith concerning a pretrial guilty plea offer made by the government that would have resulted in a sentence considerably shorter than the 262 months Smith ultimately received. We believe that the factual record before the district court is not sufficient to properly adjudicate the motion. We therefore vacate the lower court's judgment and remand for an evidentiary hearing.

I.

On April 20, 1995, a federal grand jury sitting in the Eastern District of Kentucky returned a multi-count indictment against petitioner Eddie D. Smith. A superseding indictment was handed down on August 16, 1995, which charged Smith with eight counts of sexual misconduct and one count of perjury. Counts one through five alleged that Smith engaged in sexual acts by force with four different inmates while he was employed as a correctional officer at the Federal Medical Center (FMC) in Lexington, Kentucky, all in violation of 18 U.S.C. § 2241(a)(1). Counts six and seven charged that Smith engaged in sex acts with one of the previously-named inmates while she was under his authority, contrary to 18 U.S.C. § 2243(b). Count eight alleged that Smith engaged in sexual contact with yet a different inmate while she was officially detained and under his supervision in violation of 18 U.S.C. § 2244(a)(4). Finally, count nine alleged that, on or about January 12, 1994, Smith gave false material testimony under oath before United States Administrative Law Judge Jack E. Salyer, during a Merit Systems Protection Board proceeding concerning the removal of Smith from his position as a correctional officer at the Lexington Medical Center, contrary to 18 U.S.C. § 1621.

At his arraignment, Smith was represented by the same attorney that had appeared for him at the prior proceeding before the Merit Systems Protection Board in which Smith was removed from his job with the Bureau of Prisons on account of the same misconduct that led to his indictment. Smith contends, and the government does not dispute, that sometime before the indictment was returned, the prosecution offered to allow Smith to plead guilty to a one-count information charging perjury with a maximum recommended sentence of twenty months, in exchange for abandoning the prosecution of the sexual misconduct offenses. Smith did not accept that offer. About one month after his arraignment, his lawyer withdrew and attorney Andrew M. Stephens was appointed to represent Smith. Stephens avers that the guilty plea offer remained open until approximately ten days before trial.

*2 Trial commenced on September 25, 1995. Smith testified on his own behalf, and maintained his innocence of the charges. However, the jury convicted Smith as charged on all counts but count seven, for which he was found not guilty. On March 8, 1996, Smith was sentenced to multiple terms of 262 months imprisonment on counts one, two, three and five, with thirty-six months of supervised release to follow; twelve months imprisonment on count six, with three months of supervised release; six months imprisonment on count eight, with three years of supervised release; and sixty months imprisonment on count nine, with three years of supervised release. Count four was dismissed on the government's motion. The sentences were all to be served concurrently. We affirmed Smith's convictions on direct appeal on March 20, 1998 in an unpublished opinion. *United States v. Smith,* No. 96-5385, 1998 WL 136564 (6th Cir. Mar.19, 1998).

On March 5, 1999, the petitioner filed a motion seeking to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. In the motion Smith alleges that defense counsel was ineffective for failing to advise him to accept the twenty-month guilty plea agreement offered by the government, and for failing to interview and call as a defense witness a FMC inmate who would have testified that the government's witnesses fabricated the stories about Smith. Smith further contended in the motion that his convictions violated the Fifth Amendment's prohibition against double jeopardy.

The government responded to the motion on April 20,

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1999, attaching an affidavit of attorney Stephens. The affidavit states that Stephens' conversations with predecessor counsel indicated that Smith was aware, prior to the filing of the indictment, that an offer was on the table for a guilty plea to the perjury charge. Stephens Aff. at 1, J.A. at 69. The affidavit further states that "Mr. Smith had been fully active in participation of the pension denial hearings and his potential wrongful termination. It is also relevant to the undersigned that Mr. Smith's wife accompanied him on every office conference, discovery conference, and discovery investigation conference of which there were at least fifteen or twenty." *Ibid.* "At no time," Stephens insists, "during the course of lengthy investigations, review of literally reams of documents and travel between various Federal Correctional Institutions accomplished by the undersigned in investigation and defense of this case, did Mr. Smith ever consider the entry of a guilty plea." Stephens Aff. at 2, J.A. at 70. The affidavit speculates that "Smith at some point was attempting to save face in front of his wife during the pendency of their marriage and thus, that maybe [sic] the motivation for his denial of any desire to entry [sic] a guilty plea." *Ibid.* Stephens also states, somewhat cryptically, that "[i]t would be incorrect for Mr. Smith to assert that their [sic] wasn't some talk of a guilty plea since the offer was made and held open by the United States until approximately ten days before trial." *Ibid.*

***3** The evidence against Smith, Stephens insists, was overwhelming. He further states that he prepared with Smith more than he has with any other client. When the guilty plea offer was discussed, "it was discussed with disgust." Stephens Aff. at 4, J.A. at 72. There was no doubt in his mind, Stephens states, that Smith "never considered a plea though a plea was discussed." Stephens Aff. at 3-4, J.A. at 71-72. "[N]ever ever was undersigned counsel directed to explore negotiated plea offers even though same was made." Stephens Aff. at 3, J.A. at 71.

On March 28, 2000, Magistrate Judge James B. Todd filed a report recommending that the motion be denied. After considering the petitioner's exceptions to that report, and the government's response to those exceptions, the district court adopted the report in an Opinion and Order filed January 11, 2001. No evidentiary hearing was conducted in the lower court. The district court denied the motion on the ground that the petitioner had failed to show prejudice as required by *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because there was no "objective evidence in the record demonstrating a reasonable probability that, but for his counsel's lack of advice, he would have accepted the government's offer." Opinion and Order at 3; J.A. at 112. The district court reasoned that Smith was aware of the government's offer and rejected it, and instead protested his innocence at trial (which resulted in a two-point offense level enhancement for obstruction of justice), and therefore it was unlikely that he would have pleaded guilty even if he had received proper advice from his attorney. *Ibid.* The district court also rejected Smith's claim that Stephens was ineffective for failing to interview a witness, and that prosecuting Smith following the administrative job-removal proceedings violated the Double Jeopardy Clause.

The district court's judgment against the petitioner was timely appealed on February 5, 2001. The issues raised relate only to the question of whether Stephens' advice to Smith concerning the government's guilty plea offer was constitutionally adequate, and whether the district court erred by not conducting an evidentiary hearing to resolve that question.

II.

On appeal of the district court's denial of a motion to vacate, alter, or amend sentence pursuant to 28 U.S.C. § 2255, we review the lower court's legal conclusions *de novo* and its factual findings for clear error. *Nagi v. United States,* 90 F.3d 130, 134 (6th Cir.1996). The district court's decision whether to hold an evidentiary hearing on a Section 2255 motion is reviewed under the abuse of discretion standard. *Arredondo v. United States,* 178 F.3d 778, 782 (6th Cir.1999).

[1][2][3][4] A prisoner who files a motion under Section 2255 challenging a federal conviction is entitled to "a prompt hearing" at which the district court is to "determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255. The hearing is mandatory "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Fontaine v. United States,* 411 U.S. 213, 215, 93 S.Ct. 1461, 36 L.Ed.2d 169 (1973) (citation omitted). *See also Blanton v. United States,* 94 F.3d 227, 235 (6th Cir.1996) (holding that "evidentiary hearings are not required when ... the record conclusively shows that the petitioner is entitled to no relief."). The statute "does not require a full blown evidentiary hearing in every instance .... Rather, the hearing conducted by the court, if any, must be tailored to the specific needs of the case, with due regard for the origin and complexity of the issues of fact and the thoroughness of the record on which (or perhaps, against which) the section 2255 motion is made." *United States v. Todaro,* 982 F.2d 1025, 1030 (6th Cir.1993). Furthermore, "when the trial judge also

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hears the collateral proceedings ... that judge may rely on his recollections of the trial in ruling on the collateral attack." *Blanton,* 94 F.3d at 235 (citing *Blackledge v. Allison,* 431 U.S. 63, 74 n. 4, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)). However, "[w]here there is a factual dispute, the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims." *Turner v. United States,* 183 F.3d 474, 477 (6th Cir.1999) (citing *Paprocki v. Foltz,* 869 F.2d 281, 287 (6th Cir.1989)). We have observed that a Section 2255 petitioner's burden "for establishing an entitlement to an evidentiary hearing is relatively light." *Id.* at 477.

***4** Here, Smith seeks a hearing on the question of whether his attorney was constitutionally ineffective. Such claims are guided by the now familiar two-element test set forth by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, a petitioner must prove that counsel's performance was deficient, which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052. The Court explained that to establish deficient performance, a petitioner must identify acts that were "outside the wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. 2052. Second, a petitioner must show that counsel's deficient performance prejudiced the petitioner. A petitioner may establish prejudice by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* at 687, 104 S.Ct. 2052.

The Supreme Court has applied this test to evaluate the performance of attorneys representing guilty-pleading defendants, with special attention to the second element:

> The second, or "prejudice," requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

In this case, the trial court summarily rejected Smith's ineffective assistance of counsel claim for failure of proof on this second element. The lower court found that a defendant's "own self-serving testimony" that he would have pleaded guilty if properly advised is not sufficient; in addition, the lower court required that the defendant also present "objective evidence" to establish prejudice. Opinion and Order at 3; J.A. at 112. However, we recently stated: "Although some circuits have held that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence, we in this circuit have declined to adopt such a requirement." *Griffin v. United States,* 330 F.3d 733, 737 (6th Cir.2003) (quoting *Dedvukovic v. Martin,* 36 Fed.Appx. 795, 798 (6th Cir.2002) (unpublished)).

[5] The district judge in this case, who also presided over Smith's trial, found that Smith was aware of the plea offer, rejected it, and maintained his innocence throughout the proceedings, including to the point of testifying under oath at trial that he did not engage in the conduct described by his accusers, which earned him a two-point enhancement of his offense level for obstruction of justice at sentencing. This point was addressed in *Griffin* as well, where we observed that defendants may enter a guilty plea while maintaining innocence under *North Carolina v. Alford,* 400 U.S. 25, 33, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (stating that "reasons other than the fact that he is guilty may induce a defendant to so plead ... and he must be permitted to judge for himself in this respect"); many defendants believe that they must maintain innocence right up to the point of pleading guilty in order to fortify their bargaining positions; and the Fifth Amendment gives defendants the right to assert their innocence throughout a trial. *Griffin,* 330 F.3d at 738. We concluded, therefore, that it "does not make sense to say that a defendant's protestations of innocence belie his later claim that he would have accepted a guilty plea.... These declarations of innocence are ... not dispositive on the question." *Ibid.* Protestations of innocence throughout trial are properly a factor in the trial court's analysis, however they do not, by themselves, justify summary denial of relief without an evidentiary hearing. *See Cullen v. United States,* 194 F.3d 401, 404-07 (2d Cir.1999).

***5** In *Griffin,* there was no dispute over the fact that the petitioner's trial counsel failed to convey a pretrial guilty plea offer, and that the petitioner proceeded to trial, where he testified that he was innocent. The panel noted that the substantial disparity between the five-year sentence offered by the government and the 156 months Griffin ultimately received was enough to warrant further exploration of the issue at an evidentiary hearing of the question of the reasonable likelihood that Griffin, competently advised, would have pleaded guilty. *Griffin,* 330 F.3d at 739. Other panels in this and other circuits have pointed to the

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disparity between the plea offer and the potential sentence exposure as strong evidence of a reasonable probability that a properly advised defendant would have accepted a guilty plea offer, despite earlier protestations of innocence. *See Magana v. Hofbauer,* 263 F.3d 542, 552-53 (6th Cir.2001) (finding the difference between a ten- and twenty-year sentence significant); *United States v. Day,* 969 F.2d 39 (3d Cir.1992) (finding ineffective assistance of counsel when trial counsel mistakenly described the penalties at trial as ten years rather than the twenty-two years the defendant received at sentencing, and where a plea offer of five years had been made); *United States v. Gordon,* 156 F.3d 376, 377-81 (2d Cir.1998) (holding that the wide disparity between the ten-year sentence recommended by the plea agreement and the seventeen-and-a-half years the defendant did receive was objective evidence that a plea would have been accepted).

[6][7] In this case, the petitioner concedes that he was aware of the government's guilty plea offer. However, citing *Boria v. Keane,* 99 F.3d 492 (2d Cir.1996), Smith contends that his attorney was ineffective because, in light of the overwhelming evidence of guilt, the attorney did not insist that Smith plead guilty and accept the twenty-month plea bargain. We do not believe this to be a proper basis upon which to find deficient performance by defense counsel. The decision to plead guilty--first, last, and always--rests with the defendant, not his lawyer. Although the attorney may provide an opinion on the strength of the government's case, the likelihood of a successful defense, and the wisdom of a chosen course of action, the ultimate decision of whether to go to trial must be made by the person who will bear the ultimate consequence of a conviction.

[8][9][10] On the other hand, the attorney has a clear obligation to fully inform her client of the available options. We have held that the failure to convey a plea offer constitutes ineffective assistance, *see Griffin,* 330 F.3d at 734, but in the context of the modern criminal justice system, which is driven largely by the Sentencing Guidelines, more is required. A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available. In a system dominated by sentencing guidelines, we do not see how sentence exposure can be fully explained without completely exploring the ranges of penalties under likely guideline scoring scenarios, given the information available to the defendant and his lawyer at the time. *See United States v. Day,* 969 F.2d 39, 43 (3d Cir.1992) (observing that "the Sentencing Guidelines have become a critical, and in many cases, dominant facet of federal criminal proceedings" such that "familiarity with the structure and basic content of the Guidelines (including the definition and implications of career offender status) has become a necessity for counsel who seek to give effective representation."). The criminal defendant has a right to this information, just as he is entitled to the benefit of his attorney's superior experience and training in the criminal law.

***6** [11] The record in this case leaves us in considerable doubt over the nature and quality of the advice Smith received before he made his final decision to reject the government's proposed plea bargain. Attorney Stephens' affidavit states that Smith was aware of a plea offer, and that Smith was predisposed against a plea to save face in front of his wife, but it does not state that Stephens actually discussed the terms of the agreement with Smith. More importantly, the affidavit does not state that Stephens informed Smith of the dramatically higher sentence potential (over ten times as much incarceration) to which Smith was exposed if he were convicted of even one of many charges. The affidavit does not claim that Stephens at any time expressed to Smith how unlikely he was to prevail at trial.

Stephens stated in his affidavit that Smith "knew by virtue of letters sent from [Stephens] to him possibility [sic] of the steep sentence which he ultimately got." Stephens Aff., J.A. at 71. However, the only such correspondence in the record came from Stephens *after* the trial. In his October 17, 1995 letter, Stephens wrote to Smith: "I wanted to formally advise you of what I believe the relevant sentencing guideline provisions are and to confirm with you the substance of my meeting with [the probation officer] and to give you your various options at this point." Letter of Oct. 17, 1995 from Stephens to Smith, J.A. at 105. There is no reference in the letter to earlier conversations or to pretrial discussions of the sentencing potential in the case. There is no other evidence that Smith's sentencing exposure upon conviction of the charges in the superseding indictment--information that, in our view, was necessary for a proper consideration of the guilty plea offer-- was ever conveyed to Smith before trial.

[12] The failure of defense counsel to "provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance." *Moss v. United States,* 323 F.3d

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445, 474 (6th Cir.2003). *See also Magana,* 263 F.3d at 550 (holding that the defense counsel's erroneous advice concerning sentence exposure "fell below an objective standard of reasonableness under prevailing professional norms"); *Day,* 969 F.2d at 43 (holding that incorrect advice about sentence exposure as a potential career offender undermined the defendant's ability to make an intelligent decision about whether to accept a plea offer). Whether the petitioner had this information before he rejected the plea offer is also an important factor in the consideration of the reasonable likelihood that a properly counseled defendant would have accepted the government's guilty plea offer.

Smith should have been given the opportunity at an evidentiary hearing to develop a record on these factual issues in the lower court.

III.

[13][14] The petitioner asks that the matter be remanded to a different judge to preserve the appearance of fairness. Although we have the authority to grant that request under 28 U.S.C. § 2106, it is an "extraordinary power and should be rarely invoked." *Armco, Inc. v. United Steelworkers of America, AFL-CIO, Local 169,* 280 F.3d 669, 683 (6th Cir.2002) (citation omitted). The factors that we consider are "(1) whether the original judge would reasonably be expected to have substantial difficulty in putting out of his mind previously expressed views or findings; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Sagan v. United States,* 342 F.3d 493, 501 (6th Cir.2003) (citations omitted). *See also Brown v. Crowley,* 312 F.3d 782, 791- 92 (6th Cir.2002).

*7 [15] None of these factors support the request to remand this case to a different district court judge. The record contains no evidence that the district court judge would have difficulty considering the case on remand in an objective manner. In fact, he is probably in a superior position to evaluate the claims, since he presided over Smith's criminal trial. His familiarity with the case is no evidence of a lack of propriety or fairness, since, as we observed earlier, the habeas judge may rely on his or her memory of the trial when relevant to the issues on collateral review. *See Blanton,* 94 F.3d at 235. To require a different district court judge to become familiar with the factual and procedural history of this case would waste judicial resources.

For the foregoing reasons, we **VACATE** the judgment of the district court denying the petitioner's motion to vacate his sentence under 28 U.S.C. § 2255, and **REMAND** to the district court for an evidentiary hearing.

FN* The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

2003 WL 22469973 (6th Cir.(Ky.)), 2003 Fed.App. 0387P

END OF DOCUMENT

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
JUDGE DAVID D. DOWD, JR.

To: All Judges and Magistrate Judges of the Northern District of Ohio

From: Judge David D. Dowd, Jr.

In Re: Making a Record in a Criminal Case where a Guilty Plea has been offered and Rejected

Date: November 17, 2003

Dear Judges,

1. I have reviewed this issue with the judges of this court in the aftermath of the decision in *Griffin v. United*, 330 F.3d 733 (6th Cir. 2003) and now a new decision has come from the Sixth Circuit that bears reading as now the 6th Circuit has added fuel to the fire which arguably makes an evidentiary hearing required in a subsequent 2255 case where the defendant knows about and rejects a guilty plea offer and then gets hammered by the sentence. The constitutional claim is the denial of the effective assistance of counsel. *See* the slip opinion in *Smith v. United States,____F.3d_____*, filed on November 3, 2003. *See* 2003 Fed. App. 0387P (6th Cir.).

2. AUSA Bernard Smith sends weekly memos to the U.S. Attorneys regarding recent opinions of the Sixth Circuit, and he has accurately summarized the *Smith* opinion as follows:

1. Smith v. United States, No. 01-5215 (6th Cir., filed 11/3/03)(Moore, Clay, LAWSON), is a fairly important case ineffective assistance of counsel 2255 case involving the question of adequate advice to a defendant about a plea offer from the government. Defendant was convicted of sexually assaulting/molesting federal female inmates at FMC Lexington and perjury before the MSPB when he was fired from federal employment. The government offered him a 20-month deal before trial; he went to trial, was convicted and got 262 months, including an upward adjustment for trial perjury. His trial attorney filed an affidavit stating that defendant rejected the 20-month offer and wanted to maintain "face" with his wife by denying the allegations. Nonetheless, the court remanded for an evidentiary hearing. Defendant stated that he would have accepted the plea if properly advised and, the Court held, the fact that he protested his innocence at trial does not foreclose this argument. In light of the disparity between the sentences offered and actually imposed, it is a fair inference that a properly advised defendant might have accepted a deal. In addition (here is the "news" in this opinion), under the sentencing guidelines system, merely conveying an offer to a defendant is not enough. Because of the complexity of the guidelines, a defendant is entitled to an explanation from his attorney, factoring in the quality of the government's evidence, of what a guidelines sentence would be after trial as opposed to the government's pretrial offer. On this record, the Court cannot determine if the defendant received this explanation, so a hearing is necessary.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposal from American College of Trial Lawyers to Amend Rules 11 and 16 Regarding *Brady* Material**

DATE: **April 12, 2004**

Attached is a proposal from the American Trial Lawyers Association to amend Rules 11 and 16, which would require the prosecution to disclose favorable information to the defense, as required by *Brady v. Maryland*.

In October, Judge Carnes appointed a subcommittee consisting of Judge Bucklew (chair), Judge Trager, Mr. Campbell, Mr. Goldberg, and Mr. Wroblewski to study the proposal and report any recommendations to the full committee.

The subcommittee has conferred and is currently preparing a written report to the Committee. It will be distributed under separate cover, or at the meeting.

This item is on the agenda for the May meeting.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

October 28, 2003

MEMORANDUM TO JUDGE TRAGER, LUCIEN CAMPBELL, JONATHAN WROBLEWSKI, AND DONALD GOLDBERG

SUBJECT: *Proposal from the American College of Trial Lawyers*

The American College of Trial Lawyers has recommended amendments to Rule 11 and Rule 16, requiring the prosecution to disclose favorable information to the defense in accordance with *Brady*.

At Judge Carnes's request, Judge Bucklew has agreed to chair a subcommittee to review the proposal and report its recommendations to the full committee. Judge Carnes asks that you serve on the subcommittee. Please advise me or Judge Carnes if you are willing to serve on the subcommittee.

Thank you.

John K. Rabiej

Attachment

cc: Honorable David F. Levi (with attach.)
Honorable Ed Carnes (without attach.)
Honorable Susan C. Bucklew (with attach.)
Professor David A. Schlueter (with attach.)

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

October 30, 2003

MEMORANDUM TO JUDGE TRAGER, LUCIEN CAMPBELL, JONATHAN WROBLESKI, AND DONALD GOLDBERG

SUBJECT: Proposal from the American College of Trial Lawyers

The package that you should have received today from us regarding the proposal of the American College of Trial Lawyers is missing the following: pages 5, 17 and 20.

I am faxing the above pages, so that they can be placed in your package. Please accept my apologies for the error.

If you have any questions, please don't hesitate to call me at (202) 502-1820.

Anne Rustin
Secretary

Attachments

cc: Honorable David F. Levi
Honorable Susan C. Bucklew
Professor David A. Schlueter

10/28/03

American College of Trial Lawyers

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October 14, 2003

Honorable Ed E. Carnes
United States Circuit Judge
U. S. Courthouse, Room 408
15 Lee Street
Montgomery, Alabama 36104

Re: Advisory Committee on
Federal Rules of Criminal Procedure

Dear Judge Carnes:

I write to you as Chair of the Advisory Committee and I enclose a copy of the American College's paper regarding disclosure of Brady material. This paper was adopted by the College's Board of Regents this year, and I hope that you can include its recommendations on your Committee's agenda for its spring meeting.

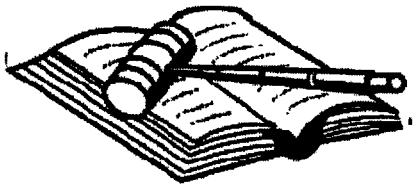
Please let me know if you have any questions regarding the College's position on this important subject.

Best regards,

Warren B. Lightfoot

WBL/ds
Enclosure
cc: Robert B. Fiske, Jr., Esquire
Executive Committee
David J. Beck, Esquire
Mr. Dennis J. Maggi

American College of Trial Lawyers



PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16

Approved by the Board of Regents
March, 2003

American College of Trial Lawyers

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

◆ ◆ ◆

"In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships."

—Hon. Emil Gumpert,
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PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16*

BACKGROUND AND SUMMARY

In the 1963 landmark decision of *Brady v. Maryland*,[1] the Supreme Court held that prosecutors have a constitutional duty to turn over "evidence favorable to an accused. .... where the evidence is material either to guilt or to punishment."[2] Four decades later, Federal Rules of Criminal Procedure 11 and 16, which govern federal plea negotiations and criminal discovery respectively, still do not address, let alone require, the government to timely disclose favorable information to the defendant that is material to either guilt or sentencing.

Without a clear definition of favorable evidence nor a disclosure timetable, prosecutors have interpreted the constitutional discovery obligation inconsistently and too often disclosed favorable information on the eve, during or after trial or not at all. Timely disclosure of favorable information can greatly impact the plea decision, trial strategy, the presentation of evidence and sentencing.

Since approximately ninety-five percent of federal criminal cases are resolved through pleas of guilty,[3] the timely disclosure of information favorable to punishment is particularly important to fair and open plea negotiations and the honest and consistent implementation of the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"). Information that tends to diminish the degree of the defendant's culpability or Offense Level under the Guidelines can significantly affect a defendant's punishment. Still, prosecutors have recently sought to require defendants to enter into knowing and voluntary plea agreements in which the defendants have not received information favorable to punishment or worse, have been required to waive the constitutional right to exculpatory material without knowing what favorable evidence may exist. This practice threatens to deprive defendants and courts of information critical to a fair and honest sentencing process.

---

* The principal draftsman of this report was Robert W. Tarun, Chicago, Illinois, assisted by a subcommittee of the Federal Criminal Procedure Committee of the American College of Trial Lawyers consisting of Locke T. Clifford, Greensboro, North Carolina, William F. Manifesto, Pittsburgh, Pennsylvania and Jordan Green, Phoenix, Arizona.

[1] 373 U.S. 83 (1963).

[2] *Id.* at 87.

[3] United States Sentencing Guidelines (U.S.S.G.), Ch. 1, Pt. A.; *Judicial Business of the United States Courts, Annual Report of the Director* (2000) (available at: http://www.uscourts.gov/judbus2000/contents.html).

Nothing is more essential to a fair criminal trial or sentence than the disclosure of information favorable to the defendant in sufficient time for the defendant to receive due process as guaranteed by the Fifth Amendment, and effective assistance of counsel as guaranteed by the Sixth Amendment. No defendant should be forced to go to trial or plead guilty without having access to favorable information as to guilt or sentencing. Any system of jurisprudence which fails to require as much condones and "shapes a trial that bears heavily on the defendant"[4] and lays the groundwork for wrongful conviction of the innocent and unfair sentencing of the guilty.

The proposed amendments to Federal Rules of Criminal Procedure 11 and 16 will ensure that defendants receive the full and consistently applied benefit of the Supreme Court's pronouncements in *Brady* and its progeny. They codify the rule of law first propounded in *Brady v. Maryland,* clarify both the nature and scope of favorable information, require the attorney for the government to exercise due diligence in locating information and establish deadlines by which the United States must disclose favorable information.

This Committee believes that the constitutional mandate of *Brady v. Maryland* has been undermined by varying prosecutorial interpretations of "favorable information," delayed disclosure of this information in both guilt and punishment stages, and recent government plea policies that have the potential to deprive defendants of information essential to the sentencing process. The amendments will not only promote greater fairness and integrity in criminal discovery generally, but also foster earlier, forthright plea negotiations and a more balanced and informed administration of the Guidelines. Specifically, the Committee proposes amendments to Fed. R. Crim. P. 11 and 16 which:

1. define favorable information to an accused;

2. require, upon a defendant's request, that the government disclose in writing within fourteen days, all known favorable information to the defense;

3. impose a due diligence obligation on the government attorney to consult with government agents and locate favorable information; and

4. require disclosure of all favorable information to a defendant fourteen days before a guilty plea is entered.

Part I of this report discusses the background and evolution of the Supreme Court's decision in *Brady v. Maryland.* Part II summarizes federal criminal discovery practice under Rule 16 as it currently exists. Part III discusses Rule 11(e) and federal plea negotiations. Finally, Part IV contains the proposed Rule 11(e)(7) and Rule 16(f) amendments and a discussion of their key provisions.

[4] 373 U.S. at 87.

I. *BRADY v. MARYLAND* BACKGROUND

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.
>
> Justice William O. Douglas
> Brady v. Maryland, 373 U.S. 83, 87 (1963)

A. *Brady v. Maryland*

Brady v. Maryland represented the first time the Supreme Court created a bright-line constitutional duty on the part of prosecutors to turn over "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment[.]"[5] In *Brady*, the defendant had been convicted of first degree murder and sentenced to death.[6] Although he had admitted to participating in the crime, Brady maintained that his accomplice had done the actual killing, and therefore asked to be spared the death penalty.[7] In an attempt to prove as much, Brady's lawyer requested that the prosecution show him several of defendant's accomplice's statements.[8] Despite this request, a statement in which Brady's accomplice admitted to the actual homicide was not provided.[9] The government's behavior prompted Justice Douglas to comment:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. [...] A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice[.][10]

The Court held "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[11]

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[5] *Id.*

[6] *Id.* at 84.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 87-88.

[11] *Id. See also Moore v. United States*, 408 U.S. 786, 794-95 (1972).

B. *Brady* Evolution

Five major Supreme Court cases since *Brady* have construed the prosecutor's obligation to disclose favorable evidence to a criminally accused. In *Giglio v. United States*,[12] the Court applied *Brady*'s mandate to impeachment evidence as well as classically exculpatory evidence.[13] Giglio had been convicted of passing forged money orders, and while his appeal was pending, his attorney learned that the government had failed to disclose a promise of immunity made to its key witness.[14] Chief Justice Burger ordered a new trial as a result of the prosecution's misconduct, stating that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within" the rule of *Brady*.[15]

In *United States v. Agurs*,[16] the Court reviewed for *Brady* violations the second-degree murder conviction of a defendant whose sole defense had been self-defense. The defendant had not requested, and the government had not disclosed, evidence that the victim possessed a criminal record which included prior convictions for assault and possession of deadly weapons.[17] The Court found that a prosecutor's constitutional duty to disclose favorable evidence was not limited to situations in which the defendant had specifically requested the evidence.[18] Nevertheless, noting that "the prudent prosecutor will resolve doubtful questions in favor of disclosure,"[19] Justice Stevens observed:

> [T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice be done.' He is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.[20]

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[12] 405 U.S. 150 (1972).

[13] *Id.* at 153-54.

[14] *Id.* at 150.

[15] *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

[16] 427 U.S. 97 (1976).

[17] *Id.* at 101.

[18] *See also United States v. Bagley*, 473 U.S. 667, 682 (1985), discussed *infra* at text accompanying notes 23 through 27, holding that regardless of whether a request had been made, the suppression of material evidence favorable to an accused is unconstitutional.

[19] 427 U.S. at 108.

[20] *Id.* at 110-11 (citations omitted).

The Court concluded that undisclosed evidence would be deemed material, and therefore violative of *Brady*'s dictates, if it "create[d] a reasonable doubt that did not otherwise exist."[21] It nonetheless upheld the conviction because the trial judge remained convinced of the defendant's guilt notwithstanding the newly discovered evidence.[22]

In *United States v. Bagley*,[23] the Supreme Court revisited the issue of "materiality" and held that undisclosed evidence is "material" for purposes of a *Brady* violation where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[24] Bagley, charged with violations of federal narcotics and firearms statutes, filed a motion requesting "any deals, promises or inducements to witnesses in exchange for their testimony."[25] In response, the government provided affidavits from two government witnesses who asserted that their statements had been given without any threats, rewards, or promises of reward.[26] Following his conviction, Bagley filed a Freedom of Information Act request with the Bureau of Alcohol, Tobacco and Firearms and learned that the agency had entered into contracts with the two witnesses under which the government had promised to pay them money for their cooperation.[27] Finding that the prosecutor's response had misleadingly induced defense counsel into believing the witnesses could not be impeached on the basis of bias, the Court remanded the case to the trial court to decide whether there was a "reasonable probability" that had the evidence been disclosed to the defense, the result might have been different.[28]

A decade later in *Kyles v. Whitley*,[29] the Court, in construing *Brady*, explained that the materiality standard does not require a defendant to demonstrate that disclosure of the suppressed material would have ultimately resulted in his acquittal.[30] Instead, such a standard requires a defendant to show that suppression of the relevant evidence caused him to receive a trial which did not "result[] in a verdict worthy of confidence."[31] In *Kyles*, the defendant faced first-degree murder charges for the alleged shooting of an elderly woman in a grocery store parking lot.[32] When his counsel filed a lengthy *Brady* motion requesting "any exculpatory or impeachment evidence," the government responded that there was "no exculpatory evidence of any nature."[33] In fact, however, the prosecution knew of no fewer than seven key pieces of

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[21] *Id.* at 112.

[22] *Id.*

[23] 473 U.S. 667 (1985).

[24] *Id.* at 682.

[25] *Id.* at 669.

[26] *Id.* at 670.

[27] *Id.* at 671.

[28] *Id.* at 684.

[29] 514 U.S. 419 (1995).

[30] *Id.* at 434.

[31] *Id.*

[32] *Id.* at 423, 428.

[33] *Id.* at 428.

exculpatory evidence, including substantial evidence affirmatively inculpating its star witness.[34] After analyzing the prosecution's failure to disclose this evidence, the Court reversed the defendant's conviction and death sentence, finding that "fairness [could not] be stretched to the point of calling this a fair trial."[35] The *Kyles* Court held that the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[36]

In *Strickler v. Greene*,[37] the Supreme Court reviewed a prosecutor's failure to disclose in a capital murder case exculpatory materials in police files consisting of detective notes about a key witness and a letter written by the witness.[38] Justice Stevens clarified that "there are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[39] Finding that no prejudice had ensued from the non-disclosure, the Court declined to reverse the defendant's conviction.

C. The Special Role of the Prosecutor in Ensuring a Fair Trial

In *Berger v. United States*,[40] Justice Sutherland outlined the unique role and responsibilities of the federal prosecutor:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[41]
>
> (Emphasis supplied.)

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[34] *Id.* at 447.

[35] *Id.* at 454.

[36] *Id.* at 437.

[37] 527 U.S. 263 (1999).

[38] *Id.* at 266.

[39] *Id.* at 281-82.

[40] 295 U.S. 78 (1935).

[41] *Id.* at 88.

Woven throughout each of the major Supreme Court decisions construing *Brady* has been the theme that responsibility for ensuring the accused receives a fair trial rests not with the judge, jury, defense counsel, police, or some combination thereof, but with the prosecutor. In *Kyles,* the Court made clear that the prosecution has the "responsibility to gauge the likely net effect of all [favorable] evidence and make disclosure when the point of 'reasonable probability' is reached."[42] This meant, stated the Court, that individual prosecutors are required to learn:

> of any favorable evidence known to the others acting on the government's behalf in the case, including the police [... for] since ... the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.[43]

The *Kyles* Court further observed that:

> [u]nless ... the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result. This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence ... And (disclosure) will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.[44]

Both the American Bar Association ("ABA") Standards of Criminal Justice and the Model Rules of Professional Conduct recognize the unique role of the prosecutor and the importance of timely disclosure of favorable evidence to the defense. The ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d Ed. 1993) provide:

> A prosecutor should not intentionally fail to make *timely* disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.
>
> (Emphasis supplied)

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[42] *Kyles*, 514 U.S. at 437.

[43] *Id.* at 437-38.

[44] *Id.* at 439 (citations omitted).

The ABA Model Rule of Professional Conduct 3.8(d) (1984) provides:

> The prosecutor in a criminal case shall . . . make *timely* disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense.
>
> (Emphasis supplied)

Thus, the two most pertinent ethical guidelines to address criminal discovery make clear that timely disclosure of favorable evidence by the prosecution is essential in a criminal case.

Codification of *Brady v. Maryland* will assist federal prosecutors and law enforcement officers in better understanding the disclosure responsibility, instill far greater confidence that this constitutional obligation is being uniformly satisfied and, above all, work to ensure that wrongful convictions and unlawful sentences do not occur. Because the prosecutor alone can know and weigh what is undisclosed,[45] he is faced with the serious and possibly conflicting responsibility of deciding what is exculpatory and, if so, whether it should be disclosed to the accused, and finally when to disclose this information. A rule of criminal procedure can only provide welcome guidance in carrying out a responsibility that ensures fair trials and sentencings.

II. FEDERAL DISCOVERY PRACTICE

A. Federal Rule of Criminal Procedure 16 Does Not Address, Let Alone Require, Disclosure of Favorable Information

Unlike the Federal Rules of Civil Procedure, which provide for wide-ranging discovery and disclosure in the form of depositions, disclosure statements, requests for production, inspections and requests for admissions, interrogatories and expert reports, the Federal Rules of Criminal Procedure afford the defendant extremely limited access to government information.

Federal Rule of Criminal Procedure 16 governs discovery in federal criminal cases.[46] It requires, upon a defendant's request, disclosure of statements made by the defendant within the government's possession, control or custody,[47] disclosure of the defendant's prior criminal record,[48] inspection and copying of documents and tangible objects intended to be used by the government at trial or material to the defendant's defense,[49] inspection of physical and

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[45] *Id.* at 438.

[46] Fed. R. Crim. P. 16 is reprinted in its entirety in Appendix A.

[47] Fed. R. Crim. P. 16 (a)(1)(A).

[48] *Id.* at 16 (a)(1)(B).

[49] *Id.* at 16 (a)(1)(C).

mental examinations and scientific tests,[50] and summaries of any expert testimony that the government intends to offer in its case-in-chief.[51] The rule affords the government reciprocal discovery upon its compliance with and request of the defendant.[52] Rule 16 also imposes a continuing duty to disclose if prior to or during a trial a party discovers additional evidence or material previously requested or ordered and subject to discovery or inspection under the rule.[53] Over its fifty-year evolution, Federal Rule of Criminal Procedure 16 has metamorphosed the spectacle of the criminal trial from a game of "blind man's bluff"[54] into a "serious inquiry aiming to distinguish between guilt and innocence."[55]

Although Rule 16 has gradually expanded the scope of discovery required in criminal cases,[56] it still does not address, let alone require, the government to timely disclose favorable information to the defendant that is material either to guilt or sentencing. This limited disclosure makes the defense of a federal criminal case especially difficult, considering the government's ability to control the flow of information to the defendant, attributable largely to the close relationships between the prosecutor and law enforcement, and the inability of the defense to compel disclosure.

In addition to disclosure under Rule 16, criminal defense lawyers can try to obtain Brady and Giglio material by filing a motion with the court. Most criminal defense lawyers file a *Brady-Giglio* motion as a matter of course in federal and state court proceedings. Some file a general request for exculpatory evidence while others tailor the discovery motion to the particulars of the case. Types of information not only favorable, but essential, to the defense in a criminal trial and at sentencing include:

- promises of immunity or other favorable treatment to government witnesses;[57]

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[50] *Id.* at 16 (a)(1)(D).

[51] *Id.* at 16(a)(1)(E).

[52] *Id.* at 16(b).

[53] *Id.* at 16(c).

[54] *See* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 Wash. U. L. Q. 1, 3 (1990) (citing Justice Douglas' opinion in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958), in which Justice Douglas noted that tools which result in broad discovery "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent").

[55] *See* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U. L. Q. 279 (1963) (quoting Williams, *Advance Notice of the Defense*, 1959 Crim. L. Rev. (Eng.) 548, 554 (1959)).

[56] See, e.g., the 1966 Amendment to the Rule (noting that "[t]he rule has been revised to expand the scope of pretrial discovery"), the 1974 Amendment ("Rule 16 is revised to give greater discovery to both the prosecution and the defense."), and the 1993 Amendment ("New subdivisions ... expand federal criminal discovery[.]")

[57] *See United States v. Butler*, 567 F.2d 885 (9th Cir. 1978) (conviction reversed where prosecution's key witness lied about the nature of his deal with the prosecution); *United States v. Pope*, 529 F.2d 112 (9th Cir. 1976) (conviction reversed where prosecution failed to disclose plea bargain with key witness in exchange for immunity while arguing to jury that witness had no motive to lie); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (prosecution concealed evidence that key witness was coerced into testifying against defendant and/or argued to the jury that no one had threatened the witness); *United States v. Gerard*, 491 F.2d 1300 (9th Cir. 1974) (convictions reversed where defendants were deprived of evidence reflecting promises of leniency).

- prior criminal records of government witnesses;[58]
- prior inconsistent statements of government witnesses regarding the defendant's alleged criminal conduct;[59]
- prior perjury or false testimony of government witnesses;
- monetary rewards or inducements to government witnesses;
- confessions to the crime in question by others;
- information reflecting bias or prejudice by government witnesses against the defendant;
- witness statements that others committed the crime in question;
- information about mental or physical impairments of government witnesses;[60]
- inconsistent or contradictory examinations or scientific tests;[61] and
- the failure of any percipient witnesses to make a positive identification of the defendant.

Brady-Giglio motions, however, often fail to unearth evidence which is critical to the defense. Federal prosecutors, largely keying on the word "exculpatory," have interpreted the *Brady* disclosure obligation in a variety of ways. A number of prosecutors have interpreted *Brady* narrowly and believe that a prosecutor's *Brady* obligation is limited to turning over information that someone other than the defendant has confessed to the crime at issue. Many prosecutors do not focus on the critical language of the *Brady* decision that requires disclosure of evidence that *tends to* exculpate or reduce one's penalty.[62] Others, knowing of favorable evidence, have tried to predict its effect on the outcome of the case in deciding whether to disclose it. Still others do not view *Giglio* or impeachment material as part of the *Brady*

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[58] *See Carriger v. Stewart*, 132 F.3d 463, 479-82 (9th Cir. 1997) (conviction reversed where prosecution failed to disclose witness's prior criminal history); *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) *cert denied*, 489 U.S. 1032 (1989) (same); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) (prosecutor's lack of knowledge of witness' criminal record was no excuse for *Brady* violation).

[59] *See United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994) (kidnapping conviction reversed where government failed to disclose key witness' letter which seriously undermined her credibility); *United States v. Herberman*, 583 F.2d 222 (5th Cir. 1975) (*Brady* violation found for failure to disclose grand jury testimony contradicting testimony of government witnesses).

[60] *See United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995) (new trial granted where government failed to reveal drug use and dealing by prisoner-witnesses during trial).

[61] *See United States v. Fairman*, 769 F.2d 386 (7th Cir. 1985) (prosecutor's ignorance of ballistics worksheet indicating that gun defendant was accused of firing was inoperable did not excuse failure to disclose); *United States v. Poole*, 379 F.2d 645 (7th Cir. 1966) (conviction reversed where government failed to disclose FBI report of victim's physical examination).

[62] 373 U.S. at 87.

exculpatory disclosure obligation. And yet others have separated the timing of the disclosure of exculpatory or guilt evidence from the disclosure of mitigating or punishment evidence.

The majority of this Committee's members practice in federal courts, and based on their experiences, believe that across the country federal prosecutors routinely defer *Brady* disclosures unless ordered by the trial court and often reply to both general and case-specific *Brady-Giglio* motions with boilerplate responses such as "none known," or "the government is aware of its obligations" - often producing little, if any, favorable information for months, in some cases not until trial is underway and in other cases not at all. Without a procedural rule containing a clear definition of *Brady* material, requiring prosecutors to consult with law enforcement officers, and mandating a firm compliance timetable, the duty to disclose favorable information has become blurred and at best of secondary importance to the explicit discovery obligations and procedures found in Rule 16.

It is anomalous that in civil cases, where generally all that is at stake is money, access to information is assured; however, in contrast, in criminal cases, where liberty is at issue, the defense is provided far less information. More significantly, in a civil case, violation of the discovery rules is punishable in extreme cases by dismissal. There is no comparable sanction in criminal cases. The amendments proposed here are consistent with the unique role of the prosecutor in ensuring that the accused receives a fair trial.

B. Most Local Rules Do Not Fully Address the Disclosure of Favorable Information

Most local rules that address *Brady-Giglio* disclosure obligations neither define the nature and/or scope of favorable information, nor require consultation with law enforcement officers, nor provide clear pre-trial or pre-plea deadlines for disclosure.[63] The most notable exception is the District of Massachusetts[64] which in 1998 promulgated the most extensive local

[63] Some local criminal rules require attorneys for the government and defense to confer with respect to a schedule for disclosure and provide that, in the absence of a stipulation, the court may intervene. *See, e.g.*, N.D. Ca. Criminal Local Rule 16-1(a). Many are silent as to *Brady* obligations (*see, e.g.*, E.D. Tn. L.R. 16.2 (Pre-trial Conferences in Criminal Cases); S.D. Tx. Criminal Rule 12 (Criminal Pretrial Motion Practice); S.D. Ca. Criminal Rule 16.1 (Pleadings and Motions Before Trial, Defenses and Objections); and M.D. Ala. L. Cr. R. IV (Arraignment and Preparation for Trial)), or address Federal Rule Criminal Procedure 16 obligations only. *See, e.g.*, E.D. Pa. Criminal Rule 16.1 (Pretrial Discovery and Inspection); D.Wy. L. Cr. R. 16.1. Still others encourage parties to meet and confer on discovery topics beyond Fed. R. Crim. P. 16 but not *Brady* material. *See, e.g.*, N.D. Ill. L. Cr. R. 16.1 (Pretrial Discovery and Inspection). Finally, some federal courts have no local criminal rules. *See, e.g.*, D.S.D. Local Rules of Practice.

[64] The Southern District of Florida has also promulgated extensive local criminal discovery rules which addresses *Brady* information. *See* S.D. Fla. General Rule 88.10 (requiring the government to disclose, within fourteen days of arraignment, not only the information required under Federal Rule Criminal Procedure 16, but also "all information ... favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland* ... and *United States v. Agurs*," as well as "the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of *Giglio v. United States* . . . and *Napue v. Illinois*").

criminal discovery rules in the nation. Massachusetts Local Rule 116.2[65] was enacted in response to federal prosecutors' indifference to pre-trial discovery obligations.

United States v. Mannarino,[66] frequently credited with precipitating the enactment of Massachusetts's Local Rule 116.2, decried "a pattern of sustained and obdurate indifference to, and unpoliced subdelegation of, disclosure responsibilities by the United States Attorney's Office."[67] *Mannarino* addressed a police officer's destruction of a star informant's self-authored narrative of his criminal history, before it could be produced to defendants, and in violation of the Jencks Act.[68] Calling the case "yet another example of concerted indolence in pursuing disclosure by the United States Attorney's Office and a willful blindness to the failure of its agents who had disclosure duties to fulfill them,"[69] Judge Woodlock cited a decade's worth of case law detailing "lame," "sloppy," "negligen[t]," "illusory," and "insensitiv[e]" criminal discovery practices by the U.S. Attorney's Office in Boston.[70] Declining to enter a judgment of acquittal, the court ordered the deposition of the government's key witness to be taken by defense counsel, to be followed by a new trial.[71] *Mannarino* highlights the practice of some prosecutors of ignoring the constitutional obligation to disclose favorable information material to guilt and punishment in a timely fashion.[72]

The Massachusetts local criminal rules establish a series of "automatic" discovery obligations imposed upon prosecutors and defendants alike.[73] The rules also require the government to disclose, under a mandated timeframe, any information that could "cast doubt" on the defendant's guilt, the admissibility or credibility of any evidence, or the degree of the defendant's culpability under the Guidelines.[74] This information expressly includes, *inter alia*, inducements rendered to government witnesses to testify, criminal records of and cases pending against such witnesses, and the failure of any such witnesses to positively identify the defendant.[75] The rules further require the government to inform "all federal, state, and local law enforcement agencies formally participating in the criminal investigation" of the local rules'

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[65] Massachusetts Local Rule 116.2 is reprinted in its entirety in Appendix B.

[66] 850 F. Supp. 57, 59 (D. Mass. 1994).

[67] *Id.* at 59. *See also id.* at 71 (stating that repeated prosecutorial discovery violations are "of sufficient concern that the District of Massachusetts has determined to review its present local rules governing criminal discovery with a view toward increased prescriptiveness in discovery responsibilities").

[68] *Id.* at 59. *See also* 18 U.S.C. § 3500 (Jencks Act).

[69] 850 F. Supp. at 71.

[70] *Id.* at 71-72 (citations omitted). The court went on to call the government's current discovery practices "unwilling[]" and "rescusan[t]," among other adjectives. *Id.* at 72.

[71] *Id.* at 73.

[72] *See, e.g.*, Moushey, *Hiding The Facts Readout; Discovery Violations Have Made Evidence-Gathering A Shell Game*, Pittsburgh Post-Gazette, November 24, 1998, at A-1; Goldberg, *Your Clients'* Brady-Giglio *Rights Are Not Protected*, 22 Champion 41 (September/October 1998).

[73] *See* D. Mass. L.R. 116.1-117.1, *infra*, Appendix B. The rules require the government to provide not only all materials required by Fed. R. Crim. P. 16, but also the fruits yielded from any search warrants, electronic surveillance, and investigative identification procedures, as well as the names of all unindicted co-conspirators. *See id.* at 116.1(C).

[74] *Id.* at 116.2.

[75] *Id.*

discovery obligations, to obtain from such law enforcement agencies any information they have which would be subject to disclosure, and to require participating law enforcement agencies to preserve their "notes" and other relevant documents.[76] Finally, Massachusetts Local Rule 1.3 provides that failure to comply with any obligation or direction set forth by the rules of the district may result in dismissal.[77]

III. FEDERAL PLEA PRACTICE

A. Federal Rule of Criminal Procedure 11(e) Does Not Address Let Alone Require Disclosure of Favorable Information

The vast majority of federal criminal cases are resolved by pleas of guilty under Fed. R. Crim. P. 11. Plea agreements are governed by the law of contracts.[78] Most pleas are negotiated and involve bargained for consideration. The parties - the United States and the defendant(s) - may bargain for particular charges, sentences, sentencing ranges or the application of USSG guidelines, policies, factors or provisions.

Federal Rule of Criminal Procedure 11(e) governs the conduct of the government and the defendant during plea negotiations. Rule 11[79] establishes guidelines to ensure that a guilty plea is made knowingly and voluntarily.[80] Before accepting a plea of guilty, a court must address the defendant personally in open court and inform the defendant that he has a right to plead not guilty, the right to be tried by a jury and at that trial he has the right to assistance of counsel, the right to confront and cross examine adverse witnesses and the right against compelled self-incrimination.[81] A waiver of an important constitutional or statutory right must be known and voluntary to be valid,[82] but Rule 11 does not require the court to specify each and every constitutional right that the defendant waives by pleading guilty.[83]

A defendant who acknowledges his plea is knowingly and voluntarily entered at his plea hearing must overcome a strong presumption of voluntariness when he subsequently seeks to challenge that plea.[84] A plea entered into without the benefit of *Brady* information is inherently suspect in this regard. Without *Brady* information, the defendant and counsel may not

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[76] *Id.* at 116.8, 116.9. Massachusetts's local rules promote enforcement by requiring the magistrate and presiding judges to hold at least three pre-trial conferences designed to effect compliance with the local rules.

[77] D. Mass. L.R. 1.3.

[78] *See Santobello v. New York*, 404 U.S. 257, 262 (1971).

[79] Fed. R. Crim. P. 11(e) is reprinted in its entirety as Appendix C.

[80] Fed. R. Crim. P. 11(c)-(d).

[81] Fed. R. Crim. P. 11(c)(3).

[82] *See United States v. Mezzanatto*, 513 U.S. 196 (1995).

[83] Fed. R. Crim. P. (c)(4). *See, e.g., Brady v. United States*, 357 U.S. 742, 748 (1970) (waiver of the constitutional rights to a trial and to remain silent); *McMann* v. *Richardson*, 397 U.S. 759, 766 (1970) (waiver of the right to contest the admissibility of evidence the government may have offered against the defendant).

[84] *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

be able to make informed decisions about whether and when to plead guilty. The common argument that a defendant knows whether he is guilty and whether there is mitigating evidence is simply not true in many cases.[85] A defendant may not know all the elements of an offense or understand that certain evidence known only to the prosecutor may negate an essential element. Further, a defendant may not know of facts that establish a legal defense and without disclosure a defendant's counsel may not become aware of facts that establish a legal defense.[86] A defendant with limited mental faculties or a significantly reduced mental capacity may not be able to fully communicate with counsel or appreciate the importance of facts critical to the defendant's guilt or innocence.

The federal circuits are split on whether *Brady* applies to plea negotiations. The Fifth[87] and Eighth[88] circuits have held that defendants waive their rights to *Brady* material in pleading. However, the Second,[89] Sixth,[90] Ninth[91] and Tenth[92] circuits have held that *Brady* does apply to guilty pleas. The Ninth Circuit in *Sanchez*, taking the strongest position, has concluded that a plea "*cannot* be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution."[93]

B. Federal Plea Agreement Policies Which Require the Defendant to Waive the Right to *Brady* Material Undermine the Due Process Goal of Ensuring a Fair Sentencing Process

A closely related question is whether a defendant can waive his right to receive *Brady* information. Some United States Attorneys Offices, notably the Southern and Northern District of California, have expressly incorporated into plea agreements a *Brady* waiver. A representative sample states:

> The defendant understands that discovery may have been completed in this case, and that there may be additional discovery to which he would have access if he elected to proceed to trial. The defendants agree to waive his right to receive additional

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[85] Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery Waivers"*, 51 Stan. L. Rev. 567 (1999).

[86] *Id.*

[87] *Matthew v. Johnson*, 201 F.2d 363 (5th Cir. 2000).

[88] *Smith v. United States*, 876 F.2d 655 (8th Cir. 1989).

[89] *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988).

[90] *Campbell v. Marshall*, 769 F.2d 313 (6th Cir. 1985), *cert. denied* 475 U.S. 1058 (1986).

[91] *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995).

[92] *United States v. Wright*, 43 F.3d 491 (10th Cir. 1994).

[93] 50 F.3d at 1453 (emphasis added).

> discovery which may include, among other things, evidence tending to impeach the credibility of potential witnesses.[94]

In *United States v. Ruiz* the Supreme Court held that the Constitution does not require the government to disclose material impeachment evidence to a defendant prior to entering a plea agreement.[95] In *Ruiz*, the defendant rejected a plea offer from the U.S. Attorney's Office in the Southern District of California which required her to waive her rights to *Brady* material in exchange for a downward departure at sentencing.[96] The trial court refused to grant the departure following her subsequent guilty plea made without a plea agreement.[97]

The Ninth Circuit in *Ruiz* had found that plea agreements and any waiver of *Brady* rights contained therein "cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution."[98] In reversing the Ninth Circuit, the Supreme Court focused on impeachment evidence rather than exculpatory or mitigating evidence. It pointed out that in *Ruiz's* proposed plea agreement, the government had agreed to provide "any information establishing the factual innocence of the defendant."[99]

The difficulty with a complete *Brady* waiver is that a defendant cannot knowingly waive something that has not been made known to him and that may exclusively be in the possession of the government. The Supreme Court has made clear that there must be an "intentional relinquishment or abandonment of a known right or privilege."[100] When a plea is made without the knowledge of all its direct consequences, it may not stand.[101]

In an analogous situation to the waiver of *Brady* material, many federal prosecutors have insisted that defendants also waive the right to appeal a sentence as part of a plea agreement even though a sentence has yet to be imposed. In this context, a District of Columbia district court held that "a defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed and about which the defendant had no knowledge as to what will occur at the time of sentencing."[102]

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[94] Banoun, *Preface: The Year in Review, reprinted in* White Collar Crime 2000, at x (ABA 2000) (quoting San Francisco U.S. Attorney's Office plea agreement provision).

[95] 122 S. Ct. 2450 (June 24, 2002).

[96] 241 F.3d 1157, 1160-61 (9th Cir. 2001).

[97] *Id.* at 1161.

[98] *Id.* at 1164 (quoting *Sanchez*, 50 F.3d at 1453).

[99] *Id.* at 2451-2452.

[100] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

[101] *Brady v. United States*, 397 U.S. 742 (1970).

[102] *United States v. Raynor*, 989 F. Supp. 43 (D.D.C. 1998). *But see United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990) (permitting waiver of sentence appeals).

In sum, the bargaining leverage of the United States in plea negotiations is enormous. The government drafts the plea agreement, usually dictates the factual basis for the plea and often pronounces *de facto* office plea policies, e.g., that the defendant must waive his right to all *Brady* material or his right to appeal a sentence. There is no compelling reason to ignore or make a defendant waive his constitutional right to information favorable to guilt or sentencing. Indeed, any policy that discourages disclosure of exculpatory material may well encourage prosecutors to elicit guilty pleas improperly.[103]

IV. *BRADY V. MARYLAND* AND FEDERAL SENTENCING

Even though *Brady v. Maryland* explicitly requires disclosure of favorable information relevant to punishment, prosecutors frequently focus only on favorable information relevant to the guilt or trial phase and view a defendant's decision to plead as extinguishing the right to favorable evidence.[104] Ironically, *Brady* involved a situation in which favorable evidence as to punishment and not guilt was at issue. Disclosure of favorable evidence as to punishment is arguably even more critical today as a result of the United States Sentencing Guidelines.

A comprehensive review of the United States Sentencing Guidelines' structure and methodology is beyond the purpose and scope of this report. However, there is no doubt that federal prosecutors wield enormous influence in determining what sentence a convicted defendant receives under the Guidelines. In particular, government attorneys at the outset calculate the offense level which is designed to "measure the seriousness of the crime."[105] They routinely formulate the specific offense characteristics such as an offense involving sophisticated means[106] or a loss exceeding certain dollar levels[107] that can significantly increase the defendant's period of incarceration. They frequently argue that for offenses committed by more than one participant, the court should consider the defendant's aggravating[108] or mitigating[109] role in the offense. In each of these instances, government attorneys may have access to, and in some cases the only access to, favorable information that diminishes the defendant's culpability or lowers the offense level under the Guidelines.

For example, witnesses may differ in describing the role of a defendant as a manager, supervisor, organizer or leader[110] - designations that can greatly affect the ultimate sentence. Similarly, government witnesses may dispute whether the loss claimed by the United

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[103] *Sanchez*, 50 F.3d at 1453.

[104] Joy & McMunigal, *Disclosing Exculpatory Material in Plea Negotiations*, 15 FALL Crim. Just. 41 (2001).

[105] Bowman, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutor Indiscipline*, 29 Stetson L. Rev. 79 (1999).

[106] U.S.S.G. § 3B1.1(b)(8)(C).

[107] U.S.S.G. § 2B1.1(b)(1).

[108] U.S.S.G. § 3B1.1.

[109] U.S.S.G. § 3B1.2.

[110] U.S.S.G. § 3B1.1.

States was "reasonably foreseeable pecuniary harm,"[111] and the final calculation of the actual losses in fraud cases similarly affects a sentence.[112] Because witnesses who have provided exculpatory evidence to the government are less likely to make themselves available to the defendant or his counsel, there is a serious risk that absent disclosure by the prosecution, the defense may never learn of material exculpatory evidence that would mitigate the offense or reduce the punishment.

Timely disclosure of favorable information can not only diminish the degree of the defendant's culpability or Offense Level under the Guidelines, its receipt or the government's certificate in writing that none exists, can lead to an earlier decision to plead guilty whereby he receives credit for that plea by the court.[113] Thus, when the government denies a defendant *Brady* information at an early stage of the process, it may well deny him the opportunity to prove to the government that a lesser sentence is fair based on evidence in the government's possession and that he is also then entitled to receive significant credit for acceptance of responsibility in timely pleading to the offense.

V. PROPOSED AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16 AND OFFICIAL COMMENTARY

A. Proposed Amendment to Rule 16

Fed. R. Crim. P. 16(f)

(f) Information Favorable to the Defendant as to Guilt or Punishment.

(1) Within fourteen days of a defendant's request, attorney(s) for the government shall disclose in writing all information favorable to the defendant which is known to the attorney(s) for the government or to any government agent(s), law enforcement officers or others who have acted as investigators from any federal, state or local agencies who have participated in either the investigation or prosecution of the events underlying the crimes charged. Information favorable to the defendant is all information in any form, whether or not admissible, that tends to: a) exculpate the defendant; b) adversely impact the credibility of government witnesses or evidence; c) mitigate the offense; or d) mitigate punishment.

(2) The written disclosure shall certify that: a) the government attorney has exercised due diligence in locating all information favorable to the defendant within the files or knowledge of the government; b) the government has disclosed and provided to the defendant all such information; and c) the government acknowledges its continuing obligation until final judgment is entered: i) to disclose such information; and ii) to furnish any additional information favorable to the defendant immediately upon such information becoming known.

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[111] U.S.S.G. § 3B1.1, Commentary 2.

[112] U.S.S.G. §2B1.1(B)(1).

[113] See U.S.S.G. § 3E1.1 (Acceptance of Responsibility).

Official Commentary

This amendment is intended to codify and clarify the prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and *Kyles v. Whitley*, 514 U.S. 419 (1995). These Supreme Court precedents and others require the prosecutor to provide to the defense not only directly exculpatory evidence (*Brady*) but also evidence impeaching the credibility of the Government's witnesses (*Giglio*); not only evidence specifically requested by the defense (*Brady*) but also that which is not requested (*Agurs*); not only evidence relevant to guilt or innocence (*Giglio*) but also evidence relevant to sentencing (*Brady*); and not only evidence known to the prosecutor (*United States v. Bagley*, 473 U.S. 667 (1985)) but also evidence known to agents of law enforcement (*Kyles*). Proposed Rule 16(f) creates a necessary analytical and procedural framework for the prosecution to carry out its constitutional responsibilities.

Examples of favorable information include but are not limited to: promises of immunity (*see, e.g., United States v. Butler*, 567 F.2d 885 (9th Cir. 1978)); prior criminal records (*see, e.g., United States v. Auten*, 632 F.2d 478) (5th Cir. 1980) and *United States v. Owens*, 933 F. Supp. 76, 87-88 (D. Mass. 1996)); prior inconsistent statements of government witnesses (*see, e.g., United States v. Payne*, 63 F.3d 1200, 1210 (2d Cir. 1995)); *United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994); *United States v. Herberman*, 583 F.2d 222 (5th Cir. 1975)); information about mental or physical impairment of government witnesses (*see, e.g., United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995)); inconsistent or contradictory scientific tests (*see, e.g., United States v. Fairman*, 769 F.2d 386 (7th Cir. 1985)); pending charges against witnesses (*see, e.g., United States v. Bowie*, 198 F.3d 905, 909 (D.C. Cir. 1999)); monetary inducements (*see, e.g., United States v. Mejia*, 82 F. 3d 1032, 1036 (11th Cir. 1996); *United States v. Fenech*, 943 F. Supp. 480, 486-87 (E.D. Pa. 1996)); bias (*see, e.g., United States v. Schledwitz*, 169 F.3d 1003 (6th Cir. 1999)); proffers of witnesses and documents relating to negotiation process with the government (*see, e.g., United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1203 (C.D. Ca. 1999)); and the government's failure to institute civil proceedings against key witnesses (*see, e.g., United States v. Shaffer*, 789 F.2d 682, 690-91 (9th Cir. 1986)).

Despite the fact that *Brady v. Maryland* recognized the prosecutor's duty to disclose evidence favorable to the defense in 1963, the decades since then have seen repeated instances of prosecutors overlooking or ignoring this obligation. *See, e.g., Boyette v. Lefevre*, 246 F.3d 76 (2d Cir. 2001) (granting habeas petition after state failed to produce evidence impeaching the victim's identification, statements of other eyewitnesses, and reports regarding other possible suspects); *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991) (overturning appellant's cocaine possession conviction because prior criminal record of prosecution witness was not turned over to the defense); *United States v. Pelullo*, 105 F.3d 117 (3d Cir. 1997) (reversing denial of collateral relief from wire fraud and RICO convictions upon showing that the government had withheld evidence of prior inconsistent statements by a key witness, there were changes to FBI incident reports, and contradictions existed regarding the appellant's attendance at a

particular meeting); *Spicer v. Roxbury*, 194 F.3d 547 (4th Cir. 1999) (upholding petition for writ of habeas corpus because state failed to turn over evidence of conflicting statements by main prosecution witness); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (prosecution concealment of coerced testimony of key witness); *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (granting petition for writ of habeas corpus when petitioner showed that the prosecution failed to turn over a report indicating that a key witness could not positively identify the petitioner as the shooter in a murder case); *Carriger v. Stewart*, 132 F.3d 463, 479-482 (9th Cir. 1997) (reversing conviction where prosecution failed to disclose witness's prior criminal history); *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992) (overturning drug trafficking convictions for government's *Brady* violation in not turning over a law enforcement official's report that raised serious doubts regarding the truthfulness of the prosecution's key witness); *United States v. Pope*, 529 F.2d 112 (9th Cir. 1976) (prosecution's failure to disclose immunity to key witness); and *United States v. Scheer*, 168 F.3d 445 (11th Cir. 1999) (overturning conviction for misuse of banking funds because of the failure to disclose prosecutorial intimidation of witnesses).

The proposed Rule 16(f) requires the prosecutor to turn over all information favorable to the defendant within 14 days of the date the defendant requests it. Timely disclosure of favorable information to the defense is essential to meaningful compliance with *Brady*. *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d Ed. 1993) and ABA Model Rule of Professional Conduct 3.8(d) (1984). It is anticipated that, like many other discovery deadlines, this one can be extended by agreement of the parties, and if necessary, the government may apply to the court for a protective order, under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time. The proposed rule requires a request from the defense in order to trigger the 14-day time frame, but the rule is not intended to obviate the prosecution's obligation to provide information favorable to the defense even in the absence of a defense request, *United States v. Agurs*, *supra*.

The drafters anticipate that before or at the time of guilty pleas, government attorneys will furnish to the defense favorable information that mitigates the offense or punishment. As a result of the promulgation of the United States Sentencing Guidelines and the increased importance of even minor facts that can affect punishment by diminishing the degree of a defendant's culpability or Offense Level, the drafters believe that timely production of *Brady* information in the sentencing context is far more significant and critical today than ever before.

Proposed Rule 16(f) requires government attorney(s) to turn over "all information, in any form, whether or not admissible . . ." The rule thus contemplates disclosure of not only written documents but also of tape recordings, computer data, electronic communications, and oral information acquired through interviews or any other means. The proposed rule does not burden the government with the responsibility of assessing whether information is likely admissible.

The proposed Rule 16(f) contains no requirement that the information be "material" to the defense. The drafters believe that the Rule's definition of "Information favorable to the defendant" is sufficiently clear to guide the government attorneys at the pre-trial stage. A materiality standard is only appropriate in the context of an appellate review since determinations of materiality are best made in light of all the evidence addressed at trial. A materiality analysis cannot realistically be applied by a trial court facing a pre-trial discovery request. *See, e.g., United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *United States v. Sudikoff*, 39 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999). In cases where a failure to disclose favorable information is uncovered after the trial or sentencing, of course, the reviewing court will presumably employ concepts of materiality in determining the degree of prejudice, if any, suffered by the defense as a result of the government's failure.

Proposed Rule 16(f)'s requirement of a written disclosure and certification by the government attorney is, the drafters believe, critical to its operation. It is anticipated that government attorneys will describe the disclosures being made in sufficient detail to permit the defense to investigate the information. Likewise, the government's certification should specifically confirm that the attorney signing it has exercised due diligence in locating and attempting to locate all information favorable to the defendant within the files or knowledge of the government. There is due diligence precedent in three sections of Rule 16: Rule 16(a)(1)(A), Statement of Defendant: Rule 16(a)(1)(B), Defendant's Prior Record, and Rule 16(a)(1)(D), Reports of Examinations and Tests.

It may be prudent for the government to maintain a record of the manner in which this due diligence inquiry was conducted so as to facilitate its response in any post-trial proceedings, but the Rule does not require this nor does it require the government to turn any such record over to the defense at the time of the certification. The drafters anticipate that in the event any government agency refuses to respond to a request from the prosecutor for information favorable to the defendant, the prosecutor's certification will identify the refusing agency and official so as to permit the defense to investigate and, if necessary, seek redress from the court.

The proposed rule contains no separate provision for sanctions for intentional violations or inadvertent noncompliance. The drafters anticipate that the full range of remedial and punitive sanctions, ranging from a trial or sentencing continuance to dismissal of the indictment, is already available to the court under Rule 16(d)(2) as is the Court's general supervisory power to craft a remedy or punishment appropriate to the circumstances. Few courts have dismissed criminal charges as a result of *Brady* violations. *See, e.g., United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998). The drafters believe that the far more common remedy of a new trial for *Brady* violations has in many instances proven impractical and ineffective for two reasons. First, many defendants are simply unable to afford a retrial while the cost to the government of a retrial is under most circumstances inconsequential. Second, the remedy of a new trial does not adequately discourage prosecutors from committing improper, incompetent or prejudicial discovery violations.

* * *

1. **Discussion**

a. **Definition of Favorable Evidence**

Proposed Language:

Information favorable to the defendant is all information in any form, whether or not admissible, that tends to: 1) exculpate the defendant; 2) adversely impact the credibility of government witnesses or evidence; 3) mitigate the offense; or 4) mitigate punishment.

Without a clear definition of what constitutes *Brady* material, prosecutors have exercised a hodgepodge of judgments about the nature and extent of favorable information to be disclosed to defendants.[114] A clear definition of favorable information will help eliminate disparate interpretations of the *Brady* obligation by both prosecutors and defense counsel and give prosecutors clear guidance, thereby promoting equal treatment of similarly situated defendants under the law.

The definition clarifies the nature and scope of favorable information by providing that favorable information includes evidence or information, whether or not admissible, that tends to: 1) exculpate the defendant; 2) adversely impact the credibility of government witnesses or evidence; 3) mitigate the offense; or 4) mitigate the punishment. The first category addresses classic *Brady* or exculpatory evidence. The second category makes clear that *Giglio* or impeachment material must also be produced. Categories three and four are intended to cover the disclosure of evidence favorable to punishment or sentencing. This definition makes clear that the admissibility and nature or form of the information, i.e., written, oral or electronic, is irrelevant in the determination of both its exculpatory nature and disclosability.

There may be instances where fairness requires that the defense make specific *Brady* requests for information from the government. Such requests must be sufficiently clear and directed to give reasonable notice about what is sought and why the information may be material to the case.[115] Absent specific defense requests the government may, notwithstanding the proposed definition, be able to fully respond to *Brady* requests and provide responsive material.

[114] Section II.A., *infra*.

[115] *United States v. McVeigh*, 954 F. Supp. 1441, 1451 (D. Colo. 1997).

b. Timing of Disclosure

Proposed Language:

Within fourteen days of a defendant's request, attorney(s) for the government shall disclose in writing and provide all information favorable to the defendant.

Absent local rules with a *Brady* disclosure timetable, there is no uniformity as to when federal defendants receive exculpatory information as to guilty or punishment. The Judicial Members of the District of Massachusetts Committee that recommended the local criminal rule changes observed that "cases too often go to trial without legally required discovery having been provided."[116] Almost invariably *Brady* material is disclosed well after the explicit Rule 16 obligations have been satisfied by the government. A major criticism of the current federal discovery practice is that prosecutors too often disclose favorable information at a stage well after it can benefit the defense. Unfortunately, the case law has left the prosecution and defense with little precise timing guidance.

In *United States v. Coppa*,[117] the Second Circuit recently addressed whether as a general rule due process of law requires that the government, disclose all exculpatory and impeachment material immediately upon demand by a defendant. In reversing a district judge's order to immediately supply this material to the defendants, the Second Circuit noted that as long as a defendant possesses *Brady* evidence in time for its effective use at trial or at a plea proceeding, the government has not deprived the defendant of due process of law.[118] *Coppa* granted the government's mandamus petition and remanded the cause to "afford the District Court an opportunity to determine what disclosure order, if any, it deems appropriate as a matter of case management."[119]

Because disclosure of favorable information affects a defendant's plea decisions, trial strategy, and sentencing, it is critical to the fair administration of justice that this discovery take place as early as practicable in the criminal process. There is no discernible benefit to fair-minded prosecutors in delaying the disclosure of constitutionally-mandated favorable information. To the extent the government has favorable evidence and is required to timely disclose it, the disclosure may affect the government's charging decision and properly lessen its sentencing position. This in turn may cause the defendant and counsel to compromise, to plead and to receive the benefit of acceptance of responsibility under the Guidelines.[120] Thus, prompt disclosure may well foster an earlier exchange of favorable information and guilty plea decisions. Furthermore, a criminal justice system with a *Brady* definition, a due diligence

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[116] *Report of the Judicial Members of the Committee Established to Review and Recommend Revisions of the Local Rules of the U.S. District Court in the District of Massachusetts Concerning Criminal Cases*, at 8 (October 28, 1998).

[117] 267 F.3d 132 (2d Cir. 2001).

[118] *Id.* at 144.

[119] *Id.* at 146.

[120] U.S.S.G. § 3E1.1 (acceptance of responsibility).

requirement, a disclosure timetable and clear sanctions may promote a system that parties have confidence in both the rule's compliance and effective sanctions. Under that system defendants and counsel, who timely have received the required disclosure or have been assured in writing that the United States possesses no exculpatory information, are more likely to reach plea decisions earlier and lessen the congestion of the trial dockets.

While timely disclosure of favorable information is mandated and essential to the defense in all cases, it is of particular importance in complex federal prosecutions where defendants and their counsel can be forced to trial with comparatively inadequate time to prepare. Federal authorities often investigate complex cases for years. The Speedy Trial Act of 1974[121] requires that a trial must begin within seventy days of an indictment or initial appearance. While defense requests for continuances are frequently granted to meet "the ends of justice,"[122] pre-trial defense preparation time is often limited. The United States will in most cases still have had at least twice as long a time to prepare for trial as the defendant. The government usually also has far more investigative resources. Fourteen days following a defense request is not an unreasonable period of time for the government to disclose in writing favorable evidence as to guilt or punishment. By the time of indictment, the government has concluded most of its investigation and is in a position to disclose any information known to be exculpatory or mitigating for the defendant. It will be thereafter under a continuing obligation to disclose additional evidence or material subject to discovery under the rule.[123]

c. Due Diligence

Proposed Language:

> The written disclosure shall certify that: a) the government attorney has exercised due diligence in locating all information favorable to the defendant; b) the government has disclosed and provided to the defendant all such information; and c) the government acknowledges its continuing obligation until final judgment is entered: i) to disclose such information; and ii) to furnish any additional information favorable to the defendant immediately upon such information becoming known.

This due diligence requirement ensures that government attorneys will fully consult with law enforcement agents by the time of indictment about potential favorable information and that the former will address not only federal agents, but law enforcement officers or joint federal-state local investigators about the nature and scope of the information required to be turned over. Several decisions have upheld the duty of the prosecution to consult

[121] 18 U.S.C. §§ 3151-3174 (2000).

[122] *Id.* § 3151(h)(8)(A).

[123] Fed. R. Crim. P. 16(c).

with the appropriate law enforcement personnel or agency[124] as simply determined that the prosecution includes law enforcement officers[125]

The due diligence language requires that government attorneys exercise due diligence in locating all favorable information. The language is intended to avoid *Kyles*-type situations where favorable evidence is known to law enforcement officers, but not to the prosecutor. The due diligence language finds precedent in three sections of Rule 16: Rule 16(a)(1)(A), Statement of Defendant; Rule 16(a)(1)(B), Defendant's Prior Record; and Rule 16(a)(1)(D), Reports of Examinations and Tests.

The certification requirement ensures a clear record of what was disclosed and not disclosed and avoids unnecessary post-trial and post-sentencing litigation about what may have been orally communicated. As important, this requirement conveys to the government attorney the importance of accuracy, consultation and prompt disclosure. This requirement too has precedent in Rule 16(e) Expert Witnesses which requires both parties to provide a written summary of testimony they intend to use.

Finally, the due diligence provision does not mandate an "open file" by the government, as favored by some commentators.[126] Open file cases do not cure *Brady-Giglio* problems,[127] and in particular, do not compel prosecutors to consult with law enforcement agents about the nature or existence of information favorable to the accused[128] or to disclose in writing favorable evidence that has not been memorialized. The provision does not impose upon the court the burden of reviewing government files for favorable information, as recommended by other legal commentators.[129] While such a review might be ideal, courts have neither the time nor the resources for such reviews, and they cannot be expected at the pre-trial stage to be familiar enough with the case or likely trial issues to appreciate which information is favorable.[130]

d. Sanctions

In addressing failures to comply with discovery requests, Fed. R. Crim. P. 16 (d)(2) provides that the court may order a party to permit the discovery or inspection, grant a

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[124] *See, e.g., Kyles*, 527 U.S. at 266; *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995).

[125] *United States v. Boyd*, 833 F. Supp. 1277, 1357 (N.D. Ill. 1993), *aff'd* 55 F.3d 239 (7th Cir. 1995); *see also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

[126] *See* Bass, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 113 (1972).

[127] *See, e.g., United States v. Hsia*, 24 F. Supp. 2d 14, 29-30 (D.C. Cir. 1998) (stating that "open file discovery does not relieve the government of its *Brady* obligations by claiming [the defendant] had access to 600,000 documents and should have been able to find the exculpatory information in the haystack").

[128] *See Strickler*, 527 U.S. 263.

[129] *See, e.g.*, Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 Fordham L. Rev. 391 (Dec. 1984).

[130] *McVeigh*, 954 F. Supp at 1451.

continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. Few courts have dismissed indictments as a remedy for the government's failure to disclose exculpatory information.[131] At present prosecutional misconduct must not only be flagrant, but must prejudice the defendant such that he does not receive a fair trial, or be intended to abort the trial to result in a dismissal.[132] Some circuits do not even permit dismissal of an indictment for a *Brady* violation.[133]. The less drastic and far more common remedy for a *Brady* violation is the granting of a new trial.[134] This remedy has been impractical and ineffective for two reasons. First, many defendants are simply unable to afford a retrial while the cost to the government is under most circumstances inconsequential. Second, a new trial does not adequately discourage prosecutors from committing improper, incompetent or prejudicial discovery violations.[135] For these reasons, the Official Commentary to Rule 16(f) urges courts to consider dismissal of an indictment for failure to comply with Rule 16 upon a showing of substantial prejudice to the defendant or intentional misconduct by the government.

e. Regulation of Discovery.

Rule 16(d) will continue to provide that a party may under a sufficient showing demonstrate that particular discovery or inspection should be denied, restricted or deferred. The government may still seek a protective or modifying order if it can establish that disclosure of exculpatory information within the time contemplated by the amendment will create an unacceptable risk of facilitating obstruction of justice or of discouraging the testimony of witnesses.

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[131] *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998). See generally, *United States v. Carter*, 1 Fed. Appx. 716, 2001 WL 32068 (9th Cir. Jan. 12, 2001) (unpublished); *United States v. Manthei*, 979 F.2d 124, 126-27 (8th Cir. 1992); *United States v. Osorio*, 929 F.2d 753, 763 (1st Cir. 1991); *United States v. Campagnuolo*, 592 F.2d 852, 865 (5th Cir. 1979), discussing the requirements for a defendant to obtain a dismissal of the indictment for a *Brady* violation. *Cf. Demjanjuk v. Petrovsky*, 10 F.3d 338, 356 (6th Cir. 1993) (vacating a denaturalization and extradition order because the government failed to disclose *Brady* information).

[132] *United States v. Vozzella*, 124 F.3d 389 (2d Cir. 1997); *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993); *United States v. McLaughlin*, 89 F. Supp. 2d 617 (E.D. Pa. 2000) (failure to disclose witness' exculpatory grand jury testimony necessitated new trial); *United States v. Patrick*, 985 F. Supp. 543 (E.D. Pa. 1997).

[133] *See, e.g., United States v. Davis*, 578 F.2d 277, 279-80 (10th Cir. 1978) ("[A] violation of due process under *Brady*, does not entitle a defendant to an acquittal, but only to a new trial in which the convicted defendant has access to the wrongfully withheld evidence.").

[134] *See United States v. Blueford*, No. 00-10210, 2002 WL 193023 (9th Cir. Feb. 8, 2002); *United States v. Service Deli, Inc.*, 151 F.3d 938 (9th Cir. 1998); *United States v. Arnold*, 117 F. 3d 1308 (11th Cir. 1997); *United States v. Lloyd*, 71 F.3d 408 (D.C. Cir. 1995); *United States v. Peterson*, 116 F. Supp. 2d 366 (N.D.N.Y. 2000); *United States v. McLaughlin*, 89 F. Supp. 2d (E.D. Pa. 2000).

[135] *United States v. Peveto*, 881 F.2d 844 (10th Cir. 1989) (pattern of United States attorneys not providing exculpatory evidence until very late only warranted two week continuance).

B. Proposed Amendment to Rule 11

Fed. R. Crim. P. 11(e)(7)

(7) Disclosure of Favorable Evidence

The attorney for the government shall disclose in writing to the defendant all exculpatory and mitigating information as provided in Rule 16(f) fourteen days before the defendant enters a plea of guilty or nolo contendere to a charged offense.

Official Commentary

This amendment is intended to ensure that a party intent on pleading guilty timely receives favorable information. The emphasis on *Brady* material by the government is too often focused on the guilt aspect rather than the sentencing impact of mitigating evidence. Since over ninety percent of all federal criminal cases are resolved by plea dispositions, it is essential that prosecutors not only provide information that can significantly affect punishment but also that they do so in time to make the information meaningful at sentencing. Belated disclosure or inadvertent nondisclosure of mitigating evidence undermines the fairness essential to the sentencing process. This proposed amendment reduces the likelihood that favorable evidence will not be disclosed or disclosed too late.

1. Discussion

a. Purpose and Cross Reference

This amendment is designed to ensure that favorable information is made known to the defendant during the plea negotiation process and to the court in the sentencing process. Rather than restate the five-part definition of favorable information, the due diligence obligation and the available sanctions, Rule 11(e)(7) cross references Fed. R. Crim. P. 16(f). The Rule 11(e)(7) amendment is also designed to avoid plea agreements where the United States requires a defendant to waive his right to exculpatory information without knowing what that information is.

b. Timing of Disclosure

Fourteen days is a reasonable period for the government to disclose in writing information favorable to the defendant on either guilt or punishment. As a practical matter, the majority of criminal cases have been investigated by the time of indictment. To the extent that investigation is ongoing, the government is required to only disclose favorable information to the defendant then known through the exercise of due diligence. Any subsequent discovery of additional favorable evidence or material can be later disclosed to the defendant.

Furthermore, to the extent some districts have in place "fast track" programs,[136] there is nothing in Rule 11(e)(7)'s language that prevents the government from providing favorable information to the defendant before an indictment. Thus, the government may still comply with this rule and enable the defendant to plead guilty at the initial arraignment and plea and receive credit under a fast track program. As with the companion Fed. R. Crim. P. 16(f) amendment, the writing requirement ensures a clear record of what was disclosed and not disclosed and avoids unnecessary post-trial and post sentencing litigation about what may have been orally communicated.

c. Sanctions

A guilty plea can be set aside in limited circumstances if a defendant can establish prejudice from prosecutorial misconduct.[137] Normally, the withheld information must be material to the prosecution of the defendant.[138] The proposed Rule 11(e)(7) is silent with respect to sanctions but does cross reference proposed Rule 16(f) which provides for a variety of sanctions, including dismissal.

In most instances the appropriate remedy for non-disclosure of information that reduces punishment will be resentencing. While the Guidelines have a basic objective of enhancing the ability of the criminal justice system to combat crime through an effective, fair sentencing system,[139] they do not at present directly provide a remedy to a defendant who has not been provided mitigating evidence under *Brady v. Maryland.* The only remedy available to federal prisoners who have been deprived of *Brady* evidence favorable to sentencing is a motion under 28 U.S.C. §2255 alleging an error that involves "a fundamental defect which results in a complete miscarriage of justice."[140]

CONCLUSION

The American College of Trial Lawyers respectfully recommends that the Judicial Conference of the United States Committee on Rules of Practice and Procedure amend Federal Rules of Criminal Procedure 11 and 16 to codify *Brady* and its progeny. The proposed amendments will ensure the timely, fair and consistent application of *Brady v. Maryland* and will aid Federal Courts in the sound administration of justice.

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[136] *See Ruiz*, 241 F.2d at 1160-61 ("fast track" programs are designed to minimize the expenditure of government resources and expedite the processing of more routine cases).

[137] *See, e.g., Banks v. United States*, 920 F. Supp. 688 (E.D. Va. 1996)

[138] *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *United States v. Kates*, 174 F.3d 580, 583 (5th Cir. 1999).

[139] U.S.S.G. Ch. 1, Part A - Introduction at 2.

[140] *Davis v. United States*, 417 U.S. 333, 346 (1974).

APPENDICES

A. Federal Rule of Criminal Procedures 16

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: 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; that portion of any written record containing the substance of any relevant oral statement 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 government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is 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.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are 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, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(b) The Defendant's Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which

the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's or attorneys.

[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure To Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

B. Federal Rule of Criminal Procedure 11(e)

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant -- or the defendant when acting pro se -- may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will:

(A) move to dismiss other charges; or

(B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any discussions between the parties concerning any such plea agreement.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(!)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court, or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussion, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

C. District of Massachusetts Local Rules 116.02 and 1.3

RULE 116.2 DISCLOSURE OF EXCULPATORY EVIDENCE

(A) Definition. Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to:

(1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;

(2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731;

(3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its, case-in-chief; or

(4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(B) Timing of Disclosure by the Government. Unless the defendant has filed the Waiver or the government invokes the declination procedure under Rule 116.6, the government must produce to that defendant exculpatory information in accordance with the following schedule:

(1) *Within the time period designated in L.R. 116.1(C)(1):*

(a) Information that would tend directly to negate the defendant's guilt concerning any count in the indictment or information.

(b) Information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under 18 U.S.C. 5 3731.

(c) A statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.

(d) A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.

(e) A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.

(f) A written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.

(2) *Not later than twenty-one (21) days before the trial date established by the judge who will preside:*

(a) Any information that tends to cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief.

(b) Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(c) Any statement or a description of such a statement, made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(d) Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.

(e) A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its casein-chief.

(f) A written description of any conduct that may be admissible under Fed. R. Evid. 608(b) known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.

(g) Information known to the government of any mental or physical impairment of any witness whom the government anticipates calling in its case-in chief, that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event.

(3) *No later than the close of the defendant's case:* Exculpatory information regarding any witness or evidence that the government intends to offer in rebuttal.

(4) *Before any plea or to the submission by the defendant of any objections to the Pre-Sentence Report, whichever first occurs:* A written summary of any information in the government's possession that tends to diminish the degree of the defendant's culpability or the defendant's offense Level under the United States Sentencing Guidelines.

(5) If an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production.

RULE 1.3 SANCTIONS

Failure to comply with any of the directions or obligations set forth herein or obligations set forth herein, or authorized by, these Local Rules may result in dismissal, default or the imposition of other sanctions as deemed appropriate by the judicial officer.

D. Bibliography

ABA Standards for Criminal Justice, *Prosecution Function and Defense Function* 3-3.11(a) (1993)

ABA Model Rules of Professional Conduct, *Model Rule 3.8* (1984)

Bass, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112 (1972)

Binimow, *Constitutional Duty of Federal Prosecutor to Disclose Brady Evidence Favorable to Accused*, 158 A.L.R. Fed. 401 (1999)

Blank, Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation, 68 Fordham L. Rev. 2011, 2085 (2000)

Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279 (June 1963)

Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report,* 68 Wash. U.L.Q. 1 (1990)

Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 Fordham L. Rev. 391 (December 1994)

District of Massachusetts Local Rules Concerning Criminal Cases 116.1-117.1 (1998)

Federal Rules of Criminal Procedure 11 and 16

Fisher, *Symposium: The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 Fordham L. Rev. 1379 (April 2000)

Franklin, Note: *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate o the Merits of "Discovery" Waivers,* 51 Stan. L. Rev. 567 (1999)

Gershman, "Suppression of Evidence" *Prosecutorial Misconduct* (West Group 1991) (Ch. 5)

Goldberg, *Your Clients' Brady-Giglio Rights Are Not Protected*, 22 Champion 41 (September/October 1998)

Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 Ga. St. U.L. Rev. 601 (1999)

Joy and McMunnigal, *Disclosing Exculpatory Material in Plea Negotiations*, 16 CRIMINAL JUSTICE (ABA Fall 2001)

Moushey, "*Hiding The Facts Readout; Discovery Violations Have Made Evidence-Gathering A Shell Game*," Pittsburgh Post-Gazette, November 24, 1998, at A-1

O'Sullivan, *Federal White Collar Crime* (West 2001)

Potter, *Discovery*, 87:1267 Geo. L.J. 1382 (May 1999)

Tarun, *Brady v. Maryland: An Underutilized Sentencing Sword*, 2001 White Collar Crime (ABA 2001)

Weihl, *Keeping Files on the File Keepers: When Prosecutors are Forced to turn Over the Personnel Files of Federal Agents to Defense Lawyers*, 72 Wash. L. Rev. 73 (1997)

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 15; Inconsistency Between Text of Rule and Committee Note

DATE: April 12, 2004

During the restyling project, the Committee amended Rule 15 regarding payment of deposition expenses. The amended Rule provides as follows:

> (d) **Expenses.** If the deposition was requested by the government, the court *may*—or if the defendant is unable to bear the deposition expenses, the court must —order the government to pay:
>
> > (1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and
> >
> > (2) the costs of the deposition transcript. (emphasis added)

The Committee Note accompanying this provision states:

> "Revised Rule 15(d) addresses the payment of expenses incurred by the defendant and the defendant's attorney. Under the current rule, if the government requests the deposition, or if the defendant requests the deposition and is unable to pay for it, the court *may* direct the government to pay for travel and subsistence expenses for both the defendant and the defendant's attorney. In either case, the current rule requires the government to pay for the transcript. Under the amended rule, if the deposition was requested by the government, the court *must* require the government to pay subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay subsistence, travel, and the deposition transcript costs—regardless of who requested the deposition. Although the current rule places no apparent limits on the amount of funds that should be reimbursed, the Committee believed that insertion of the word "reasonable" was consistent with current practice." (emphasis in the original).

There seems to be a clear inconsistency between the text of the rule, regarding the payment of expenses, etc, when the government requests the deposition, and the text of the Committee Note. My notes at this point do not indicate clearly whether the Committee intended to use the word "must" in the rule itself, instead of "may" or the word "may" in the Committee Note, instead of the word "must."

This matter is on the agenda for the May meeting.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 16; Proposed Amendment Regarding Defendant's Oral Statements**

DATE: **April 12, 2004**

Magistrate Judge Robert Collings, of the District of Massachusetts, has proposed an amendment to Rule 16. In his view, the amendment, which would reorganize the structure of the rule, would more clearly spell out the provisions regarding disclosure of a defendant's oral statements.

His letter is attached. This item is on the agenda for the May 2004 meeting

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

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EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

March 22, 2004

Professor David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Dear Dave:

Enclosed is a copy of a letter from Judge Collings, forwarded by Judge Battaglia, which addresses a concern Judge Collings has about Rule 16(a)(1)(B)(ii).

Please see that this matter is included in the agenda for our next committee meeting.

Sincerely,

ED CARNES
United States Circuit Judge

Enclosures

c: (without enclosures)
Judge Battaglia
John Rabiej

United States District Court

Southern District Of California
U.S. Courts Building
940 Front Street
Room 1145
San Diego, California 92101-8927

Anthony J. Battaglia
United States Magistrate Judge

Phone: (619) 557-3446
Fax: (619) 702-9988

March 16, 2004

Honorable Edward E. Carnes
United States Circuit Judge
United States Court of Appeals
United States Courthouse
Suite 500D, 1 Church Street
Montgomery, Alabama 36104

Re: Advisory Committee on Criminal Rules

Dear Judge Carnes:

Enclosed is a letter from Judge Collings addressing a concern with Rule 16(a)(1)(B)(ii).

Subject to your approval, this might be an issue for the Advisory Committee to consider at a future meeting.

Very truly yours,

Anthony J. Battaglia

AJB/sc
Encl.

United States District Court
District of Massachusetts
United States Courthouse
1 Courthouse Way, Suite 6420
Boston, Massachusetts 02210

Chambers of
Robert B. Collings
United States Magistrate Judge

Telephone No.
(617) 748-9229

March 11, 2004

Peter G. McCabe, Esquire
Secretary, Advisory Committee on
Criminal Rules
Administrative Office of United
States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Peter:

Re: *United States v. Almohandis*
- F. Supp. 2d - , 2004 WL 370710 (D. Mass., 2/27/2004)

Enclosed is a copy of an opinion I have written on the issue of whether an agent's rough notes of an interview with a defendant are producible as "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." Rule 16(a)(1)(B)(ii), Fed. R. Crim. P. The question seems to have divided the courts.

Quite apart from whether my opinion correctly states the law, I think the confusion in the cases might result from the fact that 16(a)(1)(B)(ii), although it deals with oral statements, is contained under part (B) which is entitled "Defendant's **Written** or Recorded Statements" rather than under part (A) which deals with "Defendant's **Oral** Statements."

I am wondering whether it would make sense to divide part (A), just as part (B) is presently divided. Subpart (i) of part (A) would contain what is now required to be produced by part (A); subpart (ii) would require production of what is now contained in part (B), subpart (ii). Subpart (ii)

would then be removed from part (B) and subpart (iii) of part (B) would be renumbered (ii).

This would have the advantage of placing all disclosures respecting defendant's oral statements in part (A) under the title "Defendant's Oral Statements" and part (B) would only deal with "Defendant's Written or Recorded Statements."

As I say, this is just a suggestion which perhaps might be worth considering . If you have any questions, please do not hesitate to contact me.

Sincerely yours,

Robert B. Collings
United States Magistrate Judge

Copy to:

✓ Honorable Anthony J. Battaglia
United States Magistrate Judge
San Diego, California

Honorable Tommy E. Miller
United States Magistrate Judge
Norfolk, Virginia

Thomas Hnatowski, Esquire
Chief, Magistrate Judges Division
Administrative Office of
United States Courts
Washington, D.C.

United States District Court
District of Massachusetts

UNITED STATES OF AMERICA,

V. CRIMINAL NO. 2004-10004-PBS

ESSAM MOHAMMED ALMOHANDIS.

OPINION[1] ON MOTION FOR PRODUCTION OF NOTES OF DEFENDANT'S STATEMENTS (#28)

COLLINGS, U.S.M.J.

Defendant's Motion for Production of Notes of Defendant's Statements (#28) raises the issue of whether the defendant is entitled, under Rule 16(a) of the Federal Rules of Criminal Procedure, to production of the rough notes of agents who interviewed him. The defendant has been provided with the agents' formal reports of the interviews which, presumably, were written after the interviews and based on the rough notes and the agents' recollections.

---

1 An Order allowing the motion entered on February 19, 2004. Time was of the essence since trial was scheduled to commence and, in fact, commenced on February 23, 2004. In the Order, the Court indicated that it intended to write an Opinion giving the detailed reasons for the allowance of the motion.

04-CV-F
04-CR-B

RECEIVED 4/7/04

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA
611 Broad Street, Suite 237
Lake Charles, Louisiana 70601

JAMES T. TRIMBLE, JR.
U. S. DISTRICT JUDGE

TELEPHONE 337.437.3884
FAX 337.437.3899

April 1, 2004

Mr. Peter McCabe
Secretary, Rules Committee
Administrative Office of the United States Courts
Washington, DC 20544

Re: Requested Rules Change

Dear Mr. McCabe:

As the Tyco jury begins its eleventh day of deliberations, I am writing to request that there be a change in the rules that require unanimous verdicts in both civil and criminal cases in the federal system.

Before becoming a United States District Judge, I practiced law for 27 years, primarily representing insurance companies, but also doing some other civil and criminal litigation as well. In the state court, a line of 12 jurors could render a verdict in a civil case. In a criminal case, 10 of 12 could render a verdict in all except capital cases. I felt that this was very fair and saw no miscarriages of justice because unanimous verdicts were not required. In fact, I feel it is absurd to expect unanimity in juries when we pass laws and can amend the Constitution without a unanimity requirement. There have been other instances where one holdout has caused a mistrial in high-profile and prolonged cases, and I have been tempted to write before, but I guess this Tyco case has pushed me over the top. When I think of the time, effort, and expense devoted to this trial that lasted some six months, it makes me ill to know that one person can stand in the way of a jury rendering a verdict. There is no reason whatsoever to give a single juror the power to veto a verdict that an overwhelming majority of jurors finds to be fair, equitable, and in keeping with the law and the evidence.

I strongly urge that action be taken to address this problem, and I would recommend something similar to the Louisiana state court system. I will say that although the rules permit six-person juries in civil cases, I do not go with less than eight people, because I do not feel that six provides the parties with a fair cross-section of the community. With an eight-person jury, I believe that seven out of eight should be able to render a verdict. With a 12-person jury, nine or ten of twelve should be adequate. In criminal cases, except for capital cases, I feel that ten of twelve would be fair to both the prosecution and the defense.

Thank you for your consideration of the suggestions in this letter.

Sincerely,

JAMES T. TRIMBLE, JR.

JTTjr/rh

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 32; Proposal to Require Court to Resolve Challenges to the Accuracy of Presentence Report.**

DATE: **April 12, 2004**

Attached is a letter from Chief Judge Gregory Carman proposing that Rule 32 be amended to require the sentencing judge to resolve challenges to the presentence report. His letter is accompanied by an article he has co-authored on the subject.

The Committee dealt with issue at length during the restyling effort and ultimately decided draft the rule to require such a finding only where the objection to the report concerns a "controverted matter." If the objection does so, the court must either resolve the issue or decide that a finding is not required because it will not affect sentencing or because the court will not consider it at all at sentencing.

This item is on the agenda for the May meeting.

RECEIVED 10/27/03

UNITED STATES COURT OF INTERNATIONAL TRADE
ONE FEDERAL PLAZA
NEW YORK, NY 10278-0001

CHAMBERS OF
GREGORY W. CARMAN
CHIEF JUDGE

03-CR-E

October 10, 2003

Honorable Anthony J. Scirica
Chief Judge
United States Court of Appeals for the Third Circuit
22614 James A. Byrne United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Chief Judge Scirica: (Old)

Enclosed please find a draft of an article entitled *Fairness at the Time of Sentencing: The Accuracy of the Presentence Report* that I co-authored with my law clerk Tamar Harutunian. The article highlights problems caused when the United States Bureau of Prisons uses contested, unadjudicated information in presentence reports that the Bureau of Prisons employs in making post-sentencing decisions affecting prisoners. The article will be published in the January 2004 issue of the *St. John's Law Review*.

As you know, under Rule 32 of the Federal Rules of Criminal Procedure, if the sentencing judge determines he or she will not utilize certain information in the presentence report in determining the sentence to be imposed because the information is not relevant for sentencing purposes, the information nevertheless remains in the presentence report. The information, whether accurate or inaccurate, is used by the Bureau of Prisons in making decisions pertaining to the prisoner's conditions of confinement.

The article suggests that where a defendant challenges the accuracy of information in the presentence report even though the information is not used in sentencing, the accuracy or inaccuracy of such information should be determined by the sentencing judge at the sentencing hearing where the information will affect the defendant's post-sentence treatment. The article urges that Rule 32 be amended to require the sentencing judge to determine the accuracy of contested information by a preponderance of the evidence and strike from the presentence report that information that the judge finds is inaccurate and will affect post-sentencing decisions.

I would appreciate any comments you have on this topic.

Cordially yours,

Gregory W. Carman
Chief Judge

Enclosure

FAIRNESS AT THE TIME OF SENTENCING: THE ACCURACY OF THE PRESENTENCE REPORT

Gregory W. Carman and Tamar Harutunian***

The presentence investigation report or presentence report ("PSR") is considered to be the most important document in the sentencing and correctional processes involving criminal defendants.[1] Its primary purpose is to assist the court in determining the appropriate sentence for the defendant after a conviction or a guilty plea.[2] The PSR is particularly important when there is a guilty plea because there has been no trial; thus, the PSR serves as the main source of information about the defendant.[3] Although primarily used for sentencing, the United States Bureau of Prisons ("BOP") also uses the PSR after sentencing to classify the inmate for security and program purposes, designate the inmate to a facility, and make programming and release

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* Chief Judge, United States Court of International Trade. Chief Judge Carman has sat by designation in various district courts and federal circuit courts and has served as a trial judge and as an appellate judge on numerous criminal matters. Chief Judge Carman has served as a standing member of the Judicial Conference of the United States for eight years.

** Law clerk for Chief Judge Carman, United State Court of International Trade; J.D., St. John's University School of Law, 2001; B.A. City University of New York, Queens College, 1998.

[1] *See United States v. Cesaitis*, 506 F. Supp. 518, 520-21 (E.D. Mich. 1981); Timothy Bakken, *The Continued Failure of Modern Law to Create Fairness and Efficiency: The Presentence Investigation Report and its Effect on Justice*, 40 N.Y.L. SCH. L. REV. 363, 364 (1996); Keith A. Findley & Meredith J. Ross, Comment, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report under* Julian *and the Sentencing Guidelines*, 1989 WIS. L. REV. 837, 837-38 (1989); THE HISTORY OF THE PRESENTENCE REPORT (Just. Pol'y Inst. ed., 2002), *available at* http://www.cjcj.org/pubs/psi/psireport.html (last visited July 31, 2003) [herinafter *History of the PSR*].

[2] *See Cesaitis*, 506 F. Supp. at 520; Note, *A Proposal to Ensure Accuracy in Presentence Investigation Reports*, 91 YALE L.J. 1225, 1226 (1982) [hereinafter *Proposal*]; U.S. Probation Office for the W. Dist. of N.C., *The Presentence Investigation Report: A Guide to the Presentence Process for Defense Attorneys, at* http://www.ncwd.net/probation/psida.html (last visited May 27, 2003) [hereinafter *Guide*].

[3] *See* Bakken, *supra* note 1, at 384; *Proposal*, *supra* note 2, at 1228.

planning decisions.[4] Before the abolition of parole, the United States Parole Commission also relied on the PSR in making parole determinations.[5]

If a defendant has an objection to information contained in the PSR, the defendant may raise that objection at the time of sentencing.[6] If the judge determines that the information does not affect sentencing or will not be considered in sentencing, then the information remains in the PSR and the PSR is forwarded to the BOP.[7] The BOP is then free to use all information contained in the PSR, including the challenged information, to make critical decisions involving the inmate's confinement. The use of disputed information to make post-sentencing decisions may be considered an additional penalty imposed upon the inmate without due process of law. We suggest that the Federal Rules of Criminal Procedure should be amended to require the sentencing court to resolve disputes over information in the PSR that may affect the inmate's confinement. Use of accurate information in making post-sentencing decisions would preserve the integrity of the criminal justice system and provide a sense of fairness for the inmate.

I. Background on presentence investigation reports

Under 18 U.S.C. § 3552(a), and in accordance with Federal Rule of Criminal Procedure 32(c), a United States probation officer is required to prepare the defendant's PSR and present it to the court before sentencing.[8] Rule 32 requires that the PSR include the defendant's history and characteristics; verified information as to financial, social, psychological, and medical impact on victims of the defendant's offense; the probation officer's calculations of the defendant's offense level and criminal history category under the United States Sentencing Guidelines; the

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[4] *See* Bakken, *supra* note 1, at 364, 370; Gary M. Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 SETON HALL L. REV. 544, 553 (1996); *Proposal*, *supra* note 2, at 1229; *Guide*, *supra* note 2; Valerie Stewart, *Frequently Asked Questions Regarding Clients Facing Designation to the Federal Bureau of Prisons*, 7 NEV. LAW. 15, 15-16 (1999).

[5] *See* Findley& Ross, *supra* note 1, at 841, 845; Maveal, *supra* note 4, at 553.

[6] FED. R. CRIM. P. 32(i)(1)(C)-(D).

[7] *Id.* 32(i)(3)(B)-(C).

[8] 18 U.S.C. § 3552(a) (2000); *see also* FED. R. CRIM. P. 32(c).

resulting sentencing range and kinds of sentences available; and any other information required by the court.[9] The information may be obtained through interviews with the defendant, his or her attorneys, investigating officers, victims, and the defendant's family members.[10] The probation officer may also obtain employment records, substance abuse treatment records, psychiatric and medical records, and information regarding prior arrests and/or convictions.[11] The Federal Rules of Evidence, other than with respect to privileges, do not apply to sentencing proceedings, and hearsay may be included in PSRs.[12] The following items are excluded from the report: "(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;" (B) information from confidential sources; and "(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others."[13]

Once completed, the PSR must be disclosed to the defendant, the defendant's attorneys, and the prosecutor at least 35 days before the sentencing hearing.[14] Any "objections to material information, sentencing guideline ranges, and policy statements" in the report by any parties must be communicated to the probation officer in writing within 14 days after receipt of the PSR.[15] In considering the objections, the probation officer may meet with the parties and conduct further investigation.[16] The officer may then decide to either revise the report or to retain it as originally

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[9] FED. R. CRIM. P. 32(d).

[10] *See Guide, supra* note 2.

[11] *Id.* Rule 32 provides that upon request, the defendant's attorney is entitled to "notice and a reasonable opportunity to attend the interview" of the defendant by the probation officer during preparation of the PSR. FED. R. CRIM. P. 32(c)(2).

[12] FED. R. EVID. 1101(d)(3); *see also Dorman v. Higgins*, 821 F.2d 133, 137 (2d Cir. 1987); *Proposal, supra* note 2, at 1229-30.

[13] FED. R. CRIM. P. 32(d)(3).

[14] *Id.* 32(e)(2).

[15] *Id.* 32(f)(1).

[16] *Id.* 32(f)(3).

drafted.[17] The officer must submit the final report to the court no later than 7 days before the sentencing hearing, along with "an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them."[18] The revised report and addendum are also sent to the defendant, the defendant's attorneys, and the prosecutor.[19]

The defendant may raise objections to the PSR for consideration by the court at the sentencing hearing.[20] The court has discretion to allow the parties to introduce testimony or other evidence.[21] Rule 32(i)(3)(B) and (C) provide that the court:

> (B) must - for any disputed portion of the [PSR] or other controverted matter - rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and
> (C) must append a copy of the court's determinations under this rule to any copy of the [PSR] made available to the [BOP].[22]

Thus, if the disputed information may affect sentencing, the sentencing judge must rule on the dispute.[23] There is no requirement to resolve the dispute if the sentencing judge does not rely upon the information or it did not effect the determination of the sentence.[24] In that case, information that has been disputed, but does not affect sentencing, remains in the PSR.

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[17] *Id.*

[18] *Id.* 32(g); *Guide*, *supra* note 2.

[19] *See supra* note 18.

[20] FED. R. CRIM. P. 32(i)(1)(C)-(D).

[21] *Id.* 32(i)(2).

[22] *Id.* 32(i)(3)(B)-(C).

[23] *See Warren v. Miller*, 78 F. Supp. 2d 120, 131 (E.D.N.Y. 2000) (citing *Townsend v. Burke*, 334 U.S. 736 , 741 (1948); *Torres v. United States*, 140 F.3d 392, 404 (1998)).

[24] *See* Bakken, *supra* note 1, at 394 (noting that "[e]ven where the judge does not rely on the controverted information, the defendant, in almost all cases, is not entitled to have the information excised from the [PSR]. The defendant will have to challenge any inaccuracies through administrative procedures." (footnotes omitted)).

Following sentencing, the inmate is designated to a particular institution by the BOP in accordance with Bureau of Prisons Program Statement 5100.07, also referred to as the Security Designation and Custody Classification Manual.[25] Every judicial jurisdiction has a community corrections manager ("CCM"), who determines the inmate's designation upon receiving the request for designation from the United States marshal.[26] If the PSR has not been provided to the CCM already, the CCM must request it from the probation officer.[27] The document is used throughout the remainder of the designation process. Some commentators note that the PSR "is known as the 'bible' by prisoners and BOP staff alike."[28] Objections to the information that the BOP relies upon in its designation and classification can be raised during the review of the information by the BOP.[29]

II. Effect of inaccuracies in the presentence report in the post-sentencing phase

Some of the issues that have been raised regarding presentence reports are the means of addressing inaccuracies in the report, the use of hearsay, and the use of evidence excluded from trial proceedings.[30] Since the 1980s, various commentators have raised concerns that PSRs may contain inaccuracies that the sentencing court did not expunge from the reports, but which the BOP relies upon in its correctional decisions.[31] Even if objections are raised before the sentencing court pursuant to Rule 32 and the court decides not to amend the report because the

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[25] *See* U.S. BUREAU OF PRISONS, PS 5100.07 SECURITY DESIGNATION AND CUSTODY CLASSIFICATION MANUAL CH. 1, 1 (Jan. 2002), *available at* http://www.bop.gov/progstat/5100_007.pdf [hereinafter BOP MANUAL]; *see also* Alan Ellis et al., *Federal Prison Designation and Placement: An Update*, 15 CRIM. JUST. 46, 46 (2000).

[26] *See supra* note 25.

[27] BOP MANUAL, *supra* note 25, Ch. 3, at 1.

[28] Ellis, *supra* note 25, at 50.

[29] Stewart, *supra* note 4, at 16.

[30] *See History of the PSR*, *supra* note 1.

[31] *See, e.g.*, Bakken, *supra* note 1, at 386-87; Ellis, *supra* note 25, at 50; Findley & Ross, *supra* note 1, at 871-74; Maveal, *supra* note 4, at 553; *Proposal*, *supra* note 2, at 1229-30.

information will not affect the sentence, the BOP is not bound to disregard that information and may rely on it to make significant decisions involving the defendant, such as designation, visitation, and transfers.[32]

An example of how the PSR can affect the prisoner is seen in the BOP's assessment of public safety factors in designating an appropriate facility for the defendant.[33] One such factor is labeled "sex offender," and applies to an inmate "whose behavior in the current term of confinement or prior history" includes nonconsensual, aggressive, abusive, or deviant sexual contact.[34] The BOP's classification manual indicates:

> A conviction is not required for application of this [public safety factor] if the [PSR], or other official documentation, clearly indicates [the offensive conduct] occurred in the current term of confinement or prior criminal history. . . . [I]n the case where an inmate was charged with an offense that included one of the following elements, but as a result of a plea bargain was not convicted, application of this [public safety factor] should be entered.[35]

Thus, even if the prisoner had objected to an alleged instance of sexual offense contained in the PSR before the probation officer or sentencing judge, the BOP could still use this disputed information to assign the prisoner to a higher security prison if the statement remains in the

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[32] Bakken, *supra* note 1, at 364; Findley & Ross, *supra* note 1, at 872-73. Before parole was abolished, many courts had held that the Parole Commission also could rely on information in the PSR that the sentencing judge had decided not to consider. *See United States v. Rosenberg*, 108 F. Supp. 2d 191, 210-11 (S.D.N.Y. 2000) (noting that the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits had acknowledged that the Parole Commission could consider information that the sentencing judge did not consider in sentencing).

[33] If any of the "public safety factors" listed in the BOP's classification manual are present, then increased measures of security may be required. *See* BOP MANUAL, *supra* note 25, Ch. 7, at 1.

[34] *Id.*, Ch. 7, at 2.

[35] *Id.* The illustration that the BOP MANUAL includes to demonstrate when the "sex offender" factor should be used is that of an inmate whose PSR indicates that he was involved in a sexual assault but who pled guilty to simple assault. *Id.*

PSR.[36] Once the designation is made, the information in the PSR is also used to determine "prison employment, prison transfers, visitation and mail privileges, sentencing credit, work study, and physical and mental health treatment."[37]

An inmate faces great difficulty in trying to have the PSR amended after sentencing.[38] The sentencing court does not have jurisdiction to correct the PSR after sentencing, thus creating a jurisdictional obstacle for the inmate.[39] As Findley and Ross point out, "[t]he defendant may try to have the [PSR] corrected on direct appeal. The appellate courts will consider whether the district court complied with the requirements of [Rule 32] and will remand if the district court failed to make the proper written findings or disclaimer of disputed information in the [PSR]. Most courts, however, have allowed no [PSR] correction on appeal, holding that the only recourse is an administrative appeal."[40]

As noted, objections to the BOP's reliance on disputed information in the PSR can be raised during the BOP's initial classification of the inmate.[41] A means of correcting the PSR after sentencing is through the BOP's Administrative Remedy Program.[42] The purpose of the

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[36] *See* Ellis, *supra* note 25, at 50.

[37] Bakken, *supra* note 1, at 387 (citing Findley& Ross, *supra* note 1, at 841.

[38] *See* Bakken, *supra* note 1, at 395; Findley & Ross, *supra* note 1, at 875.

[39] Bakken, *supra* note 1, at 395-96; Findley & Ross, *supra* note 1, at 875.

[40] Findley & Ross, *supra* note 1, at 875 (footnotes omitted).

[41] *See supra* note 29 and accompanying text.

[42] *See* 28 C.F.R. §§ 542.10 - 542.19 (2003). See U.S. BUREAU OF PRISONS, PS 1330.13 ADMINISTRATIVE REMEDY PROGRAM (Aug. 2002), *at* http://www.bop.gov/progstat/1330_013.pdf, for BOP's rules implementing 28 C.F.R. §§ 542.10 - 542.19. In their article addressing access to and the accuracy of PSRs, Findley and Ross note that the Parole Commission did not believe that it had the authority to correct PSRs. Findley & Ross, *supra* note 1, at 875-86. This policy created a significant problem for inmates: courts held that the only post-sentencing remedy to correct the PSR would be through administrative appeal, but the administrative agency asserted that it did not have authority to make corrections. *Id.* It does not appear that the BOP has taken a similar stance. The BOP allows inmates to make administrative appeals to address concerns regarding the accuracy of their PSRs. *See* Stewart, *supra* note 4, at

program is "to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement."[43] Generally, the inmate first must inform the BOP staff of his or her complaint so that an attempt may be made to resolve it informally.[44] "The deadline for completion of informal resolution and submission of a formal written Administrative Remedy Request . . . is 20 calendar days following the date on which the basis for the Request occurred."[45] The inmate is to fill out a form raising the disputed issues and requesting review and submit it to the institution staff member designated to receive such requests.[46] If the inmate's request is accepted, the warden or CCM must respond within 20 calendar days of filing.[47] If the inmate is not satisfied with the response, he or she may appeal to the appropriate Regional Director of the BOP within 20 calendar days of when the warden's response was signed.[48] The Regional Director has 30 calendar days within which to respond.[49] If the Regional Director's response is also unsatisfactory, the inmate may appeal to the General Counsel of the BOP within 30 days of the Regional Director's signing of his or her response.[50] The General Counsel must respond within 40 calendar days.[51] This is the final administrative appeal, and courts have held that the inmate must exhaust all administrative remedies before seeking judicial resolution of

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[43] 28 C.F.R. § 542.10.

[44] *See id.* § 542.13(a).

[45] *Id.* § 542.14(a).

[46] *Id.* § 542.14(c).

[47] *Id.* § 542.18.

[48] *Id.* § 542.15(a).

[49] *Id.* § 542.18.

[50] *Id.* § 542.15(a).

[51] *Id.* § 542.18.

issues.[52]

While the importance of administrative remedies must be acknowledged, there are various reasons why administrative appeals do not adequately protect inmates. If the inmate's challenge is not heard until the BOP accepts the inmate's Administrative Remedy Request and conducts an investigation, the delay may cause information crucial to the determination to be lost.[53] Additionally, witnesses may not be readily available at the time that the BOP conducts its investigation. For example, if the crime, trial, and sentencing took place in New York, and the inmate was then incarcerated in Kansas, it may not be feasible for the inmate to get the witnesses to travel to Kansas for an administrative hearing. Even if the witnesses were able to appear at the administrative hearing, the relevant information may not be fresh in their minds at that point. If the challenges to the PSR were considered during the sentencing hearing, the witnesses and the parole officer who drafted the PSR may be more readily available to testify and may have better recollection of relevant facts.[54] Additionally, when the inmate seeks administrative remedies, the inmate does not have a right to appointed counsel.[55] He or she is entitled to assistance from other inmates, institution staff, family, and attorneys in preparing the request form, but no one may submit an Administrative Remedy Request on an inmate's behalf, and there is no right to appointed counsel at the administrative hearing.[56] One commentator posits that the inmate "will stand alone in the abyss of a prison to confront and attempt to refute a document, prepared years earlier, that an untutored defendant may not be able to read, let alone comprehend. The lack of procedural safeguards inherent in Rule 32 will unfairly burden and punish a defendant far beyond

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[52] *Id.* § 542.15(a); *see, e.g., Maynard v. Havenstrite*, 727 F.2d 439, 441 (5th Cir. 1984).

[53] *See Proposal, supra* note 2, at 1248.

[54] *See id.* (noting that "at sentencing, the probation officer who wrote the [PSR] is readily available to testify while the information in the report is still fresh in his or her mind").

[55] Bakken, *supra* note 1, at 396; *see also* Findley & Ross, *supra* note 1, at 878 (noting that before the abolition of parole, inmates were often unrepresented during administrative hearings before the Parole Commission to correct presentence reports).

[56] *See* 28 C.F.R. § 542.16(a); Bakken, *supra* note 1, at 396; Findley & Ross, *supra* note 1, at 878.

the day of sentencing."[57]

III. A proposal allowing correction of presentence reports during sentencing hearings

Arguably, the BOP's use of the disputed information in the PSR is an additional penalty imposed on the inmate without due process of law. Critical decisions regarding the inmate's imprisonment are made based on information in the PSR that might be inaccurate and might have been provided by sources who have hidden biases and who the defendant has not confronted.[58] One recommendation is to require the sentencing court to inform and explain to the defendant the various uses of the PSR for correctional purposes.[59] This could be done before asking the defendant if there are any objections to the PSR's content.[60] Another suggestion is to require the sentencing court to make factual findings on controverted matters that are relevant to correctional decisions, followed by amendment of the PSR to reflect the findings.[61] At its April 2001 meeting, the Advisory Committee on the Federal Rules of Civil Procedure ("Advisory Committee") considered a proposal to amend Rule 32 to require the sentencing judge "to rule on any 'unresolved objection to a material matter' in the presentencing report, whether or not the

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[57] Bakken, *supra* note 1, at 397.

[58] Bakken, *supra* note 1, at 382-85, 389 ("Although defendants have a Rule 32 right and due process right to challenge allegedly inaccurate information contained in the [PSR], defendants have no constitutional right to procedural safeguards commonly guaranteed at trial, such as the right of confrontation and cross-examination."); *Proposal*, *supra* note 2, at 1230.

[59] Findley & Ross, *supra* note 1, at 879.

[60] *Id.*

[61] *Id.* at 873, 879-80; *Proposal*, *supra* note 2, at 1243-48. Findley and Ross note that this change was suggested to the Advisory Committee on Rule 32 in 1983 and was supported by the Criminal Law Committee Association of the Bar of the City of New York, the California State Bar Federal Courts Committee, the Jerome N. Frank Legal Services Organization of the Yale Law School, the Criminal Justice Section of the American Bar Association, and the San Diego Criminal Defense Lawyers Club, among others. *See* Findley & Ross, *supra* note 1, at 874 n.178. As discussed earlier, sentencing courts must either make factual findings on disputed information affecting sentencing or disclaim reliance upon the disputed information in sentencing. FED. R. CRIM. P. 32(i)(3)(B).

court will consider it in imposing an appropriate sentence."[62] The Advisory Committee decided that the potential problems raised by inaccurate information in the PSR should not be addressed in Rule 32 itself and instead should be addressed in the Advisory Committee Note to Rule 32.[63] In the Advisory Committee Note, the Advisory Committee stated:

> To avoid unduly burdening the [sentencing] court, the [Advisory] Committee elected not to require resolution of objections that go only to service of sentence. However, because of the [PSR's] critical role in post-sentence administration, counsel may wish to point out to the court those matters that are typically considered by the [BOP] in designating the place of confinement. . . . If counsel objects to material in the [PSR] that could affect the defendant's service of sentence, the court may resolve the objection, but is not required to do so.[64]

While the Advisory Committee's indication that the sentencing court *may* resolve the objection to allegedly inaccurate information is a step in the right direction, it does not change the fact that important post-sentence decisions might be made based on false information. The process we suggest to resolve this problem can be summarized as follows: Once the defendant has received the PSR from the probation officer, he or she would, consistent with present practice, inform the probation officer of any objections to the report's content.[65] After the probation officer investigates the objection and decides whether to keep the contested information in the report, the PSR and all remaining objections would be forwarded to the sentencing court.[66] At the sentencing hearing, the any objections to the PSR's content, including

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[62] FED. R. CRIM. P. 32, Advisory Committee Notes for 2002 Amendments.

[63] Minutes of the Advisory Committee on Federal Rules of Criminal Procedure (Apr. 25-26, 2001), *available at* http://www.uscourts.gov/rules/Minutes/Min4-2001.pdf. In an 11 to 1 vote, the Advisory Committee decided that the suggested change to Rule 32 would be withdrawn. *Id.* The Advisory Committee considered a motion that the issue not be addressed in the Advisory Committee Note, but the motion failed by a vote of 5 to 6. *Id.*

[64] FED. R. CRIM. P. 32, Advisory Committee Notes for 2002 Amendments.

[65] FED. R. CRIM. P. 32(f); *see also Proposal*, *supra* note 2, at 1243.

[66] *See supra* note 65.

those objections dismissed by the probation officer, relevant to sentencing and/or correctional decisions will be addressed. After the defendant has raised his or her objections to the information in the PSR, the sentencing court would decide whether to hear evidence to resolve the dispute.[67] Only disputes as to information relevant to sentencing and/or conditions of imprisonment would have to be considered.[68] With regard to information in the PSR that the court disclaims reliance upon for sentencing purposes but which may affect correctional decisions, the judge would either hear evidence to determine its accuracy or excise the information from the PSR.[69] Therefore, as Findley and Ross proposed, findings of fact could be made by the sentencing judge as to information affecting both sentencing and post-sentencing decisions.[70] If the judge decides to consider evidence to resolve the dispute, the prosecution would have the burden of proving the accuracy of the disputed information by a preponderance of the evidence.[71] "First the burden of production should be on the defendant. Unless the defendant challenges [PSR] information at sentencing, its validity should be accepted. . . . Once a defendant raises a sufficient challenge, the burden of persuasion should shift to the

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[67] *See* Bakken, *supra* note 1, at 389-90 (noting that under the present Rule 32, the sentencing judge has broad discretion to allow evidence or hold a hearing regarding disputed PSR content").

[68] *See Proposal, supra* note 2, at 1248.

[69] *See* Findley, *supra* note 1, at 879-80.

[70] *See id.*; *see also Proposal, supra* note 2, at 1243 (suggesting that disputes over PSR accuracy be resolved at the sentencing hearing and that "[i]nformation the judge finds to be unsupported or irrelevant to the sentencing or parole decisions would be excised from the [PSR]").

[71] The preponderance of the evidence standard applies when the sentencing court relies upon information in the PSR in sentencing the defendant. *See United States v. Blanco*, 888 F.2d 907, 909 (1st Cir. 1989); *Dorman v. Higgins*, 821 F.2d 133, 138 (2nd Cir. 1987). Some commentators have suggested that the standard should be the higher "clear and convincing evidence" standard. *See, e.g.*, Findley & Ross, *supra* note 1, at 871; *Proposal, supra* note 2, at 1245; *see also United States v. Johnson*, 682 F. Supp. 1033, 1035 (W.D. Mo. 1988) (acknowledging the strong policy arguments in favor of a clear and convincing evidence standard but ultimately applying the preponderance of the evidence standard).

government."[72] If the information is not important to the sentencing decision and the judge does not hear evidence to determine its accuracy, the disputed information would be removed from the report before it is forwarded to the BOP.[73] Similarly, if the prosecution wishes to retain the material, its accuracy could be assessed at the sentencing hearing.[74]

The suggested approach would likely reduce the chance that the BOP will rely on potentially inaccurate information in making determinations regarding the defendant's confinement in prison. As discussed earlier, the witnesses and relevant information would be more readily available at the sentencing hearing than at an administrative hearing after sentencing.[75] It is probable that many of the witnesses that would testify at the sentencing hearing as to matters in the PSR affecting sentencing will also be the same witnesses that would testify as to other matters in the PSR. It would be more efficient to have the witnesses testify while present at the sentencing hearing than to try to reconvene them for an administrative hearing. Additionally, counsel is more likely to be available to the defendant at the sentencing hearing than at an administrative hearing. Information relevant to the disputed portion of the PSR would be before the sentencing judge, who is "an expert in resolving adjudicative disputes," and all unresolved PSR challenges would efficiently be determined in a single hearing.[76]

Criticism of the suggested approach may be that it places too great a burden on sentencing courts and significantly prolongs the sentencing hearing. While the sentencing hearing may take longer to complete if the judge decides to consider evidence regarding the disputed information, the burden may not greatly increase. Consideration of the disputed information may involve examination of many of the same witnesses that would be testifying as to other information in the PSR. Upon making a suggestion similar to the one proposed in this

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[72] *Proposal*, *supra* note 2, at 1244-45 (footnotes omitted).

[73] Findley & Ross, *supra* note 1, at 874, 879-80; *Proposal*, *supra* note 2, at 1243.

[74] *See Proposal*, *supra* note 2, at 1243-45.

[75] *See supra* notes 53-54 and accompanying text.

[76] *Proposal*, *supra* note 2, at 1247.

article, Findley and Ross explain:

> Although such a procedure may prolong the sentencing hearing, it will save litigation later. Furthermore, the defendant is unlikely to make too many frivolous challenges, for fear of alienating the sentencing judge by prolonging the hearing. Any disputed information that the court finds immaterial to sentencing and corrections should be excised from the report. It is important that the [PSR] be altered to incorporate the court's deletions and factual findings; otherwise, inaccurate information remaining in the [PSR] may affect a reader despite an appended correction or disclaimer. . . . In this age of word processors, it is reasonable to require the probation officer to revise the [PSR] to incorporate the sentencing court's deletions and findings of fact.[77]

Giving the sentencing judge discretion to consider disputes involving PSR information affecting service of a sentence may bolster confidence in the criminal justice system and cause inmates to feel that they are at least receiving fair treatment.[78] The sense of fairness that an inmate may develop could assist in his or her rehabilitation and potential return to society.

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[77] Findley & Ross, *supra* note 1, at 873-74 (footnotes omitted). Another commentator making such a proposal has stated:

> Because limited sentencing hearings are currently provided pursuant to Rule 32, the benefits of this proposal are likely to outweigh its expected costs. Costs will largely be attributable to delay from longer sentencing hearings, additional investigation, and loss of unverifiable though possibly accurate information from the [PSR]. Admittedly, the [PSR] challenges under this proposal will inevitably lengthen some sentencing proceedings. To the extent that sentencing is the only opportunity for most defendants to develop the facts upon which their terms of incarceration will be based, however, delays due to more extensive investigations and hearings are justified. In addition, the incidence of frivolous challenges should be minimal in light of defendants' tactical desire to avoid antagonizing the sentencing judge.

Proposal, *supra* note 2, at 1248 (footnotes omitted).

[78] *See Proposal*, *supra* note 2, at 1247.

IV. Conclusion

In order to maintain faith in the criminal system, it is important to ensure that decisions affecting sentences and confinement conditions are based upon accurate and relevant information. Correction of the PSR to prevent reliance upon potentially inaccurate information is one way to preserve the integrity of the system. It also allows for the defendant to consider his or her sentence and decisions affecting confinement to be fair, which in turn may assist in the defendant's rehabilitation. The proposed modification to Rule 32 helps in the achievement of fair and just results in our criminal system.

Rule 31 Require less than unanimous verdicts	04-CR-B Judge James T. Trimble, Jr. 4/1/04	4/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 32 Require the sentencing judge to determine the accuracy of contested information by a preponderance of the evidence	03-CR-E Judge Gregory W. Carman 10/10/03	10/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 32(c)(3)(E) Provide for victim allocution in all felony cases	Professor Jayne Barnard	8/02 - Referred to chair and reporter 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 32.1(a)(5)(B)(i) Eliminate requirement that the government produce *certified* copies of the judgment, warrant, and warrant application	03-CR-B Judge Wm. F. Sanderson, Jr. 2/24/03	3/03 - Referred to reporter and chair 4/03 - Committee considered 10/03 - Committee considered and subcommittee formed **PENDING FURTHER ACTION**
Rule 32.1 Right of allocution before sentencing at revocation hearing	02-CR-D U.S. v. Frazier 2/25/02	3/02 - Referred to chair and reporter 4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 33 Extension of time to file motion for new trial	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**

Rule 34 Extension of time to file motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 40(a) Authorize magistrate judge to set new conditions of release	03-CR-A Magistrate Judge Robert B. Collings 1/03	1/03 - Referred to chair and reporter 10/03 - Committee considered **PENDING FURTHER ACTION**
New Rule 59 To provide counterpart to Civil Rule 72	U.S. v. Abonce-Barerra 7/20/01	4/02 - Committee considered 9/02 - Committee approved proposed amendment in principle 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
28 U.S.C. § 2254 Rule 9(a) Revise rule so that it refers to a *claim* and not to the *petition*. *See Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003)	03-CR-F Steven W. Allen 11/5/03	11/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Habeas Corpus Rule 8(c) Correct apparent mistakes in Rules Governing Section 2254 Cases and Section 2255 Proceedings	97-CR-F Judge Peter Dorsey 7/9/97	8/97 - Referred to chair and reporter 10/97 - Referred to Subcommittee 4/98 - Committee considered 10/98 - Committee considered 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee deferred pending further study 4/02 - Committee considered and approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved **PENDING FURTHER ACTION**

Model form for motions under 28 U.S.C. § 2255	00-CR-C Robert L. Byer, Esq. & David R. Fine, Esq. 8/11/00	8/00 - Referred to chair and reporter 4/02 - Committee approved 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved **PENDING FURTHER ACTION**
Restyle Habeas Corpus Rules		10/00 - Committee considered 1/01 - Standing Committee authorizes restyle project to proceed 4/02 - Committee approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved **PENDING FURTHER ACTION**

CRIMINAL RULES DOCKET

ADVISORY COMMITTEE ON CRIMINAL RULES

The docket sets forth suggested changes to the Federal Rules of Criminal Procedure considered by the Advisory Committee since 1991. The suggestions are set forth in order by (1) criminal rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Rule 4 Clarify the ability of judges to issue warrants via facsimile transmission	01-CR-A Magistrate Judge Bernard Zimmerman 1/29/01	1/01 - Referred to chair and reporter 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 11 To direct a random number of plea-bargained cases be tried	03-CR-C Carl E. Person, Esq. 4/1/03	4/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12.2(d) Sanction for defendant's failure to disclose results of mental examination	Roger Pauley 7/5/01	4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 16(a)(1)(B)(ii) Clarify whether a law enforcement agent's notes of an interview with defendant must be produced under the rule	04-CR-A Judge Robert B. Collings 3/11/04	3/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 29 Extension of time for filing motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 29 Preserve the government's right to appeal a trial court's decision to grant a motion for judgment of acquittal	Department of Justice 3/31/03	3/03 - Sent directly to chair and reporter 4/03 - Committee considered and deferred consideration pending additional research by the FJC 10/03 - Committee considered and approved in principle for publication **PENDING FURTHER ACTION**

The facts are that the defendant, a citizen of Saudi Arabia, was arrested at Logan International Airport, Boston after he arrived on a Lufthansa flight from Riyadh, Saudi Arabia via Frankfurt on January 3, 2004. He was arrested before he was admitted to the United States when border agents discovered three "devices" in his backpack which the government claims are "incendiary" or "explosive" devices. He was charged in a complaint with possessing the devices on the aircraft as well as making false statements to government agents that the devices were artist's pens or crayons.

On January 13, 2004, the Grand Jury returned a two-count indictment against the defendant. Count Two of that indictment alleges that:

> On or about January 3, 2004, at Boston, in the District of Massachusetts,
>
> ESSAM MOHAMMED ALMOHANDIS,
>
> in a matter within the jurisdiction of the executive branch of the Government of the United States, knowingly and willfully made materially false, fictitious or fraudulent statements or representations, to wit, that three explosive or incendiary devices in his possession were artist's crayons or pens, in violation of 18 U.S.C. § 1001(a)(2).

The allegedly false statements were made during the interviews of the defendant by government agents at Logan Airport on January 3, 2004.

Rule 16(a)(1), Fed. R. Crim. P., deals with disclosures which the

government must make. Subsection (A) governs disclosure of "Defendant's Oral Statement," and subsection (B) governs disclosure of "Defendant's Written or Recorded Statement."

Subsection (A) reads:

> (A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant 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.

Subsection (B) reads:

> (B) Defendant's Written or Recorded Statement. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection copying, or photographing, all of the following:
>
> (i) any relevant written or recorded statement of the defendant if:
>
> the statement is within the government's possession, custody or control; and
>
> the attorney for the government knows - or through due diligence could know - that the statement exists;
>
> (ii) the 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; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

In my judgment, Rule 16(a)(1)(A), Fed. R. Crim. P., is designed to deal with the situation in which a defendant makes an oral statement to a government agent in response to interrogation knowing that the person is an agent. Regardless of whether or not the agent ever reduces the oral statement to writing, the government must disclose the "substance" of the oral statement to the defendant if it intends to use the oral statement at trial. There is no question but that the United States Attorney has complied with the obligation to disclose the "substance" of the defendant's oral statements in the instant case; the "substance" is contained in the agents' formal written reports which have been turned over. But the important point is that even if the agents had not written any reports, the government would still have had the obligation to disclose the "substance" to the defendant in some other manner if the government intended to use the statements at trial. If there were oral statements made by the defendant to a government agent which the government was not going to use at trial, Rule 16(a)(1)(A) would not impose

a duty to disclose them. However, as discussed *infra,* if the substance of the oral statements was reduced to writing, Rule 16(a)(1)(B)(ii) would require production.

Rule 16(a)(1)(B)(ii), Fed. R. Crim. P., contains an additional obligation to disclose "any written record containing the substance of any relevant oral statements" made by the defendant. Unlike Rule 16(a)(1)(A), the obligation to disclose exists regardless of whether or not the government intends to use the statement at trial. Thus, under this provision, the United States Attorney also would have had the obligation to turn over the agents' formal written reports because they were a "written record containing the substance of" defendant's oral statements to a government agent.

That brings us to the issue raised by defendant's motion in the instant case, i.e., under Rule 16(a)(1)(B)(ii), must the United States Attorney disclose the agents' rough notes of the interviews with the defendant? In my judgment, the correct answer to the question is in the affirmative. The Rule requires production of "***any*** written record of the substance of any relevant oral statement...". The notes are "***a***" written record. They may not be the only written record, but they certainly are "a" written record.

Rule 16(a)(1)(B)(ii) was added in 1991.[2] The Advisory Committee Notes to the 1991 amendments support this view. They provide, in pertinent part:

> The rule now requires the prosecution, upon request, to disclose any written record which contains reference to a relevant oral statement by the defendant which was in response to interrogation, without regard to whether the prosecution intends to use the statement at trial. The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecutor's intent to make any use of the statement.
>
> The written record need not be a transcription or summary of the defendant's statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement.

1991 Advisory Committee Notes, reprinted at 134 F.R.D. 495 (1991). In the instant case, the rough notes surely contain a "reference to a relevant oral statement" and, as such, are a "written record" required to be disclosed.

In addition, some recent case law supports the principle that rough notes

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[2] The pre-1991 version of Rule 16(a)(1)(A), to the extent that it required production of the defendant's oral statements, only required the government to disclose "...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...". There was no provision for disclosure of any written record of oral statements. Thus, under the pre-1991 version of the Rule, the agents' rough notes would not be subject to production under Rule 16.

of a defendant's oral statements are subject to disclosure. *United States v. Molina-Guevara,* 96 F.3d 698, 705 (3 Cir., 1996); *United States v. Lilly,* 2003 WL 168443, *1-2 (D.W.Va., 2003); *United States v. Shane,* 2001 U.S. Dist. Lexis 6437, *48 (D. Kan., 2001); *United States v. Griggs,* 111 F. Supp. 2d 551, 553-556 (M.D. Pa., 2000); *United States v. Carucci,* 183 F.R.D. 614 (S.D.N.Y., 1999). In fact, in both the *Molina-Guevara* and *Carucci* cases, the Government took the position that the agent's rough notes taken during the interrogation of the defendant were discoverable at least during the pre-trial phase of the case. *See Molina-Guevara,* 96 F.3d at 705; *Carucci,* 183 F.R.D. at 614-5.

The post-1991 cases which hold that an agent's rough notes of a defendant's oral statements are not producible do not appear to take note of the 1991 change adding Rule 16(a)(1)(B)(ii) . In *United States v. Muhammad,* 120 F.3d 688, 699 (7 Cir., 1997), the Court cited its 1978 holding in *United States v. Batchelder,* 581 F.2d 626, 635 (7 Cir., 1978), *cert. granted,* 439 U.S. 1066 (1979), *reversed on other grounds,* 442 U.S. 114 (1979), to the effect that "[a] defendant is not entitled to an agent's notes if the agent's report contains all that was in the original notes." *Muhammad,* 120 F.3d at 699. It does not appear from the Court's opinion that any argument was made that the

defendant was entitled to the notes pursuant to Rule 16(a)(1)(B)(ii), Fed. R. Crim. P.

The Fifth Circuit in *United States v. Brown*, 303 F.3d 582 (5 Cir., 2002), *cert. denied,* 537 U.S. 1173 (2003), followed the Seventh Circuit's decision in the *Muhammad* case. *Brown,* 303 F.3d at 590. However, like the Seventh Circuit, the Fifth Circuit made no mention of Rule 16(a)(1)(B)(ii).[3] It is not clear that in the District Court the defendant relied on that provision in seeking the agent's notes. It is more likely that the defendant relied on Rule 16(a)(1)(A). In fact the Fifth Circuit mentions the 1991 Amendments in its opinion but only as to the change to Rule 16(a)(1)(A), not the addition of Rule 16(a)(1)(B)(ii). *Brown,* 303 F.3d at 590, n. 18.

There are three post-1991 cases in the Northern District of New York which deal to differing degrees with the issue. In *United States v. Walker*, 922 F. Supp. 732, 743 (N.D.N.Y., 1996), the Court was dealing with a motion to require agents to preserve their notes, a motion which was granted. In the course of that discussion, the Court cited the text of Rule 16(a)(1)(A), made

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3 It is worth noting that the petition for certiorari in the *Brown* case was based, in part, on an argument that the Fifth Circuit did not consider the issue of whether disclosure was required by Rule 16(a)(1)(B)(ii). *See* 2002 WL 32133818.

no mention of Rule 16(a)(1)(B)(ii), and cited a pre-1991 case for the proposition that "[i]n order to fully comply with Rule 16, the government only needs to provide the defendant with the typewritten memoranda of interviews prepared from the agent's handwritten notes" citing *United States v. Konefal,* 566 F. Supp. 698, 708 (N.D.N.Y., 1983). *Walker,* 923 F. Supp. at 744.

In *United States v. Mango,* 1997 WL 222367, *2 (N.D.N.Y., 1997), the same judge who decided *Walker* reiterated the points which he had previously made in the *Walker* case when confronted with a motion for order that the government preserve the notes of its agents. Again, no mention was made of Rule 16(a)(1)(B)(ii), and the motion to preserve the notes was allowed.

Lastly, in *United States v. Myers,* 1997 WL 797507 (N.D.N.Y., 1997), *affirmed,* 208 F.3d 204 (2 Cir., 2000) (unpublished), *cert. denied sub nom. Orcutt v. United States,* 529 U.S. 1122 (2000), the District Court, relying on a 1989 Second Circuit opinion, states that the defendant "...is not entitled under Rule 16(a)(1)(A) to discovery of notes of government agents made during the interrogation of [the defendant]." *Myers,* 1997 WL 797507 *3 citing *United States v. Koskerides,* 877 F.2d 1129, 1133 (2 Cir., 1989). Again, no mention

is made of Rule 16(a)(1)(B)(ii).[4]

In conclusion, I rule that an agent's rough notes of an interview of a defendant in circumstances in which the defendant, at the time of the interview knew that the interviewer was a government agent, are required to be produced under Rule 16(a)(1)(B)(ii), Fed. R. Crim. P., as a portion of any written record containing the substance of any relevant oral statement" made by the defendant. Hence, I allowed the Motion for Production of Notes of Defendant's Statements (#28) on February 19, 2004.

/s/ Robert B. Collings
ROBERT B. COLLINGS
United States Magistrate Judge

February 27, 2004.

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[4] With all due respect, I disagree with the holding in *United States v. Mebust*, 857 F. Supp. 609, 615 (N.D. Ill., 1994) that "...oral statements made by the defendant which are later memorialized by a government agent are not discoverable under Rule 16." Only pre-1991 precedent is cited in support of that holding. *Id.* The Court did cite the post-1991 version of Rule 16(a)(1), including (B)(ii), *id.*, but did not discuss why the agent's written memorialization of the defendant's statements was not a "written record containing the substance of [a] relevant oral statement made by the defendant."

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 31, Proposal to Amend Rule to Permit a Less Than Unanimous Verdict.**

DATE: **April 12, 2004**

Attached is a recent letter from Judge James T. Trimble (W.D. La.) reacting to the the recent mistrial in the Tyco case. He recommends that the rules be amended to permit a less than unanimous verdict in non-capital criminal cases.

That would require an amendment to Rule 31(a). This item is on the agenda for the May 2004 meeting.